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DOL Wins Rule-Making Battle, But Deference Rift Lingers

By **Ben James**

Law360, New York (March 09, 2015, 10:09 PM ET) -- The U.S. Supreme Court's decision Monday that the Department of Labor and other agencies don't need notice-and-comment rule-making to change interpretive regulations sets the stage for politically motivated flip-flopping, lawyers said, but also underscores a split among the justices on precedent requiring judicial deference to agencies' interpretations of their own rules.

The nation's highest court unanimously ruled in favor of the DOL and against the Mortgage Bankers Association, which had persuaded the D.C. Circuit to vacate a DOL "administrator's interpretation" that changed the agency's stance on mortgage loan officers' overtime status in 2010.

"Now it will be a lot easier for a Republican president to get his or her Department of Labor to reverse field on this and a lot of other things," said Crowell & Moring LLPpartner Tom Gies. "I think it's bad for employers."

The 2010 administrator interpretation trumped a George W. Bush-era DOL opinion letter that said loan officers qualified as overtime-exempt employees under the Fair Labor Standards Act, and some saw the case as a chance for the high court to discourage regulatory changes based on who is in the White House.

But the high court's decision gave a green light to more shifts like the course change on mortgage loan officers' exempt status in the future, attorneys said.

"I think it's a rather important ruling insofar as it empowers agencies to engage in greater informal rule-making — and to do so without going through the notice-and-comment rigmarole that is more typically associated with formal rule-making," said American University Washington College of Law professor Stephen Vladeck.

Under the D.C. Circuit's 1997 Paralyzed Veterans ruling, an agency had to use the Administrative Procedures Act's notice-and-comment procedures to issue a new interpretation of a regulation that differed significantly from a previous interpretation.

But the Paralyzed Veterans doctrine is at odds with the text of the APA, which exempts "interpretive rules" from notice-and-comment requirements, the high court ruled Monday.

For employee-side lawyers, striking down the Paralyzed Veterans doctrine was overdue.

“It was welcome ... because the Paralyzed Veterans doctrine has enabled big-business obstructionism to the Labor Department’s employee-friendly rule changes. The overtime rule in Perez v. Mortgage Bankers Association never should have been challenged, and today’s decision protects other Obama-era interpretations from similar attack,” said R. Scott Oswald, managing principal of The Employment Law Group PC.

Justice Sonia Sotomayor's opinion reversed the D.C. Circuit holding in the Mortgage Bankers Association's favor and found the Paralyzed Veterans doctrine contrary to the law, a ruling lawyers said wasn't a surprise.

But Justice Sotomayor's opinion was accompanied by three concurrences that some lawyers said cast doubt on long-standing high court precedent requiring judges to defer to agency interpretations of regulations and underscored a split among the justices.

“What might be more significant for future litigants and court watchers is that the case confirmed an ongoing split among the justices about the proper role of deference to administrative agencies,” said University of Virginia School of Law professor Rip Verkerke.

Paul DeCamp, former DOL Wage and Hour Division administrator and current leader of Jackson Lewis PC's wage and hour practice, said that while the justices ruled against the solution the D.C. Circuit came up with, the concurrences show some sympathy for the problem the appeals court was trying to address: agency flip-flopping.

“This decision does free up agencies, at least in the short term, to articulate their enforcement positions without regard for the Paralyzed Veterans line of cases from the D.C. Circuit. However, in winning this fight against the Paralyzed Veterans doctrine, DOL may have inadvertently brought on a bigger confrontation," DeCamp said. "They may win the battle but lose the war.”

Justice Clarence Thomas' concurrence took aim at the legitimacy of prior Supreme Court rulings, running from the 1945 Seminole Rock decision to 1997's Auer v. Robbins, that call on judges to defer to agency interpretations of regulations. That whole line of cases raises “serious constitutional questions” and ought to be revisited, Justice Thomas wrote.

“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,” Justice Thomas wrote.

Justice Antonin Scalia cited “weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means” and advocated abandoning Auer deference.

Justice Samuel Alito said that while the Paralyzed Veterans rule wasn't a viable remedy for the concerns that may have prompted the D.C. Circuit's approach, he did not dismiss those concerns and was waiting for a case that would allow for full exploration of Seminole Rock.

Lawyers said it was uncertain whether five of the current justices would vote to overturn the Seminole Rock and Auer line of precedent. But if that happened, it would be a sea change in the law, they said.

“If Seminole Rock gets overturned, DOL may find itself with a lot less deference than it has today,”

DeCamp said, adding that Monday's concurrences make it clear that at least three justices have doubts about whether Seminole Rock and its progeny should remain good law.

Chief Justice John Roberts joined Justice Sotomayor's opinion Monday, but he wrote a concurring opinion in a case called Decker v. Northwest Environmental Defense Center in March 2013 that pointed to "serious questions" about the principle laid out in Seminole Rock and Auer and said reconsideration might be appropriate in the right case.

“As a practical matter, agencies express their views as to what their regulations mean in all sorts of forms. They take positions in litigation, they issue guidance documents, they sign opinion letters. Getting rid of Auer would change the value of all of those documents,” said Mayer Brown LLP partner Brian Netter. “It's hard to estimate what the actual practical effect would be.”

But employee-side lawyers didn't see the Supreme Court jettisoning the Seminole Rock and Auer precedents anytime soon.

It's unlikely that the Supreme Court would uproot Seminole Rock and “effectively try to rewrite the Administrative Procedures Act and decades of jurisprudence,” said Wigdor Law LLP partner Lawrence Pearson.

Oswald said the Supreme Court had turned a deaf ear Monday to Justices Scalia and Thomas' drumbeat for overturning the Seminole Rock and Auer line of cases.

“Auer isn’t perfect, but the alternative would be a patchwork of different legal interpretations by courts in different jurisdictions, which would be unfair to anyone subject to federal regulations,” Oswald said.

--Editing by Kat Laskowski and Brian Baresch.
