Podcast

# Workplace Law After 'Loper': What's Next for the NLRB?

By Daniel D. Schudroff & David Kelly

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**The NLRB stands out from other administrative agencies due to its quasi-judicial nature. It doesn't just issue decisions; it also has rule-making powers. The agency's decisions are often given great deference. Will the *Loper Bright* decision make it easier for employers to challenge Board regulations?**

## 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?*

*The United States Supreme Court's recent decision to end the Chevron doctrine in Loper Bright case exposed a governmental fault line, which may have far-reaching implications for many entrenched U.S. federal agency regulations that have existed for decades and, consequently, for employers. In this second episode of our podcast series, Workplace Law After Loper, we focus on the impact on cases before the National Labor Relations Board.*

*The NLRB stands out from other administrative agencies due to its quasi-judicial nature. It doesn't just issue decisions; it also has rule-making powers. The agency's decisions are often given great deference. Will the Loper Bright decision make it easier for employers to challenge Board regulations?*

*On this episode of We get work™, we discuss how the Loper Bright decision may make it easier for employers to challenge Board regulations.*

*Our hosts today are Daniel Schudroff and David Kelly, members of the Labor Relations Group. Daniel is a principal in Jackson Lewis' New York City office, and David is of counsel in the firm's Washington, DC, office. Both work hard to keep clients informed of their rights and obligations under the National Labor Relations Act, including the frequently changing interpretations of the NLRA by the NLRB.*

*Daniel and David, What impact does the recent U.S. Supreme Court's decision in Loper Bright have on cases under the NLRB, and how does that impact my business?*

**David A. Kelly | Of Counsel**

We're talking about *Loper Bright* today, the U.S. Supreme Court decision that overruled *Chevron* deference, and how it may or may not impact cases before the National Labor Relations Board.

*Loper Bright* dealt with a Department of Commerce rule that required fishermen to pay for observers on their boats and was an interpretation of a marine act. Under *Chevron* deference, agencies were given the deference by courts to interpret their statutes and courts granted them a fairly wide range of deference.

The question, though, is what impact does this have on cases under the National Labor Relations Act?

**Daniel D. Schudroff | Principal**

That's a really good question, David. Today is July 26 [2024], andwe've been posting on this case for about a month.

The National Labor Relations Board is a little bit different than a lot of administrative agencies in the sense that it's quasi-judicial. The decisions that come out of it are oftentimes afforded great deference by appellate courts when either charging parties or respondents petition for review before federal circuit courts. So, I'm not sure that *Loper Bright* will have so much of an impact on Labor Board decisions and the deference that it has now changed.

What are your thoughts, David?

**KELLY**

I do agree with you. We can see it in a recent D.C. Circuit case called*Concepcion*, where the court reviewed a Board decision and gave it a very high degree of reference. There was no reference in the court's decision to *Loper Bright* or to *Chevro*n. The court just proceeded applying other D.C. circuit precedent giving cases like that deference.

To give perspective to this case, it's important to note that nothing in the *Concepcion* case plowed new ground. It's not like a*Thryv* case that upended Board law. The case was about whether the employer had implemented unilateral changes; nothing controversial in terms of the law or the facts of the decision. Even so, in the decision, the D.C. Circuit granted deference only to the factual determinations and application of the law in terms of actually looking at the language of the collective bargaining agreement at issue. It gave the Board zero deference consistent with its past practice.

**SCHUDROFF**

That's a very good point. These decisions that have come from the Board are probably going to have similar levels of deference.

But, we do know that the Labor Board doesn't just issue decisions. It also has rulemaking as well; it makes and promulgates rules. And there's the joint employer rule that recently came out, and just this morning the Board released the

final rule reversing a Trump-era election rule to go back to where we were prior to 2020.

It's going to be interesting to see whether these two kinds of rules will be afforded the same level of deference as they may have been under *Chevron*; that there might be a challenge to either or both of those rules.

I was reading the new rules, called the Fair Choice–Employee Voice Rule, this morning. And there was a brief discussion in there about *Loper Bright.* In its comments, the Board said that the effect of *Loper Bright* was an "open question." But then it went on to cite a raft of cases going back decades that said that the Board was an expert in its field and should be afforded discretion in its determinations unless it did something that was wildly inappropriate.

We're seeing a lot of challenges to the Board's actions. So, it wouldn't surprise me one bit if a party decided to challenge this rule at some point, given the climate that we're in today. We're seeing challenges to Board actions in federal courts pretty routinely now, so it wouldn't surprise me to see that this rule gets challenged notwithstanding the Board's current reaction to *Loper Bright.*

I also know that there could be some additional issues that come up based upon not just *Loper Bright* but even other cases that came out at the end of June from the Supreme Court, including *SEC v. Jarkesy*.

David, what are your thoughts on that as far as the Seventh Amendment issues? Have you thought about that and how that might impact how employers or unions or other charging parties might proceed before the Board?

**KELLY**

I know a number of employers have sought preliminary injunctions against the Board, arguing that it is violating their Seventh Amendment rights by seeking legal damages without a jury trial. This is based on the Board's expansion of its remedies in the *Thryv* case and in the general counsel memos where, in addition to the traditional equitable remedies that the Board has traditionally sought such as reinstatement and back pay, the Board's seeking all sorts of compensatory damages, including direct and foreseeable losses such as losing a house because you can't make mortgage payments or penalties on credit card debt.

And these types of damages are more in the nature of compensatory damages. They're more in individual damages, as opposed to the public rights type damages that give rise to a Seventh Amendment argument. It's another tool in the arsenal for litigants before the Board to challenge Board actions.

One thing this could end up doing, where there are challenges to Labor Board actions, is like what we saw before back in the 20-teens, when cases ended up going to the Supreme Court. A whole slew of cases was then vacated by the Supreme Court and the Board had to then reissue many of those decisions. It could start a cycle where there's kind of this instability.

From a practitioner standpoint and from a client-relations standpoint, we want to make sure we're able to provide as much stability in our advice and the way that we

practice. So, things like this can sometimes be somewhat unclear how to proceed. And that's what makes this kind of area of the law kind of fun because we don't know where things are going and it's constantly evolving. And we're seeing different types of arguments coming into play that are novel and creative and have an impact on real-life cases.

Returning to our initial question about *Loper Bright*'s effect on the NLRB, I think the NLRB's response for the time being is going to be "So what?" Even before *Loper Bright* was decided, they were already pointing to cases decided in the 1950s, 1960s, in which the Board was granted deference based on its expertise. And *Loper Bright* didn't discuss those. As far as the Board is concerned, those remain good.

And then there are the other types of deference that are still fully in play. There's *Skidmore* deference that will apply to factual determinations. There's the *Kisor* deference, which is almost an exact analog to the *Chevron* deference. And that was reaffirmed about five years ago by the Supreme Court with Justice Roberts casting the deciding vote (*Kisor v. Wilkie*, 2019). That is the same thing as *Chevron* deference, except *Chevron* deference applies to agency interpretations of statutes and *Kisor* applies to agency interpretation of regulations. It's a confusing mess.

**SCHUDROFF**

Yes, that's a good way of describing it. A confusing mess that we all have to try to navigate through and help our clients figure out which way to proceed — especially for those clients who have matters before the Labor Board or might have matters before the Labor Board soon or have matters that are pending before the Board.

It's very important for us to all be on the same page as we try to figure out where we should go next with these issues as more law comes out and the issues get more settled. We may have a new Board in place, in which case there won't be the same maybe level of activism that we've seen.

It's a great time to be a labor lawyer. This has been a great conversation this afternoon, David, with you. And we really appreciate our listeners listening to this conversation, this kind of nuanced area of labor law and the impact the Supreme Court's recent decisions have on how we all will practice going forward.

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