CLIENT ALERT

Supreme Court Says DOL May Change Regulatory Interpretations without Undertaking Rulemaking

Mar.17.2015

On March 9, the Supreme Court decided that government agencies may alter prior interpretations of their regulations without engaging in notice-and-comment rulemaking under the Administrative Procedure Act (APA). *Perez v. Mortgage Bankers Association* involved the U.S. Department of Labor's (DOL) reversal of its previous interpretation of the Fair Labor Standards Act's (FLSA) administrative exemption. Neither the result nor the Court's discussion of the relevant administrative law principles is surprising. Yet the decision is likely to create unwelcome uncertainty for employers. *Mortgage Bankers* may empower enforcement agencies like the Equal Employment Opportunity Commission (EEOC) and DOL to accelerate interpretive reversals based on policy considerations. In that event, employers may have even less confidence that they operate in a predictable legal environment.

The Supreme Court's Decision

The specific question in *Mortgage Bankers* was whether the APA requires administrative agencies to undertake notice-and-comment rulemaking when they issue an interpretation of a regulation that "deviates significantly" from the agency's prior interpretation of that rule. The D.C. Circuit had said there was such a requirement in its 1997 decision in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). In a unanimous decision, the Supreme Court disagreed. The Court concluded that the *Paralyzed Veterans* doctrine was inconsistent with the APA, which, by its terms, exempts "interpretative rules" from notice-and-comment rulemaking.

The Court's opinion recounts a number of policy reversals by DOL on the exemption. Under President Clinton, DOL's Wage and Hour Division (WHD) issued Opinion Letters in 1999 and 2001, stating that mortgage loan officers did not qualify as exempt under the FLSA's "white collar" exemption rules. 29 CFR § 541.200 *et seq.* In 2004, during the Bush administration, DOL revised those regulations, using the APA's rulemaking process. The new version included several examples of broadly defined categories of employees that would likely qualify for the administrative exemption. In 2006, in response to an industry request, the WHD issued a new Opinion Letter stating that mortgage loan officers are presumptively exempt under the 2004 regulations. Then, in 2010, the Obama Administration's WHD withdrew the 2006 Opinion Letter and issued an Administrator's Interpretation stating that mortgage loan officers were presumptively non-exempt employees. None of the WHD's interpretations were issued through APA rulemaking.

Plaintiffs in *Mortgage Bankers* brought suit, arguing that the 2010 interpretation was an impermissible "flip-flop" that could not be accomplished without APA rulemaking. Plaintiffs in private party litigation pending against several mortgage industry employers intervened, arguing that the 2010 interpretation was properly issued and that it should be given judicial deference.

The Court rejected the trade association's argument. Justice Sotomayor's majority opinion adopted a textual analysis of the APA in concluding that issuance of the 2010 interpretation did not require compliance with the APA's rulemaking procedures.

Yet the Court did **not** conclude that the 2010 interpretation was necessarily a correct interpretation of the 2004 regulations. One of the trade association's principal arguments was that, because agency interpretations effectively have the force of law, they should only be adopted after compliance with APA rule-making. In dismissing that claim, the majority nevertheless reaffirmed the principle that "it is the court that ultimately decides whether a given regulation means what the agency says." The Court cited its 2012 decision in *Christopher v. SmithKlineBeecham Corp.,* in which the Court rejected a DOL interpretation of the FLSA's "outside sales" exemption made in a series of *amicus curiae* briefs. The Court stated that there should be no deference given to an interpretation that is "plainly erroneous or inconsistent with the regulation."

The Court's opinion also acknowledged that the agency's change in position could be a relevant consideration in litigation over whether particular employees were misclassified. Justice Sotomayor observed that, while, an agency is generally free to change its position with respect to an interpretive rule, an agency's interpretation of a regulation that conflicts with its prior interpretation is "entitled to considerably less deference than a consistently held agency view."

Division at the Court Regarding Deference to Agencies

Despite the 9-0 vote to jettison the *Paralyzed Veterans* rule, *Mortgage Bankers* reflects the current divide among the Justices as to how much deference should be given to administrative agencies. Justice Sotomayor stressed that a court "lacks authority 'to impose upon [an] agency its own notion of what procedures are 'best' or most likely to further some vague, undefined public good," because a contrary rule "would violate 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" For the Court's majority, a decision on whether it is wise policy to permit an agency to change "its interpretation of one of the regulations it enforces" is "the responsibility of Congress or the administrative agencies."

In separate concurrences, Justices Alito, Scalia and Thomas suggest a markedly different view of deference to agency interpretations. Justice Thomas's opinion focuses on the administrative law principle known as *Auer* deference, which authorizes courts to take a deferential view of an agency's interpretations of its own regulations. Justice Thomas argues that *Auer* is unconstitutional. He contends that *Auer* effectively transfers the exercise of judicial independence from the judiciary to the executive branch in an improper delegation of powers that is inconsistent with the Constitution's system of checks and balances.

The Court's decision in *Mortgage Bankers* also reveals a broader disagreement at the Court about the continuing expansion of the modern administrative state. *Auer* is an extension of the principle of *Chevron* deference, in which courts are required to defer to an agency's interpretation of the statute authorizing the agency. Courts continue to expand the scope of *Chevron* deference, often invoking the maxim that agency expertise in a technical field justifies deference. Justice Scalia's concurring opinion in *Mortgage Bankers* suggests that the resulting "elaborate law of deference to agencies' interpretations of statutes and regulations" is "[h]eedless of the original design of the APA."

When one reads *Mortgage Bankers* in tandem with Justice Thomas' concurring opinion in *Department of Transportation v. Ass'n American Railroads,* issued the same day as *Mortgage Bankers*, it is evident that at least some members of the Court are increasingly uncomfortable with the current breadth of the agency deferral concept. Some commentators suggest that some number of the Justices may be predisposed to limit or overrule *Auer* in a subsequent case.

Implications for Employers

The immediate effect of *Mortgage Bankers is the Supreme Court's endorsement of the WHD's right to issue the 2010 interpretation. Courts are thus required to consider* the WHD's conclusion that the "typical" mortgage-loan officer is not exempt from the overtime requirements of the FLSA. Yet the extent to which a court should defer to this conclusion is another matter. The parties in *Mortgage Bankers* had conceded in the lower courts that the rule at issue was an interpretive regulation and thus not subject to the notice-and-comment rulemaking that characterizes a "legislative regulation" under the APA. As Justice Sotomayor stated, this concession "comes at a price" because "[i]nterpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" Accordingly, while DOL was free to change its interpretation of the regulation in 2010, its latest interpretation of the exemption may not carry the day in a given FLSA case. DOL's reversal of position will be one of many factors that will be assessed in deciding "how much" deference should be given to its 2010 interpretation.

In any event, the clear take-away from *Mortgage Bankers* is that companies that employ mortgage-loan officers (and employees performing similar duties) should review the circumstances of these employees' employment and re-examine their FLSA classification.

Employers will have to wait to see the broader effect of *Mortgage Bankers* on agency behavior. Some agencies may find in this decision an incentive to promulgate comparatively vague regulations through APA rulemaking, knowing that they will have license to elaborate on those rules later. In other circumstances, an agency may decide to reverse a prior interpretation through administrative interpretations like the one at issue in *Mortgage Bankers.* Some agencies may decide that the best way to advance the administration's policy objectives is by adopting detailed regulations through rulemaking, in the belief that only APA-promulgated regulations would be given outcome-determinative deference by the courts. Agencies adopting that view may reason that this approach is the best way to prevent the next administration from reversing field yet again. How DOL responds to *Mortgage Bankers* may be reflected in its impending announcement of revisions to the FLSA's white collar exemptions.

Employers should expect a significant increase in the issuance of agency interpretative guidance. It is doubtful that additional agency "flip flops" will provide certainty to employers trying to manage the complex task of compliance with federal and state wage hour law.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Andrew W. Bagley
Senior Counsel – Washington, D.C.
Phone: +1 202.624.2672
Email: abagley@crowell.com