akerman

Blog Post

Thanks for Your Opinion, But We've Got This: SCOTUS Eliminates Long-Standing Deference to Federal Agency Statutory Interpretation

July 3, 2024

Based upon a recent ruling by the U.S. Supreme Court, federal regulatory agencies are no longer entitled to deference as to their interpretation of a statute that is ambiguous, and federal courts are now compelled to exercise their independent judgment in deciding if an agency acted within its statutory authority. While the Supreme Court was careful not to disturb decades of precedent where deference previously may have been given, the future implications may be unprecedented and far reaching in the business world, affecting rulemaking by the alphabet soup of federal regulatory agencies that may apply to a particular company's operations (DOL, EEOC, EPA, FTC, ICC, NLRB, OSHA, SEC...).

Employers may now have even stronger grounds to challenge onerous federal agency rules and regulations, and the seismic shift of authority back to the federal courts may dissuade federal agencies from drawing outside the lines in the future. The renouncement of deference has already fueled recent legal challenges, with the employer taking the victory lap, and more is expected to come. While employers cannot simply ignore final agency action, this might be an ideal time for a strategic pivot.

Related Work

Employment Litigation
Labor and Employment
Wage and Hour

Related Offices

Los Angeles

HR Defense

Akerman Perspectives on the Latest Developments in Labor and Employment Law

Visit this Akerman blog

The Pendulum of Statutory Interpretation Swings Back to the Courts

Since Congress created the first federal regulatory agency in 1887 (the Interstate Commerce Commission), agencies have enjoyed increasing freedom in creating and enforcing rules. Until the Supreme Court's ruling last week, some agencies may have acted as though they had unfettered discretion to interpret the meaning of statutes which were ambiguous or silent. On Friday, June 28, 2024, the Supreme Court (in a 6-3 ruling) set the record straight when it overturned this agency deference (known as the *Chevron* doctrine) in the case of *Loper Bright Enterprises v. Raimondo*, finding that its application "improperly strips courts of judicial power by simultaneously increasing the power of executive agencies." This ruling unraveled the thread of power woven by the *Chevron* doctrine, inviting new — or giving a boost to already pending — legal challenges to potentially overly broad federal agency action.

Previous *Chevron* Two-Step Test and the New Rule

Under the prior doctrine established by the Supreme Court in *Chevron v. Natural Resources Defense Council* (1984), there was a two-part test which courts used to interpret federal statutes:

First step: If the text of the statute clearly expresses Congress's intent, then the agency must carry out the clearly expressed intent of Congress, and courts should reject administrative interpretations which are contrary to that intent.

Second step: If, however, the intent of Congress is unclear in the text of the statute, or otherwise silent or ambiguous, then the court was instructed to defer to the agency's interpretation of the statute as long as that interpretation was reasonable. The court was not free to impose its own interpretation on the statute, even if it may have differed, but rather to

adopt the agency's interpretation if it had offered a "permissible" one.

In *Loper Bright,* the Supreme Court expressly overruled *Chevron* and swung the pendulum of statutory interpretation back to the judicial branch, citing the unworkability and "dizzying" volatility from the patchwork of edifications that have been spawned since *Chevron*'s inception 40 years ago. In the post-*Chevron* world, ambiguities are not necessarily an invitation for regulatory agencies to fill in the blanks absent specific legislative authority to do so. Courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [Administrative Procedure Act] requires." So, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within in." Conversely, courts need not (and should not) "defer to an agency interpretation of the law simply because a statute is ambiguous." The Supreme Court blamed *Chevron* deference for fostering "unwarranted instability in the law" and creating "an eternal fog of uncertainty" enabling agencies to change positions on a political whim.

The Supreme Court stopped short of similarly unraveling cases decided over the last 40 years where *Chevron* deference was applied. In doing so, the Court reasoned that an announced change in its "interpretative methodology" is not grounds to evade the doctrine of *stare decisis* (to stand by things decided) and overrule statutory precedent. Yet, going forward, the Supreme Court reclaimed for the federal courts the province of statutory interpretation.

The Employers Strike Back

The *Loper Bright* ruling just might be the glittering new trophy the business world can display in an effort to push back on rules and regulations that expose companies to potentially onerous compliance

standards and accompanying litigation. The ruling doesn't give employers carte blanche to outright disregard agency rules or regulations, but may boost the business world's efforts to challenge overly broad agency rules or regulations with a much higher chance of success. Now, employers can reconsider their approach to employment law compliance by (1) reevaluating litigation strategies around the potential likelihood of success in challenging agency action; and (2) rethinking risk mitigation when drafting new policies. The impact of the unraveling of *Chevron* deference may not be fully known or appreciated for some time, but this is a pretty big development that should be monitored.

How Pending Challenges May Be Impacted

Many of the most burdensome employment laws are borne from agency rules. Earlier this year, we reported on the Federal Trade Commission (FTC) releasing a rule broadly banning nearly all forms of non-compete agreements between employers and employees. The U.S. Chamber of Commerce immediately struck back by filing a suit in the Eastern District of Texas, and the FTC responded by justifying its practice of promulgating similar legislative rules as precedent. With the *Loper Bright* ruling, the FTC's reference to prior practices will continue to lose meaning as more courts sound the death knell to *Chevron* deference — the FTC's backstop for its prior practices.

We also previously reported on the Department of Labor (DOL) issuing an additional rule for interpreting whether a worker is considered an employee or an independent contractor under the Fair Labor Standards Act (FLSA). Specifically, the DOL added an additional factor — whether any investments by the worker are "capital or entrepreneurial in nature" — used for determining the "nature and degree" of the employer's "control over the performance of the work and economic aspects of the working relationship" when deciding the ultimate question of whether a worker is an independent contractor under the FLSA. While this

rule is more specific than the FTC's non-compete agreement ban, it demonstrates an agency's broad strokes in regulating specific areas of law, even in creating new legal definitions, where statutes have not already provided an interpretation. As with the FTC's rule, challengers to this DOL rule may have a much stronger position with the elimination of *Chevron* deference.

Opportunities for employers to successfully challenge overly broad rules and regulations are now plentiful and ripe. Other recent employment agency rules which will almost certainly be susceptible to challenge include the pro-union regulations recently issued by the National Labor Relations Board (NLRB), increasing compliance requirements for discrimination and harassment issued by the Equal Employment Opportunity Commission (EEOC), and a rule issued by the Occupational Safety and Health Administration (OSHA) allowing others, including union representatives, to accompany safety inspectors during facility walkarounds. But, with any legal challenge, an employer must first determine whether the fight is worth the associated litigation costs. Combining forces with other employers and lobbyists similarly situated may be the best course of action for challenging these agencies in court.

Are We Entering a New Age of Agency Deregulation?

At this point, agency power remains strong, but will almost certainly lessen over time. Whether agencies will continue to publish rules or regulations which arguably exceed the scope of their power is still undecided. Some agencies may take the "ask for forgiveness" rather than "permission" approach, while others may be more conservative in implementing new rules or regulations. Regardless of the approach these agencies take, businesses may now be empowered to push back on broad interpretations promulgated in self-published agency rules. It may take years for employers to feel

the lasting effect of the repeal of *Chevron*, but the landscape has already begun to shift.

The ink on the Supreme Court's *Loper Bright* decision was still drying when a judge for the U.S. District Court for the Eastern District of Texas already cited to it in blocking enforcement of the DOL's "Overtime Rule" as to the State of Texas as an employer, just before the July 1, 2024, effective date of the increased minimum salary threshold for the FLSA's executive, administrative, or professional (EAP) exemptions. The district court applied the *Loper Bright* test by holding that the interpretation of the EAP exemption terms turns on a "person's function and duties," not their compensation. Although limited to one employer in this case, this ruling is a sign that courts across the country are starting to and will continue to block agency rules which extend beyond the authority clearly delegated by statute.

With *Loper Bright* as a resource, employers are better equipped to strategically challenge agency action lacking clear legislative authority. The new test shifts the burden to the federal district courts to determine if agencies have acted within their statutory authority, but the Supreme Court has sent the strong message that agencies will no longer have the benefit of unrestrained deference. With this pendulum swing back to the federal courts for independent statutory interpretation, many employers should brace for uncertainty, but potentially less volatility and susceptibility to political influences in the long term. Time will tell. And, in fact, time is now on the side of the challengers. Due to another recent decision by the Supreme Court (same 6-3 ruling), *Corner Post, Inc. v. Board of Governors, FRS*, issued July 1, 2024, challengers now have six years from the date they are injured by final agency action to bring suit, even if the agency action being challenged had been finalized a much longer time ago. This may breathe new life into challenges to long-standing rules and regulations for those more recently impacted.

For questions regarding how the erosion of *Chevron* deference may apply to your business, please contact your Akerman Labor & Employment attorney.
