

Department of Labor's New Interpretation of FLSA's Administrative Exemption to Mortgage Loan Officers Upheld by U.S. Supreme Court

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The United States Supreme Court recently issued its ruling in *Perez v. Mortgage Bankers Association*, upholding a Department of Labor ("DOL") interpretation regarding the status of mortgage loan officers as non-exempt under the Fair Labor Standards Act ("FLSA"). At issue was whether the DOL could alter its position regarding whether mortgage loan officers qualify for the administrative exemption under the FLSA without adhering to the notice-and-comment rulemaking process set forth in the Administrative Procedure Act ("APA").

Prior to 2004, the DOL took the position that mortgage loan officers did not qualify for the FLSA's administrative exemption to overtime pay requirements. In 2006, the DOL issued another opinion letter changing its position and finding that mortgage loan officers fell within the administrative exemption. But then, in 2010, without providing notice or an opportunity for comment, the DOL again changed its interpretation of the administrative exemption and issued an "Administrator's Interpretation" that mortgage loan officers did not fall within the administrative exemption.

The U.S. Supreme Court found that the APA only requires a notice-and-comment process for the formulation, amending, or repealing of rules (i.e. "legislative rules"). On the other hand, opinions or interpretation about existing rules (i.e. "interpretive rules") are specifically exempt from the notice-and-comment process under the APA. Therefore, because the DOL's 2006 opinion letter and 2010 Administrator's Interpretation of an existing regulation was an "interpretive rule" as opposed to a "legislative rule," no notice-and-comment process was required.

EMPLOYER TAKE AWAY: The *Perez* case settles “for now” the administrative exempt status of mortgage loan officers and similar positions in the financial industry. It further illustrates the ever changing landscape of federal wage and hour law. Accordingly, employers are encouraged to work with their employment counsel to audit their exempt positions to ensure they are in compliance with the most up to date DOL regulatory interpretations.