Legal Update Article

U.S. Supreme Court's Decision Curtailing Regulators May Raise 'Major Questions' for Employers

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The U.S. Supreme Court has issued a forceful rebuke against what it found to be agency overreach. *West Virginia v. Environmental Protection Agency*, No. 20-1530 (June 30, 2022).

In a 6-3 decision, the Court invalidated the Clean Power Plan, an Environmental Protection Agency (EPA) regulation aimed at reducing carbon emissions by requiring coal-fired power plants to limit their electricity production or subsidize increased energy generation by natural gas, wind, or solar sources. The Court struck down the regulation based on the "major questions doctrine." The major questions doctrine provides that Congress cannot defer significant issues of national policy to an administrative agency unless there is a clear expression of such intent.

The growing reliance on this seldom-invoked doctrine could signal a desire by the Court's conservative majority to rein in the federal enforcement agencies, with potential ramifications for employers.

Major Questions

Under the major questions doctrine (as explained by Justice Neil Gorsuch in his concurrence), "administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'" The doctrine may apply when the matter to be regulated is of considerable significance.

In this case, the EPA rule sought to address climate change, "the most pressing environmental challenge of our time," as Justice Elena Kagan noted in her dissent. The agency adopted the bold measure in an effort to spur an "aggressive transformation in the domestic energy industry," according to a White House fact sheet announcing the measure.

The EPA's role is to regulate the nation's coal-fired power plants, the Court pointed out, not effectuate a dramatic shift from coal-based electricity generation to wind and solar sources. "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body," the Court said. It noted that had Congress intended to endow the EPA with sweeping authority to adopt such radical change to the nation's energy policy, Congress would have stated this intent.

The Court's decision marks the second time the Court has invoked the major questions doctrine this term. Six months earlier, the same 6-3 majority relied on the doctrine to invalidate the Occupational Safety and Health Administration's (OSHA) COVID-19 vaccine mandate for private employers, a regulation that would have applied to 84 million U.S.

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workers. *National Federation of Independent Business v. Occupational Safety and Health Administration*, 142 S. Ct. 661 (Jan. 13, 2022). OSHA was empowered to regulate *worksite* hazards, and the agency overstepped its authority by encroaching upon significant issues of public health well beyond the workplace, the majority held in that case. Further, the fact that COVID-19 vaccine mandates were the subject of ongoing, "robust" national debate was a clear indicator that the OSHA rule implicated a "major question" meant for Congress to deliberate, not the federal bureaucracy, the Court explained.

Major Employment Questions

Cases involving major questions "have arisen from all corners of the administrative state," Chief Justice John Roberts noted in *West Virginia*. Likewise, the reasoning adopted by the Court's majority in this opinion will apply to judicial review of regulations across the federal bureaucracy, including agencies that enforce federal workplace laws and issue rulemaking to that end.

In support of its authority to issue the COVID-19 vaccine emergency temporary standard, OSHA pointed to Section 655(c)(1) of the Occupational Safety and Health Act, which empowers the agency to issue "emergency" regulations. However, Section 655(c)(1) was adopted some 50 years before the onset of the COVID-19 pandemic, the Court pointed out. Since the law's enactment, OSHA has relied on this provision, Justice Gorsuch said, to promulgate "only comparatively modest rules addressing dangers uniquely prevalent inside the workplace." As Justice Gorsuch explained in his concurrence, this prior restraint was likely "a warning sign" that OSHA's current "remarkable measure" lacked congressional authority.

The Court's reasoning may apply to a host of regulatory activity affecting the workplace. The decision, for example, may apply to Department of Labor (DOL) efforts to define independent contractor status. A court may rule Congress never authorized the DOL's attempts to retrofit the Fair Labor Standards Act (passed in 1938) to address the contemporary, seismic shift toward contract work and an exploding gig economy.

The major questions doctrine potentially could be invoked to block continued attempts by the National Labor Relations Board (NLRB) to expand the National Labor Relations Act (NLRA) as well — particularly at a time when labor organizing activity is on the rise. For example, while the NLRB has general rulemaking authority, the major questions doctrine might hamstring it from requiring employers to recognize unions through card checks rather than secret ballot elections by employees; granting union organizers and third parties greater access to employer private property; restricting employer free speech; expanding the meaning of employee protected concerted activity; extending jurisdiction over religious institutions and student athletes; changing the independent contractor standard and making misclassification a violation of the NLRA; creating new consequential damages liability for violations of the NLRA, and so forth.

As for the Equal Employment Opportunity Commission (EEOC), although it does not have substantive rulemaking authority under Title VII of the Civil Rights Act of 1964, it can create substantive rules under the other statutes it enforces. Furthermore, the EEOC soon may explore ways to reimplement pay data collection. Application of the major questions doctrine may hamper the EEOC's efforts to expand its authority in this manner.

Litigants challenging federal rulemaking have invoked the *West Virginia* in support of their contention that the issuing agency overstepped its legislative authority in

promulgating the regulation in question. On July 11, a restaurant industry group challenging the DOL's "80-20-30" dual jobs rule for tipped workers sought to file a notice of supplemental authority in its ongoing case, asserting that *West Virginia* "articulated principles of administrative law and separation of powers" that have a bearing on the litigation. *West Virginia* also was cited in two ongoing suits seeking to overturn President Joe Biden's executive order increasing the minimum wage rate for employees of federal contractors. "*West Virginia* makes plain both that the major questions doctrine (1) very much does exist and (2) is plainly applicable here," the plaintiffs in one suit told a federal court. In the other case, the plaintiffs argued that the U.S. Supreme Court did not expressly limit the reach of the major questions doctrine to administrative agencies; meaning, the doctrine applied to the executive branch, generally, including to actions by the president.

If the courts apply a broad view of what constitutes a "major question," the*West Virginia* could sharply restrain agency efforts to adopt far-reaching workplace measures. Jackson Lewis attorneys will continue to monitor developments related to the major questions doctrine as applied to employment-related regulations and to attempts by federal agencies to issue new rules of broad significance to the workplace.