Podcast

Workplace Law After 'Loper': Can Employers Really Expect Less Regulation?

By Stephanie L. Adler-Paindiris & Patricia Anderson Pryor

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Many entrenched U.S. federal agency regulations have existed for decades. However, the United States Supreme Court's decision to end the Chevron doctrine exposed a governmental fault line, which may have far-reaching implications for employers.

Transcript

Welcome to Jackson Lewis's podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

Many entrenched U.S. federal agency regulations have existed for decades. However, the United States Supreme Court's decision to end the Chevron doctrine exposed a governmental fault line, which may have far-reaching implications for employers. In the inaugural episode of our new podcast series, Workplace Law After Loper, we shed light on one of the most crucial — and perhaps the threshold issue — following the end of a 40-year precedent: the misconception that federal regulations are no longer applicable. Or, more pointedly: Can employers really expect less regulation?

Our hosts today are Patty Pryor, office managing principal of the Cincinnati office, and Stephanie Adler-Paindiris, principal of the Orlando office and co-leader of the firm's Litigation practice. Clients rely on Patty and Stephanie to understand and apply not only SCOTUS decisions, but all applicable case law and regulations to their clients' best advantage and to proactively manage risk.

Patty and Stephanie, the question on everyone's mind today is: Can employers expect less federal agency oversight in the workplace, and how does that impact my business?

Stephanie L. Adler-Paindiris
Principal and Litigation Co-Leader

Good morning, Patty.

Patricia Anderson Pryor
Principal and Office Managing Principal

Hi, Stephanie.

ADLER-PAINDIRIS

I'm excited to talk with you for a few minutes about where we are in this insane environment after *Loper Bright*. It's been a few weeks now and the dust is starting to settle. Or maybe the dust is starting to kick up. I'm not sure which one. What do you think? Is the sky falling? Is this much ado about nothing? What do you think about all of this kind of talk after *Loper Bright*?

PRYOR

Well, that's a big question. And really, Stephanie, isn't the sky always falling when it comes to employment law anymore? That's why we're here. I don't even know if you can say the dust is settling, because I think you're right. It's just really getting stirred up. You might say the sky is falling at least from the vantage point of the agencies. Because the Supreme Court's decision signals to the lower courts they have a duty to fully, independently scrutinize their actions. I think that message may be heard regardless of what that action is and what level of judicial scrutiny technically applies to the agency activities in question.

On the other hand, at least at the Supreme Court, the writing has been on the wall for several years that *Chevron* deference as a practical matter was no longer going to apply. I don't think the Supreme Court has granted deference to an agency regulation in some time. Some have argued that agencies have been well-aware of that and in issuing rules, they've known better than to rely on *Chevron* and are trying to make a stronger case to support their rulemaking.

And consequently, *Loper Bright* may not be that big of a deal. But on the other hand, the lower courts have continued to apply *Chevron*. So, we're certainly going to see an impact there. It may not be immediate though. There are many entrenched agency regulations that have been around for decades. And we may see courts, at least in the beginning, reflexively enforcing those rules, if only due to inertia.

It may be up to the litigants, us in challenging these long-standing rules to press the issue, to make that convincing argument why the rule is invalid, and to remind the court of its duty to independently scrutinize the regulation. One of the biggest misconceptions by the public, though, is that because of *Loper Bright*, no one needs to follow the regulations anymore or that they no longer exist. Obviously, that's not the case at all.

Stephanie, what other misconceptions are you seeing in coverage of the*Loper Bright* decision — and about *Chevron* deference generally? Are there important points that you think are not being made?

ADLER-PAINDIRIS

That's a really great question, Patty. You know, a lot of clients called me after*Loper Bright* and said, so I don't need to comply with the minimum salary basis or I don't need to comply with the FTC's non-compete ban or all of these. And I was like, whoa, whoa, whoa. No, we do. We do need to comply with these things.

I think there was this idea that somehow*Loper Bright* was a switch that you turned off and it kind of shut all the agencies down and we don't need to listen to them anymore. And obviously that is not true. So, you know, I think all of us lawyers probably haven't even uttered the word *Chevron* since law school, but there's just a lot

of confusion over what is *Chevron* and when it actually applies. And it's kind of murky. It's murkier than you would think.

So there's some confusion over whether it applies to what we consider sub-regulatory guidance or rules of agencies. Is it actual regulations? Agencies of the federal government, including the agencies that we work with, like the EEOC, the Department of Labor, they speak in a number of different ways. And not all of the ways that they speak have an impact on this *Chevron* decision or the *Loper Bright* decision.

One of the common misconceptions is that every way that an agency speaks somehow is subject to a challenge under *Loper Bright* and that's just not the case. But even if there is a radical change, like the fact that the Supreme Court has now overturned this landmark precedent, as you said, it takes a long time for a regulatory ship to change course. Many of these decisions and these rules have been around for 40, 50, 60 years. And it's going to take a lot of time to kind of undo them, pull them apart and figure out where did they really come from? Are they relying on *Chevron* deference or are they relying on older cases?

As I was thinking about the impact of *Loper Bright*, I kind of think that this is sending a message to Congress. Congress passes laws, and a lot of times those laws are just not clear. They're aspirational in nature. They're not business-minded. They're results of compromise between deeply divided parties. And they kind of pass these laws, and they assume agencies and courts and businesses are going to figure it out.

And in some ways, that is what's been happening. But *Loper Bright* pushes back on that and says, "No, Congress, if you leave something vague and unclear and you don't delegate to an agency very clearly what they can and can't do, the courts are going to figure this out." So, my word to Congress is to try to be more focused on the legislation and clearer.

I don't think that's ever going to happen. Maybe that's a bit of a pipe dream. But one can hope.

If you listen to the oral argument in *Loper Bright*, which of course you and I did because we're geeks, during the oral argument, Justice Kagan posed an example of kind of the trouble that we're going to find ourselves. And she used the example of artificial intelligence and how are we possibly going to regulate this new technology, particularly when Democrats and Republicans can't agree on anything, whether it should be regulated.

So how is this going to work? How are lawmakers going to write detailed laws about a technology that's literally changing every minute? And who is best suited to interpret laws when they're drafted? Is it the policy kind of technology geeks that various agencies hire? Or is it judges who sometimes, quite frankly, don't know how to use Facebook? They've never used technology, and they're going to decide how AI should be regulated.

She was really trying to make that point in trying to preserve *Chevron*, but obviously she didn't get the better of the argument and she lost that one. So, we're going to be

relying on courts to interpret these very unclear statutes. So, I don't know. I'm trying to see into the future for the benefit of our clients, but Patty, what do you think are the main concerns, confusions and questions that employers have today about this decision and how it impacts their actual businesses.

PRYOR

Are you suggesting someone might be confused by a Supreme Court decision?

ADLER-PAINDIRIS

I am in fact suggesting that.

PRYOR

Well, you know, the *Loper Bright* decision has received a ton of press coverage, or maybe it's just the things we read, because again, we are the geeks who pay attention and read all this. But there are a lot of questions about what it all means. And generally, as you mentioned, from a compliance perspective, we are still status quo.

No employment regulations have been overturned yet based on *Loper Bright*. The agencies still provide guidance and the regulations provide guidance on what the agency's position is going to be. Whether the regulation will be overturned or not, that agency's position is pretty clear. And they're still, quite honestly, the applicable regulations right now.

Now, on the litigation side, the *Loper Bright* decision certainly gives us another arrow in our quiver. We certainly will consider using *Loper Bright* to challenge the application of any impacting regulation when needed if that's the cause of litigation. And so, while all this may seem like really great news for employers, a lot of hope is on what's the future to hold. Maybe some of these regulations that may not be our favorite ones will no longer apply. I think some people are kind of getting giddy about that.

But one thing we haven't mentioned yet is how the coming regulatory confusion may make it more challenging for employers to comply with the law. You may not always agree with them, but agency regulations have served as useful roadmaps. As the rules change or get stricken or upheld in some jurisdictions and then stricken in others, employers may need to remain vigilant and cognizant of what the courts are saying and what jurisdiction they are in. It won't be as easy as looking at a regulation. This is going to require, I think, inconsistent practices sometimes depending on jurisdiction and certainly possible revision and changes to handbooks and HR practices. And again, depending on jurisdiction, it's going to be more important than ever that companies partner with good legal partners to stay well advised on these issues.

Now, in terms of questions we're getting, some of the big ones are certainly more directed at "has this regulation or that regulation been struck down yet?" For example, we've been fielding a lot of questions about the FTC's non-compete rule. Does *Loper Bright* mean the rule is void? Well, we don't know yet, right? Honestly, *Chevron* deference and *Loper Bright* haven't really come into play yet on that particular issue. The first question is still whether FTC had authority to issue the rule in the first place. The district court decision that you've probably heard about,

granted a very limited injunction against the rule, but only made a passing reference to the *Loper Bright* decision.

So Stephanie, maybe you can help us out and give us the current lay of the land on how the rest of the regulations are faring. What's happened since the Supreme Court decision?

ADLER-PAINDIRIS

What's not happened? Every single day a new case comes out. There's a new oral argument. In fact, there's an oral argument in front of the Sixth Circuit that's very relevant. So, I'm excited about this podcast series because in each of our episodes, we're going to really drill down into a particular agency or a particular case. So, we're just going to kind of give high-level discussions, but there are so many cases pending right now challenging new agency regulations. And in some of those cases, the plaintiffs have submitted the *Loper Bright* decision to the court to bolster their arguments that the court should invalidate a decision. Everybody's using it. And that includes a current lawsuit, one of several, seeking to invalidate the Department of Labor's independent contractor rule that was enacted earlier this year and an ongoing litigation challenging the DOL's TIP, which is currently pending in the Fifth Circuit.

Those two issues have been up and down the courts for years, and everyone's trying to use *Loper Bright* to their advantage, both the agencies and the litigants. In fact, on the very day it issued *Loper Bright*, the justices vacated and remanded nine cases that cited *Chevron*, several of which were employment related, and we're going to talk about some of those in the coming episodes.

But one of the most significant developments for employers though, is on the very same day that the Supreme Court issued *Loper Bright*, a federal court in Texas cited the opinion and granted a preliminary injunction barring the Department of Labor for enforcing its new rule raising the minimum salary threshold for the FLSA's white collar exemptions.

But don't get excited folks — anyone listening? Unfortunately, the court only enjoined the rule from taking effect on about 88 government employees in the state of Texas. Interestingly, while the Supreme Court is limiting agency power, it is also flexing its muscles in the area of standing and limiting who can seek relief in court. So those two concepts are really starting to collide and is very, very interesting, which we'll again talk about in episodes to come.

While the court declined to impose a nationwide injunction, remember folks, the minimum salary threshold applies to you as of July 1, the court did say it was going to issue its ruling on the merits very soon. And if you read its order granting the injunctive relief, it included a pretty detailed analysis of the regulation and a fairly emphatic pronouncement that the rule was likely not valid. But in this case, the Department of Labor flagged *Loper Bright* for the court.

So, you've got both sides citing to this case. And the reason the Department of Labor is citing to it is because the Supreme Court specifically said in that decision that *stare decisis* would apply, which means the justices were not going to disturb any other precedential decisions interpreting and upholding agency regulations. Clear as mud.

What does that really mean? The DOL is saying to the Texas courts, "hey, because we've had this old appellate precedent on our side going back to 1966, holding that the minimum salary requirement was permissible because the FLSA gave the DOL authority to define and delimit the executive administrative and professional exemptions, we can still do it. It was before Loper Bright."

In fact, there's three different federal circuits that have held the DOL can create a minimum salary rule. So, it's really interesting that the litigants seeking to overturn the rules are citing *Loper Bright*, the agencies are citing *Loper Bright*. What's to do with all of this?

So Patty, it's grabbed most of the attention this case, but there were actually a couple of other cases I think are worth a mention that have impacted administrative agencies. And I know we're almost out of time, but can you give us a brief rundown of those decisions?

What else should employers know today?

PRYOR

Sure. Now, as an employment law geek, the last several Junes have really seen a host of what we call SCOTUS watch parties. I mean, literally watching on SCOTUS decision days as the decisions come out because we know the impact that they're going to have on our clients. This year was no exception. We've had a number of them besides just *Loper Bright*.

So, we've got the *Corner Post* case. This was kind of a sleeper case. But the bottom line is it extends the amount of time to file a lawsuit to challenge an agency rule on its face. So previously you had to sue within six years of the agency issuing the regulation. The only other option was to draw an enforcement action and then challenge the agency regulation as it applied. Well, in *Corner Post*, the employer wasn't even in existence when the regulation came into existence. So how does that seem fair? Well, the Supreme Court also didn't think it was fair. And now litigants have six years from the point at which they suffer harm as a result of the federal agency action in order to sue.

So, while *Loper Bright* says courts will give agency rules greater scrutiny, *Corner Post* expands the timeframe for getting an agency rule in front of the judge in the first place. A bit of a one-two punch.

Then we've got the *SEC v. Jarkesy* case. In *Jarkesy*, the Supreme Court held that the Securities and Exchange Commission could not impose civil penalties in agency hearings against individuals for violations of securities laws. Not employment, why do we care, right? I don't know about you, Stephanie, but I always love when I'm fighting an agency, the agency's bringing the action against my client, and then I've got to prove it to the agency. So they kind of get the benefit of both things,

In that case (*Jarkesy*), an individual is found liable for securities fraud after an in-house hearing and an SEC administrative law judge ordered them to pay $300 ,000 in civil penalties. And the Supreme Court said, "hey, you know, I think this violates the individual's Seventh Amendment right to a jury trial."

Now that *Jarkesy* decision is going to impact federal agencies who want to pursue civil penalties against companies in-house. You know, exactly that issue I was talking about. So they may now have to file suit in court and afford the defendant a jury trial.

The corollary is that if an agency does want to conduct the enforcement proceedings in-house, it may have to forego seeking civil penalties. This sounds like good news for our clients.

ADLER-PAINDIRIS

It does seem like good news.

PRYOR

And there are a lot of federal agencies that use this kind of quasi-judicial in-house enforcement proceedings including, for example, the NLRB and OSHA. So, there's a question as to whether these agencies have the resources to file against every alleged wrongdoer and whether they even have the authority to bring enforcement actions directly in court.

So, *Jarkesy* may curtail some of the agencies and their enforcement powers going forward. In fact, it's already looming over high-profile cases challenging the constitutionality of the NLRB's law judges and its structure. And the decision already came up in an NLRB ALJ proceeding when a union citing *Jarkesy* moved to stay the proceedings pending a jury trial.

Now in that case, the law judge dismissed the case against the union, so they never got to reach the *Jarkesy* issue.

And then finally, we've got *Murthy v. Missouri*. This was supposed to be an important First Amendment case about whether federal officials improperly influenced the content-moderation policies of various social media platforms. But it turned out to be an important case about standing, which is an increasingly salient issue. The justices held that neither the plaintiff states, that was brought by states, nor the private individuals who sued had standing to seek a nationwide injunction in the case.

Now why does that matter? Well, for employers, you're looking at the litigation challenging the salary minimum rule. The DOL cited the *Murthy* case decision to argue to the court that the court can't impose a blanket injunction barring the agencies from enforcing the rule on a nationwide basis. Days later, the district court issued that surprisingly narrow order enjoining the rule as to the state of Texas employees only, but letting the rule take effect for private employers in Texas and for the rest of the country, which was enormously consequential to employers. Now, the court didn't cite *Murthy*. It didn't cite that case at all, and it's reasoning, but the timing is noteworthy. I think that was really surprising to people. I think everyone kind of assumed given the last go-around, that was not going to happen. So that was a shock.

ADLER-PAINDIRIS

Well, that's exactly it. Over the years, we've seen one entity, one group, whatever, files

a lawsuit and enjoins the regulation at issue for all of us. Now there's the question of, we all need to sue? You know, does everyone have to go into court? Does everyone need to join the lawsuit? A lot of questions opened up. Better hire more lawyers, Patty.

PRYOR

Well, it certainly seems like that's what the agency's ploy is, because not only did they cite it in that DOL case, but the EEOC filed a motion to amend a court order partly barring enforcement of its rule implementing the Pregnant Workers Fairness Act. The EEOC argued the same thing, that the plaintiffs lacked standing under *Murthy*, and failing that, the EEOC asked the court to narrow the scope of the preliminary injunction to the named plaintiffs only. Currently, the rule is partly enjoined as to all employers with employees in Louisiana and Mississippi, where it was brought.

So, this can be a pretty significant development for employers hoping to obtain relief from new regulations while those rules are pending legal challenge. All in all, the Supreme Court's decisions this year create a lot of uncertainty concerning how much power the alphabet soup of agencies impacting employers will have going forward. Some may say the future looks bright, but you may want to keep those shades handy.

ADLER-PAINDIRIS

This was so much fun, Patty. Thanks for taking some time to talk about it. I'm excited to talk about more of these issues in episodes to come.

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