LOPER BRIGHT'S POTENTIAL EFFECT ON FEDERAL LABOR AND EMPLOYMENT LAW: POSSIBLE CONSEQUENCES FOR AGENCIES AND PRACTITIONERS

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On 28 June 2024, the US Supreme Court in *Loper Bright Enterprises v. Raimondo*[1] (*Loper Bright*) overturned the 40-year-old *Chevron* doctrine, which required courts to defer to federal agencies' reasonable interpretations of ambiguous statues. In the three months since *Chevron's* fall—as well as other recent significant administrative law rulings[2] —a clearer picture has emerged of what a post-*Loper Bright* administrative state may look like for federal employment and labor law practitioners. Among the federal labor and employment law issues that may be affected by *Loper Bright* are union elections, tip credits, noncompetition agreements, and much more.

In the post-*Loper Bright* era, there may be more immediate legal uncertainty because federal courts will now likely take a more active role in scrutinizing agency rulemakings, enforcements, and adjudications. Perhaps most importantly, in the medium to long term there could be less policy vacillation if the White House changes parties since underlying law will not be so readily subject to political reversal.

What follows is an analysis of how *Chevron's* demise and subsequent related developments may affect—or have already affected—key federal labor and employment administrative agencies and laws.

NATIONAL LABOR RELATIONS BOARD

The Biden administration's National Labor Relations Board (NLRB or the Board) and General Counsel (NLRB GC) have been among the most ambitious federal administrators in attempting to reinterpret key, long-standing legal principles. Indeed, this is likely in part why the Board and NLRB GC, post-*Loper Bright*, have come under greater legal assault by regulated parties.[3] Nevertheless, even if the Board and NLRB GC ultimately survive that assault, their rewriting of blackletter federal labor law may not withstand judicial review post-*Chevron*.

Perhaps most vulnerable to judicial review is the NLRB's recent landmark decision in *Cemex*,[4] which overturned more than 50 years of law governing how the Board administers union elections. Pre-*Cemex*, employers could voluntarily recognize a union and begin collectively bargaining or deny recognition and insist on a secret-ballot, NLRB-conducted election. Importantly, pre-*Cemex*, employers insisting on a secret-ballot election without filing for NLRB relief did not violate Section 8(a)(5) of the National Labor Relations Act (NLRA or the Act). However, under *Cemex*, employers facing union organizing campaigns must now bargain with a union unless they promptly file a petition challenging a union's claim of majority support among employees or the appropriateness of the employee

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bargaining unit. Critically, even if an employer timely files a petition after declining to voluntarily recognize a union, should the NLRB find that the employer committed serious unfair labor practices—which remain undefined by the Board—in the run-up to a secret-ballot election (e.g., retaliating against employees for union organizing), then the petition will be dismissed and the Board will issue a *Cemex* bargaining order mandating that the employer immediately bargain with the union.

Cemex is likely vulnerable post-*Loper Bright* in part because it is predicated on the NLRB's reinterpretation of the NLRA based on the essential logic of a long-defunct NLRB case.[5] Moreover, *Cemex* arguably oversteps the relatively strict lines that the Supreme Court drew in its landmark *Gissel* decision for when the NLRB may abandon the default secret-ballot election and impose a mandatory bargaining order on employers.[6] Perhaps tellingly, post-*Cemex*, where the NLRB has held that employers violated Section 8(a)(5) by not bargaining with unions, the Board has cited *Gissel* alongside *Cemex* when imposing mandatory bargaining orders, possibly in anticipation of hostile judicial review.[7] Indeed, shortly after *Loper Bright*, the Fifth Circuit made clear how little deference the NLRB will receive when interpreting federal labor law.[8] Although, notably, the D.C. Circuit has more recently recommitted to reviewing NLRB decisions with a "very high degree of deference."[9] These different approaches to deference could lead to circuit splits and more Supreme Court involvement in federal labor law.

In addition to threatening recent expansive interpretations of the NLRA, *Loper Bright* may also stall the NLRB's attempts to further expand the Act's reach. For example, without *Chevron* deference, the NLRB may be less optimistic that federal courts will uphold an attempt to overturn *Ex-Cell-O Corp*.,[10] which could dramatically expand the Board's remedial powers. Specifically, the end of *Ex-Cell-O Corp*. would permit the NLRB to impose financial consequences on employers that violated Section 8(a)(5) for bargaining in bad faith with unions. This would dramatically expand the remedies currently available to the NLRB, which primarily include posting notices and issuing bargaining orders to employers. Moreover, if the NLRB overturns *Ex-Cell-O Corp*., then its effect on employers would be compounded by *Thryv, Inc.*,[11] which also expanded the scope of make-whole remedies available against employers that commit unfair labor practices.

Lastly for the NLRB, but perhaps most consequentially, post-*Loper Bright*, the Supreme Court may soon review direct—and existential—constitutional challenges to the Board, including under the major questions and nondelegation doctrines.[12] Indeed, in September 2024, federal trial courts have already split on whether to issue injunctions halting the NLRB's enforcement actions because, post-*Jarkesy*, the job protections of NLRB administrative law judges (ALJs) may violate Title II's "Take Care" clause and the Seventh Amendment. That is arguably because those protections deprive the president of removal powers and parties before the NLRB of civil jury trials.[13] The Supreme Court may eventually resolve this dispute, especially because the US Department of Labor's (DOL) ALJs face similar constitutional challenges.[14] Moreover, while not a constitutional case, the Supreme Court's recent decision[15] weakening the NLRB's ability to secure Section 10(j) injunctions in federal court indicates that the Board may continue to face a hostile audience should such challenges reach the high court. Relatedly, based on data from 2024, the NLRB is set to petition for fewer Section 10(j) injunctions despite the NLRB GC's 2021 call for aggressive enforcement, possibly because of the Supreme Court's recent Section 10(j) decision and concern that its petitions will not survive judicial review post-*Loper Bright*.[16]

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DOL

The DOL has also faced post-*Loper Bright* challenges. Indeed, on 23 August 2024, the DOL's so-called 80/20 tip-credit rule became one of the first casualties of *Loper Bright* when the Fifth Circuit struck down the rule under the "now-*ancien régime* that *Chevron* imposed."[17]

Under the Fair Labor Standards Act (FLSA), employers can pay tipped employees US$2.13 per hour in direct wages—provided that direct wages and tips combine to at least the current US$7.25 hourly federal minimum wage. The DOL rule attempted to limit employers' ability to take this tip credit, excluding employees who spent more than 20% of their time on nontipped activities. That part of the rule was based on prior DOL nonregulatory guidance, which had vacillated with changing administrations.[18] The DOL's rule also excluded from the tip credit employees who spend more than 30 minutes per shift on side work that directly supports tip activity.

The Fifth Circuit invalidated the DOL's final tip credit rule, holding that DOL's interpretation of the FLSA post-*Loper Bright* was owed no deference and was contrary to the law's text. Specifically, the court held that the DOL's rule impermissibly "replaces the Congressionally chosen touchstone of the tip-credit analysis—the occupation—with one of DOL's making—the timesheet."[19] Thus, the court held that the DOL's final rule was a misinterpretation of the FLSA and was arbitrary and capricious under the Administrative Procedure Act (APA).

Other DOL initiatives may suffer a similar fate post-*Loper Bright,* especially those that are linked to politically charged social issues. For example, in July 2024, the Fifth Circuit vacated a Texas federal trial court's decision upholding on *Chevron* grounds a 2022 DOL final rule under the Employee Retirement Income Security Act that permitted fiduciaries to consider environmental, social, and governance (ESG) issues when recommending investments in light of *Loper Bright*—which was decided 11 days before the Fifth Circuit heard oral arguments over the final ESG rule.[20] Critically, because the same Texas federal trial court will now review the ESG rule without *Chevron* deference, the litigation is arguably a test case for how *Loper Bright* may impact federal rulemaking.[21]

Indeed, even when federal courts post-*Loper Bright* uphold DOL regulations, the agency may nevertheless feel circumscribed in how it subsequently enforces such rules.[22] For example, while the Fifth Circuit, on 11 September 2024, upheld the DOL's overtime rule using worker salaries in determining if such workers are exempt from FLSA's overtime protections, it did so on narrow grounds.[23] Specifically, the court warned the DOL that it had limited authority under the FLSA to determine the salary threshold for the so-called white-collar exemption to overtime protections because the rule fell within the agency's "explicitly delegated authority to define and delimit the terms of the Exemption, and because that power is not an unconstitutional delegation of legislative power[.]"[24] Pointedly, while the court upheld the DOL's authority to impose a minimum-salary rule for FLSA overtime protections, it remains unclear if the Biden administration's proposed threshold, which is set to reach US$58,656 in January 2025, will survive judicial review post-*Loper Bright*.

Another example of a potentially endangered DOL policy post-*Loper Bright* is a final rule from the Occupational Safety and Health Administration (OSHA) that became effective in May 2024 under Section 8(e) of the Occupational Safety and Health Act (OSH Act). The rule permits employees to have third-party representatives, including union officials, accompany OSHA personnel inspecting employer workplaces for potential hazards. The same month, industry trade groups sued OSHA in Texas federal court alleging the so-called "walkaround rule" was an impermissible interpretation of the OSH Act, citing *Loper Bright* in their summary judgment papers.[25] While

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that litigation remains ongoing, OSHA's walkaround rule may fall without the benefit of *Chevron* deference. Indeed, in addition to *Loper Bright*, OSHA's walkaround rule—and possibly others involving employer property—may separately run afoul of another Supreme Court decision[26] hostile to administrative agency access to private property.

OTHER FEDERAL AGENCIES WITH LABOR AND EMPLOYMENT LAW IMPLICATIONS

Arguably the most well-known casualty among federal regulations post-*Loper Bright* thus far has been the final rule from the Federal Trade Commission (FTC) banning most noncompetition agreements under Section 5 of the FTC Act. In August 2024, a federal court in Texas issued a nationwide injunction against the FTC's noncompete ban after finding the agency's interpretation of the FTC Act was arbitrary and capricious under the APA. The court held that the noncompete ban was "unreasonably overbroad without a reasonable explanation" and "imposes a one-size-fits-all approach with no end date, which fails to establish a 'rational connection between the facts found and the choice made.'"[27] While the FTC has yet to appeal that decision, it may face similar judicial hostility at the Fifth Circuit. Moreover, while the district court did not address it, the FTC's noncompete ban—and other key federal labor and employment law administrative actions—also could implicate the major questions doctrine, which bars agencies from taking action with "economic and political significance" that Congress arguably reserved for itself.[28] A national bar on noncompetes based on a new interpretation of an old statute could arguably fall within that doctrine.

Indeed, an April 2024 final rule from the US Equal Employment Opportunity Commission (EEOC) mandating employers to accommodate employees with work limitations due to abortion-related health care under the Pregnant Workers Fairness Act (PWFA) already fell to the major questions doctrine. In June 2024, a federal court in Louisiana noted that the PWFA was silent on abortion and held that the "EEOC's use of its regulatory power to insert the issue of abortion into a law designed to ensure healthy pregnancies for America's working mothers squarely implicates the 'major questions doctrine' as enunciated by the Supreme Court."[29] Importantly, the court rejected the EEOC's attempt to ground the rule in "general workplace protections" instead of high-profile abortion policy and avoid the major questions doctrine. In invoking the major questions doctrine, the court pointed to social science data illustrating public division on abortion, concluding that "there can be little doubt in today's political environment that any version of the PWFA that included an abortion accommodation requirement would have failed to pass Congress."[30]

CONCLUSION

As discussed above, federal agencies that enforce key labor and employment laws will face significant legal headwinds post-*Loper Bright*, especially in courts with a well-documented skepticism toward zealous agency action.

While the scope and scale of *Loper Bright* remains unclear so soon after *Chevron's* fall—especially as some courts continue to defer to agencies based on other precedent[31]—in the short run, federal agencies may scale back previously contemplated ambitious regulatory action.

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However, in the long run, *Loper Bright* may symbolize a greater hostility to the federal administrative state that will reduce the policy fluctuation that occurs when the White House changes hands. It remains unknown whether Congress will, post-*Loper Bright*, provide greater statutory clarity in key federal labor and employment statutes, creating space for more expansive federal administrative action. Indeed, *Loper Bright* could even open the door to invalidating entire agencies when coupled with other constitutional doctrines, including the nondelegation and major questions doctrines. Ultimately, *Chevron* was the keystone case in administrative law for four decades, and its reversal will likely continue to have reverberations for years to come.

Given the changing landscape post-*Chevron*, employers should continue to monitor any legal challenges or other developments affecting federal employment agency actions, including recent regulations, as compliance obligations may shift. Our Labor, Employment, and Workplace Safety practice can assist with all aspects of preparing for and maintaining compliance in the post-*Chevron* world.

FOOTNOTES

[1] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[2] *See, e.g.*, Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024) (expanding statute of limitations for parties to challenge federal administrative actions under the Administrative Procedure Act).

[3] *See, e.g.*, Josh Eidelson, *Trader Joe's Follows SpaceX in Arguing US Labor Board Is Unconstitutional*, BLOOMBERG L. (Jan. 26, 2024), https://www.bloomberg.com/news/articles/2024-01-26/trader-joe-s-follows-spacex-in-arguing-nlrb-is-unconstitutional; Noam Scheiber, Amazon Argues Labor Board Is Unconstitutional, N.Y. TIMES (Feb. 15, 2024), https://www.nytimes.com/2024/02/15/business/economy/amazon-labor-nlrb.html.

[4] Cemex Constr. Materials Pac., LLC, 372 NLRB No. 130 (2023).

[5] Joy Silk Mills, Inc., 85 NLRB 1263 (1949).

[6] NLRB v. Gissel Packing Corp., 395 U.S. 575 (1969).

[7] *See, e.g.*, Np Red Rock LLC, 373 NLRB No. 67 (June 17, 2024).

[8] Tesla, Inc. v. NLRB, 86 F.4th 640, 647 (5th Cir. 2023) ("[W]e do not give deference to the NLRB's interpretation of Supreme Court rulings.").

[9] Hosp. de la Concepcion v. NLRB, 106 F.4th 69, 76 (D.C. Cir. 2024).

[10] 185 NLRB 107 (1970).

[11] 372 NLRB No. 22 (Dec. 13, 2022).

[12] *See, e.g.*, John Fry, *Tracking Attacks on the NLRB: Amazon Invokes the Major Questions Doctrine*, ONLABOR (Feb. 19, 2024), https://onlabor.org/tracking-attacks-on-the-nlrb-amazon-invokes-the-major-questions-doctrine/.

[13] *See* Robert Iafolla, *Labor Board Sees Another Texas Judge Freeze Enforcement Case*, BLOOMBERG L. (Sept. 17, 2024), https://news.bloomberglaw.com/daily-labor-report/labor-board-sees-another-texas-judge-freeze-enforcement-case.

[14] *See* Rebecca Rainey, *Perdue Attacks DOL Judge System, Adding to Post-Jarkesy Lawsuits*, BLOOMBERG L.

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(Aug, 20, 2024), https://news.bloomberglaw.com/daily-labor-report/perdue-attacks-dol-judge-system-adding-to-post-jarkesy-lawsuits; Rebecca Rainey & Rebecca Klar, *In-House Judges Jeopardized in New DOL Contractor Watchdog Suit*, BLOOMBERG L. (Sept. 26, 2024), https://news.bloomberglaw.com/daily-labor-report/in-house-judges-jeopardized-in-new-dol-contractor-watchdog-suit.

[15] Starbucks Corp. v. McKinney, 144 S. Ct. 1570 (2024).

[16] *See* Rebecca Rainey & Robert Iafolla, *Punching In: NLRB Backs Off Potent Tool, Overtime's Ill Effects*, BLOOMBERG L. (Sept.16, 2024) https://news.bloomberglaw.com/daily-labor-report/punching-in-nlrb-backs-off-potent-tool-overtimes-ill-effects-28; *see also* NLRB Memorandum GC 21-05 (Aug. 19, 2021).

[17] Rest. L. Ctr. v. U.S. Dep't of Lab., No. 23-50562, 2024 WL 3911308, at *4 (5th Cir. Aug. 23, 2024).

[18] *See, e.g.*, Max Kutner, *5th Circ. Strikes Down DOL Tip Rule*, LAW360 (Aug. 23, 2024) https://www.law360.com/articles/1873183/5th-circ-strikes-down-dol-tip-rule.

[19] *Rest. L.* Ctr., 2024 WL 3911308, at *10.

[20] Utah v. Su, 109 F.4th 313, 317–18 (5th Cir. 2024).

[21] *See* Ben Miller, *Texas Court to Rehear ESG 401(k) Rule Challenge Post-Chevron (1)*, BLOOMBERG L. (July 18, 2024), https://news.bloomberglaw.com/daily-labor-report/texas-court-to-revisit-esg-401k-investment-rule-post-chevron.

[22] *See* Rebecca Rainey, *Biden's Overtime Rule Faces Trouble Despite Fifth Circuit Nod*, BLOOMBERG L. (Sept. 13, 2024), https://news.bloomberglaw.com/daily-labor-report/bidens-overtime-rule-faces-trouble-despite-fifth-circuit-nod.

[23] *See* Mayfield v. U.S. Dep't of Lab., No. 23-50724, 2024 WL 4142760 (5th Cir. Sept. 11, 2024).

[24] *Id.* at *1.

[25] Brief of U.S. Chamber of Com., U.S. Chamber of Com. v. OSHA, 6:24-cv-00271-ADA-DTG (W.D. Tex. Aug. 28, 2024), at 7.

[26] Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (holding California labor regulation permitting union organizers to enter employer property was a per se taking under the Fifth Amendment).

[27] Ryan, LLC v. FTC, No. 3:24-CV-00986-E, 2024 WL 3879954, at *13 (N.D. Tex. Aug. 20, 2024).

[28] *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023) (invaliding the US Department of Education's student debt forgiveness program under the major questions doctrine).

[29] Louisiana v. EEOC, No. 2:24-cv-00629, 2024 WL 206849, at *11 (W.D. La. June 17, 2024) (citation omitted).

[30] *Id*. at *12.

[31] *See, e.g.*, *Hosp. de la Concepcion*, 106 F.4th at 76.

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