Now Might Be a Good Time to Review FLSA Overtime Exemptions

SCOTUS Holds Federal Agency can 'Flip-Flop' on How Regulations Apply to Certain Job Descriptions

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The "white-collar" exemptions under the Fair Labor Standards Act (FLSA) have caused many headaches for employers, including those in the title insurance industry. Title companies of all sizes struggle to apply the regulations to the myriad of job descriptions within the field, and mistakes may prove costly should FLSA or state law litigation ensue. Compounding the problem, the U.S. Department of Labor's (DOL) guidance on the issue has been difficult to pin down, as the agency, on a number of occasions, has reversed its position of how the exemptions apply to certain jobs.

The mortgage banking industry recently learned this lesson in a case that went to the U.S. Supreme Court. *Perez v. Mortgage Banking Association* involved an industry challenge to the DOL's "flip-flopping" on its interpretation whether loan officers are exempt. The DOL literally took a 180-degree reversal on its position, most recently announcing that the administrative exemption no longer applies to loan officers, despite an earlier opinion letter that had said the opposite. The Supreme Court held that a federal agency indeed can "flip-flop" in this way without announcing a rule change in advance, seeking public comment or engaging in formal rulemaking.

Many employers already find it difficult to determine whether they are in compliance with the FLSA. *Perez* adds an additional element of unpredictability to the analysis. Notwithstanding the fact that *Perez* draws into question the extent to which employers can rely on agency interpretations and opinion letters, employers should undertake an analysis of their job classifications to make sure that they are applying the FLSA exemptions correctly. Also, remember that state law can impose additional or stricter requirements, and employers are required to comply with both.

Finally, the DOL has announced its intention to undertake rulemaking to address the scope of the FLSA exemptions, with the stated intention of making it harder for employers to classify employees as exempt. It is rumored that these changes may impact both the salary level required for exemption (currently, $455/week) and/or the primary duties test. Proposed regulations are expected in the near future.

FLSA Exemptions Common to the Title Industry

The underlying facts of *Perez* relate to Section 213(a)(1) of the FLSA, which provides an exemption from FLSA minimum wage and overtime requirements for certain executive, administrative or professional employees, or for those engaged in outside sales. Under the current regulations, to qualify for an exemption, the employee in question must earn a salary of at least $455 dollars per week and also must meet certain criteria with respect to job duties. An employee's job title does not determine whether the employee qualifies for the exemption. Rather, the employee's specific job duties and salary must meet each requirement under the regulations.

Many employers rely on the administrative exemption. Under the current regulations, the administrative exemption applies to salaried employees whose primary duty is to perform office or non-manual work directly related to the management

or general business operations of the employer or its customers. "Primary duty" requires that the employee exercise discretion and independent judgment on "matters of significance." The regulations offer examples of employees that commonly qualify for the exemption, including insurance claims adjusters, certain employees in the financial services industry and "team leaders" responsible for negotiating real estate transactions.

Classification questions in the title industry generally concern the administrative exemption, and to a lesser extent the outside sales exemption, as title agents, abstractors, or other title work employees might fall within either category, depending on the structure of the company and the particulars of a given employee's duties.

While the administrative exemption would seem to apply to these categories of employees, often the exemption fails because the employee does not exercise adequate independent judgment or does not have sufficient sway with respect to the employer's broader business policies. For example, the argument that escrow closers qualified for the administrative exemption was rejected by a federal court in *Reich v. Chicago Title*. There, the court found that the escrow closers in question primarily performed day-to-day closing operations and were not sufficiently involved in administering the broader business policies of the company. Prior to the DOL's 2004 revisions to the FLSA regulations, ALTA had submitted a comment letter to the DOL, arguing against the *Reich* decision and in favor of a specific carve-out for escrow closers under the revised rules. The DOL did not grant the request, and, based on *Reich*, escrow closers continue to fall into a questionable category when it comes to the administrative exemption.

To qualify for the "outside sales" exemption, the employee's primary duty must be "making sales or obtaining orders" (as defined by the FLSA). Such duties must be customarily and regularly performed away from the employer's place of business. Property title transfers fall within the purview of "sales," and, thus, certain individuals involved in real estate transactions may qualify for the exemption.

Note that the outside sales exemption does not necessarily require that the employee in question facilitate the transfer of title to property. For example, in 2012, the U.S. Supreme Court found in *Christopher v. SmithKline Beecham Corp.* that a pharmaceutical representative who pitched a new drug to doctors qualified for the outside sales exemption, despite the fact that the employee did not actually transfer title. Rejecting the DOL's position that sales required a transfer of title and pointing out that the agency's lack of enforcement in the area could be construed as evidence that the agency did not find the exemption unlawful, the Court concluded that a pharmaceutical rep who obtained a non-binding commitment from a physician, but collected a commission upon consummation of the sale, would qualify as exempt.

The issue of commission was dispositive in a case several years earlier involving a Florida-based title marketing company. In *Gregory v. First Title of America*, a "marketing executive" with a background in title insurance sales argued that she should not have qualified for the outside sales exemption because she never actually consummated a sale during her tenure with First Title. Pointing to an earlier case rejecting the exemption for pharmaceutical reps, she drew the analogy to her job responsibilities, the scope of which involved inducing Realtors, brokers and lenders to refer their customers to First Title for title insurance services.

The court rejected this argument by analogy, finding that because her compensation was tied directly to the sale, the marketing executive qualified for the outside sales exemption. Thus, employers in the title industry may wish to note this distinction when reviewing the status of employees, as certain employees involved in what might be characterized as promotional work could qualify under this exemption if their compensation hinges on the completion of a sale.

The Perez Decision

The background facts in *Perez* involve two abrupt policy flip-flops by the DOL on the question whether mortgage loan officers qualified for the administrative exemption under the FLSA. In 1999 and 2001, the DOL issued opinion letters stating that mortgage loan officers did not qualify for the administrative exemption under the FLSA. After revising the FLSA regulations in 2004, the DOL issued a new opinion letter in 2006, backtracking from its earlier opinions and allowing the administrative exemption for mortgage loan officers.

This reprieve for the mortgage banking industry was short-lived, however, as the DOL once again about-faced on the issue, reversing course in 2010 with an administrative

interpretation disallowing the exemption. Focusing on the duties of a "typical" mortgage loan officer, the agency decided that making sales and collecting financial information from customers and entering it into a computer program designed to assist customers in selecting the best mortgage options constituted "the production work of an employer engaged in selling or brokering mortgage loan products." According to the DOL, such duties did not sufficiently relate to the internal management or general operations of the company, and thus did not qualify for the administrative exemption. The DOL noted that the opinion did not apply to mortgage loan officers who spend the majority of their time working outside the employer's place of business, thus leaving the door open for the outside sales exemption to apply to some mortgage loan officers. The Mortgage Bankers Association challenged the DOL's reversal, arguing that the DOL was required by law to provide notice and an opportunity for comment from interested parties under the federal Administrative Procedures Act.

The Supreme Court rejected the argument and deferred to the DOL's 2010 interpretation. The court held that the DOL (and other federal agencies) have the authority to amend or repeal a prior interpretation of an agency-issued regulation without providing notice or the opportunity for comment, provided that the prior interpretation was an "interpretive" rule rather than a "legislative" rule.

The distinction between the two is relevant because for the latter, agencies are required by law to provide notice and consider comments from the public during the rulemaking process. For example, the DOL's 2004 revised regulations were legislative rules, and thus could not be changed without advance notice and opportunity for comment. However, the DOL's 2006 *interpretation* of the 2004 regulations was within bounds, as the agency was free to unilaterally change its position with respect to its own formal rule. In *Perez*, given that the rule in question was interpretive, the Court did not address whether the DOL correctly interpreted the rule. Rather, the Court focused on the *process* by which the DOL interpreted the rule.

The Aftermath of Perez

At the very least, *Perez* shows that courts will defer to a federal agency's interpretation of its own rule, even when the interpretation might substantially alter how the rule affects businesses to which it applies. For example, in *Navorro v. Encino Motorcars LLC.*, a federal court in California upheld the DOL's change of position on whether a specific exemption for a "salesman, partsman, or mechanic primarily engaged in selling automobiles" applied to service advisors or service writers at car dealerships. After reviewing an opinion that dealerships had been relying on for 24 years, the DOL changed its mind and said that the exemption did not apply. Citing *Perez*, the court sided with the DOL, and the fight was over.

While the DOL has not issued interpretive guidance for title industry employers like that relied upon by the auto dealer in *Navorro*, title industry employers should pay attention to cases like *Navorro*. Along with *Perez*, *Navarro* shows that even long-relied upon precedent can be overturned, suddenly exposing employers to FLSA liability for misclassifying employees as exempt. Given the mercurial nature of certain agency interpretations of the exemptions, employers across all business sectors would be wise to follow new developments in this highly unsettled area of the law and periodically to undertake a review of exempt classifications that fall into "gray areas."

Perhaps there may be some clarity on the horizon with respect to the FLSA exemptions, as the DOL is set to propose revisions to the regulations soon. In early 2014, President Obama signed a presidential memorandum requesting that the DOL "restore common sense principles" to the overtime regulations and other provisions of the FLSA. Given that both employers and courts have found the current regulations unwieldy and difficult to apply, many hope the revisions will clear the murky waters surrounding the white-collar exemptions.

Whether the revised regulations succeed in cutting off a *Perez*-type skirmish in the title insurance industry remains to be seen, but it is safe to assume that changes will come to the overtime exemptions that will raise the bar on who qualifies as exempt. As a general matter, following *Perez*, title industry employers should be aware that if the DOL turns its attention to the title industry, it will do so with what appears to be a more expansive interpretive authority. ■

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