

March 11, 2015



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## Precedent Preserves Prerogative: Agency Can Change Position on Issue without Advance Notice

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When a government agency changes course completely, reinterpreting its own rules in a way that constitutes a reversal of its previous position, what notice, if any, must it provide to the public? The Supreme Court ruled this past Monday that the answer is simple: None.

The case, [\*Perez v. Mortgage Bankers Association\*](#), involved the changing positions of the Department of Labor ("DOL") on whether mortgage-loan officers qualify for the administrative exemption to the Fair Labor Standards Act and whether the DOL's changing of position violated the rulemaking requirements of the Administrative Practices Act ("APA").

By way of background, when new laws are enacted, the agency administering that law often has authority to promulgate administrative rules for the statute. Thus, the DOL issues rules for the laws it administers, such as the Fair Labor Standards Act or the Family and Medical Leave Act. The APA, however, imposes certain requirements on federal agencies when formulating, amending, or repealing these rules. If a rule is considered a "legislative rule," it must go through a formal notice-and-comment rulemaking process set forth by the APA - these are the proposed rules published for public comment that [we have written about in the past](#) in several contexts. However, per the APA, this notice-and-comment process

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does not apply to "interpretative [or interpretive] rules, general statements of policy, or rules of agency organization, procedure, or practice." Thus, agencies often issue interpretations of their own rules, such as through opinion letters and administrator interpretations. And that is what was at issue in *Perez*.

In 1999 and 2001, the DOL issued opinion letters stating that it believed mortgage-loan officers fell under the Fair Labor Standards Act's administrative exemption. In 2004, the DOL issued, through formal notice-and-comment, the current set of regulations for the Fair Labor Standards Act. In 2006, the Mortgage Bankers Association ("MBA") requested a new opinion from the DOL on whether mortgage-loan officers continued to fall under the administrative exemption in light of the new regulations. The DOL confirmed that they did. In 2010, however, [the DOL changed course](#) and issued an Administrator's Interpretation that concluded that mortgage-loan officers did *not* fall under the exemption. The interpretation was issued without public notice or opportunity for comment.

MBA then sued, arguing (as is relevant for our purposes) that the DOL's 2010 interpretation violated the ruling of a 1997 case, *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). That case created what is known as the "*Paralyzed Veterans* doctrine," which states that, under the APA, if an agency has previously given its regulation a definitive interpretation (as MBA contended the DOL did in 2006) and subsequently significantly revises that interpretation (as MBA contended the DOL did in 2010), then the agency has, in effect, amended its own rule - something it cannot do under the APA without public notice and opportunity to comment.

The Supreme Court, with all justices concurring in the judgment, roundly rejected MBA's arguments, and in doing so rejected the *Paralyzed Veterans* doctrine as contravening the APA. The Court's holding was grounded in the statutory text of the APA, which wholly exempts an agency's interpretive rules from the formal public-notice-and-comment requirement. (The APA does not define what constitutes an "interpretive rule," and the Supreme Court declined in this case to look at that issue.) Because the DOL was only *interpreting* its own rules, rather than issuing or amending its rules (under the plain meanings of those words), it was not required to provide any public notice or opportunity to comment in advance of its change in position, regardless of what MBA claimed to be issues of procedural fairness.

The Court's holding, while seemingly straightforward - the DOL's 2010 change of position comports with the APA and the *Paralyzed Veterans* doctrine does not - raises a number of issues close to employers' hearts. Employers routinely attempt to parse agency rules and regulations to ensure they are in compliance, and as

employers know, changing administrations can result in changes at agencies, which in turn can result in changing interpretations of administrative rules. Employers have learned to navigate these waters, knowing, as this case demonstrates, that there is little recourse due to case law providing deference to agencies interpreting their own rules.

For employers, the *Perez* decision has takeaways both immediate and far-reaching. As to the latter, those employers or organizations inclined to challenge agency actions may take solace in the Court's concurring opinions, which question (and invite challenge to) the current line of cases requiring court deference not only to an agency's rules that interpret an ambiguous statute, but also to an agency's interpretation of its own ambiguous rules. That issue, as any company employing mortgage-loan officers over the past decade can attest, has real-world consequences.

As to the former, more immediate takeaway, the *Perez* decision shows the need for employers to remain up-to-date on the actions of federal agencies. In recent months, we have written several times on actions of federal agencies that affect employers, whether it be the Equal Employment Opportunity Commission's [new pregnancy discrimination guidance](#) - which, it bears mention, was subject to criticism for being issued without opportunity for public comment - or [new proposed rules](#) from the Office of Federal Contract Compliance Programs implementing Executive Orders affecting federal contractors. *Perez* makes clear that to the extent these agencies issue interpretations of their regulations that deviate from or conflict with their prior positions on the regulations, no advance notice or opportunity to comment is required. Employers are on notice.

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