THOMPSON HINE

Labor & Employment @lert

July 2024

Loper Bright's Impact on Employment Laws: Navigating the Post-*Chevron* Landscape

The U.S. Supreme Court's landmark case *Loper Bright Enter., et al. v. Raimondo, et al.*, Case No. 22-451 (June 28, 2024) signals a seismic shift in employment law, dismantling federal agencies' authority under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to interpret ambiguous statutes, potentially unraveling existing regulations and sparking a wave of litigation that could reshape the regulatory landscape for years to come.

Forty years ago, when issuing its landmark opinion in *Chevron*, the Supreme Court established the principle known as "Chevron deference," a doctrine that compels federal courts to defer to a federal agency's interpretation of ambiguous statutory language within its own regulatory scope. Under this doctrine, if a law is unclear, courts must uphold an agency's interpretation as long as it is "reasonable," which is a very low burden for agencies to meet. *Chevron* deference has significantly impacted rulemaking by federal agencies, granting them broad authority to interpret and implement laws, thereby influencing a wide array of regulatory areas including labor, environmental protection, and public health. The doctrine's centrality in administrative law has made it a cornerstone for defending agency actions against legal challenges. In recent years, those challenges have grown, including lawsuits filed against OSHA's masking and vaccination rules, as well as rules issued that relate to independent contractors and overtime, among other things. Indeed, OSHA interprets and enforces an extensive body of federal safety and health regulations that it promulgated based upon how it interprets a very broad safety and health statute, where *Chevron* deference to such OSHA enforcement of its regulations is now no longer applicable.

Loper Bright, in essence, eliminates the requirement for courts to defer to federal agencies as they have under *Chevron* and opens up years of agency rules and regulations to legal challenges with uncertain outcomes. Of particular note, the ruling puts into question recently promulgated federal rules that are just about to go into effect and others that were recently enacted. The first, the DOL's increases to salary thresholds for exempt workers, is set to go into effect in July. The second, the FTC's noncompete clause rule is scheduled to go into effect on September 4. Both are subject to existing legal challenges. Third, the National Labor Relations Board's (NLRB) rules and interpretative guidance of the National Labor Relations Act (NLRA) are also now in question.

DOL Overtime Rules

Employers may avoid paying employees overtime pursuant to various exemptions, including executive, administrative, and professional (EAP) exemptions, if employees meet specific duties and salary thresholds. Under the Trump administration, the DOL increased the salary threshold from $455 per week ($23,660 annually) to $684 per week ($35,568 annually). This increase was challenged in *Mayfield, et al. v. U.S. Department of Labor, et al.*, U.S. Dist. Ct. W.D. Tx. Case No. 1:22-cv-792-RP. The district court granted summary judgment for the defendants, relying solely on *Chevron*. That ruling is currently on appeal before the Fifth Circuit, Case No. 23-50724, with oral arguments scheduled for August 5. Based on *Loper Bright*, the Fifth Circuit will likely have little choice but to remand the case to the district court to reconsider the DOL's rulemaking authority under the new standard, placing the **current** EAP salary threshold in limbo.

Similarly, the Biden administration's recent rule increasing the EAP salary threshold to $844 per week ($43,888 per year) is also at risk. This rule is being challenged in various cases. On June 28, the court in consolidated cases *Plano Chamber, et al. v. Su, et al.*, USDC EDTX, 4:24-c-v-468 and *State of Texas v. Dep't of Labor, et al.*, USDC EDTX, 4:24-CV-499 issued an injunction staying implementation of the Biden DOL rule in Texas, and in light of *Loper Bright,* it is likely that a national ban may be granted in this or one of the other pending cases.

FTC's Final Rule Banning Noncompetes

On April 23, the FTC issued a final rule essentially banning all noncompetes, with a few exceptions for existing noncompetes with senior executives earning more than $151,164 and in "policy-making positions" and for sellers of a business in some circumstances.

A barrage of litigation immediately ensued challenging the rule, including three separate cases filed by global tax and technology firm Ryan, LLC, the U.S. Chamber of Commerce, and ATS Tree Services, LLC, in the Northern District of Texas, Eastern District of Texas, and Eastern District of Pennsylvania, respectively. All three lawsuits make similar arguments: (1) the FTC does not possess the statutory authority to issue the final rule; (2) the FTC exceeded its authority in issuing the rule; (3) the rule is the result of an unconstitutional delegation of legislative power; and (4) the rule is arbitrary and capricious because there are less onerous means available to achieve the FTC's stated goal of encouraging competition in the economy.

The courts in *Ryan, LLC* and *ATS Tree Services* are set to issue rulings on motions to stay the effective date of the final rule in July, with the first expected by July 3 and the second expected by July 23. The overturning of *Chevron* eliminates the requirement (upon a finding of ambiguity) that courts defer to the FTC's interpretation that noncompetes constitute "unfair methods of competition" under the FTC Act. This decision greatly undermines the FTC's rulemaking authority, which makes it more likely that the final rule's effective date will be delayed and/or it may never go into effect.

National Labor Relations Board

The NLRB has frequently changed its mind, seesawing back and forth between statutory interpretations of the NLRA, where courts routinely uphold the NLRB's differing interpretations on the basis of *Chevron* when determining whether or not an employer or union has violated (or will violate) the NLRA by engaging in certain conduct. In May, the Ninth Circuit Court of Appeals upheld the NLRB's decision based upon *Chevron* in a case regarding a challenge as to whether the NLRB could change its position on whether it required employers to continue with dues checkoff after the expiration of a collective bargaining agreement – an issue on which the NLRB has frequently changed its stance. *Valley Hosp. Med. Ctr., Inc. v. NLRB*, 100 F.4th 994, 1003 (9th Cir. 2024). Circuit Judge O'Scannlain authored the opinion for the court, noting in a special concurrence, "Because the Board adequately explained its reasoning and reached a result not at odds with the NLRA, it can require employers to continue dues checkoff after the expiration of the applicable collective bargaining agreement – *at least until the next time that the Board changes its mind*."

Over the past several years, the NLRB has also issued new rules interpreting the NLRA as to the protections for employees who advocate for nonemployees, what is concerted activity, employers' duty to bargain before changing terms and conditions of work, the definition of independent contractors versus covered employees under the NLRA, and the definition of joint employers. These NLRB rules and decisions interpreting the NLRA will no longer be subject to *Chevron* deference.

Other employment rules and regulations that likely will face legal challenges as a result of the *Loper Bright* decision include:

- Independent contractor classification under the FLSA
- OSHA regulations related to workplace safety and health standards
- EEOC regulations implementing the Pregnant Workers Fairness Act
- Interpretations and rules regarding eligibility, leave entitlements, and employer obligations under the Family and Medical Leave Act

- EEOC rules and guidelines on workplace discrimination, harassment, and retaliation
- Prevailing wage rules under the Davis-Bacon Act

The removal of the *Chevron* deference standard will require agencies to provide clearer statutory justifications for their rules and related interpretation of statutes, likely leading to increased litigation and uncertainty in the regulatory environment for employers and employees alike. While the Supreme Court abandoned the *Chevron* framework, it emphasized that it was not overturning prior decisions that relied on the *Chevron* doctrine absent "special justification." Employers should recognize that existing regulations and guidance remain in effect, as this decision does not address any employment or labor regulations or find them legally invalid.

Going forward, employers will need to monitor litigation, as orders issued may necessitate changing policies and practices. This will be particularly important for multistate employers, as courts in different jurisdictions will almost undoubtedly issue conflicting opinions where a regulation is invalidated in one district but upheld in another.

We will continue to monitor the reverberations of *Loper Bright* and keep our clients updated accordingly.

FOR MORE INFORMATION

For more information, please contact:

Glianny Fagundo
404.407.3677
Glianny.Fagundo@ThompsonHine.com

Nancy M. Barnes
216.566.5578
312.998.4240
Nancy.Barnes@ThompsonHine.com

M. Scott Young
513.352.6617
202.263.4134
Scott.Young@ThompsonHine.com

Brittany A. Mallow
216.566.5654
Brittany.Mallow@ThompsonHine.com

or any member of our Labor & Employment group.