

Gov't Victory In Perez V. MBA May Be Pyrrhic

Law360, New York (December 08, 2014, 4:15 PM ET) --

The government's argument in *Perez v. Mortgage Bankers Association* seemed to garner the support of a majority of U.S. Supreme Court justices during argument held on Dec. 1, but victory today (which seems almost certain) may well come at a hefty price tomorrow. In the near term, the court appears willing to abrogate a nearly 20-year-old D.C. Circuit precedent that discourages agency flip-flopping by requiring agencies making changes to definitive interpretations of rules to go through notice-and-comment rulemaking. Nevertheless, the longer-term ramifications for agencies defending against challenges to their decision-making appear more ominous, as it seems that a growing consensus on the Supreme Court realizes that deference to agency interpretations of their own rules may be, after awhile, too much of a good thing (for the agency that is).



Daniel Wolff

Background

Perez v. MBA arises from the Fair Labor Standards Act's requirement that employers pay overtime wages to employees unless the employees fit within certain exemptions, which include employees with administrative responsibilities and certain salespersons. The U.S. Department of Labor has promulgated regulations giving effect to this overtime pay law and, for decades, it interpreted the exemptions (as stated in its regulations) to not include mortgage loan officers (thus requiring mortgage banks to pay overtime to such officers). In 2006, under the Bush administration, the DOL reinterpreted its regulations to place mortgage loan officers within the exemption (thus eliminating their employers' duty to pay overtime wages). Then, in 2010, under President Obama, the DOL flip-flopped once more, placing mortgage loan officers outside the exemption, and yet again requiring mortgage banks to pay them overtime.

The MBA challenged the DOL's 2010 flip-flop in D.C. federal court on grounds that, among other things, it ran afoul of D.C. Circuit precedent (*Paralyzed Veterans of America v. D.C. Arena LP*) standing for the proposition that when an agency has given its regulation a definitive interpretation, any revision to that interpretation must go through notice and comment. MBA prevailed and the DOL sought, and was granted, certiorari.

Divining the Court's Sentiments on the Question Presented

As examined at greater length in our article on Dec. 1, the government's central position in *Perez v. MBA* is that the *Paralyzed Veterans* line of authority is at odds with the text of the Administrative Procedure Act,

which exempts interpretive rules from notice-and-comment requirements. The MBA counters that a change to a definitive interpretation of a legislative rule effectively modifies that legislative rule and is, therefore, a legislative rule in its own right that may only be promulgated through the APA's notice-and-comment procedures. In its view, this is the central tenet of the Paralyzed Veterans doctrine, and it is fully consistent with the APA.

Although sympathetic to the MBA's position on account of the DOL's repeated flip-flopping, and somewhat doubtful that the DOL was not skirting the line between "legislative" and "interpretative" rulemaking in calling its 2010 flip-flop a new "interpretation" (as compared to a revision to the underlying legislative rule itself), the court seemed willing at the end of the day to accept the proposition that the case before it posed only the narrow question of whether an interpretive rule must go through notice-and-comment rulemaking. Because the APA exempts such rules from notice and comment, and because the APA makes no distinction between an initial interpretation and a subsequent and new interpretation, the court appeared poised to agree that, on that narrow question, the case should be decided in the DOL's favor.

MBA counsel pressed the position that changing a definitive interpretation of a regulation is de facto rulemaking in its own right, and thus must go through notice and comment, but the court (encouraged by government counsel and its briefs) pointed out that the MBA had conceded in the lower court proceedings that the rule in question was an interpretive one, not a legislative one (i.e., not a rule that, on its own terms, had the force and effect of law). In other words, there was no need for the Supreme Court to consider the difficult issue of whether the rule was actually an interpretive one or, in substance, a legislative one, because the MBA had already waived that argument and, in any event, Paralyzed Veterans itself is concerned only with interpretive rules.

For this reason, as noted in our article of Dec. 1, we think a decision in the DOL's favor in *Perez v. MBA* will be an easy decision for the court to make. Justice Elena Kagan, for example, pushed back when MBA's counsel brought up the distinction between interpretive and legislative rules, commenting that everyone involved in the case has long accepted that the rule at issue was interpretive. And Justice Stephen Breyer, after restating the narrow question presented, commented that the court "can answer that pretty quickly," and that all of the other issues raised, while interesting, were for another day.

Indeed, as we noted at the end of our earlier article, we fully expect the court to take up — soon — a case posing the question of whether agency interpretations of their regulations are entitled to deference (as is currently given under *Bowles v. Seminole Rock & Sand Co.* and its progeny, as reaffirmed in *Auer v. Robbins*). Lines of questioning posed during oral argument in *Perez v. MBA* indicated the justices are interested in revisiting that issue. If they do, that case could be of greater consequence to agencies, and not necessarily in their favor.

The Continuing Viability of Auer Deference

Among the interesting administrative law topics bandied about at oral argument despite not being central to the question presented were: (1) the line between interpretive and legislative rules; (2) the appropriate level of deference to be given to interpretive rules; (3) the legal effect of a regulated entity's reliance on an interpretive rule; and (4) an agency's ability to apply a new interpretation retroactively.

Notwithstanding the court's apparent willingness to agree with the DOL that, on the narrow question presented, the government had the better of the argument, there was no small amount of discomfort with the notion that federal agencies too often get to have their cake and eat it too. This is because while the APA exempts interpretive rules from notice-and-comment rulemaking, the court's own jurisprudence tends not to

distinguish between legislative rules (interpreting and implementing statutory mandates) and interpretive rules (interpreting other statutory or regulatory provisions, but not altering rights and responsibilities in their own right) for purposes of extending deference.

Justice Kagan questioned the unfair surprise that might befall an unsuspecting regulated party whose conduct becomes the subject of agency scrutiny due to a new interpretation of an old regulation. And Justice Ruth Bader Ginsburg inquired about what might be necessary for a regulated entity to prove good faith reliance as a defense to any regulatory repercussion. But, as expected, it was Justice Antonin Scalia — recognizing the court's own culpability in the too-much-of-a-good-thing state of administrative law — who poked most sharply at the elephant in the room: Auer deference.

Justice Scalia, who has for several years been chomping at the bit to overturn Auer — on the theory that if it knew an interpretive rule would not garner deference, an agency would have greater incentive to promulgate less ambiguous regulations and not leave important details to subsequent interpretation — was chomping once again: “Maybe we shouldn’t give deference to agency interpretations of [their] own regulations,” he commented. “For me it would be easy.”

Justices Kagan and Sonia Sotomayor underscored the concern by pressing government counsel to explain what principle guides an agency to modify the regulation itself or merely reinterpret it. Indeed, Justice Anthony Kennedy foreshadowed this concern by inquiring at the outset of oral argument about what background principle might motivate an agency preference for utilizing interpretive rules instead of revising its regulations. Ultimately, though, the justices seemed to acknowledge that it was not necessary to the case to identify the existence or contours of any such guiding principle.

Nevertheless, for his part, Chief Justice John Roberts emphasized the change of administration between the two conflicting interpretations, hinting at a cynical (and indubitably correct) perspective on why agencies frequently choose to reinterpret regulations in lieu of actually changing the regulatory text through notice-and-comment rulemaking: it is easier for new administrations to change old administrations’ policies without the hassle of rulemaking. Indeed, the court’s questioning of government counsel highlighted that both the 2006 flip-flop (not at issue) and the 2010 flip-flop (at issue) were reversals of policies of earlier administrations, and of a different political party at that.

While the government is likely to win this round, relegating the highly valued (by industry), but doctrinally feeble, Paralyzed Veterans principle to the jurisprudence dustbin, Auer’s day of reckoning may not be far off. While in prior cases a majority of justices has not been moved to reconsider the wisdom of Auer, the agency flip-flopping that gave rise to *Perez v. MBA* has crystallized its shortcomings. And if Auer does eventually fall, *Perez v. MBA* might go down in history as the greatest rope-a-dope since Ali dropped Foreman in the 1974 “Rumble in the Jungle.”

—By Thomas Means, Daniel Wolff and Sharmistha Das, Crowell & Moring LLP

Thomas Means and Daniel Wolff are partners and Sharmistha Das is an associate in Crowell & Moring's Washington, D.C., office. Means is chairman of the firm's administrative law and regulatory practice group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
