Podcast

Workplace Law After 'Loper': Is Disability and Leave Management in Peril?

By Joseph J. Lynett & Katrin U. Schatz

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Details

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Recent SCOTUS decisions, including Loper Bright could see challenges to ADA and FMLA regulations.

Transcript

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Hi. I'm here today with my partner, Kathy Schatz. We're here to talk about significant Supreme Court decision in *Loper Bright v. Raimondo* and its implications for employers.

Now, Kathy, it's a little odd, right? Because *Loper Bright* is not an employment case. It involves a regulation under the National Marine Fisheries Service (NMFS), which is a subsidiary agency of the Department of Commerce. While it's not an employment case, it is perhaps one of the most significant decisions in the last few decades that the Supreme Court has issued regarding the Administrative Procedures Act and a federal court's review of agency regulations.

Obviously as a firm, Jackson Lewis, we are heavily involved in law that is highly regulated by agency regulations like the EEOC, the Department of Labor, and various other agencies. So, what is *Loper Bright*? Without getting into too much detail, what were the facts of the case?

Katrin U. Schatz (**Kathy**)

Principal

The facts are a little convoluted, so let me let me see if I can get right to the gist of it. It was a challenge to agency regulations under something called the Magnuson Stevens Fishery Conservation and Management Act, MSA for short. MSA is a statute that goes back to the 1970s, and the purpose of the statute was to better allow the government to regulate in managed fishery resources. And the NMFS — I'm sorry, it's a difficult set of acronyms there — essentially was established to implement regulations under the Act and to administer the Act.

And one of the things that the MSA allowed the NMFS to do was, in certain cases

with respect to certain fishing vessels, to require those vessels to have on board what were called observers. And the purpose of those observers was basically to do data collection. And in some cases, some vessels could be required to pay for the cost of those observers.

What the statute didn't address was whether that applied to Atlantic herring fisheries. And what happened is initially the NMSF actually paid for those observers for herring fisheries. But in 2020, they decided to amend the regulations in order to allow for the herring fisheries to have to pay those costs themselves, those particular vessels.

Lynett

So the industry was actually paying for monitoring itself rather than the agency.

Schatz

Yes. And so we had a bunch of family businesses, really, fairly small businesses in the Atlantic herring fisheries industry who didn't like that very much. And so they filed a lawsuit and they essentially challenged the authority of the NMFS to issue this particular regulation and to require them to have to pay for the cost of the observers.

What happened is the lower court and the appellate court both said, we agree that the MSA, the underlying statute, is ambiguous on this issue. It's not clear what the statute really meant here. But because of that, they said in light of a previous Supreme Court case, which led to what's called the *Chevron* doctrine, we have to defer to the agency's interpretation of the statute and therefore that regulation stands.

And that was the issue before the Supreme Court: Does that *Chevron* doctrine apply and should we — and actually it was a broader issue — overrule *Chevron* altogether for various reasons. So that was what the case was about in essence.

Lynett

So *Chevron*, this Supreme Court case from 1984, which established what we call now *Chevron* deference, applies where the statute is ambiguous, right? And the court will uphold an ambiguous language of a statute and the regulation supporting it if it finds that the agency's interpretation was reasonable, right? Even if the court would have made a different decision with regard to how that ambiguous language should be resolved.

I read an interesting statistic and it gives you the impact of this decision. Essentially the court overruled, clarified, whatever you want to call it, *Chevron* deference. And *Chevron* deference really no longer applies. Justice Gorsuch said in his decision that today's decision in *Loper Bright* essentially puts the tombstone on *Chevron*, and that the federal judges, while [they] can respect the decisions of the agencies and the expertise, under the Administrative Procedures Act and the way our Constitution is designed, that the courts be the final arbiter of what statutes mean. The judges don't have to give that deference anymore, even to a reasonable interpretation of the statute by the agency involved.

As I mentioned, I was reading a statistic that was sort of astounding: There was something like 20 ,000 decisions citing Chevron and 77 percent of the federal circuit court decisions had applied the *Chevron* deference, usually in favor of the government because it's pretty low standards. So, this is a decision that is probably among the most cited and frequently applied of any Supreme Court decisions, really, because it involves probably the most fundamental and significant application of administrative law.

Schatz

To add to your statistic there: I also saw that when courts decided that a statute was silent or unambiguous on an issue, in 93.8 percent of the cases they applied deference. Basically, that meant agencies really felt that they were at liberty to regulate on pretty much anything where a statute didn't specifically address that issue and felt fairly safe in not being able to be challenged on that successfully.

Lynett

In light of the fact that it [SCOTUS] was overruling*Chevron*, the logical question is "what's the implication of that for cases that have already been decided using *Chevron* deference and those that are yet to be decided?" The court, at least the majority, made very clear that cases that applied *Chevron* in the past are not overruled; the decision in *Loper Bright* does not overrule all those decisions where the courts have applied *Chevron* deference and upheld a regulation. Prospectively, what do you think we're going to see now that *Chevron* deference essentially, as Justice Gorsuch said, now has a tombstone over it?

Schatz

I find it very interesting because in*Loper Bright* the court said,*stare decisis* applies. So, cases that have already been decided, that have already upheld a particular regulation, aren't overturned simply because of *Loper Bright.* But three days after *Loper Bright*, the Supreme Court issued another decision in*Corner Post v Board of Governors*. In that case, the question before the court was, when does the statute of limitations to challenge a statute start to run?

In the past, courts generally found that the statute of limitations, which is six years — and that wasn't in question, started running on the date that the regulation was issued. So, six years after that regulation is issued, you can no longer challenge it. But the Supreme Court wasn't persuaded by that. They said that really keeps people who have more recently been harmed by a statute's after the six-year period from being able to challenge that regulation.

The Supreme Court in *Corner Post* held that the statute of limitations starts to run on the date that a party suffers harm as a result of a regulation. So, if I'm harmed by regulation today, I have six years to challenge that regulation. Despite stare decisis, you can freely challenge whatever you want to.

Lynett

Some of these regulations go back many years. What if the company didn't even exist at the time the regulation was promulgated? These are all interesting questions that I

think are going to be are going to be worked out.

The EEOC obviously is a very mature agency. It's issued many, many regulations that have essentially been held and followed by the courts and by employers. What's your take on the regulations issued by agencies like the EEOC and DOL that have been long standing in nature?

Schatz

In some ways, time will tell. An important point to really grasp here is that for the immediate term, nothing really has changed because of *Loper Bright*, those regulations are still all in effect.

But, for all intents and purposes, all those regulations that we see from the EEOC, the Department of Labor, the National Labor Relations Board, those are all still in effect. It takes somebody to actually come out and challenge them. Now, what's been happening is all of those three agencies that I've mentioned have recently, in the last two or three years or so, come out with regulations that have been subject to challenge, that have been quite controversial. Those are currently making their way through the courts, and *Loper Bright*, I think, is going to really play a significant role in how those cases are going to be decided. So that's where perhaps in the intermediate term, we're going to see some changes.

For example, the EEOC issued regulations in April under the Pregnant Workers' Fairness Act. One of the things that the PWFA does is it requires employers to accommodate employees who have been limited because of pregnancy, childbirth or related medical conditions. And then the PWFA next went that extra step to tell us what related medical conditions are. The EEOC interpreted that term very, very broadly and included abortion, essentially telling employers if somebody wants to go through an abortion procedure, you have to, as an employer, accommodate that. That's led to several challenges even before *Loper Bright*. What we're seeing right now is that those are making their way through the courts. There's currently one case on appeal before the Eighth Circuit and *Loper Bright* was specifically referenced there in the briefing. So, we're going to see *Loper Bright* having an impact on how courts are going to ultimately decide whether or not to uphold controversial regulations.

Lynett

Do you think that regulations that have been promulgated and effective for a long time, are probably less subject to successful challenge under *Loper Bright*, as distinct from, as you point out, the PWFA [and] more recently promulgated regulations that have already garnered some controversy as to the EEOC's authority to issue certain regulations? For example, as you point out, the regulations concerning abortion have garnered a lot of litigation focus by various groups to overturn. And this is before *Loper Bright*.

Chevron always posed a pretty significant hurdle to challenges to overturn regulations. Now it's no longer a hurdle. I agree with you that the more recent enactment or promulgation of the regulations, the more vulnerable it could be to a challenge by various groups, which in turn may make the issuing agency of these

regulations more careful and complete in justifying the authority they have to issue the regulations or for certain aspects of the regulations.

Schatz

If we go back into the Loper Bright decision, there's actually a couple of things that the court said that influence all of that a little bit.

One is the Court said there is an exception to no deference, and that is when you have a statute that expressly says on this particular issue, we delegate authority to the agency to interpret what the statute says. So, if that's the case, then you should defer to the agency. But most of the time, you're not going to see that; probably in our case and in the employment area, we don't see that very much.

The other thing the court said is: If an agency issued a regulation pretty much at the same time that the statute came out or some reasonable time after that, and then it has consistently interpreted the statute with that regulation over time, hasn't flip - flopped, hasn't changed the regulation, and has been very consistent in its position, [then] courts shouldn't necessarily defer to that, but they should respect that. They should accord it some kind of credence.

When we're talking about something that's been around for a very long time — and that's, one of the arguments with the minimum salary threshold; that threshold is not written into the statute but it has been in the regulations for a very long time — the argument is, “you know, why not defer to that? Why not at least give some respect to that, even if it's not deference?”

But in other cases, agencies have taken to changing positions on subjects and have flip-flopped. We see that, for example, with another rule that's been under a lot of challenge recently, which is the Department of Labor's most recent interpretation of the independent contractor rule. They've gone back and forth on how they want to define what establishes an independent contractor versus employee time and again over the years. With those challenges, under *Loper Bright*, you don't give a lot of respect to the agency's interpretation. And there may be some regulations that have been around that have also had different agency interpretations over time where that same argument might apply.

It's going to be a one-on-one situation. The crazy thing is we're going to have different courts deciding perhaps on the same issue and different courts having different decisions.

Lynett

Yes. That's not good for employers. Especially employers that have multistate operations. It can create a patchwork of compliance issues depending on what state or states the employer is in. We'll see how Lope or Bright plays out. What's clear is that it will make challenges to agency regulations easier than it has been since 1984 when *Chevron* was decided and *Chevron* deference was established. So, we will see.

The takeaway though for employers is to continue to abide by the regulations that have been promulgated, particularly those that have been longstanding regulations. And if you don't, you're doing so at your own peril?

Schatz

Absolutely. Yes. You're so right about that. It's perhaps an interesting litigation strategy going forward to consider whether or not your case has a potential challenge to a regulation and whether to pursue that. So, there's some implications there that we probably all should be aware of, especially as outside employment lawyers moving forward.

But in terms of compliance, you're so right. Continue to comply because you definitely don't want to be out on a limb.

Lynett

While the PWFA regulations are the most recently enacted and, as we discussed, Kathy, are the ones really under challenge even before *Loper Bright*, there have been some particularly unpopular regulations that the EEOC has promulgated under the ADA. Most notably — it's not so much a regulation, it's almost sub-regulatory guidance —granting leave as an accommodation has been a real challenge for employers. It's not mentioned anywhere in the statute at all. But the EEOC has interpreted the statute for many years to require leave as a reasonable accommodation, even though accommodations are meant to enable disabled employees to perform all essential functions of the job. The nature of leave is that it doesn't enable you to perform the essential functions of the job. It may enable you to recover at some point so you can perform the essential functions of the job.

The whole concept of leave as an accommodation is one that the EEOC has sort of developed through regulatory and mostly sub-regulatory guidance. I could see challenges to those aspects of the ADA regulations that have been most troublesome for employers to administer. I think leave is certainly at the top of that list. In a litigation involving a failure to accommodate, I could see a private litigant, not a public interest group, raise the issue of not deferring to the EOC's interpretation on leave as a reasonable accommodation, even though it's existed for many, many years. And, you know, the agency's interpretation of the ADA and leave as a reasonable accommodation even preceded the enactment of the FMLA, which many people have pointed out was developed by the agency in a legal regime where there was no statutory leave entitlement under federal law. And since the FMLA was enacted, now there ***is*** a leave entitlement for a person's own serious health condition.

So [as] an implication of *Loper Bright* in terms of the challenges to ADA regulations, I could see a challenge to the notion of leave as a reasonable accommodation and whether that is a reasonable interpretation of the statute, which makes no reference to leave.

Schatz

I agree with you, Joe. It's EEOC guidance — and that's not a regulation. It's not supposed to be a court of deference. But what courts have been doing, at least what I've seen in the case law, is to say, “Well, but you know, it's an agency and they know the statute best and therefore we'll not maybe defer, but we'll definitely, you know, give a lot of credence to what the agency says in this kind of guidance.” We see that time and again, and I think with *Loper Bright* right now that gives litigants the

argument that, “Well, no, we're not supposed to do that.” And so I think that there is an opportunity there.

Leave has been a real challenge in terms of just trying to figure out how do you even deal with leave as an accommodation and the agency's position, not just that it is a reasonable accommodation, but that you have to grant it really, unless there's an undue hardship for however long. And that becomes a major problem. On top of that, over the years, there have been a number of regulatory provisions that have been subject to challenge under *Chevron*. And courts have always accorded deference.

So, things like the EEOC's regulatory definition of disability under the ADA to include severe temporary impairments — even a temporary impairment can be a disability — might get challenged again and we might see a different outcome in the future. There's been a number of provisions under the FMLA, for example, whether or not the FMLA actually includes a prohibition on retaliation for exercising FMLA rights, what the scope of that is, and various other things like even the notice period that is required for under FMLA to provide medical certification: Does it have to be 15 days? Where is that coming from? It's not in the statute. All of those things may ultimately be subject to some kind of challenge.

Lynett

Well, Kathy, this has been an interesting discussion. We're going to see how it all plays out. We're at the beginning of *Loper Bright* and its application. Perhaps a year from now, we'll be talking about the decisions following Loper Bright and what they mean for employers.

Schatz

It'll be an interesting time.

Lynett

Yes, it will be. Thank you.