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E-ALERT | Employment Litigation

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D.C. CIRCUIT REJECTS DEPARTMENT OF LABOR'S 2010 INTERPRETATION THAT LOAN OFFICERS ARE FLSA NONEXEMPT, SENDING A STRONG SIGNAL ON "AGENCY FLIP-FLOPS"

On July 2, 2013, the U.S. Court of Appeals for the D.C. Circuit rejected the Department of Labor's 2010 reclassification of mortgage loan officers as non-exempt from overtime under the Fair Labor Standards Act (FLSA) because DOL did not follow Administrative Procedure Act ("APA") notice-and-comment rulemaking procedures. This means that you may want to reevaluate policies that may have been adopted in reliance on official DOL guidance that is not based on a regulation promulgated as required by the APA.

The *Mortgage Bankers Association v. Harris*[1] decision represents a victory for the financial services industry in the wage-and-hour context by broadening the administrative exemption from the FLSA's minimum wage and overtime requirements to encompass mortgage bankers. Perhaps more importantly, the ruling sends a signal to DOL that reversals of prior administrative interpretations -- which the Court called "agency flip-flops"[2] -- cannot be put into effect without complying with the notice-and-comment procedures of the APA.

In 2006, under the Bush administration, DOL originally issued an opinion letter stating that mortgage loan officers typically fell within the administrative exemption from the FLSA. In 2010, however, under the Obama administration, the agency reversed its earlier stance by issuing a so-called Administrator's Interpretation that "explicitly withdrew" the agency's 2006 opinion letter and instead stated that loan officers were nonexempt under the FLSA.[3]

Subsequently, the Mortgage Bankers Association challenged DOL's decision to change its interpretation, without first undergoing notice-and-comment rulemaking, as a violation of the APA. But the District Court for the District of D.C. upheld the agency's interpretation, finding that the Mortgage Bankers Association had not demonstrated the "substantial and justifiable reliance on a well-established agency interpretation" necessary to prevail on its claim.[4]

On appeal, however, the D.C. Circuit reversed. Citing its precedent, the Court observed, "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment."[5] The Court recognized that, on its face, this analysis requires just two elements: (1) definiteness and (2) significant change. The Court rejected a separate or

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[1] *Mortgage Bankers Ass'n v. Harris*, No. 12-5246 (D.C. Cir. July 2, 2013).
[2] *Id.* at 10.
[3] *Id.* at 4 (quoting *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 201 (D.D.C. 2012)).
[4] *Id.* (quoting *Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 207).
[5] *Id.* at 2 (quoting *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)).

independent reliance requirement. Moreover, the Court observed that DOL had "conceded the existence of two definitive -- and conflicting -- agency interpretations" at oral argument.[6]

Ultimately, the Court concluded that DOL's 2010 guidance was a "definitive" regulatory interpretation that significantly reversed the agency's 2006 position that loan officers fell within the FLSA's administrative employee exemption. DOL was therefore required to undergo notice-and-comment rulemaking before issuing the new guidance. Because the agency did not follow this procedure, the Court reversed the district court's denial of summary judgment to the Mortgage Bankers Association and remanded the case with instructions to vacate the DOL's 2010 interpretation.

Moving forward, the D.C. Circuit's decision in *Mortgage Bankers Association* will make it more difficult for DOL to overrule interpretations issued under previous administrations. When the agency wants to issue a definitive interpretation of a regulation that significantly changes previous guidance, this decision makes clear that the agency will have to go through the rulemaking process required by the APA. This may lead to greater consistency in agency positions, regardless of which party is in office.

However, this issue is likely not yet settled. The agency could still petition the D.C. Circuit for *en banc* review of the case. Alternatively, DOL could seek appeal with the U.S. Supreme Court. As the D.C. Circuit recognized, there appears to be a circuit split over the whether a "definitive interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter."[7]

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[6] *Id.* at 3.
[7] *Id.* at 5 n.3.