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Supreme Court Rules That Agency Interpretive Rules Are Not Subject to Notice-and-Comment Rulemaking

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Recently, the Supreme Court issued a unanimous judgment that government agency "interpretive rules" are not subject to notice-and-comment rulemaking, but cautioned that those same rules do not carry the "force and effect of law." *Perez v. Mortgage Bankers Assoc.*, Case No. 13-041 (Mar. 9, 2015). In *Perez*, the Supreme Court addressed whether an Administrator's Interpretation by the U.S. Department of Labor (DOL), which reversed the agency's prior position that mortgage loan officers were administratively exempt under the Fair Labor Standards Act (FLSA), was procedurally valid because it was issued without using the notice-and-comment process set forth in the Administrative Procedure Act (APA).

In March 2010, the DOL issued Administrator's Interpretation No. 2010-1 (the "Interpretation"), which concluded that employees who perform the "typical" duties of a mortgage loan officer employee do not satisfy the duties requirements of the FLSA's administrative exemption. The Interpretation was significant not only because it withdrew a 2006 opinion letter that reached the opposite conclusion—that certain mortgage loan officer employees qualified for the administrative exemption—but also because it established a new procedure for the DOL to provide broad interpretive guidance. The DOL's new procedure is a significant departure from its practice prior to 2010, under which it issued guidance in the form of rules and opinion letters limited to the specific facts presented to it in each request.

The Interpretation was a significant departure from this prior practice. Rather than respond to a specific set of facts presented by an employer, the Interpretation was based on the DOL's general understanding of the "typical" duties performed by employees in a certain role. By doing so, the DOL does not take into account any variations in duties that might exist among employees in the same position or with the same job title, across the industry or even at the same employer. Because the issue of exempt status is a question of fact, variations can affect significantly the question of qualifying for exempt status, thereby making categorical guidance less helpful.

The Mortgage Bankers Association (MBA) filed suit in U.S. District Court, District of Columbia, challenging the procedural validity of the Interpretation. The MBA's suit argued that the DOL's substantive change in its interpretation of the 2004 FLSA regulations required a notice-and-comment process under both the APA and the D.C. Circuit precedent, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). Following discovery, the district court entered summary judgment for the DOL. On appeal, the D.C. Circuit Court of Appeals reversed, holding that its decision in *Paralyzed Veterans* necessitated that the Interpretation be rejected as procedurally invalid because the DOL failed to follow notice-and-comment procedures. The D.C. Circuit held that under *Paralyzed Veterans*, when agencies wish to issue a new interpretation of a regulation that significantly deviates from a previously adopted interpretation, the agency is required to engage in the notice-and-comment process—which allows stakeholders and other interested parties of all viewpoints to submit comments for the agency's consideration prior to finalization of a proposed federal rule.

The DOL appealed, and the Supreme Court granted *certiorari*. On March 9, 2015, the Supreme Court issued its judgment and opinion, with Justices Alito, Scalia and Thomas filing separate concurring opinions. The Supreme Court recast the question originally posed as follows: Whether the *Paralyzed Veterans* doctrine was contrary to the APA's rulemaking provisions, improperly imposing an obligation on agencies beyond the APA's procedural requirements. The Court unanimously held that the *Paralyzed Veterans* doctrine was contrary to the APA's rulemaking provisions, overturning that decision. The Court held that agencies are only required to follow notice-and-comment procedures for legislative rules (rules that amend or otherwise modify statutes and/or rules) and not interpretive rules (rules that constitute an agency's construction and/or interpretation of a statute and/or rule). Where agencies issue interpretive rules, notice-and-comment rulemaking is not required, but those rules do not carry the "force and effect of law." In addition, the Court stated that the level of deference afforded to an agency's interpretive rule depends on that agency's consistent, or inconsistent, historical interpretation of the same regulation. Finally, the Court also cautioned that when an agency substantially alters its interpretation of a regulation—as the DOL did here— that "Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations." The Court then set forth the FLSA's safe harbor provision as one such example.

Justices Alito, Scalia and Thomas all concurred in the judgment insofar as overturning the *Paralyzed Veterans* doctrine; however, each Justice wrote separate concurring opinions addressing the need to revisit the amount of deference afforded to government agencies under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

For employers, the DOL's Interpretation now stands as its current position as to whether mortgage loan officers are administratively exempt under the FLSA. However, the level of deference afforded to the DOL's Interpretation will be litigated in light of the dicta in the Supreme Court's opinion, as well as other agency interpretations that have vacillated significantly.

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