SPECIAL REPORT
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U.S. Supreme Court Hears Oral Arguments in FLSA Mortgage Loan Officer Classification Suit

by Gina Carter and Tiffany Hutchens

On Dec. 1, 2014, the U.S. Supreme Court heard oral arguments in *Perez v. Mortgage Bankers Association* (consolidated with *Nickols v. Mortgage Bankers Association*). The Supreme Court's decision in the matter, which is expected in the first half of 2015, may impact the classification of mortgage loan officers under the Fair Labor Standards Act (FLSA).

Background of the Case

The FLSA generally requires that employees be paid overtime for working more than 40 hours per week, unless the employee qualifies for an exemption as an executive, administrative or professional employee. In 2006, the Department of Labor (DOL) issued an interpretative rule stating that mortgage loan officers are generally exempt from the FLSA's overtime requirement based on the typical job duties and level of discretion exercised by mortgage loan officers and similarly situated employees. However, in 2010, the DOL withdrew its 2006 interpretative rule and issued dramatically different guidance, construing the same FLSA provisions, advising that mortgage loan officers are not exempt and are consequently entitled to overtime pay for hours worked over 40 in a workweek. The Mortgage Bankers Association (MBA) sued the DOL, arguing that the 2010 re-interpretation is invalid because the DOL did not engage in notice-and-comment rulemaking.

DOL's Rulemaking Authority

Under the Administrative Procedures Act (APA), federal agency rules, including those issued by the DOL, can be "legislative" or "interpretative" in nature. A legislative rule issued by a federal agency is said to have the force and effect of law and cannot be issued without prior notice and comment by the public. By contrast, an interpretive rule is intended to only advise the public of an agency's view of a law or regulation and not bind the public or have the force and effect of law. For these reasons, the APA expressly provides that an interpretive rule need not go through the public notice and comment period. The question certified to the Supreme Court assumes that the DOL's 2010 rule is interpretative in nature and does not require advance notice and comment by the public. Although the attorney for the MBA argued before the Supreme Court that the 2010 rule is legislative in nature, the MBA will not likely be successful on this point. Assuming that the 2010 rule is interpretative, whether advance notice and a period of comment by the public was required prior to the DOL, reversing its opinion regarding the classification of mortgage loan officers under the FLSA will rest on the Supreme Court's interpretation of a line of cases originating out of the D.C. Circuit Court of Appeals.

Summary of Oral Arguments

At the heart of the dispute is a series of cases known collectively as the *Paralyzed Veterans* doctrine, arising out of the D.C. Circuit Court of Appeals. Under the *Paralyzed Veterans* doctrine, the D.C. Circuit Court has held that when a federal agency issues an interpretive rule that significantly revises or reverses an existing interpretive rule, the agency must make the

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revision after a period of notice and comment by the public. The Supreme Court is essentially ruling on the validity of the *Paralyzed Veterans* doctrine in deciding whether, and if so, when, an interpretative rule must be revised following a notice-and-comment period.

As previously noted, the question before the Supreme Court assumes that the DOL's 2010 rule is an interpretive rule that does not bind the public. However, some justices expressed concern with the deference courts give to interpretative rules, despite the fact that they do not technically have the force of law. Justices Elena Kagan and Sonia Sotomayor wondered whether the government was seeking an "end run" around the notice-and-comment process by issuing interpretative rules. "Why, after all, would an agency go through the cumbersome process of legislative rulemaking if interpretive rules are given controlling deference and yet are much easier to promulgate?," they asked. Justice Antonin Scalia joined the discussion and noted that "whether it's an interpretative rule or a substantive rule, . . . you want us to give the same deference to both." The attorney defending the DOL conceded "yes."

Analysis and Recommendations

Based on this line of questioning, it is likely that one or more justices will express concern over the deference given to interpretive rules and, perhaps, the difficulty distinguishing between interpretive and legislative rules; however, the distinction is not crucial to deciding the question certified to the Supreme Court and will likely remain undecided. Commentators following the case have surmised that the *Paralyzed Veterans* doctrine will be overruled, and the Supreme Court will hold that a revised interpretive rule need not go through notice-and-comment rulemaking. Such a holding will validate the DOL's 2010 rule advising that mortgage loan officers are non-exempt under the FLSA.

The decision has important implications not only for employers in the financial industry who employ mortgage loan officers and similarly situated employees, but also employers who rely on opinion letters, interpretative rules and similar "informal" guidance from federal agencies including, but not limited to, the DOL. If the Supreme Court rules as expected, administrative agencies will continue to have free reign to significantly revise an existing interpretive rule without seeking notice and comment from the public.

Employers with questions regarding the current classification of financial service employees under the FLSA or the appropriate reliance on administrative rules and opinion letters should contact Gina Carter at (608) 234-6058 or ecarter@whdlaw.com, or Tiffany Hutchens at (414) 978-5336 or thutchens@whdlaw.com.

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