Podcast

Workplace Law After ‘Loper’: The Impact on Immigration Compliance

By Michael H. Neifach & Amy L. Peck

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The impact of the *Loper Bright* and *Jarkesy* decisions could be widely felt including in increased immigration litigation and challenges.

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INTRO

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 SEC v. Jarkesy the Court held that certain SEC adjudications must take place in court because defendants are entitled to a jury trial.

The impact of the Loper Bright and Jarkesy decisions could be widely felt including in increased immigration litigation and challenges. On this episode of our podcast series, Workplace Law After Loper, we discuss the ramifications of these decisions for immigration compliance.

Today's hosts are Michael Neifach, office managing principal in the Washington, D.C. region, and Amy Peck, principal in the Omaha office, and co-leaders of the Immigration Group.

Michael and Amy, the question on everyone’s mind today is: How do the U.S. Supreme Court's decisions in Loper Bright and Jarkesy affect immigration proceedings, and how does that impact my business?

CONTENT

Michael H. Neifach

Washington, D.C. Region Office Managing Principal and Immigration Co-Leader

I am thrilled to be here with my good friend Amy Peck. We are going to talk about the sea change in administrative law with *Chevron* being overturned and some other Supreme Court cases. The news really has been that *Chevron* is dead. *Chevron*, which has been the law since 1984 and really was a bedrock in how

administrative agencies operated and their relationship with federal courts, was overturned by the Supreme Court.

Let's just back up a little and say "What did *Chevron* do?" *Chevron* said that when you're looking at any administrative agencies, and you look at the plain language of the statute, is the agency vested with the authority to do whatever it is? And if it is, then that's the end of the analysis. If it's ambiguous, and in the world of immigration, particularly, so much of what we do is really ambiguous, there the court just has to determine whether the agency's decision was arbitrary and capricious. And if it wasn't, and it was reasonable, that's the end of the analysis. The courts will defer to agencies and let the agencies' determinations rule. And that really gave the agencies wide discretion to make very far-reaching decisions, even where the statute or regulations didn't say that and it wasn't the only way that a court could come out.

With *Loper Bright*, the Supreme Court said that we're no longer going to do that: That doesn't take into account the APA requirements; it potentially is unconstitutional. There are a number of reasons that *Chevron* is just unworkable — and frankly, it hadn't been applied in the immigration context directly since 2016. With *Loper Bright*, it became clear that no longer will courts defer to agencies, which potentially gives individuals and companies much wider range to go into court and challenge an agency's determination, whether it's the definition of an aggravated felony, a specialty occupation in the H1B, a particular social group in the asylum context? In all of those areas, the USCIS, ICE, DHS, Department of Justice, fill in those gaps with what they view as a reasonable interpretation and the courts have deferred. That's no longer the case. It potentially opens up significant litigation and challenges where we can roll back some of what the agency is doing — for good and for bad.

Interesting thing is, in addition to *Loper Bright*, at that same time, there was another decision, *Jarkesy*, which significantly impacts or potentially impacts the immigration litigation world as well. And I want to just kick it over to Amy to give a little bit of what *Jarkesy* did and what those impacts are.

Amy L Peck
Principal and Immigration Co-Leader

Hello, everybody. It's my pleasure to be here today with my good friend Michael. It has been a great time to be alive in this space because of the sea shift in these cases.

The agencies really have had a lot of power post-*Chevron*. And, like Michael said, the courts kind of deferred to the agencies, and agencies said, "Yes, please. We like this. We love this Supreme Court ruling and we're going to take this as far as we can." — and some would argue too far. And so, when *Loper-Bright* came along, there was a real, I'd say, relief among some people. A lot of people thought, "Well, it's about time."

Jarkesy is another in this line of cases. This was decided on June 27, 2024. This is also a Supreme Court case. It's the *SEC vs. Jarkesy*. This was a case when the Security and Exchange Commission was seeking civil penalties from defendants for securities fraud. And the administrative tribunal was finding for fraud, finding for

the SEC. This went up to the Supreme Court and the Supreme Court said, “Wait a minute. The Seventh Amendment requires these types of actions — you're trying the defendant for fraud in an administrative tribunal. And the Seventh Amendment says not so fast. You have to bring this action in a court of law where the defendant is entitled to a trial by jury.” This was a 6 – 3decision and it ended essentially the SEC's long-running use of in-house tribunals led by ALJ's, administrative law judges, to adjudicate fraud actions.

This was one where lawyers are saying, “Okay, now what?” Because there are *a lot* of administrative tribunals out there. The EEOC, for example.

OCAHO, which is one that a lot of people don't know about, but that stands for the Office of the Chief Administrative Hearing Officer. OCAHO hears cases under 8 USC 1324A, which are I-9 violations, I-9 fines. Also 8 USC 1324B, which are immigrant and employee rights division actions that are brought by the Department of Justice or individual actions that are brought under 8 USC 1324B that are not properly before the EEOC. And OCAHO is an administrative body; there are ALJs that cover OKHOP. So, all of a sudden, things are looking *very* interesting with these administrative bodies, including the EEOC, under *Jarkesy* and under *Loper Bright.*

Let me talk about a couple of areas where we've seen some real movement. There have been some recent cases in the EEOC, but I'm going to talk about the 8 USC 1324A, which are the I-9 decision with *Walmart* and 8 USC 1324B, which is the *SpaceX* decision.

Let's start with the *Walmart* decision. Walmart was found to have violated 8 USC 1324A and was fined for I-9 violations. And Walmart disagreed with this. Walmart said, “We don't think that you are properly assessing these fines. What you said we did wrong, we don't think we did that.” Immigration Customs Enforcement, Department of Homeland Security said, “Nonetheless, we're going to fine you.”

Walmart filed in the district court in Georgia and made some arguments that furthered *Jarkesy* and *Loper Bright.* They basically said that OCAHO, which is this administrative body, those administrative law judges are unlawfully shielded from removal by the president. And that makes them unaccountable to the executive, so the president must have removal power under the constitution to keep officers accountable, as well as to promote democratic accountability so the public can judge the president's efforts.

Walmart said that is not the case with OCAHO. These certain principal officers within OCAHO have double insulation from removal under Article 2. Basically, the district court agreed and said that the ALJ’s broad power to assess these fines and penalties against private parties on behalf of the government requires supervision by the president. And basically, they granted an injunction in favor of Walmart saying that OCAHO has unconstitutional authority for ALJs to act.

This interpretation, of course, has not been accepted by OCAHO . OCAHO is like, “Who us? Worry? We don't recognize that decision.” It was not an injunction for all the cases. It was an injunction for the Walmart case. And it is on appeal. But basically, this and a number of other cases will probably end up in front of the

Supreme Court again.

Neifach

Now on top of *Jarkesy*, you have *Loper Bright*. I would imagine that in the context of all this, you're now looking at a court being able to say, “I don't have to defer to your interpretation of this. I don't have to defer to your scheme.” And so, from a pro plaintiff standpoint, this is now another opportunity where we can potentially push back at the agency's determination that based on X, whatever it is, we owe all of these fines when in fact the process that you're using isn't grounded in the statute and the tribunal that you're working is not affording the claimants their due process.

In the past, so many of our clients were just saying, “You know what, we'll just try to settle it. We'll write a check and we'll move on.” The government has now started to up the ante and we're seeing fines potentially in the millions of dollars and not willing to settle for what we would think is a more reasonable amount. And at the same time, you've got these court determinations that hopefully will let courts take a more clear-eyed view and hopefully sustain some of these challenges.

Peck

Yes. And that leads right over to the *SpaceX* case. The overarching theme is the courts are saying, “Look, administrative agencies, you *are* going too far. These fines are really high.” The agencies have a pretty big opinion of themselves coming in — and in potentially an unfair tribunal, which I'm sure they would dispute, right? The tribunals themselves would dispute that but the courts are saying, “Look, these decisions within these administrative tribunals can have a huge impact on companies and individuals. And it should be heard in an Article III court, not an administrative tribunal.”

So, in comes the *SpaceX* decision in the Fifth Circuit, Texas. Basically, SpaceX got sideways under 8 USC 1324B allegedly. And that is within the purview of the Immigrant and Employee Rights Division, which is part of the Department of Justice. They are charged with administering 1324B, which is: Citizenship discrimination; nationality description for employers of fewer than 15 employees — the rest of those go to EEOC; documentation discrimination, such as if you are requiring permanent residents to produce their green card during the I-9 process; and retaliation in the hiring process. It's a narrow scope, but it's all related to the hiring and recruitment process tied to I-9s.

Well, the IER contended that SpaceX placed a bunch of ads that forgot to include refugees and asylees. And why is that important? Because US citizens or US nationals — US nationals are born in US protectorates, permanent residents, asylees and refugees are protected individuals under 1324B. Folks on work visas are not protected. But the class that I just mentioned is protected. And IER contended that SpaceX placed ads for US citizens only or US citizens in permanent residence and forgot about asylees and refugees, and that this was citizenship discrimination and that SpaceX owed them millions of dollars.

SpaceX said, “That's an unreasonable amount.” They went back and forth and

eventually SpaceX filed litigation in the Fifth Circuit and forwarded a couple different theories. One of them was that OCAHO was designed to bypass the attorney general — and if you look at the statute, that's in fact what happened — and that this is unconstitutional. The attorney general must be able to review 1324B decisions.

The government anticipated this argument and tried to change the regulations; in fact went through a rulemaking process to change the regulations. But the statute makes clear that the regulations are now in conflict with the statute. The court wasn't persuaded. The court's like, “Yeah, this is not lining up.” and they found in favor of SpaceX.

So, this is also a case that found OCAHO, as a body with respect to 1324B cases, is unconstitutional. Now the IER is not having it. They are saying “What? Nothing to see here. Nothing to see here. Proceed as usual.” But this gives companies who have litigation with the IER, quite frankly, a lot of leverage. Now, whether the IER recognizes that is another matter. Again, they're pretending that these cases don't exist. But this is real. The SpaceX litigation and the arguments that they forwarded are quite strong just by plain statutory interpretation. So, it's a *fun* time to be alive, Michael.

Neifach

It is. I think that similar to *Walmart*, there's an opening now to also challenge in light of *Loper Bright* and to make those points that in fact what on a substantive basis what IER is doing and also getting into sometimes they view their jurisdiction as broader than maybe the statute allows, especially when they're doing their own independent investigations. There is potential to start raising those *Loper Bright* arguments and saying to courts: “You don't have to defer to what the agency is doing. There's really not an interpretation that fits within what the law allows.” and to start narrowing the scope of how far back should IER be able to look to see if there were violations — especially when they're making these systemic allegations that are based on maybe not including asylees and therefore we're going to ping you and fine you for each job application that was out there or job note posting, even though there's no proof that anybody was specifically not selected or chose not to apply because of the way that the job posting was worded.

There are multiple things here, both on OCAHO on its own does not have the authority under *Jarkesy* or that, substantively, what the agency's doing should not be, there's really no deference there and it's beyond what the statute allows.

Peck

Yes. I think you're exactly right. The IER does not want us questioning their authority. The Department of Homeland Security, that’s kind of separate because immigration is traditionally an exclusive function of the federal government and the sovereign. But the IER cases . . . this is something where if you do have one, you need to be digging into these issues because they are very powerful. And it's been a long time since companies have had leverage against the IER.

Neifach

Yes. Again, clients that in the past would have just said, “You know, let's just sign away and settle this and make it go away” are now starting to say, “Wait a minute, can we challenge this?” And the answer is, “Yes, we can challenge it.” We don't know how this is all going to play out, but in the right set of circumstances, it does give you leverage to push back and not just take what the government is offering.

The flip side, of course, of some of this is that there are things that the government does, that USCIS has put forward and what DHS has put out sort of implementing the statute, in a way that is favorable for practitioners and employers. Some of the things that come to mind are the OPT and STEM OPT rules. These are rules that allow an individual who may have graduated from university to continue in student status under optional practical training so that they can continue to work for companies for one year and if there's STEM OPT, for another two years. Well, the government issued regulations and rules that broadly interpreted what's not in the statute to allow those individuals to continue to have work authorization or remain lawfully in the United States.

There have been groups that have been trying to challenge some of those rules, and because it's an interpretation that is reasonable, those have not been successful. *Now* with the end of *Chevron* and under *Loper Bright*, it remains to be seen if you're going to start seeing challenges to some of these kinds of more favorable government interpretations and whether there's going to be pushback. Think of H4 work authorization and the big one is DACA, which has been challenged and been in litigation for years. But certainly, the end of *Chevron* deference isn't helpful to the government's position that we have the authority to interpret.

Now, it's not as simple as that. There's arguments to be made, et cetera, but big picture-wise, *Loper Bright* makes some of those administrative interpretations that are favorable more difficult.

Peck

Well said.

Neifach

Some of the other areas where we'll just have to wait and see what happens is with outstanding individuals, EB1 petitions. The government did something that was sort of interesting.

There was a very clear, defined line of what you needed to meet to show that you were eligible under the EB1 employment-based first-preference category. There were sort of 10 factors and if you could hit three of them, you could make the case and hopefully get the petition — assuming that the government bought what you were saying. Those would be approved.

The government has now glommed on to a new final merits determination that they sort of made up and did in a policy handbook. It isn't in the regulations, isn't in the statute and has made it more difficult— whether it's an academic or a businessperson or what have you — to meet the requirements and the government has been denying more of those cases. Post-*Loper Bright*, there's no deference to that interpretation. We can argue that that was just made up by USCIS and, to the

extent that it's just sort of duplicating what is already in those 10 factors, it's not even a reasonable or persuasive interpretation. This is another example of where we've got more leeway to push back at the government.

So, this is all really new. A lot of this is not getting to litigation [yet], but we're seeing arguments that we're making on behalf of our clients to the government and there are instances where the government is saying, "You know what, we don't need this to go to court. We'll settle on a more advantageous term." In the I-9 cases, we've had some situations where the government has said, "You know what? We won't issue a fine. We'll issue a warning notice and let's move on from this."

Not always the case. There are instances, Amy mentioned, that IER is really looking at this like they're just marching forward and saying that these district court decisions are not nationwide, they're not affecting them, and they're not going to really impact the way that they're going to be treating these individual cases. But at some point, this is going to inevitably reach the Supreme Court. And then we will see both *Loper Bright* and *Jarkesy*, what the full ramifications are.

Peck

We're looking forward to it because it's a lot of fun to tell the government that we don't like their made-up policy and we don't like their made-up interpretation of the statute — and see what they say. So, it's a great time to be alive.

Neifach

Thanks, Amy. You know, I'm glad we had a chance to go through this. I'd love to do another one in a year or six months when we start to see how these things really do play out. It is an exciting time. Thanks, everybody.

OUTRO

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