After Chevron: Various Paths For Labor And Employment Law

By **Alexander MacDonald** (July 3, 2024)

On June 28, the U.S. Supreme Court overturned a decades-old precedent, known as Chevron deference, that favored federal agencies' rulemaking interpretations. In this Expert Analysis series, attorneys discuss the decision's likely impact on rulemaking across the federal government.

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In Loper Bright Enterprises v. Raimondo, the U.S. Supreme Court held that federal judges cannot defer to administrative agencies on questions of law.[1] While ostensibly about administrative law, the decision will ripple through many other areas of law — including labor and employment law.

Today, labor and employment law leans heavily on guidance from agencies, including the U.S. Department of Labor, the U.S. Equal Employment Opportunity Commission and the National Labor Relations Board. It is basically a subset of administrative law. And like other kinds of administrative law, after Loper, it will have to change.

But how much it will change remains to be seen. It might suffer only short-term spasms, as agencies and judges initially react to Loper and then fall back into familiar habits. But it might also transform into something new.

It could become less a body of agency-made regulation and more one of judge-made law. It might also create workplace policy through new channels, including strategic litigation, informal guidance and state-level regulation.

All these paths remain open. And whatever path the law takes, agencies will doubtless continue to help shape the law of work.

How did agency deference affect labor and employment law before Loper?

At bottom, agency deference is about who decides what a statute means. Until Loper, the answer was usually a federal agency.

Agencies are sometimes instructed to administer labor and employment statutes, like the National Labor Relations Act and the Fair Labor Standards Act. And because many of those statutes were written long ago — some in the 1930s — it isn't always clear how they should apply in today's workplace. So agencies often have to expand and specify the statutes' language through official interpretations.

Those interpretations got a boost in 1984, when the Supreme Court decided Chevron USA Inc. v. Natural Resources Defense Council.[2] Chevron told lower courts that they should defer to an agency's interpretation of a statute when (1) the statute is ambiguous, and (2) the interpretation is reasonable. Those concepts were themselves sometimes hard to define; "ambiguity" and "reasonableness" can be in the eye of the beholder. But in most cases, agencies could expect to get some deference.

That deference applied as much to labor and employment agencies as to any other. And the agencies came to rely on it heavily.

Until last week, the DOL was one of Chevron's most frequent customers. The DOL regulates a kaleidoscope of subjects ranging from mine safety to agricultural visas. And for many of these subjects, it relied explicitly on Chevron deference.[3]

So too did the EEOC[4] and the Occupational Safety and Health Administration.[5] Even the NLRB relied on judicial deference to defend its decisions in court, albeit under a different line of cases.[6]

They all had become used to judicial deference in some form or another. And to varying degrees, they wrote their rules expecting to get it.

What will change after Loper?

That expectation was scrambled last week. In Loper, the Supreme Court threw out the Chevron framework. It held that courts should not — indeed, cannot — defer to agency interpretations of law. Instead, courts must exercise their "independent judgment" and give a statute its "best meaning."

That new approach will affect labor and employment law immediately. Under the Biden administration, labor and employment agencies have been active rule-makers. In just the last 12 months, they have published major rules on overtime,[7] worker classification,[8] joint employment,[9] pregnancy accommodations,[10] prevailing wages and noncompete agreements.[11] Those rules have all been challenged in court, and the lawsuits are still pending.

And now, under Loper, the agencies will no longer be able to defend their rules as "reasonable" interpretations. Instead, they will have to convince courts that their rules are not only permissible interpretations, but the best ones.

That task could be easier in some cases than in others. In Loper, the court recognized that sometimes, the best interpretation of a statute is that the agency has discretion. That is, the statute might explicitly assign some decision to the agency, which gives the agency space to develop policy.

And at least two of the administration's new rules seem to fall in that policymaking space.

First, the DOL recently published a rule raising salary levels for the FLSA's executive, administrative and professional exemptions. And the FLSA itself says that those exemptions will be "defined and delimited" by the DOL.[12]

Second, the DOL published a rule changing how to calculate prevailing wages under the Davis-Bacon Act. And the Davis-Bacon Act says that the DOL will determine those wages. Both rules, then, seem to fall within Loper's policymaking scenario.[13]

But that doesn't mean the rules are safe. Loper also explained that even when a statute delegates a decision to an agency, courts still have to make sure the agency stays within its delegated zone. That is, courts still have to interpret the statute, fix the outer bounds and keep the agency in its lane.

Plus, both the FLSA and Davis-Bacon Act rules are being challenged in ongoing lawsuits.[14]

The question in those lawsuits will be whether the DOL exceeded its delegated authority. So they could offer an early test of how broad Loper's policymaking exception goes.

Whatever the fate of those two rules, other recent rules may face an even dimer future. For example, the Federal Trade Commission was already facing an uphill battle to defend its new noncompete rule. The rule bans noncompete agreements as an "unfair method of competition."

Observers have debated whether the FTC has the authority to adopt the rule at all.[15] But even if the agency does have the basic authority to adopt rules, it must now convince a court that the noncompete rule is the best interpretation of the FTC Act. And since noncompetes have been considered legal since the act was passed — in fact, for centuries before that[16] — the FTC may face a skeptical judicial audience.

Challenges like that one may force agencies to rethink their strategies going forward. Even under the old, deferential approach, agencies were struggling to make their rules stick. Almost every recent labor and employment rule has been challenged, and many have been struck down.

Since 2016, courts have blocked rules on labor persuaders,[17] joint employment,[18] mask mandates,[19] worker classification[20] and minimum salaries[21] for the FLSA's white collar exemptions (twice).[22] Rulemaking was fraught with risk even before Loper, and it will be only more so now.

No one wants to write a rule that will be blocked in court. So agencies may have to change their approach. They may regulate less often and more modestly. Rather than taking big policy swings, they may instead nibble around the edges.

What is left of agency policymaking in the workplace?

But that doesn't mean agencies will be complacent. They will still face the same economic, social and political pressures to change policy. So agencies will still have incentives to update and change their rules. They will just have to find other ways to do it.

One way might be to use more informal guidance. Loper said that courts can no longer treat agency interpretations as binding. But it said nothing about nonbinding interpretations. And federal labor and employment agencies use nonbinding guidance all the time.

For example, the DOL often issues nonbinding, informal guidance in the form of bulletins,[23] opinion letters[24] and administrator's interpretations.[25] These documents are not binding in any formal sense; they do not purport to change the law. But even so, they do affect employers' behavior.

No employer wants to end up on the wrong end of a DOL audit or lawsuit. So employers watch what the DOL says. And as a result, the DOL can shape employers' behavior even if it can't change the law.

Another policy avenue might run through states. For all its sweeping language, Loper affected only federal agencies. It said nothing about agencies in states, cities or other municipalities. Those bodies have their own structural principles about who can make binding rules. And in recent years, state and city agencies have become increasingly active rule-makers.

For example, in California, the Civil Rights Council has proposed sweeping regulations to expand state anti-discrimination law to cover the developers of certain "automated decisionmaking tools" (read: artificial intelligence).[26]

In Seattle, the Office of Labor Standards has collected rulemaking authority under 14 different city ordinances.[27]

And in New York City, the Department of Consumer and Worker Protection has effectively written its own minimum-pay standard for app-based delivery workers.[28]

Nothing in Loper affects these agencies' power. And with federal agencies more hemmed in, state agencies may see a chance to fill the gap.

There is also still a question about how wide that gap will be. Many commentators[29] — including me — have argued that formal deference rules,[30] while infinitely fascinating to admin law nerds, really don't matter.[31] What matters instead is social, policy and political salience.

If a judge comes into a case with strong views about the merits, she may find her way to the decision she thinks is right regardless of the formal standard of review. That process may not be conscious, but can make the difference. Some judges will make their decisions based on how they see the merits, regardless of the word formulas they use to get there.

Ultimately, what does Loper change for labor and employment law? Maybe it changes nothing. Agencies and judges might behave just as they did before, and we'll end up with basically the same rules. But maybe, Loper changes everything.

Agency rulemaking, which was already on the ropes, might be as good as dead. And if that's the case, labor and employment law might stop being a subspecies of administrative law. Instead, it might become a common law system of judicial interpretation — a common law for the new century. Only more time and much more litigation will tell.

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