Ohio: Legislative veto override imposes new agency rule review requirements that affect department of taxation

David M. Kall | Thursday, January 24, 2019

The Ohio General Assembly recent overrode the veto of former Gov. John Kasich on a bill affecting agency rule review procedures that could have big ramifications despite flying largely under the media radar. The law, Senate Bill 221, grants new powers to the Joint Committee on Agency Rule Review (JCARR) and imposes new rule review requirements on all Ohio agencies (excluding statewide office holders, state institutions of higher education, and state retirement systems). Consequently, Ohio agencies including the Department of Taxation must now periodically review, and potentially change, their operations and policies relating to their audits and other administrative responsibilities.

New Powers and Responsibilities

The new powers and rule review requirements include the following:

- Ohio agencies must now review their operations and policies at least once during each gubernatorial term to determine whether the agency is applying "principles of law or policy" in practice or written administrative guidance (such as Ohio Department of Taxation Information Releases) that have not been set forth in official rules.
- Affected persons may petition Ohio agencies to restate a principle of law or policy if the person was a party to an agency determination that the person believes applied a principle of law or policy not stated in an agency rule. Such persons may include taxpayers that receive adverse final determinations

through the Tax Department's tax appeals process. These persons or petitioners, however, have no appeal right from an adverse determination by the agency considering their petition for rule review.

- JCARR may order an agency to appear before it and explain why it has not adopted rules in situations where: (a) the agency is relying on a principle of law or policy that should be but has not been stated in a rule; or (b) the agency has not adopted a rule that the General Assembly directed it to adopt by statute.
- JCARR may order an agency to submit a rule for its review where the JCARR chairperson becomes aware that an existing rule has had or is having an unintended or unexpected effect on businesses.
- Senate Bill 221 provides that a rule under review has an "adverse impact on businesses" for purposes of Gov. Kasich's "Common Sense Initiative" (to review agency rules to take into account their impact on the business climate), if the rule "would be likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies."

Implications Uncertain

Going forward, the implications on Ohio agencies including the Department of Taxation are uncertain. SB 221 was designed to limit any adverse impact that agency rules may have on the business environment in Ohio. Gov. Kasich nevertheless vetoed the measure as unnecessary in light of his advisory Common Sense Initiative panel that is already designed to do that.

It remains to be seen how often JCARR will summon agencies before it to explain their practices and policies, or how, if at all, agencies will reform their practices or adopt rules based upon their periodic rule review and petitions from affected persons. Certainly Ohio agencies will incur additional costs as they periodically review their operations and policies.

There are constitutional dimensions with the separation of powers between the legislative and judicial branches of Ohio government as well. The settled principle of judicial review, *i.e.* that courts interpret the laws, traditionally does not require the extra step of executive agencies adopting court rulings as administrative rules. If SB 221 is understood to impose this extra step, the General Assembly arguably infringed upon the power of Ohio Judiciary to interpret laws.

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