Supreme Court Permits Labor Department to Flip-Flop on Wage-Hour Interpretations

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Last week, the U.S. Supreme Court held that the Department of Labor (DOL) was not required to go through any formal administrative procedures to change its opinion whether mortgage loan officers are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). The DOL has changed course several times over the years, most recently taking the position that the typical mortgage loan officer is not exempt and therefore must be paid overtime.

The dispute in *Perez v. Mortgage Bankers Association* centered on the obligations of federal agencies under the Administrative Procedures Act (APA). The APA requires federal agencies to go through a formal process, known as notice and comment rulemaking, when issuing regulations. Before issuing a regulation, the agency must invite all interested parties to comment on the proposed regulation. The agency must then respond to any significant comments. The APA, however, distinguishes between regulations and an agency's interpretation of those regulations. Agencies may interpret their own regulations without going through notice and comment, and, like the DOL, often do so through opinion letters or similar interpretative guidance.

In 1999 and 2001, the DOL issued opinion letters stating that mortgage loan officers are not "administrative" employees who are exempt from the FLSA's minimum wage and overtime requirements. In 2004, the DOL amended the FLSA's regulations regarding the so-called "white-collar exemptions," which include the administrative exemption. In 2006, the DOL issued an opinion letter interpreting the new regulations and stated that typical mortgage loan officers are likely administrative employees who are exempt. Four years later, the DOL flip-flopped again, issuing an administrative interpretation stating that mortgage loan officers are not exempt administrative employees.

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In *Perez*, the Mortgage Bankers Association sued the DOL, arguing that the 2010 reinterpretation should have gone through notice and comment rulemaking. The Association lost in the District Court, but the U.S. Court of Appeals for the D.C. Circuit reversed. According to the D.C. Circuit, significantly amending the interpretation of a regulation effectively changes the meaning of the regulation itself and therefore should be subject to the same process required to issue or amend a regulation.

The Supreme Court, in a unanimous opinion authored by Justice Sotomayor, sided with the DOL and overruled the D.C. Circuit. The Court held that because agency interpretations of their own regulations are not required to go through notice and comment rulemaking in the first instance, the government need not amend its interpretation through the formal rulemaking process. The Court did not take a position on whether mortgage loan officers are exempt or even whether the DOL's opinion was entitled to deference. Whether or not the DOL's opinion was arbitrary and capricious and, therefore, entitled to no deference was not before the Court. The only issue before the Court was whether the DOL was required to go through notice and comment rulemaking to change its interpretation.

The Court's opinion has significance beyond the DOL's interpretation that typical mortgage loan officers are likely not exempt from the FLSA's requirements. Federal agencies may amend the interpretation of their regulations without inviting comment from stakeholders, even if the new interpretation significantly deviates from the previous position. This is significant because employers may be subject to liability based on agency interpretation, either through agency enforcement of its interpretation or through litigation, where courts regularly give deference to agency interpretations. Thus, employers may suddenly be subject to increased exposure based on an unexpected change in an agency's position with no advance warning, no opportunity to comment, and with minimal recourse in the courts, other than challenging the agency's position as arbitrary and capricious.

This lack of predictability in an agency's position underscored the concurring opinions of Justices Scalia, Thomas, and Alito. Justice

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Scalia, for example, sympathized with the D.C. Circuit's attempt to proscribe an agency's ability to flip-flop, labeling it a "courageous (indeed, brazen) attempt to limit the mischief." The concurring Justices also questioned the Court's own authority on deference to agencies' informal interpretations and guidance and appeared poised to revisit those cases if given the opportunity.

Employers should be mindful of agency interpretations, such as EEOC Enforcement Guidance, Administrator Interpretations from the DOL, and even memoranda from the NLRB Office of the General Counsel. While such informal agency positions do not have the same force of law as regulations that go through formal rulemaking, these interpretations regularly state the agency's policy direction and can be used to subject employers to liability.

Please contact Eugene Droder III or any other member of Frost Brown Todd's Labor and Employment practice group for questions about the Supreme Court's ruling in *Perez* or any other issue involving the DOL or other federal agencies that regulate workplaces.

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