Podcast

Workplace Law After 'Loper': Workplace Safety and Health Enforcement

By Jeremy K. Fisher

September 16, 2024

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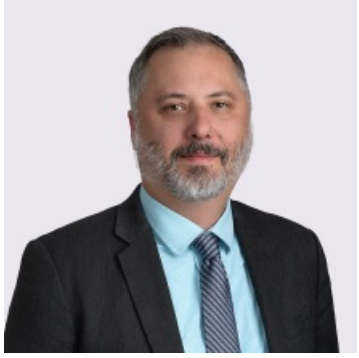

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September 16, 2024

The recent SCOTUS decision in *Loper Bright* may make it difficult for the Occupational Safety and Health Administration to enforce its authority in court.

Transcript

Melanie L. Paul

Principal and National Workplace Safety and Health Practice Group Leader

Hi, I'm Melanie Paul. Joining me today on the microphone is Jeremy Fisher, who is of counsel in the Atlanta office of Jackson Lewis. Jeremy and I happen to go way back a number of years because we both worked together at the US Department of Labor in the Office of the Solicitor in the Southeast and we were colleagues there for about 10 years.

Then, Jeremy joined the firm within the last year and has hit the ground running.

Today's topic that we are going to be talking about is something that's been on everyone's mind a lot lately. The Supreme Court in its last term was extremely active — and in a way that was certainly more positive for employers and in terms of executive agency authority. Of course, I'm referencing the monumental *Loper Bright* case, which overturned *Chevron* deference that was given to agency interpretations of their statutes when they were ambiguous. That decision has basically said that courts can handle issues of statutory ambiguity just fine, that they are the experts of those types of questions, and that the agencies themselves don't have special expertise when it comes to statutory ambiguity. Therefore, the Court overturned what has been four decades of precedent in this area. The original *Chevron* decision came out in 1984.

What do you think the future is going to be for OSHA enforcement authority and their ability to promulgate standards or how they interpret the OSH Act itself?

Jeremy K. Fisher

Of Counsel

That's a great and complex question that I'm sure OSHA is asking itself right this moment. As you mentioned, the *Loper Bright* decision so incredibly kind of reversed this four-decade long pattern of agencies saying we should have the right to interpret any ambiguity in our own regulations because we're the agency enforcing them. We're the experts. *Loper Bright* has cut that down, citing *Marbury v. Madison*, for the

prospect that courts are the only bodies that can interpret what the law actually says.

So right now, what we've seen over the past couple of months as*Loper Bright* came out, was a halt in OSHA issuing what they call interpretation letters. These are letters in response to employers who write into the agency and essentially ask for guidance on what certain regulations say and how to comply. Under this administration, OSHA was issuing those letters at the rate of about twice a month and none have come out since early June when *Loper Bright* was actually issued. And I don't know if we're going to see another one of those letters come out for quite a while.

Loper Bright is going to have enormous impacts on not just OSHA, but every administrative agency out there; every executive branch administrative agency is affected by it one way or another. While the future is very uncertain, what we're probably going to see is more case law, more suits being filed, going up to the system, going through the circuit courts and eventually going to the Supreme Court to determine exactly what kind of ability OSHA has to not only interpret their own regulations, but to enforce them.

Paul

We're talking about Chevron deference and we're talking about statutory ambiguities, but with that, there are regulations that OSHA promulgates that they have authority to do so under the OSH Act. But they have to make sure now that the regulations that they want to promulgate follow the Administrative Procedures Act and also that they have the authority to issue certain regulations under the statute itself. And so that's what I think has been called into question.

There was another Supreme Court case that came out this term, the*Corner Post* case, where an employer had challenged the statute of limitations that six years that companies have to challenge a new rule when it's promulgated. And in that case, the employer the business wasn't even formed until after the expiration of that initial six years after the rule was promulgated and the Supreme Court basically said that now businesses, the statute of limitations for when they can challenge a rule promulgated by an executive agency, including by OSHA, is going to not begin to run until that business has been aggrieved by it.

So that's really interesting as well because that kind of goes along with*Loper Bright.* It does remain to be seen how that's going to affect the regulatory landscape, but there may very well be businesses that have more recently formed that want to take on challenging rules that have been in effect and enforced and litigated for years.

Fisher

And speaking of a couple of the sort of the newer things that OSHA has attempted to do. How do you think *Loper Bright* is going to affect, the challenges right now to the walk -around rule, the new heat stress guidance that has come out? How do you see that playing out?

Paul

On the walk-around rule, there's already been a challenge filed in federal court in Texas. That's been ongoing. Even before the *Loper Bright* decision, the challenge has

been — or the criticism of that rule has really been — that this is not really tied to safety and health, which is the purpose of the OSH Act, and ensuring a safe and helpful working environment for workers in this country. It doesn't really have that tie to safety and health and seems to be more of a back door for the agency to really promote its unionization efforts or pro -union philosophies that have permeated this administration.

As far as the heat illness rule, OSHA has drafted a rule. It hasn't yet been published in the Federal Register, which is certainly interesting. Normally, once they announce that they've drafted a rule and published the quote draft rule on its website, usually it gets published in the Federal Register the next business day. It's been over a month already [as of 08.20.24], so I'm kind of scratching my head there.

How is that going to play out? I think there's going to be a lot of challenges to the heat rule regardless of *Loper Bright* based on the fact that, is this something that an employer can really have control over?

So if you want to relate that back to *Loper Bright* and arguments that can be made there: If a hazard is not something that is either (a) strictly occupational because of the work environment or (b) as in the case of heat illness, there are so many other factors at play — people's personal medical issues, any medications they're on, their personal diets and lifestyle, consumption of alcohol and caffeinated drinks, if they've ever had heat stress before, they could be more susceptible to that again in the future — then these are all things that an employer is going to be hard pressed to control in the work environment. We're going to see challenges with lots of different arguments, and *Loper Bright* can certainly form some of the basis for a challenge to a heat rule in the future. There are lots of questions that clients have been asking about what this is all going to mean.

One of the other cases that has also come out in this term, this last term in the Supreme Court is the *Jarkesy v SEC* case. We're going to talk about that in a little bit. But I raise that now because my question to you, Jeremy, is: Are the OSHRC decisions self-enforcing or does a party have to bring a petition to enforce in an Article III court?

Fisher

OSHRC has always had a self-enforcement mechanism because OSHRC actually was created as part of the Occupational Safety and Health Act in 1970. So, there is a congressionally passed basis for the existence of OSHRC and its decisions are self-executing unless they're appealed.

What I think is going to be interesting, and we don't exactly know how this is going to play out, but in *Loper Bright*, the court cited back to *Marbury v. Madison* for the concept that only courts can interpret the law. And *Marbury v. Madison* is pretty clearly talking about Article III courts, which OSHRC is not an Article III court. OSHRC is an executive branch agency.

Yes, the commissioners on OSHRC are appointed. However, the ALJ's administrative law judges are simply federal employees who up until a few years ago became ALJs by simply applying for open positions. They are not presidential

appointees; they simply have to go through the same sort of interview and clearance process that any other federal employee has to do. So right now the real question is going to be what kind of deference are Article III courts going to be giving OSHRC decisions? The standard tends to be “arbitrary and capricious,” which is a really high standard. It's very difficult to have OSHRC decisions overturned in circuit courts.

However, now that we're looking at the way courts are going to be looking at OSHRC decisions, are they going to be giving deference to the commission or are they going to be giving any deference to OSHA's interpretations that might be echoed by the commission? There's a little bit of a separation there as to what exactly these courts are going to start looking at. The bottom line is it might take a few years again for these cases to kind of move through the system. But I think that employers’ chances of having an OSHRC decision overturned before a circuit court is going to be much greater than it has been traditionally.

Paul

That's really interesting that you mentioned that. So yes, OSHRC, the Occupational Safety and Health Review Commission, which hears contests of OSHA citations is a quasi -judicial, quasi -administrative body. It's an executive agency that's supposed to have three commissioners that are nominated by the president and obviously confirmed by the Senate. And so, they're not Article III judges.

And you're right, the circuit courts of appeals, which in the OSH Act can actually hear any petitions for review from a final order of the commission, and that “arbitrary and capricious” standard is really very high and difficult for employers to overcome on appeal, so this could change the whole landscape.

Some of the case law evolved before *Chevron*, prior to 1984. A lot of the OSHRC case law evolved in its early days, in the first decade of the Act's existence. One of the things I've been thinking about is the word “repeated,” which is in the OSH Act but not defined. That would be a really good example of an ambiguity in the statute. But it has been defined over the years by OSHRC and then the courts of appeal. But one would have to go back to all those legal decisions and see if those courts have really been deferential to OSHRC and how it interpreted the term “repeat” that's in the statute itself.

This could be a really good area for challenge for employers. I know I counsel employers all the time that that's a huge area of vulnerability for them. If you're a big company that has a nationwide footprint, that has multiple locations, different parts of the countries and

the facilities might not even do the same things or have the same type of equipment. Now, I'm f talking about a manufacturing type setting because they're extremely vulnerable, that industry. You could have a lockout/ tag out issue on a piece of equipment in New Jersey and then, four years later, you have a facility in Colorado and you have a different kind of a lockout/tag out issue on a totally different piece of equipment that doesn't even do the same thing. Maybe there was an employee injury, but it occurred in an entirely different way from the previous New Jersey incident. And you can have scenarios that are very factually dissimilar, but basically the case law now just simply says, well, if the hazard is the same, then “too bad, so sad”

employer. I think that's an area that should be examined further by the defense bar to figure out what can really be done to help companies try to overcome decades of executive branch overreach of authority, if you will.

Fisher

That's a great point. One of the other things I've been wondering about, and it's not strictly a *Loper Bright* issue, but I would think if I'm a general contractor, I'm pretty happy with the decision and how things are going because one thing I'm curious about is the multi -employer work site policy, which is a policy that OSHA developed essentially to allow the agency to cite general contractors. But what it allows them to do or permits them to do is to cite employers whose own employees were not exposed to a violation with a logic that "well, they're an exposing employer because they have allowed exposure by other employees." It's essentially a way to cite general contractors for the actions of subcontractors. It's not statutory whatsoever. It's simply a policy. Now it has been approved and sanctioned by OSHRC. But to my knowledge, I don't know that a circuit court has necessarily blessed the MEP, which is something that employers have really hated since it was established in 1999. So it's another one of those issues that I'm wondering how much the fallout is going to affect the MEP.

Paul

Seems like the agency has a lot to consider. This is an election year as well, so that just adds a little spice to the mix, if you will. What's going to happen? Obviously, what happens during an election year will have fallout in the following year.

Are we going to have another four years of a Democratic administration where we could see continued attempts by the administration to push the envelope, if you will, as is usually done during Democratic administrations? The thought being that OSHA and of course the Department of Labor itself, is really there to ensure safe and helpful working conditions and that everybody in the country who's here working has appropriate workplace conditions. With that in mind, agencies like OSHA are always really trying to push to provide the greatest amount of protection possible. If a Republican administration takes over the White House, we're likely to see less regulation; there'll be more pullback of a lot of this interpretation and guidance that has come out more recently and more of an adherence to the *Loper Bright* decision.

Fisher

Absolutely. And I think it'll allow a lot more consistency in terms of guidance, because as you and I know since we spent a long time with the Department of Labor, when administration change often agencies' interpretations of their own statute changes. So, it will be very interesting see what happens in November and how that affects things going forward.

Paul

That was a lot to unpack in a very short amount of time. We're going to continue the dialogue as new issues arise and the agency continues down their rulemaking path as they continue to put forth a very ambitious regulatory agenda with a number of rules slated to come out later this year. We'll see if that happens. Again, it's an election year, so it's anybody's guess.

Until the next time with our podcast, thank you so much for joining us. As always, if you need any assistance in the workplace safety and health area, please feel free to reach out to Jeremy or myself. Thanks so much.