

MORTGAGE BANKERS ASSOCIATION SUES GOVERNMENT ON OVERTIME PAY REVERSAL

The Mortgage Bankers Association (MBA) filed a federal lawsuit Wednesday against U.S. Labor Secretary Hilda Solis challenging an Administrative Interpretation issued last April which held that mortgage lenders are non-exempt employees under the Fair Labor Standards Act (FLSA), and must therefore be paid overtime for all hours worked in excess of forty a week. Banks have traditionally regarded mortgage lenders as salaried-exempt employees under the administrative exemption to the FLSA's overtime pay requirement. Indeed, prior Opinion Letters issued by the Department of Labor (DOL) had confirmed this classification. The new Interpretation reversed these prior rulings, requiring banks to completely rethink their pay practices for mortgage lenders and others in similar positions.

The MBA alleges two bases for the suit. First, an abrupt reversal of such magnitude, without prior notice of rule-making and an opportunity for public comment, is a violation of the Administrative Procedure Act. Second, the Interpretation is contrary to the plain language of current DOL regulations covering the administrative exemption, and is therefore arbitrary, capricious, and an abuse of discretion.

While the lawsuit wends its way through the courts, the Interpretation still stands. Banks should be aware that liability continues to accrue for treating mortgage loan officers and other lenders, brokers or financial consultants who deal in loans and other financial products with individual consumers as salaried-exempt employees.

Practice Pointers:

- Conduct a Wage & Hour audit to identify any positions that may be incorrectly classified as exempt
- Review all job descriptions for non-exempt positions to ensure the relevant exemption is identified and the job duties meet the named exemption
- Consider whether an incorrectly classified position might be adjusted to fit another overtime exemption, or whether hours worked in the position can be restricted to forty or less a week
- For those positions that must be reclassified as non-exempt, the incumbent must record all hours worked, and overtime paid for hours worked in excess of forty

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