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Supreme Court Makes It Easier for Administrative Agencies to Change "Interpretive Rules"

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Last week, the Supreme Court of the United States held that Interpretive Rules issued by administrative agencies do not have to undergo the notice-and-comment rulemaking procedures of the Administrative Procedure Act ("APA") even if they contradict or substantially change previously issued Interpretive Rules. *Perez v. Mortgage Bankers Association, et al.*, —S.Ct.—, 2015 WL 998535 (Mar. 9, 2015). Specifically, the Court held that the Department of Labor was allowed to change its position on whether mortgage-loan officers were exempt from the overtime provisions of the FLSA even though (1) it did not follow the APA's notice-and-comment rules prior to changing its position and (2) it had taken the exact opposite position just four year earlier. This development is concerning because it is now easier for administrative agencies to change longstanding interpretations of ambiguous labor and employment regulations without giving warning to, or getting input from, private employers. Therefore, private employers will have to monitor changes to interpretative guidelines more closely than they have in the past.

Legislative Rules vs Interpretive Rules

The APA empowers administrative agencies to issue rules that implement federal statutes. The rules created by administrative agencies fall into two categories, "Legislative Rules" and "Interpretive Rules." Legislative Rules are the substantive regulations that implement a federal statute (e.g. 29 C.F.R. § 530). Interpretive Rules are rules that explain how an administrative agency will interpret an ambiguous portion of a federal statute or a Legislative Rule (e.g. a Department of Labor Opinion Letter explaining whether a particular type of employee fits within a statutory exception to the Fair Labor Standards Act).

Legislative Rules are subject to the APA's notice-and-comment procedures. But Interpretive Rules are not. This means that an administrative agency is required to notify the public and seek input on the rules it issues when it seeks to change a substantive regulation. But if the administrative agency "merely" changes its interpretation of an ambiguous regulation then it is not required to seek public input and can immediately implement the change.

The Paralyzed Veterans Doctrine – An Attempt to Guard Against the Flip-flopping Government Agency

The problem with the legal distinction that the APA draws between Legislative Rules and Interpretive Rules is that it allows administrative agencies to randomly change their position on how a regulation should be interpreted to the detriment of employers that have relied on previous interpretations. How can employers comply with administrative regulations if the agencies that created the regulations can constantly change what compliance means?

The *Paralyzed Veterans*Doctrine attempted to address these concerns. "The creation of the doctrine may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations." *Id.* at *10.

"Under the *Paralyzed Veterans*Doctrine, if 'an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish' under the APA 'without notice and comment.'" *Id.* at *5.

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The Supreme Court Strikes Down The Paralyzed Veterans Doctrine

The Supreme Court concluded that the plain text of the APA required it to strike down the *Paralyzed Veterans* Doctrine. According to the Court, an Interpretive Rule need not undergo comment-and-notice procedures regardless of whether it contradicts or changes a previously issued Interpretive Rule. "The APA's categorical exemption of interpretive rules from the notice-and-comment process is fatal to the *Paralyzed Veterans*doctrine. . . . Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule." *Id.* at *1.

Employers Should Become Very Familiar With Regulatory Safe-Harbor Provisions

Fortunately, there are still some legal protections in place to prevent employers from being blind-sided by sudden interpretative changes. Many federal statutes contain safe-harbor provisions that protect employers who make employment decisions based on an Interpretive Rule only to be told subsequently by the agency that it no longer follows that interpretation.

For example, the "FLSA provides that 'no employer shall be subject to any liability for failing 'to pay minimum wages or overtime compensation' if it demonstrates that the 'act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation' of the Administrator of the Department's Wage and Hour Division, even when the guidance is later 'modified or rescinded.' §§ 259 (a), (b)(1)." *Id.* at *9. However, it is important to note that safe harbor provisions typically only protect parties from liability when the administrative agency adopts an interpretation that conflicts with its previous position. *Id.* Therefore, if the new Interpretive Rule is entirely new or is different from, but consistent with, prior Interpretive Rules then an employer may still be liable for violating it.

The APA itself also provides some protections to employers. Specifically, the "APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* Therefore, a particularly large and disruptive change can be challenged on the ground that there is not a substantial justification for the change.

Employers Lost The Battle But They May Have Won The War – Supreme Court Signals That It May Be Ready To Stop Giving Judicial Deference To Administrative Interpretations of Ambiguous Regulations

Although private employers lost this battle, they have taken affirmative step toward winning the war. In a series of concurring opinions, several of the justices question whether the Court has gone too far in granting such substantial deference to administrative agencies and openly questioned whether *Chevron U.S.A. v. Natural Res. Def. Counsel, Inc.* needs to be revisited.

- "I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide – with no deference to the agency – whether that interpretation is correct." *Id*. at *11. (Scalia, J., concurring).

- "The opinions of JUSTICE SCALIA and JUSTICE THOMAS offer substantial reasons why the Seminole Rock doctrine may be incorrect. (citation omitted). I await the case in which the validity of Seminole Rock may be explored through full briefing and argument." Id. at *10 (Alito, J., concurring).

- "I concur in the Court's holding . . . [But] I write separately because these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations. That line of precedents, beginning with Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), requires judges to defer to agency interpretations of regulations, thus, as happened in these cases, giving legal effect to the interpretations rather than the regulations themselves. Because this doctrine effects a transfer of judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent." Id. at *13 (Thomas, J., concurring).

For now, private employers should carefully monitor new interpretative changes that are likely to be made in the wake of this case. But they should also be on the look-out for opportunities to directly challenge arbitrary actions by administrative agencies and create an opportunity to attack the long line of cases giving rise to the substantial deference standard.