CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

WAGE HOUR REPORT
A Constangy publication

No More Opinion Letters, Mortgage Loan Officers Not Entitled To Administrative Exemption

BUSINESS ***NOT*** AS USUAL AT WAGE HOUR DIVISION

By James M. Coleman and Maureen R. Knight
Fairfax, VA

Since President Obama's inauguration approximately 14 months ago, the Wage and Hour Division of the U.S. Department of Labor had seemed to be asleep: it had issued not a single opinion letter related to the Fair Labor Standards Act. This week, the sleeping giant finally awoke, and employers are unlikely to be pleased with the result. The Division announced that it would be departing from its longstanding practice of publishing opinion letters to provide fact-specific guidance to employers and employees. In the future, requests for opinion letters 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. The Division also withdrew a September 2006 opinion letter that had been favorable to finance industry employers regarding the exempt status of mortgage loan officers and similar positions.

"Administrative Interpretations" to Replace Opinion Letters

The Division has entirely changed the format of its written guidance. Since the FLSA was enacted in 1938, the Division has issued opinion letters written in response to specific requests from employers, employees, unions, and attorneys. This week, the Division announced that it is abandoning this type of opinion letter in favor of "Administrator's Interpretations." Where opinion letters responded to specific situations, the Administrator's Interpretations will "set forth a general interpretation of law and regulations, applicable across-the-board to all those affected by the provision in issue." Where opinion letters were intended to respond to each request from a member of the regulated community, the "Administrator's Interpretations" will be written only when the Administrator believes that an interpretation is warranted; that is, when she determines that "further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate." Judging from the first issue that the Administrator determined needed clarity, we are concerned that these interpretations will be issued primarily when the Administrator determines that the Division should take a more "employee-friendly" position than it has in the past.

Many questions remain unanswered about "Administrator's Interpretations." Will the Division take another 14 months before we see a second Administrator's Interpretation, or has the floodgate been opened? Will the courts give more deference to these Administrator's Interpretations than they gave to opinion letters, or less? Will we see more Administrator's Interpretations that withdraw prior opinion letters on which employers had relied? What will become of an employer's ability to plead and prove the statutory affirmative defense to liability under the FLSA based on good faith reliance on the written rulings and interpretations of the Division? We will have to wait and see, but this change will probably benefit employers rarely, if ever. If this first Administrator's Interpretation is an accurate indicator

of things to come, it may well be that there will be less employer-favorable opinion letters upon which to rely. Certainly, this is already true for employers in the finance and mortgage industry.

The First Administrator's Interpretation: ***Mortgage Loan Officers Do Not Qualify For Administrative Exemption***

As we **reported in October 2006**, financial workers with overtime claims have been creating an extremely lucrative trend of collective actions under the FLSA for the last decade. Proving that overtime is not just a requirement for low-wage earners, well-compensated brokers achieved staggering settlements, including $37 million from Merrill Lynch, $42.5 million from Morgan Stanley, $89 million from Swiss-based UBS, and $98 million from Smith Barney.

These finance-industry brokers and loan officers have been arguing they are entitled to overtime because they do not fit into any of the four white-collar exemptions of the FLSA. They are not "**professionals**," because their positions do not require advanced degrees. They are generally not managers (**executives**) because they do not supervise two or more employees, or possess the required authority concerning hiring and firing. Because they argued that their primary role was sales, they argued that they did not meet the **administrative** exemption. (*Note*: Some brokers do not qualify for any of the above three exemptions for the additional reason that they are paid exclusively by commission. The above three exemptions require payment on a salary or fee basis.) Finally, brokers are generally not **outside salespeople** because their responsibilities are generally not out-of-the-office.

Historically, the employers' best shot in these cases was the potential application of the **administrative** exemption. The largest hurdle was the likelihood that the position would be considered an inside sales position, which did not qualify for the administrative exemption. But an opinion letter published in September 2006 by the Wage and Hour Division under the Bush Administration gave employers significant support in that regard.

The September 2006 opinion letter accepted a narrow interpretation of sales duties offered by the company requesting the opinion: "[C]ustomer-specific persuasive sales activity, such as encouraging an individual potential customer to do business with his or her employer's mortgage banking company rather than a competitor, or to consider the possibility of a mortgage loan if they have not expressed prior interest." Because the company stated that the loan officers in question engaged in this type of sales activity less than 50 percent of their working time, the Division agreed that sales was not their primary duty and approved the administrative exemption.

As of this week, that 2006 opinion letter has been withdrawn. The inaugural Administrator's Interpretation formally rejected the September 2006 opinion letter and its "inappropriately narrow definition of sales." Not pulling any punches, the Interpretation explained that it was withdrawing the opinion letter because of its "misleading assumption and selective and narrow analysis." Similarly, another related Bush Administration opinion letter from early 2006 was also withdrawn.

The Obama Administration focused on the so-called "production/administrative dichotomy" that employers have been urging the Labor Department and courts to abandon for years, with little success. The dichotomy distinguishes between work related to the goods and services that represent the company's business (production work) and work that contributes to the running of the business itself (administrative work). This week's Interpretation makes clear that only work in the latter category will qualify for the administrative exemption. The Interpretation cited approvingly to numerous court cases and prior opinion letters that have held that sales activities are production work, not administrative work. Applying that principle to the mortgage loan officers, the Interpretation concluded that they are not exempt because their primary duty is their customer-specific sales-related activity, a conclusion it held was supported by other aspects of their jobs, including payment by commission, sales training, and evaluation based on sales volume.

March 26, 2010

There is no question that the Interpretation is a blow to finance industry employers who had relied on the September 2006 opinion letter for support that their mortgage loan officers (and similar positions) were exempt. However, it may be some cold comfort that the 2006 opinion letter had not persuaded many courts, which have generally been finding that these types of positions had sales as their primary duty and therefore did not qualify for the administrative exemption.

If you have questions about the Administrator's Interpretation, the change in the Division's practice, or any other wage-hour related question, please contact any member of Constangy's **Wage and Hour Practice Group**, or the Constangy attorney of your choice.

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, Super Lawyers, and Top One Hundred Labor Attorneys in the United States. More than 120 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Georgia, Florida, South Carolina, North Carolina, Tennessee, Alabama, Virginia, Missouri, Illinois, Wisconsin, Texas, California, Massachusetts and New Jersey. For more information, visit www.constangy.com.