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Supreme Court Rules in Favor of the DOL on Agency Interpretation Regarding Mortgage Loan Officer FLSA Exemption Status

In a unanimous decision, the U.S. Supreme Court ruled on March 9, 2015, that federal agencies can make significant changes to rules interpreting regulations without engaging in the notice-and-comment procedures required by the Administrative Procedure Act (APA). The *Perez v. Mortgage Bankers Association* opinion, written by Justice Sotomayor, overturned the holding of a 1997 case from the U.S. Court of Appeals for the D.C. Circuit that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency had previously adopted, finding the 1997 holding inconsistent with the text of the APA.

The DOL's Shifting Interpretations of Its Regulations and the *Perez* Lawsuit

At issue in the *Perez* decision was the Department of Labor's (DOL) shifting opinions as to whether mortgage loan officers are covered by the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) or whether they are exempt under the FLSA's administrative exemption. In 1999 and 2001, the DOL issued Opinion Letters concluding that mortgage loan officers do not qualify for the administrative exemption. After the DOL promulgated its current FLSA regulations in 2004, it issued a 2006 Opinion Letter during the George W. Bush Administration suggesting that mortgage loan officers *are* covered by the administrative exemption. In 2010, the DOL under the Obama Administration again changed its interpretation of the administrative exemption, issuing an Administrator's Interpretation that mortgage loan officers do *not* qualify for the exemption. In other words, the DOL's 2010 interpretation concluded that the FLSA's minimum wage and overtime requirements applied to mortgage loan officers. The 2010 Administrator's Interpretation, like the 1999, 2001 and 2006 Opinion Letters, was issued without notice to the public or an opportunity for comment.

In response to the 2010 Administrator's Interpretation, the Mortgage Bankers Association (MBA), a national trade association representing real estate finance companies, filed a complaint against the DOL, contending that the interpretation was procedurally invalid because it was issued without notice-and-comment. Bound by the 1997 case, the D.C. Circuit agreed with the MBA and vacated the DOL's 2010 Administrator's Interpretation as procedurally invalid.

The Supreme Court, however, reversed the D.C. Circuit, holding that the APA does not require federal agencies to comply with notice-and-comment procedures when they make changes to their interpretations of administrative regulations because the APA's notice-and-comment requirement does not apply to interpretive rules. Accordingly, the DOL's current interpretation that mortgage loan officers are not exempt under the FLSA is procedurally valid,

and the DOL has the authority to change its mind on this interpretation in the future without providing notice or an opportunity for comment.

Importantly, the *Perez* decision extends well beyond the FLSA context and makes it easier for the DOL and other agencies to reverse or change any prior interpretations, even if this means reversing direction on significant regulatory issues in ways that can have a dramatic impact on employers. The DOL's Wage and Hour Division issues Administrator Interpretations relating to a number of federal employment laws, including the FLSA, the Family and Medical Leave Act, the Davis-Bacon Act and the Service Contract Act, and employers rely on those interpretations as part of their efforts to comply with these laws. After *Perez*, however, the DOL can reverse its prior interpretations of the regulations enforcing any of these statutes without a notice-and-comment period, introducing significant uncertainty into employers' compliance efforts. Similarly, *Perez* expands the ability of hundreds of other federal agencies with similar regulatory powers to revise their interpretations.

The Current State of the Mortgage Loan Officer Exemption Issue

Perez does not answer the question of whether mortgage loan officers are exempt or non-exempt under the FLSA, but instead focuses on the administrative law question of how a federal agency can make significant changes to its interpretations of its own regulations. When the exemption status of a particular loan officer has been presented to federal district courts, they have generally acknowledged the DOL's opinion letters on the issue, but have not found them to be dispositive. Rather, recent cases assessing whether or not a loan officer is exempt typically focus on whether the individuals in question meet the specific requirements of the administrative exemption under 29 C.F.R. § 541.200(a).

In this arena, courts mainly concentrate on whether a particular loan officer's "primary duty" is "directly related to the management or general business operations of the employer," as distinguished from production or sales work. Courts have found that a loan officer whose primary duty is to sell financial products is ineligible for the administrative exemption. Facts supporting such a finding include when a loan officer takes mortgage applications and sells mortgages, works in a sales department, is required to adhere to a strict sales method, is considered to be a salesperson, has the primary job focus of selling as many loans as possible, is evaluated based on his sales numbers, is paid commissions based on sales, and does not perform underwriting. Generally, courts hold that there is at least an issue of fact as to whether a particular loan officer (or similar employee) has a primary duty of making sales and would thus be non-exempt.

Additionally, the exemption status of mortgage loan officers also turns on whether the employees in question exercise "discretion and independent judgment with respect to matters of significance." Courts often address this issue alongside the primary duty inquiry, and in doing so they typically examine whether the employee uses judgment to assist individual clients with selecting a proper type of loan or whether the officer is restricted by his employer's established operating procedures such that he has no choice in the lending products or terms to offer clients, and similar questions. Given the fact-specific nature of this analysis, the courts often conclude that this issue, too, must be decided by a jury, rather than on summary judgment.

In a way, the courts' focus is consistent with the issues raised in the DOL's 2006 and 2010 letters, which emphasize the distinction between primary job duties that include making sales for an employer and those that involve administering the company's business affairs. The 2006 Opinion Letter, which responded to a particular set of facts, concluded that mortgage loan officers whose work included analyzing customers' financial information, advising customers about the risks and benefits of different loan options and advising customers about how to obtain a better loan program had a

"primary duty other than sales" and thus satisfied the duties requirement of the administrative exemption. The 2010 interpretation rejected the 2006 letter's sales work analysis as too narrow and found that work performed incidental to and in conjunction with an employee's own sales or solicitations is also considered non-exempt sales work. Thus, work activities such as collecting financial information from customers, entering such information into computer programs to determine what particular loan products might be available to customers and explaining the terms of available options and the pros and cons of each option constitute production or sales work and do not relate to the management or operations of the employer. Accordingly, the 2010 interpretation determined that mortgage loan officers who perform these "typical duties" of their jobs have the primary duty of making sales and do not qualify for the administrative exemption.

Lingering Questions Regarding Judicial Deference to Agency Interpretations

Courts do not completely ignore DOL interpretations on the loan officer exemption question. But, while they tend to acknowledge the 2006 and 2010 DOL letters in their discussion of the issue, courts have not been consistent in the amount of weight they give to such opinions. At the district court level, the amount of deference given to agency interpretations varies based on multiple, sometimes inconsistent, factors, including whether the interpretation was arrived at after a formal adjudication or notice-and-comment rulemaking, whether the agency opinion is classified by the court as merely an "application" of a regulation to a particular set of facts instead of an "interpretation" of an ambiguous regulation, whether the facts in the opinion letter and the facts of the particular case at hand are "substantially similar" and whether the opinion letter was signed by the wage & hour administrator.

Indeed, the amount of deference that courts should give such interpretations has not only been an issue of contention at the district court level, but also now at the Supreme Court. All three of the *Perez* concurrences, written by Justices Alito, Scalia and Thomas, express deep concerns with the level of deference courts currently give to an agency's interpretation of its regulations under the binding Supreme Court precedent of *Bowles v. Seminole Rock & Sand Co.* (1945), *Auer v. Robbins* (1997) and subsequent related cases. Under such precedent, courts are required to defer to administrative interpretations of ambiguous regulations unless they are plainly erroneous or inconsistent with the regulation. The concurring Justices' opinions call into question the legitimacy of such precedent and suggest the possibility that the Supreme Court will overrule it.

Perez's Political Implications

The Supreme Court's holding expands the ability of federal agencies to advance administrative priorities without subjecting their actions to a notice-and-comment process. With a Republican-controlled Congress and a President who has demonstrated a willingness to use executive power to advance an employment agenda for which he lacks sufficient congressional support, *Perez* could result in a further expansion of the Obama Administration's use of executive actions to impact the federal employment law landscape. Moreover, the ruling makes it easier for agencies to use their interpretive powers to make changes that follow the White House's leanings on employment law issues. The fact that the DOL's 2006 Opinion Letter—which suggested that mortgage loan officers were exempt under the FLSA—was issued by the Bush Administration, while the 2010 Administrator's Interpretation—opining that such officers are not exempt—was issued by the Obama Administration highlights this point. In this way, *Perez* is not so much a victory for employees (or employers), as it is a victory for executive agencies and their political agendas.

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