

Supreme Court Holds that Mortgage Loan Officers are Eligible for Overtime

Labor & Employment Law Update

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On March 9, 2015, the U.S. Supreme Court issued a ruling in *Perez v. Mortgage Bankers Association* that should put all employers on notice. In this decision, the Court held that federal agencies, specifically the Department of Labor (DOL), do not need to go through the same rulemaking procedure of providing notice to the public and soliciting input before issuing their own interpretive guidance, even if it contradicts the agency's prior guidance.

In *Perez*, the DOL issued opinion letters that stated mortgage loan officers were not eligible for overtime under the administrative exemption of the Fair Labor Standards Act (FLSA). Subsequently, at the request of the Mortgage Bankers Association (MBA), the DOL issued another opinion letter reaffirming that mortgage loan officers were exempt from overtime under the administrative exemption of the FLSA. However, several years later the DOL flip flopped and reversed its prior opinion letters stating that mortgage loan officers did not fall under any of the FLSA exemptions and thus were entitled to overtime.

At issue in *Perez* was whether the DOL's 2010 interpretation was procedurally invalid under the Administrative Procedure Act's (APA) and doctrine set forth in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). Under the *Paralyzed Veterans* doctrine and APA, when a federal agency was issuing an interpretation that significantly revised its prior interpretation, the federal agency had to comply with the APA notice-and-comment procedures. The APA's notice-and-comment procedures required that federal agencies publish a notice of the proposed rulemaking in the federal registry and allow interested persons to provide input on the proposal. Then, in finalizing the rule, the federal agency was required to take all comments into consideration and any amendments or changes would be subject to the same notice-and-comment requirements.

In *Perez*, the Supreme Court reversed the lower court's decision applying the *Paralyzed Veterans* doctrine and held that the *Paralyzed Veterans* doctrine was contrary to the text of the APA and exceeded the scope of judicial review authorized by Congress.

The first takeaway for employers from the Supreme Court's decision in *Perez* is that under the DOL's opinion letter, mortgage loan officers are not exempt from overtime under the FLSA administrative exemption. As such, mortgage loan officers must be paid overtime, unless you can show that they fit under another FLSA exemption. Additionally, it creates significant questions for employers in how much credence they should give to interpretations, opinion letters and guidance issued by federal agencies, as the agencies may be able to issue contradictory opinions or interpretations without having to go through the notice and comment procedures set by the APA.

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