Podcast

Workplace Law After 'Loper': Wage and Hour Compliance in the Future

By Charles H. Wilson & Eric R. Magnus

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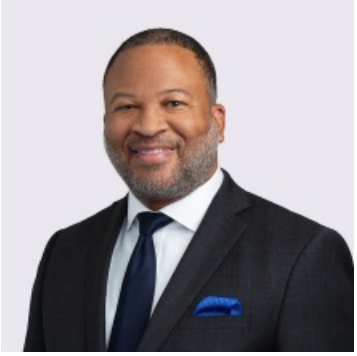
Meet the Authors



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Details

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Recent SCOTUS decisions including *Loper Bright, Enterprises v. Raimondo*, and *Murthy v. Missouri* are potential game changers for employers, and may make it difficult for the Department of Labor to defend its wage and hour rules in court.

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 the 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 third episode of our podcast series, Workplace Law After Loper, we focus on how Loper Bright and Murthy v. Missouri may make it difficult for the Department of Labor to enforce its wage and hour regulations in court.

Our hosts today are Eric Magnus and Charles Wilson. Eric is the co-leader of the firm's Class Action and Complex Litigation Practice Group and the Litigation Manager of the firm's Atlanta office. Charles is the office managing principal in the Houston office and a member of the firm's Litigation Group. Both serve as members of the firm's task force interpreting the impact of recent SCOTUS decisions on employers.

Eric and Charles, what do the Supreme Court's recent decisions mean for wage and hour compliance in the future, and how does this impact my business?

CHARLES H. WILSON

Houston Office Managing Principal

Eric, the Department of Labor came out with its new salary rule, and I'm sure, like myself, you're getting a lot of questions from clients. So why don't you lay out the big picture for us in terms of wage and hour compliance? What did *Chevron* deference mean in that area? And what does the Supreme Court's decision in *Loper Bright* overturning *Chevron* deference mean for employers going forward?

ERIC R. MAGNUS

Principal, Atlanta Office Litigation Manager and Class Actions and Complex Litigation Practice Group Co-Leader

From a big picture perspective, there is very, very little in the Fair Labor Standards Act that is actually in the statute passed by Congress. This is a statute that hasn't been materially amended since the Portal-to-Portal Act was passed in the early 1940s. There have been minor things like a few years ago when Congress enacted the rules for tip pools for non-tip credit employees and little things like that. But in terms of material amendments, this is a statute that has basically been untouched since the early 1940s.

The overwhelming majority of what we would call "the law," or our clients would call "the law" in wage and hour at the federal level is done in regulation. And that's been the case with case law going back almost 75 years now. And the way that most courts traditionally have dealt with regulations is they've treated them like the law. And it's gone sort of as a *fait accompli* with respect to most regulations.

The reason they treat regulations like the law in most cases is because of what was known as *Chevron* deference. Since that case came down in the early 1980s, courts have as a matter of course, deferred to the interpretations of the Fair Labor Standards Act as laid out by the Department of Labor and all of its iterations since the early 1980s.

That very underlying basis as to why the regulations have credibility as quote "the law" has now been undone by the Supreme Court. From a 40,000-foot perspective, [that undoing] gives us the ability to argue that anything that is in a regulation [and not the actual statute] is not the law.

Having said that, on the older issues that you and I deal with every day in wage and hour law — I could run off example after example: the exemptions, the salary basis rule, the rounding rule, you name it — most regulations are so old and so established that if you do case law research on them, the cases stopped saying "we believe this to be a correct interpretation of the law because of *Chevron* 30, 40 years ago." So, like the rounding rule or the salary basis rule, if you do case law research in whatever jurisdiction you're in, very, very, very, very few of those cases are going to say the reason we are concluding that as the law is because of *Chevron* deference, even though it really is.

On more recent rules — like the most notorious one that I deal with a lot is the tip credit rule, or what's become known as the 80/20 rule, the limitations on the duties tipped employees can do, things like that — on more controversial rules like that, that have flip-flopped back and forth by administration, in those kinds of situations, the uprooting of *Chevron* is really a game changer because it means that these recent interpretations of the statute by the Department of Labor are very, very much up for question.

A lot of our clients have wanted to take very, very aggressive positions in their practices going forward and saying "such and such regulation is no longer the law because *Chevron* was overturned." On that, our advice , I think, would be to be very

careful when it's long-established regulations because the case law on those regulations doesn't say that the reason they're correct interpretations of the law is because we're deferring to *Chevron* 'because they're so long and so established.

At a 40,000-foot view, that's kind of where we are with *Chevron*.

I know that one of the examples of these sorts of more controversial and recent rules is something that you've dealt with, really in the immediate wake of the *Chevron* ruling. Could you fill us in on the immediate impact, and what rules you think that the overturning of *Chevron* will have in the wage and hour space?

WILSON

Sure. Interestingly, or not interestingly, on the very same day the Supreme Court decided *Loper Bright*, a federal district court in Texas, relying extensively on that decision, enjoined the new salary level rule enacted by the Department of Labor. And that district court made it very clear that it was relying heavily on the Supreme Court's decision and interpreted Section 213(a) of the Fair Labor Standards Act independently from the salary level rule — in other words, without deferring to that rule — to decide whether, for example, the Department of Labor even had the authority to enact the salary level rule, at least in 2024.

And although the district court in the case of*State of Texas v. Department of Labor* was a decision to enjoin the rule for right now until a decision on the merits is decided, I think later in the year, the court pretty much said it believes the rule is invalid and made that conclusion deciding that likely on the merits, the rule is invalid because the plain ordinary text of the rule doesn't turn on or doesn't require a consideration of compensation.

A lot of companies, a lot of employers out there, got a preview from this decision enjoining the rule in the *State of Texas* decision. And now we're just waiting on the ruling on the merits.

MAGNUS

I take it that we're not running out based on that ruling to our clients and saying prospectively "ignore the salary basis rule, and if someone meets the duties test, just consider them exempt regardless of what you're paying." So, what are the contexts that you're seeing where that would come up—where it's affecting our litigation strategy or advice we're giving to clients?

WILSON

That's a good point. As a general rule, we're telling clients and should be telling clients that this is a regulation, and it's a regulation that you should follow.

Now, if you're in litigation and there's an opportunity to challenge not only the salary level rule, but for example, the salary basis rule or the reasonable relationship test, which is another salary requirement, depending on the facts, you may want to do that. And you might have a good argument there as well, especially since in *Helix* [*Energy Solutions Group, Inc. v. Hewitt*, a 2023 Supreme Court decision] for example, or the Fifth Circuit, some of the dissenting Fifth Circuit judges, and at the

Supreme Court level, some of the dissenting justices, basically called out the continued validity of the salary basis rule and related requirements. Employers now might want to use the *Loper Bright* decision to say in the litigation context that the court ought to take a very close look at whether, for example, other regulations like the salary basis rule are even valid under Section 213(a) of the Fair Labor Standards Act.

MAGNUS

That example you gave, the reasonable relationship test, that's a fantastic example of what I'm talking about of a newish sort of controversial rule. The reasonable relationship test exists solely because of an interpretation that is only in a DOL opinion letter. That's the type of rule, like the 80/20 rule, that *Loper* really does give us the ability to reasonably fight about as opposed to long-established regulations that have been on the books for a very, very long time, like the rounding rule or something like that. That's a very good example of the type of controversial rule that, as you put it, Charles, gives us a much greater ability to have a more aggressive litigation position.

But it sounds like you agree with me that*Loper* isn't really changing our advice we're giving to clients about substantively complying with the regulations going forward, right?

WILSON

That's correct. We get these questions, I'm sure you're getting similar questions, "OK, Charles, I've got this employee that's pretty much on the threshold, right below the threshold of the new salary level. What should we do with this employee?"

My advice is you still have got to comply with the new salary level requirement and you know, either increase that employee's pay and, if that's not viable, then consider some other alternatives, which could include reclassifying the employee and maybe employing a fluctuating workweek compensation scheme if that's going to work. Or you might just have to pay them straight hourly plus overtime, depending on the situation.

Some clients might decide not to follow the advice and they might decide "well, maybe we ought to join the [legal] challenge." So that's another option.

MAGNUS

That's a good segue to the other Supreme Court ruling that we wanted to talk about, which is this *Murthy* decision. What Charles was just speaking about in terms of the new minimum salary rule is one example of this recent phenomenon that we have seen of district courts giving narrow injunctions on some of these new rules, the most prevalent of which for Charles' and my practice is this ruling in the Eastern District of Texas that only preliminarily enjoined the application of the new salary level to employees of the state of Texas. That case, along with a few others, the Pregnant Worker [Fairness Act] litigation that's going on, the FTC [noncompete rule] issue is another case, where there was a narrow injunction.

Some of these cases, but not all of them, have cited to this Supreme Court decision

that came out earlier this summer called *Murthy v. Missouri* (June 2024). *Murthy* stands for the proposition — or the Department of Labor and the other agencies are *using* it to stand for the proposition — that whether a preliminary or permanent injunction litigation, the plaintiffs have to have standing in the case in order to apply the injunction to that party.

What we're used to in the history of these cases is that if the state of Texas comes to try and get an injunction on the salary basis rule, and this is certainly what happened with the Obama rule, it either is going to apply to every employer or not, meaning there's going to be a nationwide injunction. Well, the Department of Labor has jumped on this *Murthy* decision to try and argue, "court, even if you issue an injunction, it only applies to the party that has filed the litigation."

The court in Texas that preliminarily enjoined the application of the new salary level rule bought that argument and only applied it to employees of the state of Texas, which means we are now sort of in open season questioning whether any of the standing precedent that we are used to, like when associations file these cases, whether it's the National Association of Realtors or the Restaurant Law Center, that when they file injunction litigation, they're doing it on behalf of all of their members. That's called associational standing.

Because of *Murthy*, we're now questioning whether that applies anymore. Likewise, we're questioning if these rules are going to get enjoined, whether we should take as a matter of course that they *are* going to have a nationwide injunction, even on a permanent injunction. And we really don't know the answer to these questions. This *Murthy* case certainly has thrown that into flux. I think we will get that shaken out. It is still our expectation and certainly our hope that the injunction on the salary basis rule and the FTC rule and all these other rules, when the permanent injunctions come out, will be nationwide injunctions.

But because of this *Murthy* decision, we're really in uncharted territory on the standing issue. And to your point, Charles, of whether every company is going to need to go file their own motion for injunction or motion for summary judgment to try and enjoin these rules, that seems wildly inefficient and would overwhelm the courts and I suspect, and hope, that that argument carries the day as to why we have such things as associational standing and things like that so that that doesn't have to happen. But we're certainly in uncharted territory there because of this other Supreme Court decision.

WILSON

That's a very good point. And it's a good reminder that the*State of Texas* case was just one of a number of cases that raised a challenge to the salary level rule. And on your point regarding association standing, you've got the Plano Chamber of Commerce in one action and there's another suit that represents a number of other employers. They've all been consolidated, a number of them in Texas, and they are seeking a nationwide permanent injunction, but also a ruling on the merits.

Perhaps the district courts in those consolidated cases decide that on a nationwide basis, there should be an injunction or at least a decision on the merits that the salary level rule is invalid. And the district court kind of already did that in the *State*

of Texas case. It kind of previewed what it's likely to say on that issue and in a nutshell, explained, "look, the ordinary meaning of bona fide administrative, executive and professional capacity turns on an employee's functions and duties, not compensation." That's based on the plain language of Section 213(a). So it's going to be interesting to see what the district court says on the permanent injunction question, given that we do have good representation of not only the state of Texas, but other private employers.

MAGNUS

I completely agree.

The only other development on this category of wage and hour cases that I did want to talk about is one we made reference to earlier: the 80/20 tip pooling/tip credit rule litigation separate and apart from *Loper*. The Fifth Circuit already had a case pending before it as to the validity of the Biden regulations that came out a year-and-a-half ago on the 80/20 rule and the new 30-minute rule, which are the rules that limit the duties that tip credit employees are allowed to perform while being paid subminimum wage.

The appeal that's in front of the Fifth Circuit already had strong arguments. The oral argument went very heavily against the Department of Labor. That matter was closed and ripe for decision prior to the issuing of the *Loper* decision. But certainly they have filed supplemental briefings and the *Loper* decision gives the Restaurant Law Center challenge to the tip credit rules a whole other argument because there is no rule that has had more flip-flopping by administrations than this rule. Literally every administration going back to the Bush administration has changed the 80/20 rule as that administration changed.

What's different under the Biden administration is for the first time, they actually codified the 80/20 rule and the new 30-minute rule, meaning that if any employee spends at least 30 consecutive minutes or more engaged in non-tipped duties, the time has to be paid at minimum wage. The Biden administration codified those into a regulation for the first time. Prior to that, this rule solely existed in the Department of Labor's field operations handbook, which gets an even lower level of deference than what was *Chevron* deference.

In short, the appeal that is currently pending before the Fifth Circuit in that case, which was already strong, is now even stronger in the wake of the *Loper* decision. And we could get a ruling on that any day. And there is a lot of pending litigation on that issue.

The advice that I've been giving clients is, to settle a case like that, you either have to get a deal that you're really, really happy with or you should be waiting for that decision to come out because it might fundamentally upheave the regulatory basis of all of those claims.

So that's the other major wage and hour issue that affects a lot of our clients that's affected by *Loper*. Did you have any others that you wanted to cover?

WILSON

Just the reasonable relationship test [a requirement of the salary basis test — one of the three tests for exempt status]. We talked about that previously, but that's also another issue that's going to come to the forefront because the Fifth Circuit just came down with a decision against an employer on the reasonable relationship test and how it applies, particularly when you're not paying the conventional salary.

In cases like that, employers have an opportunity and probably an obligation to raise a challenge to the reasonable relationship test. Of the three tests, that particular test is probably lower-hanging fruit because, to your point, it was issued in 2004, but it was based on the DOL's field book.

MAGNUS

Yes, the existence of the test is in a regulation, but the laying out of the 50% rule, that non-salary compensation is more than 50% of the overall compensation, that's in an opinion letter. And that opinion letter, to your point, Charles, that opinion letter is due an even lower level of deference than *Chevron*. So you're right. So, anybody litigating that issue should be raising *Loper* as a defense for sure.

WILSON

Absolutely.

MAGNUS

That covers the issues that we wanted to cover. Thank you everyone for tuning in.

WILSON

Thank you.