

Tightening a White-Collar Exemption

U.S. Labor Department officials are closely scrutinizing the exempt status of finance professionals.



By Tim Watson and Barry Miller

Among the many challenges facing human resource and compensation professionals in the finance industry these days—a troubled economy, scrutiny of bonus payments, the requirements of the Troubled Asset Relief Program and the Dodd-Frank financial reform bill—there looms a lesser-known but no less serious challenge brought about by recent developments at the U.S. Department of Labor.

Since the 2008 elections, the Labor Department has drastically narrowed its interpretation of the administrative exemption to federal overtime pay requirements under the Fair Labor Standards Act in ways that have an acute effect on the finance industry. Employers caught unaware of these developments may be exposed to government enforcement actions or class-action lawsuits that pose significant potential liability. There are steps, however, that employers in the finance industry can take to minimize exposure. Employers in other industries also should note the narrowing of the administrative exemption—one of several “white-collar” exemptions—and respond proactively.

Administrator’s Interpretation

In a surprise announcement on March 24, the Labor Department articulated its position on the exempt status of mortgage loan officers in “Administrator’s Interpretation No.

2010-1,” which reverses a September 2006 opinion letter issued under the previous administration.

The Labor Department concluded in the opinion letter that mortgage loan officers are subject to the administrative exemption from federal overtime pay requirements. In reaching that conclusion, department officials reasoned that mortgage loan officers meet each of the key elements of the exemption, including having a primary duty that is focused on their employer’s management or general business operations and the exercise of discretion and independent judgment regarding matters of significance.

One key point in the reasoning of the opinion letter had broad implications for the application of the administrative exemption in the finance industry generally. Labor Department officials concluded that mortgage loan officers’ job duties included promoting and marketing their employers’ financial products, collecting and analyzing customers’ financial information to assess customers’ financial circumstances and determine whether they qualified for certain types of loans, and advising customers about the benefits and risks of loan alternatives.

Labor Department officials found these activities to be consistent with the administrative exemption’s requirement that an employee have a primary duty that relates to “the management or general business operations of the employer or the employer’s customers.” In reaching this conclusion, the officials relied on a provision of the governing regulations, 29 C.F.R. §541.203(b) (“Section 203(b)”)

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ILLUSTRATION BY STEVE DININNO

which provides examples of activities by employees in the finance industry that meet the requirements for the administrative exemption.

In its March administrator's interpretation, the Labor Department withdrew its 2006 opinion letter, asserted that mortgage loan officers are primarily focused on the sale of their employers' financial products and concluded that such employees are not properly exempt from federal overtime pay requirements. In reaching this conclusion, the department focused on a dichotomy in which "production employees" are focused on work related to the goods and services that constitute the employer's marketplace offerings, while "administrative employees" are focused on running the business itself; however, only the latter are properly subject to the administrative exemption.

The Labor Department asserted that mortgage loan officers are not focused on the management or general business operations of their employer because they are:

- Often paid on a commission basis that rewards sales performance.
- Provided with training that focuses on sales techniques.
- Subject to performance goals and evaluations that focus on sales volume.

The Labor Department also noted that residential mortgage lenders cannot avail themselves of a provision of federal law permitting the application of the administrative exemption to employees whose primary duty relates to the management or general business operations of their employer's customers. The

department noted that mortgage loan officers generally deal with customers who are individuals acting in their personal capacity and who thus have no "management or general business operations." Finally, the Labor Department noted that Section 203(b) does not expand the scope of the exemption or provide an "alternative test" for exempt status, but

"merely provides an example" of the types of employees whose primary duty is management or general operations of the employer's customers.

Pharmaceutical Sales Reps

The Labor Department's position on the application of the administrative exemption to mortgage loan officers is not an anomaly. Labor Department officials have deliberately tried to narrow the scope of the administrative exemption.

by persuading doctors to prescribe them. This argument would allow the position to satisfy the requirements of the administrative vs. production dichotomy. Yet the department argued that the position nonetheless failed to meet the administrative exemption because it did not involve the exercise of independent judgment and discretion with respect to matters of significance.

Labor Department officials argued that employees do not exercise the req-

U.S. Labor Department officials have deliberately tried to narrow the administrative exemption to overtime pay requirements.

An example is an argument that the department made in filing an October 2009 brief in an appeal—*In re: Novartis Wage and Hour Litigation*, 611 F.3d 141 (2nd Cir. 2010)—concerning the exempt status of pharmaceutical sales representatives.

Though the Labor Department was not a party to the case, it chose to advocate for the view that the employees in the litigation—pharmaceutical sales representatives who earned average annual compensation of more than \$90,000—were not properly exempt from federal

overtime pay requirements. While the case did not concern employees in the finance industry, the arguments that Labor Department officials made in the appeal reflect how the department

now views the application of the administrative exemption to a position that, in the agency's view, is not a sales job.

In its brief, the Labor Department argued strenuously that the pharmaceutical sales representatives were not sales employees because they did not actually take orders for the sale of drugs but only "promoted" the sales of such products

using discretion merely because they go without direct supervision, have latitude in prioritizing their tasks or have job duties that can have significant financial impacts on their employer's bottom line. Instead, they argued, employees will meet the exemption only where they engage in activities "such as formulating or implementing management policies, utilizing authority to deviate from established policies, providing expert advice or planning business objectives." Ultimately, the appellate court adopted the department's arguments and ruled that the pharmaceutical sales representatives were not properly exempt.

Interpretation's Impact

The full impact of the shift in the Labor Department's interpretation of the administrative exemption is not yet apparent. However, attorneys representing plaintiffs in wage and hour lawsuits are betting that the effects will not be limited to mortgage loan officers or pharmaceutical sales representatives. In recent months, plaintiffs' lawyers have filed class-action overtime claims on behalf of employees of major financial institutions who are arguably subject to similar lines of reasoning. These positions include lending officers and consultants working with other types of loans.

Online Resources

For more about the administrative exemption from federal overtime pay requirements, see the online version of this article at www.shrm.org/hrmagazine/1210LegalTrends. For other resources on employment law, visit www.shrm.org/LegalIssues.

Lawsuits relating to positions that interface with loan officers, such as mortgage underwriters, also have been filed. In some regions, it is common for lenders to classify loan originators and other business development personnel as independent contractors, and that practice has been subject to challenge.

All of these lawsuits are costly and difficult to defend. They tend to involve highly compensated employees, making for a high theoretical overtime rate of pay and quickly inflating the damages in such cases to millions of dollars. In addition, because the positions at issue in these cases have long been viewed as properly exempt, there are often no records of the hours that the employees have worked, and employers face challenges in rebutting employees' allegations about their extended work schedules.

Critical Look

As a first step in protecting their organizations against the threat of wage

and hour litigation, human resource and compensation professionals in the finance industry should look critically at the positions classified by their organizations as subject to the administrative exemption that might be susceptible to an argument that they are focused on sales of financial products or an argument that they do not meet the exemption's discretion and independent judgment requirement. These jobs might include any type of loan officers, relationship managers and customer service personnel.

Such positions could include business development jobs involving the promotion or sales of nearly any financial product, including deposit accounts or other investment or cash management vehicles. Employees who work with individual customers, as opposed to corporate clients, may become a point of exposure. As reflected in the March administrator's interpretation, the Labor Department is likely to take the position that such employees have a primary duty that focuses

on neither the employer's general business operations nor the general business operations of the employer's customers. This makes it more difficult to defend the exempt status of such jobs.

To the extent that employers in the finance industry have previously undertaken a formal review of the exempt status of their positions, jobs that were found to be subject to the administrative exemption based on the examples set forth in Section 203(b) may merit further analyses in light of Labor Department officials' newly stated view about the limited effect of that provision. Employers may want to review the status of employees classified as subject to the administrative exemption who are provided training in sales techniques or who participate in compensation programs that provide financial rewards based on the number or volume of transactions an employee originates or closes.

That a position meets one or more of the criteria above does not necessarily

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mean it is properly subject to overtime pay requirements or that its classification may be vulnerable to challenge. It may mean that further review is prudent or that the employer should take steps to ensure its ability to defend the exempt status of the position.

Reducing Exposure

Once employers have identified positions that may be subject to challenge, they can take steps to reduce potential exposure. First, employers should review job de-

scriptions, training programs and materials, and performance evaluation forms for at-risk positions. These materials often become critical evidence in litigation regarding exempt status, and employers should ensure that these documents properly emphasize the duties of the positions.

Employers should avoid undue focus in these materials on any aspects of a position that are described in terms of "sales" or "production." To the extent that a job involves work related to the general business operations of the institu-

tion's customers, such as providing advice to commercial clients about cash management or asset allocation, those aspects of the position should be noted expressly. Employers should also ensure that the components of a job requiring the exercise of discretion and judgment are described in detail and meaningfully incorporated into performance evaluations.

Employers may consider tailoring the position to bolster the case for the application of the administrative exemption. In some cases, employers may consider adding responsibilities to a position that clearly requires the exercise of discretion regarding important matters, if the incumbents in that position are qualified to take on such responsibilities.

Employers also may consider reassigning more routine tasks performed by exempt personnel to employees in non-exempt support positions, to prevent the more simplistic duties from overshadowing the aspects of the job that are consistent with the administrative exemption. Of course, any such changes in duties should be properly documented.

Finally, where the case for the application of the administrative exemption remains unclear, employers may consider reclassifying such positions as nonexempt as part of prudent risk management. In making such decisions, employers must take a number of factors into account, including how to manage the costs of overtime compensation and recruiting and retention concerns.

While these considerations often draw resistance to the reclassification of many positions in the finance industry, objections can frequently be overcome through thoughtful and creative design of an appropriate compensation plan for the position on a nonexempt basis and a communication plan that addresses concerns that can be anticipated from affected employees and their managers.

Experience among employers that have reclassified their mortgage loan officers in response to the Labor Department administrator's interpretation has shown that employees' reaction to such reclassifications has been more subdued than many expected, and the expenses associated with treating the position as eligible for overtime can be managed effectively. ■



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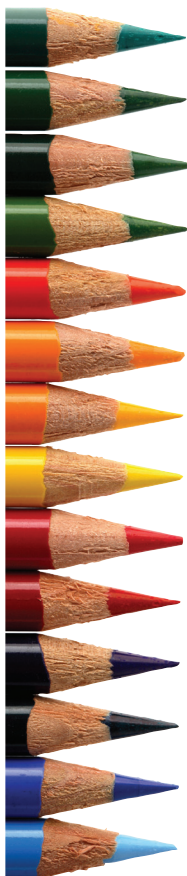
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