

## **Wage and Hour “Administrator Interpretations” to Replace Opinion Letters; Further Cutbacks in White Collar Overtime Exemptions Expected**

**March 30, 2010**

On March 24, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) issued its first-ever “Administrator Interpretation.” According to the WHD, these broad general pronouncements are designed to replace the more narrowly focused and fact-specific opinion letters that have been a fixture of Wage and Hour interpretation for decades. While not entirely foreclosing opinion letter requests, the WHD’s announcement suggests that meaningful opinion letters that provide guidance to employers on fact-specific situations will rarely, if ever be written. The WHD explained: “Requests for opinion letters generally will be responded to by providing references to statutes, regulations, interpretations and cases that are relevant to the specific request but without an analysis of the specific facts presented.”

Not only is this development a stunning departure from decades of established practice, the content of the Administrator’s first “Interpretation” strongly suggests that the WHD’s concerted efforts to cut back on the white collar overtime exemptions will continue. In fact, the first Administrator Interpretation purported to overturn prior opinion letters by concluding that as a general matter, the “typical” mortgage loan officer is not exempt under the Fair Labor Standards Act’s (FLSA’s) administrative exemption.

### **Implications for Employers**

For decades, the WHD has provided individualized wage and hour guidance and advice in response to individual requests for the issuance of opinion letters, as well as more generalized guidance through its Field Assistance Bulletins and Wage and Hour Advice Memoranda. It now appears that going forward, the WHD will focus almost entirely, if not exclusively, on providing general guidance intended to “clarify the law as it relates to an entire industry, a category of employees, or to all employees,” without referring to any actual job or analyzing any specific set of facts. This dramatic and unexpected change in approach could have far-reaching implications for employers who will no longer be able to obtain specific guidance regarding individual positions through requests for opinion letters.

The WHD’s decision not to respond to specific requests for opinion letters will likely limit employers’ opportunity in the future to seek the statutory protection of the Portal-to-Portal Act. Under the Portal-to-Portal Act, employers have a good-faith defense to liability under the FLSA for actions taken “in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation.” 29 U.S.C. § 259(a). This defense to liability does not require a specific opinion letter to have been issued to the employer seeking the defense. For example, employers can rely on opinion

letters issued to another employer if the facts are essentially the same as those recounted in the opinion letter. However, it may be more difficult for employers to receive the protections of the FLSA under a generalized interpretation, which may not fully describe the specific facts necessary to trigger that protection.

It also seems clear that the WHD intends to use this new tool to try to reclassify as nonexempt employees who were previously thought to be exempt based on prior DOL regulation and guidance. In fact, in announcing the new Administrator Interpretations, the WHD explained: “Guidance in this form will be useful *in clarifying* the law as it relates to an entire industry, a category of employees, or to all employees.” However, the first Administrator Interpretation did not merely “clarify” the law, but in fact purported to overrule a number of prior opinion letters and thus clearly sought to change the law.

This new tool is plainly part of the WHD’s larger efforts to narrow the scope of the FLSA’s white collar exemptions, especially in key industries that have been the target of the plaintiffs’ bar. For example, late in 2009, the WHD filed an amicus brief in support of the plaintiffs-appellants in the Second Circuit case *In Re Novartis Wage and Hour Litigation*. In that brief, the WHD expressed the view that pharmaceutical sales representatives could not meet either the administrative or the outside sales exemptions. In doing so, the WHD asked the court to apply a more stringent interpretation of these exemptions, warning that failure to do so “would effectively swallow the ‘rule’ requiring the payment of the minimum wage and overtime compensation under the FLSA.”

Employers are not without tools to challenge this Interpretation. Employers can argue that the facts of their situation differ from the more generalized amalgamated facts contained in the Administrator Interpretation. The WHD acknowledges that “as the regulations make clear, a job title does not determine whether an employee is exempt. The employee’s actual job duties and compensation determine whether the employee is exempt or nonexempt.” This position was recently successfully argued to at least one court of appeals to distinguish the WHD’s amicus brief in the *Novartis* case. The Third Circuit recently held in *Patty Lee Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), that the administrative exemption applied to a pharmaceutical sales representative who testified to “the independent and managerial qualities that her position required” and “described herself as the manager of her own business who could run her own territory as she saw fit.” *Smith*, 593 F.3d at 285. Moreover, employers can argue that the WHD’s interpretation—whether in an amicus brief or in a new Administrator Interpretation—is entitled to no deference because it is inconsistent with the 2004 regulations and preamble.

### **Mortgage Loan Officers Found to Not Qualify for Administrative Employees**

The WHD’s first “Administrator Interpretation” is a clear example of its new stricter interpretation of the administrative exemption. In Administrator Interpretation 2010-1, WHD Deputy Administrator Nancy Leppink expressed the view that the “typical” mortgage loan officer does not qualify for the administrative exemption because his or her primary duty is to make sales. This Administrator Interpretation largely focused on whether or not the primary duty of a “typical” mortgage loan officer was “directly related to the management or general business operation” of the employer or his customers.<sup>1</sup>

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<sup>1</sup> The Interpretation explained that the “financial services industry assigns a variety of job titles,” including mortgage loan representative, mortgage loan consultant, and mortgage loan originator, to what the WHD calls “mortgage loan officers.”

The WHD noted that the administrative exemption is largely reserved for employees whose primary duty relates to the “administrative, as distinguished from the production, operations of a business.” Although the 2004 regulations significantly reduced the applicability of the administrative-production dichotomy, the WHD seems to be trying to revive this distinction—in contravention of its own regulations—in industries such as the financial services, where the dichotomy should not properly be used.

In contrast to its previously issued opinion letters, the WHD did not render its opinion based on an actual job whose duties were described by an actual employer. Rather, the WHD’s characterization of mortgage loan officers’ job duties was an amalgam of descriptions culled from case law and prior WHD investigations. From these sources, the WHD assumed that a typical mortgage loan officer’s duties include collecting required financial information from customers, running credit reports, and entering such information into a computer program designed to identify available loan products. The WHD further described that after obtaining that information, mortgage loan officers then work with customers, explaining the terms and conditions of each loan and helping customers decide which loan is most appropriate for them. Finally, according to the WHD, mortgage loan officers are responsible for forwarding all relevant paperwork to loan underwriters and other employees for further processing.

After a discussion of the statute, regulations, relevant case law, and administrative guidance, the WHD concluded that the “typical” mortgage loan officer does not qualify for the administrative exemption because his or her primary duty is sales. In analyzing whether the “typical duties” were sales, the WHD relied on factors from the outside sales exemption, including how a typical mortgage loan officer is compensated. The WHD placed significant weight on the fact that many mortgage loan officers are paid based on commissions and also receive sales training. According to the WHD, such sales duties do not relate to an employer’s internal management or general business operations, and therefore fall squarely on the production side of the dichotomy, rendering these employees ineligible for the administrative exemption.

The WHD reached its conclusion without respect for the DOL’s regulations or opinion letters. Rather, the WHD relied on cases such as those involving employees working in a call center, and concluded that “[w]ork such as collecting financial information from customers . . . and explaining the terms of the available options and the pros and cons of each option . . . constitutes the production work of an employer engaged in selling or brokering mortgage loan products.”

In an apparent effort to downplay the applicability of the specific regulation providing an example of an employee who meets the administrative exemption in the financial services industry, see 29 C.F.R. § 541.203(b), the WHD stated that the former administration purportedly created an “alternative standard for the administrative exemption for employees in the financial services industry” by finding that employees in the financial services industry generally meet the administrative exemption’s duties requirements by performing many of the tasks described above. The WHD then concluded its first Administrator Interpretation by purporting to overturn two prior opinion letters, contending that they used a “misleading assumption and selective and narrow analysis.”

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