Who Needs Rules? The DOL Wins Supreme Court Battle In Mortgage Loan Officer Administrators Interpretation vs. Rule Making

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When a federal agency deviates significantly in its historic interpretation of a regulation - in this case, doing a complete 180 on whether mortgage loan officers are exempt from overtime under the Fair Labor Standards Act - what (due) process must the agency follow?

In the closely-watched case of *Perez v. Mortgage Bankers Association*, the U.S. Supreme Court on Monday held that public notice and comment rule-making is not required. This decision is a victory for the U.S. Department of Labor ("DOL"), which in 2010, and with a new Administration at the helm, issued an "Administrator's Interpretation" that mortgage loan officers were *not exempt* from minimum wage or overtime requirements under the white collar "administrative exemption."

Flip-flopping. In 1999 and again in 2001, the DOL Wage and Hour (W&H) Division issued Opinion Letters concluding that mortgage loan officers *do not qualify* for the administrative exemption, and therefore must be paid minimum wage and overtime. Then, following the DOL's update of the Fair Labor Standards Act ("FLSA") regulations in 2004, the Mortgage Bankers Association requested a new opinion interpreting the revised regulations. In 2006, the George W. Bush-era W&H Division issued an Opinion Letter that concluded the opposite -- mortgage loan officers *do meet* the administrative exemption. Four years later, the Obama-era W&H Division changed course and issued an "Administrator's Interpretation" that mortgage loan officers typically *do notqualify* for the administrative exemption. In short, the DOL's interpretation of the exemption changed with who was in the White House. The DOL withdrew its 2006 Opinion Letter, and as a result, the mortgage industry had to revamp its mortgage loan officer compensation structure or in some cases face costly class and collective action litigation under the FLSA.

The Mortgage Bankers Association ("MBA") filed suit, arguing that when an agency has given its regulation a definitive interpretation, and then changes that interpretation, the agency has in effect amended its rule, which must be done through public notice-and-comment rule making. Therefore, the 2010 "Administrator's Interpretation" was arbitrary and capricious, and procedurally invalid. The federal District Court disagreed with the MBA, and held that the 2010 interpretation was not arbitrary or capricious. The MBA appealed, and the D.C. Circuit Court of Appeals agreed with the MBA and vacated the Administrator's Interpretation. The DOL appealed to the U.S. Supreme Court.

The Supreme Court ruled that a federal agency does not have to go through formal rule-making when issuing significant changes to its interpretation of its regulations. Relying on the text of the Administrative Procedures Act ("APA"), the Court confirmed that the APA's public notice-and-comment requirement does not apply to interpretive

rules. Quite simply, "[b]ecause 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 when it amends or repeals that interpretive rule." Thus, the 2010 Administrator's Interpretation stands.

Deference Battle Remains. The Supreme Court was split, however, on the level of deference that courts owe to an agency, particularly when it flip-flops in its interpretations. Justices Thomas, Scalia, and Alito wrote concurring opinions that raised serious questions about the constitutionality of deference in such an instance, and opened the door to revisiting the deference issue in the right case in the future.

For banks and those in the finance industry, particularly the mortgage loan industry, the Supreme Court's ruling increases the risk of a successful legal challenge to a mortgage loan officer's exempt status under the administrative exemption. When classifying mortgage loan officers, employers should look carefully to the DOL's 2010 Administrator's Interpretation for guidance. The DOL will not consider those employees who perform the typical job duties of a mortgage loan officer, as set forth in the guidance, to qualify for the administrative exemption. In those cases, companies should revisit the compensation arrangements with their mortgage loan officers (if they have not done so already), and consider whether other exemptions may apply. A note of caution, however: the "highly compensated" exemption under the federal FLSA is not available under Pennsylvania law.

Please contact a member of Barley Snyder's Employment Law Group with any questions about this alert.

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