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LEGAL ALERT

Supreme Court Paralyzes Paralyzed Veterans Doctrine, Affords Greater Deference To Federal Agencies

On March 9, 2015, in a 9-0 decision, the U.S. Supreme Court abolished a precedent on which the regulated community has relied to keep federal agencies in check for nearly 20 years. This precedent, commonly referred to as the *Paralyzed Veterans* doctrine, required a federal agency to engage in notice-and-comment rulemaking before revising its definitive interpretation of a regulation. In its departure from the *Paralyzed Veterans* doctrine, the Supreme Court paved the way for even greater deference to federal agencies. According to the Court, the *Paralyzed Veterans* doctrine is contrary to the clear text of the Administrative Procedures Act's rulemaking provisions and improperly imposes on agencies an obligation beyond the Administrative Procedures Act's maximum procedural requirements. *Perez v. Mortgage Bankers Association* consolidated with *Nickols v. Mortgage Bankers Association*.

Background

In recent years, the U.S. Labor Department (DOL) has provided mixed signals as to whether mortgage loan officers are exempt under the Fair Labor Standards Act (FLSA). In 2004, after engaging in notice-and-comment rulemaking, the DOL issued revised regulations addressing various FLSA exemptions. These regulations included a section that spoke to employees in the financial services industry.

Under the regulations, whether mortgage loan officers were exempt hinged on how involved the employee was in the sale of financial products. In 2006, the DOL issued an administrator opinion letter in response to an inquiry by the Mortgage Bankers Association (MBA) – a national trade association that represents more than 2,200 real estate finance companies and has more than 280,000 employees across the United States.

The 2006 opinion found that mortgage loan offers typically qualified for one of the so-called "white collar" exemptions (the administrative exception) and were therefore exempt from the FLSA. In 2010, the DOL flip-flopped and issued an interpretation declaring that employees who perform the typical job duties of a mortgage loan officer were not exempt under the FLSA.

MBA challenged the 2010 interpretation in federal court, contending that the DOL should have conducted notice-and-comment rulemaking before issuing a new interpretation that squarely conflicted with the 2006 interpretation. The district court found this argument unavailing. Aggrieved, MBA appealed.

On appeal, a three-judge panel for U.S. Circuit Court of Appeals Circuit Court for the District of Columbia – the Circuit that hears more Administrative Procedure Act (APA) cases than any other – unanimously reversed the district court. The D.C. Circuit relied on the *Paralyzed Veterans* doctrine, a doctrine that prohibits an agency from significantly revising its definitive interpretation of a regulation without notice-and-comment rulemaking under the APA. While the D.C. Circuit took no position on the substance of the 2010 interpretation, it remanded the case to the district court, instructing that the DOL's 2010 interpretation be vacated.

The DOL appealed to the Supreme Court. The issue presented is whether a federal agency must engage in notice-and-comment rulemaking pursuant to the APA before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

Decision Of The Court

In a 9-0 decision, the Supreme Court held that the clear text of the APA stood in conflict with the *Paralyzed Veterans* doctrine. The Supreme Court pointed to Section 4 of the APA, which specifically exempts legislative rules from notice-and-comment procedures to issue an initial or interpretive rule. The Court reasoned that, because there is no requirement that an agency employ notice-and-comment rulemaking to issue an interpretive rule, there is no requirement that it do so to amend

or repeal that rule. The *Paralyzed Veterans* court, the Supreme Court found, focused on the wrong section of the APA and then misapplied it to the exemption for interpretive rules. This failure was fatal to the long-held *Paralyzed Veterans* doctrine.

The Court went on to state that the APA sets forth the full extent of judicial authority to review executive agency action for procedural correctness, and courts lacked authority to impose differing procedures on an agency – even under the guise that they would benefit public good. Thus, the *Paralyzed Veterans* doctrine improperly invaded the province of Congress by imposing a notice-and-rulemaking requirement on interpretive rules.

The Court also issued three concurring opinions, all of which concurred in the judgment and all of which found the APA to be incompatible with the *Paralyzed Veterans* doctrine. Interestingly, the opinions also called for a reexamination into *Bowles v. Seminole Rock & Sand Co.*, which held that agencies may authoritatively resolve ambiguities in regulations, suggesting that it too may be incorrect.

Implications For Employers

The regulated community is a large one. For nearly 20 years, the members of that community have relied in part on the *Paralyzed Veterans* doctrine to curtail sudden changes to definitive regulatory interpretation by federal agencies. In the post-*Perez v. MBA* era, where the *Paralyzed Veterans* doctrine is no more, agency overreach remains a concern. Employers will need to pay careful attention to the latest interpretive guidelines to avoid penalties. But, even more important, *Perez v. MBA* signals that broader changes could be afoot, and the *Paralyzed Veterans* doctrine may be just the first domino to fall.

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