

# LENDERS UPDATE™

A MONTHLY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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## AN ALT & ASSOCIATES NEWSLETTER

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The purpose of the Lenders Update is to provide a “heads-up” of new legislation and regulations affecting the mortgage lending industry. We provide summaries of new matters so our readers can judge whether the subject impacts their operations. We recommend that our readers review the entire new statute, regulation or other material in detail where it is relevant to them. For convenience, the applicable matter can be easily identified in the summary, and, where possible, a link is provided.

**The Update includes information available to Alt & Associates as of May 9, 2010.**

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## **US DEPARTMENT OF LABOR EXTENDS OVER TIME PROVISIONS TO MORTGAGE LOAN OFFICERS**

In 2006 the US Department of Labor issued a Wage and Hour Opinion Letter. The Letter stated that Mortgage Loan Officers could be classified under the Administrative Exemption to the overtime provisions of the Federal Fair Labor Standards Act. As such, they were not entitled to overtime pay for hours worked in excess of 40 hours per week.

However, on March 24<sup>th</sup> of this year, the Department of Labor issued a new type of advisory opinion which is called an Administrative Interpretation (“AL”) which reverses this previous position. The AL is not law. However, it will be influential to courts who are asked to interpret the Fair Labor Standards Act.

The AL defines a mortgage loan officer as follows:

*Mortgage loan officers receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity. Mortgage loan officers collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history, prior bankruptcies, judgments and liens. They also run credit reports. Mortgage loan officers may enter the collected financial information into a computer program that identifies which loan products may be offered the customers based on the financial information provided. They then assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products. Mortgage loan officers also compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings.*

As we said, the original 2006 Opinion Letter found that mortgage loan officers satisfied the Administrative Exemption to the required payment of overtime under the Fair Labor Standards Act. This exemption very generally includes an employee whose primary duty is non-manual work directly related to management or general business operations of his employer. However, the new AL finds that “the job duties mortgage loan officers typically perform, as defined above, lead to the conclusion that they have a primary duty of making sales and as such “their duties do not relate to management or general business operations, irrespective of job title.” As a consequence, the exemption does not apply to mortgage loan officers and overtime must be paid.

What happens if, in the past, your company has not paid mortgage loan officers for overtime worked? In short, a company can be held liable for overtime not paid. Under the Fair Labor Standards Act, the penalties could be up to 3 years of unpaid overtime, plus damages of up to twice the pay due and attorney's fees incurred in collecting the fees.

There are several defenses that could be asserted by an employer. For example, a company may in some instances be able to point to the original Department of Labor Opinion Letter and argue that they were behaving in reliance on that Letter. This is a factual issue and the burden of proof will fall to the employer to show actual reliance.

Another possible defense might revolve around the applicability of the “outside sales” exemption under the Fair Labor Standards Act. At the moment, under current law, this exemption does not seem to apply. The applicable employee must be primarily engaged in selling loans and must also be regularly engaged away from the place of business of the employer. Obviously, this brings into serious question whether state law allows a loan officer to work outside of the licensed headquarters or branch of its employer/lender. We submit, that in most circumstances, this is not allowed. Therefore, this exemption would not be available.

**Oh yes, employment agreements with waivers of overtime rights are unenforceable.**

If any of this sounds familiar and/or worrisome to you, we suggest discussing the matter with your employment law counsel as soon as possible.

Our monthly Lenders Update is published via e-mail as a complimentary service to our friends and clients in the financial industry throughout California and the United States. Only those persons who have requested this newsletter are on our mailing list. Should you have colleagues who wish to receive this complimentary service, please have them e-mail us at

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ALT & ASSOCIATES provides regulatory, compliance, operational advice and transactional assistance, as well as litigation representation, to the financial services industry. Over the past two decades, members of the firm have represented Institutional Lenders and Mortgage Bankers and Brokers in all aspects of their operations. If you have any questions please contact:

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