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WLF Asks High Court to Preserve Requirement that Agencies Provide Notice and Seek Public Input When Reversing Formal Policies

(Perez v. Mortgage Bankers Ass'n)

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—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—The Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to require a federal administrative agency, before altering a definitive interpretation of an agency regulation, to provide public notice of its plans and a meaningful opportunity for the public to participate in the revision process. WLF’s brief argued that the Administrative Procedure Act (APA) requires agencies to follow notice-and-comment procedures when substantively altering a prior regulatory interpretation, because such alterations are equivalent to amending—and amendments are subject to the APA’s notice-and-comment requirements.

The case focuses on a 2010 Obama Administration policy reversal. The Fair Labor Standards Act (FLSA) provides several exemptions from overtime pay rules. In 2006, the Department of Labor (DOL) determined that mortgage loan officers were exempt from overtime rules. The Obama Administration’s DOL repudiated that determination, concluding that mortgage loan officers are entitled to overtime pay because they are primarily engaged in sales.

However, the Administration chose not to effect its policy change through a formal rulemaking, which would have required use of the time-consuming notice-and-comment process. Instead, DOL simply announced that it had “reinterpreted” the applicable regulations (drafted by the Bush Administration in 2004), concluded that the 2006 Bush DOL decision misinterpreted its own 2004 FLSA regulations, and withdrew the 2006 decision. WLF argued that such reinterpretations of formal decisions constitute *de facto* amendments of the regulations.

Upon filing, WLF issued the following statement by Chief Counsel Rich Samp: “Administrative agencies are entitled to revise the rules governing how they carry out their statutory mandates, in order to reflect a new Administration’s priorities. But they aren’t permitted to act unilaterally. They must allow the public to participate in the revision process. Among other things, requiring advance notice gives affected entities time to adjust their operations to come into compliance with the new regulations.”

WLF is a public interest law firm and policy center with supporters nationwide. WLF regularly litigates to enforce statutory requirements against federal regulatory agencies.

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