



## **Supreme Court Gives Obama Opening for New Regulations Without Notice and Comment Rulemaking**

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As Congress began to pass more and more laws that give administrative agencies such as the Department of Labor, the Department of Transportation, and the Department of Justice, the authority to issue legislative rules, *i.e.*, rules that have the force and effect of law, Congress recognized the need to exercise control over the rule making process. Congress passed the Administrative Procedure Act (APA) which established the requirement that whenever an administrative agency issued a legislative rule, the agency had to follow notice and comment rule making requirements. This means that first the agency must publish a notice of the proposed rulemaking; second that all interested parties be given the opportunity to comment and third, that the agency must consider the comments made and any final rule must include a concise general statement of the rule's basis and purpose.

However the APA also gives administrative agencies the right to issue "interpretive" rules. "An interpretive rule is one wherein an agency clarifies the meaning of a legislative rule. An interpretive rule is not a new rule or an amendment of an existing rule, it basically explains the meaning of an existing legislative rule. Under the APA an administrative agency can issue interpretive rules without having to go through notice and comment rule making. All the agency needs to do is publish a document stating the agency's position as to what a particular legislative rule means. With that background, we turn to the case of *Perez v. Mortgage Bankers Association* decided by the Supreme Court on March 9, 2015.

The Wage and Hour Division has issued regulations regarding requirements to pay overtime to employees. These regulations include an exemption that provides that employers do not have to pay overtime to "administrative" employees as that term is defined in the regulation. In 2006, at the request of the Mortgage Brokers Association, the Wage and Hour Division issued an opinion letter stating that mortgage loan officers fell within the "administrative" exemption of the regulations and therefore were not required to be paid overtime wages. However, in 2010, the Wage and Hour Division changed its view and without notice and comment rule making, the Wage and Hour Division withdrew its 2006 interpretation and issued a new interpretation finding that mortgage loan officers were covered by the regulations overtime requirements.

Thus we have the same agency interpreting the same regulation but coming out with diametrically opposed conclusions. First the agency said the mortgage loan officers were exempt from

overtime under the regulation and then the agency said that mortgage loan officers were covered by overtime under the exact same regulation.

The Mortgage Bankers Association filed suit claiming that under the doctrine established by the United States Court of Appeals for the District of Columbia in the case of *Paralyzed Veterans v. D.C. Arena*, if an administrative agency wants to issue an interpretive rule that differs substantially from a prior interpretive rule, it has to go through notice and comment rulemaking. The Department of Labor defended claiming that under the APA, an agency has the right to issue interpretive rules without notice and comment rule making and the Paralyzed Veterans decision was wrong.

The case came to the Supreme Court and the Court held unanimously that the APA gave the administrative agencies authority to issue interpretive regulations without notice and comment rule making and a Court could not limit that authority by imposing a notice and comment requirement on an interpretive rule that is a substantial deviation from a prior rule.

This decision opens the Pandora's box for administrative agencies. At a time when the Obama Administration must deal with a House and a Senate controlled by Republicans, the Administration has repeatedly said that it will try to use the administrative agencies to implement policy objectives that would not be passed by Congress. The Mortgage Banker's decision gives the Administration great latitude to use interpretive rules to push the Administration's policy objectives without going to Congress and without having to use the lengthy and tedious notice and comment rule making process.

This decision has wide ramifications for the association community. Interpretations of regulations made by agencies during times when the White House was controlled by Republicans may be reversed by the current administration without giving the affected parties notice of the proposed change or the right to comment.

Think of the Mortgage Bankers Association. For many years that association certainly would be entitled to advise its members that mortgage loan officers are not covered by the overtime provisions of the Fair Labor Standards Act. How did they know that? They had a written opinion from the Department of Labor which said that mortgage loan officers did not have to be paid overtime. Now the Department of Labor changed its mind and said that mortgage loan officers are covered. How do you explain that to the industry?

Association Executives should carefully review the major regulations covering their industries or professions. If there are interpretive regulations in favor of the industry or profession written during a time when the Administration was a conservative Republican administration, there is a good possibility that those interpretations could change to the detriment of the industry or profession without any notice whatsoever. This is a time to be proactive and open up relationships with the regulatory agencies involved with your industry or profession. Don't be blind-sided. Changes will be coming and you need to be in a position of providing your members with as much notice as possible.

If you are interested in learning more about “Supreme Court Gives Obama Opening for New Regulations without Notice and Comment Rulemaking,” contact Steven Fellman, GKG Law, P.C. at 202.342.5294 or [sfellman@gkglaw.com](mailto:sfellman@gkglaw.com).