SPECIAL REPORT

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Client Success.

Supreme Court Weighs in on Classification of Mortgage Loan Officers Under the FLSA

by Gina Carter and Tiffany Hutchens

In a unanimous decision authored by Justice Sonia Sotomayor, the U.S. Supreme Court held on March 9, 2015, that federal agencies, such as the Department of Labor (DOL), do not have to engage in formal notice-and-comment rulemaking when making changes to interpretative rules, such as the DOL's analysis of whether mortgage loan officers are exempt under the Fair Labor Standards Act (FLSA). See *Perez v. Mortgage Bankers Association*.

DOL's Classification of Mortgage Loan Officers

In a 2006 publication, the DOL opined that mortgage loan officers are generally exempt under the FLSA's minimum wage and overtime requirements as "administrative employees." To qualify for the exemption, an employee must be compensated at a rate not less than $455 per week; have as a primary duty the performance of work directly related to the management or general business operations of the employer or the employer's customers; and exercise discretion and independent judgment with respect to matters of significance. Employers in the financial industry relied on this opinion letter, and assuming that the previously noted factors were satisfied, classified mortgage loan officers and similar workers as exempt employees under guidance from the DOL.

In 2010, the DOL, without notice or an opportunity for comment by the public, published an interpretation that withdrew the 2006 opinion letter and reversed its earlier opinion regarding the classification of mortgage loan officers under the FLSA. The 2010 DOL publication opined that mortgage loan officers do not qualify as administrative employees and are subject to minimum wage and overtime requirements. The DOL reasoned that mortgage loan officers follow explicit instructions and policies regarding the approval or denial of loans and exercise virtually no independent judgment or discretion.

Litigation Summary

The Mortgage Bankers Association (MBA), representing more than 2,200 real estate finance companies nationwide, challenged the DOL's unilateral decision to reverse its 2006 interpretation of the administrative exemption by an informal administrative interpretation. The MBA argued that the DOL's administrative interpretation was void because it did not propose the rule change to the public and allow for a notice-and-comment period. The U.S. Court of Appeals District of Columbia Circuit agreed with the MBA, and the decision was appealed by the DOL to the U.S. Supreme Court.

The U.S. Supreme Court reversed the D.C. Circuit Court's ruling, finding that the DOL did not have to engage in formal notice-and-comment rulemaking when reversing its interpretation of whether mortgage loan officers are exempt under the FLSA because such an interpretation does not have the "force and effect of law" and merely advises the public how the DOL views the law. Although a few justices expressed concerns with federal agencies skirting the formal notice-and-comment requirements by

Credit Union Law Team Members

Gina Carter
Team Leader

Brian D. Anderson
Benjamin P. Brunette
Daniel W. Gentges
Melinda S. Giftos
Thomas P. Godar
Frank A. Gumina
Edward J. Heiser
Tiffany L. Hutchens
Jerard J. Jensen
Marci V. Kawski
Lisa R. Lange
Daniel J. McGarry
Kenneth R. Nowakowski
Melissa C. Selinger
Michael W. Taibleson
Iana A. Vladimirova
Kim Marie Wynn

classifying regulations as merely "interpretative," the decision undoubtedly makes it easier for a federal agency such as the DOL to modify or even reverse the interpretation of existing regulations without notifying the public and undergoing a lengthy notice and comment process.

Consequences for Employers

Although the DOL's 2010 interpretation of how mortgage loan officers should be classified under the FLSA does not have the "force and effect of law," employers should not ignore the DOL's opinion when determining whether mortgage loan officers and similar employees are entitled to overtime wages for hours worked more than 40 in a workweek. Financial institutions should review and analyze how such employees are classified under the FLSA and determine if reclassification to non-exempt status and remediation such as back pay may be appropriate.

For more information, please contact Tiffany Hutchens at (414) 978-5336 or thutchens@whdlaw.com, or Gina Carter at (608) 234-6058 or gcarter@whdlaw.com of Whyte Hirschboeck Dudek's Credit Union Law Team.