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Lender Alert
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U.S. Supreme Court Upholds Validity of Department of Labor's Interpretation on Overtime Pay for Mortgage Loan Officers

By: Labor & Employment Group

For the past several years, an action by the Mortgage Bankers Association has been brewing in the courts challenging the U.S. Department of Labor ("DOL") for issuing contradictory opinion letters on whether mortgage loan officers are eligible for overtime pay. We reported in July 2013 that the D.C. Circuit Court of Appeals invalidated the DOL's pronouncement in 2010 that loan officers typically do not qualify for the administrative overtime exemption. The DOL's 2010 pronouncement reversed its 2006 opinion, reaching the opposite conclusion. We then reported in July 2014 that the U.S. Supreme Court granted review. The Supreme Court has now spoken.

On March 9, 2015, the Supreme Court ruled in *Perez v. Mortgage Bankers Association*, Case No. 13-1041, that the DOL was entitled to issue its 2010 interpretation notwithstanding the flip-flop, and that the D.C. Circuit Court erred in invalidating it. This ruling is particularly significant for companies that employ loan officers, and it has broader implications concerning the ongoing reliability of agency opinion letters for guidance in making business decisions.

Loan Officer Overtime Eligibility

For employers that already classify loan officers as non-exempt, and therefore eligible for overtime, the *Perez* decision will not have much direct impact. For those that classify loan officers as exempt, the decision does not necessarily foreclose the possibility that an exemption might apply, but it narrows the potential for an applicable exemption.

According to *Perez*, the DOL was permitted to withdraw its 2006 interpretation and issue an opposite interpretation in 2010 that loan officers with *typical* duties do not qualify for the administrative overtime exemption. Employers therefore may no longer rely on the 2006 opinion letter as a basis for classifying its loan officers as exempt.

On the other hand, *Perez* does not rule out the possibility of establishing an exemption in different circumstances or on other grounds. The DOL's now-operative 2010 interpretation does not address whether loan officers with *atypical* duties might qualify for the administrative exemption, or whether the loan officers might qualify for a different exemption such as the outside sales exemption.

As we previously reported, determining whether a particular overtime exemption applies is a highly fact-specific inquiry. In addition, for loan officers that work in states such as California, state law exemption tests must be satisfied as well.

Broader Implications

Perez also is noteworthy because it holds that federal agencies are permitted to modify their opinions interpreting statutes and regulations under their jurisdiction, even to the point of completely reversing their prior interpretations, simply with the stroke of a pen. When revisiting (or even reversing) an administrative interpretation, these agencies do not have to comply with the notice and comment procedures of the Administrative Procedures Act or any other safeguards for preserving the integrity of a previously issued interpretation.

Note also that three Justices wrote concurring opinions expressing concern that other Supreme Court precedent requires courts to give a high degree of deference to a federal agency's interpretations. These three Justices suggested that, if federal agency interpretations are so easily manipulated, perhaps the Supreme Court should reconsider how much deference the courts should be required to give them. For the time being, however, the Supreme Court precedent of affording deference remains intact. Thus, federal agencies are permitted to unilaterally modify or even reverse their prior

interpretations, and the new interpretations may still receive deference from courts.

Next Steps

Practically speaking, what does this decision mean for companies that employ loan officers? As indicated previously, those who still classify these employees as exempt should revisit this classification with legal counsel to determine if their loan officers fall under some other applicable federal or state exemption or if their duties are atypical. This should be done on a case-by-case basis because it is a fact-intensive inquiry. Employers must examine state as well as federal exemption laws. For instance, loan officers who work in California are subject to California's more stringent exemption requirements.

Employers should also revisit its pay practices for non-exempt loan officers, asking the following questions, among others: Are such employees receiving overtime, and are they receiving meal and rest periods where required by state law, such as California? For overtime purposes, are employers calculating the regular rate of pay correctly for these employees? Are employers including the appropriate compensation in the regular rate for purposes of calculating overtime pay? If loan officers are paid on a commission basis, is the commission being paid correctly? Are employers complying with ever-evolving state laws regarding commission plans? By way of example, in California commission plans must be in writing.

The bottom line is that employers should take this opportunity to re-examine their classification and pay practices with respect to their loan officers. Experienced employment counsel can assist companies with this analysis. Please contact any one of our seasoned labor and employment attorneys to guide you through these steps or answer specific questions for you.