

Attorneys React To High Court's Agency Rule-Making Decision

Law360, New York (March 09, 2015, 6:27 PM ET) -- On Monday, the U.S. Supreme Court sided with the Labor Department, ruling that federal agencies don't have to go through formal rule-making to make significant changes to rules interpreting regulations. Here, attorneys tell Law360 why the decision in *Perez v. Mortgage Bankers Association* is significant.

Benjamin Diehl, Stroock & Stroock & Lavan LLP

"The potential importance of the *Perez* case is suggested by the concurrences, which indicate that the Supreme Court may be willing to reconsider how much deference, if any, to give to interpretative opinions in the future. The opinion suggests renewed litigation on that question, particularly if the CFPB and other agencies increase the use of advisory publications and those publications are then relied on in future enforcement actions or examinations. "

Stuart Gerson, Epstein Becker Green

"The court's decision in *Perez* is an extremely important administrative law case that has significantly increased unilateral 'informal' interpretive rulemaking authority. That significance lies in the fact that the court rejected the generally accepted view of the D.C. [Circuit] in *Paralyzed Veterans of Am. v. D.C. Arena LP*, which had required agencies to use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The Supreme Court now has held that this doctrine improperly exceeds the APA's maximum requirements, leaving agencies free to alter even long-standing interpretive rules at will. This will not only empower DOL, but other activist agencies like the Centers for Medicare and Medicaid Services, which promulgates a large number of rulings that it states are 'interpretive.' The decision also augurs substantial unilateral agency shifts in interpretations when administrations change. It also may signal agency deference under the Chevron doctrine in the now-pending Affordable Care case regarding the IRS regulation as to tax credit subsidies."

C. Lance Gould, Beasley Allen Crow Methvin Portis & Miles PC

"The ruling [Monday] was not surprising given the posture of the case. The more nuanced and parallel issue of the amount of deference owed to agency rulings will be left for another day. The important distinction of whether the DOL's actions involved a 'substantive' rule or an 'interpretive' rule was not before the high court. The lower court assumed the rule at issue was 'interpretative' and that premise wasn't directly challenged by the parties on appeal. Substantively, this case is a victory for administrations that want to change the direction or stated policy of the previous administration. In that sense, it shouldn't be considered pro-employer or pro-worker. Instead, it will be what each administration chooses to make out of it."

John Meyers, Barnes & Thornburg LLP

"*Perez v. Mortgage Bankers Ass'n* is a groundbreaking decision because it makes clear that the current

Supreme Court will do little to rein in the executive agencies of the United States. The Department of Labor offers many interpretive opinions and regulations, and most of us assumed that if the DOL would substantially change an area of the law that it would be subject to the rule-make requirements of notice and a comment period by constituent groups. But the unanimous SCOTUS decision nixes this belief and provides complete deference to the DOL and therefore to hundreds of agencies with similar regulatory powers. We can expect more agencies to use their powers and be influenced by whomever is in the White House to engineer changes that follow the administration's leanings toward workers or businesses. The other interesting point about Perez is the mention by three of the concurring justices of reining in agencies' powers by changing the deferential standard of review normally afforded by the courts to agency pronouncements. Were this view to take hold in the majority, things could change dramatically in terms of the level of judicial oversight of agency changes. Until then, the executive branch through its powers to appoint agency heads has a wide berth to enact substantial changes in the landscape that businesses operate in. "

Barry Miller, Seyfarth Shaw LLP

"It is notable that the court did not hold that the administrator's interpretation was correct or entitled to any deference. The court held only that the failure to engage in notice and comment rulemaking before reversing its position on the exempt status of mortgage loan officers did not, by itself, render the DOL's view invalid. The court made a point to note that such vicissitudes are not immune from judicial review and specifically observed that an agency's abrupt reversal in position may support a finding that a newly promulgated rule is arbitrary and capricious. That argument may still present a viable attack on the administrator's interpretation in the trial courts."

Pamela Moore, McCarter & English LLP

"Though technically a loss for employers, this ruling may actually be a thinly disguised win. Interpretive rules lack the effect of law and must be weighed accordingly, but Perez generally supports the notion that agencies cannot act arbitrarily in violation of the APA. The justices could have further limited the application of precedent on the standard for agency deference, but the majority's language means that reviewing courts, not agencies, will have the final word on what regulations governing employers mean. The concurring opinions signal the conservative justices' desire to remove any doubt that the judiciary will determine whether an agency interpretation is correct."

Jeffrey P. Naimon, BuckleySandler LLP

"Perez v. Mortgage Bankers puts a focus on regulatory agencies' ability to shift course on critical legal requirements stated in informal guidance and rules. For comprehensively regulated entities like banks and other financial services providers, informal rules like the one at issue in Perez comprise a very large percentage of their compliance obligations. Justice Thomas, quoting Marbury v Madison in his concurring opinion, noted that the ability of an agency to change its position, or even completely reverse course, puts at risk 'the principle that the United States is "a government of laws, and not of men.'"

Brian Netter, Partner at Mayer Brown LLP

"The court's decision in Perez v. Mortgage Bankers continues its holding pattern on administrative procedure. The court's conservative wing has a clear appetite for re-evaluating whether to defer to an agency's interpretation of its own regulations, but it has now repeatedly failed to reconsider Auer/Seminole Rock deference in cases where the doctrine is applied."

Francis "Trip" Riley, Saul Ewing LLP

"This decision may hold tremendous significance given the recent trend by the Securities and Exchange Commission, the Consumer Financial Protection Bureau and the Federal Trade Commission to craft,

behind closed doors, their interpretation of the regulations they each enforce and reveal that interpretation for the very first time when it is applied as a basis for an enforcement action.”

Dan Wolff, Crowell & Moring LLP

“The Perez decision was entirely foreseeable, and by itself is not that interesting — a conventional application of the Administrative Procedure Act, albeit one that effectively overrules a longstanding D.C. Circuit precedent. For now, it merely reiterates an agency’s flexibility to reconsider prior interpretations of its regulations. More interesting is what it portends for judicial deference to an agency’s interpretation of its regulations in future cases. The concurrences in particular build upon prior statements of the conservative justices that the day of reckoning for so-called Auer (or Seminole Rock) deference may be near. If that future case comes to pass, as seems likely, the half-life of the Perez decision will prove to be very short.”

Jaklyn Wrigley, Fisher & Phillips LLP

“The Supreme Court’s decision to side with the DOL in Perez v. Mortgage Bankers Association is significant for two major reasons. First, it restores discretion to federal agencies in interpreting regulations, which the Paralyzed Veterans doctrine sought to erode, and the court clarified that the role of the courts is limited to the judicial authority prescribed by the APA. Second, and probably more consequential, is that the court (via the concurring opinions) sent a very clear message that Paralyzed Veterans was not the only one in need of re-examination. As such, it is unlikely that the story ends here.”

--Editing by Chris Yates and Kelly Duncan.