

EMPLOYMENT, LABOR & BENEFITS LEGAL UPDATE



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Mortgage Loan Officers Do Not Qualify as Exempt Employees Under the FLSA

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The Fair Labor Standards Act (“FLSA”) requires the payment of overtime pay to employees who work more than forty (40) hours in a work week. However, certain employees are exempt from the overtime pay requirements, including executive, professional, and administrative employees. These exemptions are commonly known as “white collar” overtime pay exemptions.

Although some employee positions easily qualify under one of the white collar exemptions (e.g., lawyers, teachers, CEOs), others do not and pose difficulties in categorizing. Recently, the Deputy Administrator of the United States Department of Labor (“USDL”) issued an opinion providing guidance on one of the more difficult positions, mortgage loan officers. The Deputy Administrator opined that a typical mortgage loan officer does not meet the qualifications for the administrative exemption and, therefore, is entitled to overtime pay.

Under the FLSA, an administrative employee is an employee: (1) that receives a salary of not less than \$455.00 per week; (2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (3) whose primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In her opinion, the Administrator analyzed the job duties of a typical mortgage loan officer and determined that the position does not qualify as an exempt administrative position because a loan officer does not satisfy the second requirement; that is, a mortgage loan officer’s primary duty does not relate to the management or general business operations of the employer or the employer’s customers.

The Administrator found that the primary duty of a mortgage loan officer (sometimes called a mortgage loan representative, mortgage loan consultant, or mortgage loan originator) is making sales and, therefore, they perform production work, as opposed to administrative work. The Administrator further found that work, such as collecting financial information from customers, entering it into the computer program to determine what particular loan products might be available to that customer, and explaining the terms of the available options and the pros and cons of each option, does not relate to the internal management or general business operations of the employer (or the employer’s customers). The Administrator stated that work related to “management or general business operations” includes work in such areas as

accounting, budgeting, advertising, and human resources if it relates to the core business of the employer or the employer's customers, and that a mortgage loan officer's duties do not fall under these categories.

The Administrator's opinion is based upon the duties performed by a typical mortgage loan officer as she understood them. Duties can vary, however, from position-to-position and employer-to-employer. For example, a mortgage loan officer could possibly be considered an exempt administrative employee if their primary duties consist of advising a business customer on the merits of obtaining a mortgage that is vital to the customer's business. A mortgage loan officer who performs this function may qualify as an exempt administrative employee because they are assisting the employer's customer in a manner that is essential to the customer's business operations. In addition, the Administrator's opinion did not address whether mortgage loan officers qualify for another exemption, the outside sales person exemption, if they meet the relevant criteria.

To avoid potential future liability, financial institutions utilizing mortgage loan officers or similar positions should review the job duties of those positions in light of the Administrator's opinion to determine whether the position qualifies for the administrative overtime pay exemption (or possibly another exemption). Even the job duties of mortgage loan officer who strictly advises commercial clients should be reviewed to ensure that the position qualifies for the overtime pay exemption.



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ABOUT RUDER WARE'S EMPLOYMENT, LABOR & BENEFITS GROUP

Ruder Ware's Employment, Labor & Benefits practice group works in tandem with private and public employers providing counsel on all aspects of human resource management. The breadth of services offered, unique for a law firm headquartered in Wausau, Wisconsin, includes counsel on highly sensitive issues such as workplace harassment, employee privacy, drug and alcohol testing, and disciplinary issues. In addition, attorneys design and assist with the development, implementation, and enforcement of policies and procedures relating to benefits, hiring practices, employee handbooks, state and federal discrimination laws, FMLA, FLSA, ADA, OSHA, and workers' compensation.

Attorneys in the group regularly represent public and private sector employers in collective bargaining, negotiations, union elections, unfair labor practices, and grievance arbitration matters in addition to guiding nonunion clients on maintaining their union-free status.

Actively involved in organizations with human resource professionals as the primary member base, our attorneys are in tune with the various sensitivities and complexities of the profession. Our attorneys often present seminars and in-house training on employment law topics both across the state and nationwide.

Areas of practice by the Employment, Labor & Benefits practice group:

- Employee Benefits & Executive Compensation
- Employment Law
- Labor Law

PLAN AHEAD WITH AN EMPLOYMENT LAW AUDIT

Countless lawsuits are filed in state and federal courts and with governmental agencies by disgruntled employees every year. Employers spend hundreds of thousands of dollars and many work hours defending against these lawsuits. Of course, there is no guarantee that any given employee will not file a lawsuit. Ruder Ware can help your company proactively detect "hidden problems" by performing an audit of your human resource operations. Tailored to your needs, an employment law audit involves a detailed review and analysis of all current employment-related policies and procedures. The goal of an audit is to ensure your company is in compliance with current employment laws so you are prepared if a lawsuit arrives. Employment law audits are available upon request. For a complete checklist of policies and procedures included within the audit or for an estimate for this service, contact any attorney within the Employment, Labor and Benefits group.

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As part of a full-service law firm, our attorneys provide clients with a one-stop approach to their legal needs. Ruder Ware, the largest Wisconsin law firm headquartered north of Madison, also provides legal counsel in Business Transactions; Litigation & Dispute Resolution; and Employment, Labor & Benefits.