Westlaw Today
powered by Reuters

The artificial intelligence angle: Loper Bright's impact on federal and state AI legislation, regulations, and guidance

By Bradford J. Kelley, Esq., and Maria-Jose Malaver-Reyes, Esq., Littler Mendelson PC*

SEPTEMBER 18, 2024

- The Supreme Court's decision in *Loper Bright* may serve to limit federal agencies' guidance on an employer's use of AI in the workplace.
- State and local laws and regulations governing AI, on the other hand, may proliferate.
- Whether federal agencies will rely on more formal rulemaking processes or on less-formal guidance documents as they respond to *Loper Bright* remains uncertain.

This summer, the Supreme Court made waves (https://bit.ly/3XHVeLG) with its decision in *Loper Bright Enterprises v. Raimondo*.[1] Decided on June 28, 2024, the case overturned *Chevron* deference, a decades-long cornerstone of administrative law. *Loper Bright* held that judges cannot defer to an agency's interpretation of law simply because it is "reasonable."

Loper Bright cautions courts against deferring to agencies' views about the scope of their authority based on agencies' "subject matter expertise regarding the statutes they administer" and ability to engage in political "policymaking." Instead, federal judges are to exercise "independent judgment" and give statutes their "best meaning."

Under this standard, judges will be more skeptical of agency interpretations, especially if there is inconsistency. They may consider agency guidance if it is persuasive, longstanding, and consistent, but the guidance is not binding.

The *Loper Bright* decision will undoubtedly affect employers. For example, federal labor and employment agencies tasked with enforcing anti-discrimination, labor, wage and hour, and occupational health and safety statutes, all previously relied on judicial deference in adopting and defending regulations and rules that often shifted when agency leadership changed with new presidential administrations.

Federal agencies regulating the workplace also rely on their own guidance documents to announce how they will interpret the laws they enforce. In recent years, and in the absence of congressional legislation on artificial intelligence (AI) in the workplace, the U.S. Equal Employment Opportunity Commission (EEOC, https://www.eeoc.gov/ai), National Labor Relations Board (NLRB, https://bit.ly/3XLulXq), and the U.S. Department of Labor (DOL, https://bit.ly/4enAoXC) have announced various initiatives to restrict the use of AI in the workplace.

As discussed in Littler's 2024 Annual Employer Survey Report (https://bit.ly/3ZiuwdQ), the rapidly proliferating federal and state legislation and regulation in the AI arena is already posing compliance challenges for employers. AI technology constantly evolves, necessitating regulatory flexibility.

The EEOC has not issued any guidance on generative AI tools even though generative AI tools are frequently used in today's workplace.

Post-*Loper Bright*, while compliance with the law is still a priority, agency rules will be much easier for employers to challenge, particularly if the rules stray from statutory text or flip-flop from one administration to the next.

How will *Loper Bright* impact federal administration of AI statutes, regulations, and guidance?

Federal agencies may rely increasingly on guidance documents following *Loper Bright*, though this guidance generally lacks the force of law. Agencies may do so because these guidance documents carry less risk of court challenges than adopting formal rules.

But from the perspective of the courts, without the requirement to defer to agency interpretations, regardless of whether the interpretation is in a guidance document or in a formal rule, judges will certainly be more skeptical of any agency interpretations.

Loper Bright establishes that, in balancing the equities or determining the public interest, federal agencies do not get a

proverbial "thumb on the scale" in favor of their own evaluation of their statutory mission.

There are several reasons courts would decline to defer to the EEOC's AI guidance.

First, the EEOC has issued no AI-related guidance in over a year even though AI continues to rapidly develop. The EEOC has not issued any guidance on generative AI tools even though generative AI tools are frequently used in today's workplace.

Second, none of the guidance that has been issued was voted on by the full Commission.

Third, the EEOC's AI guidance has not been through the administrative law process involving notice and comment. In other words, the guidance does not reflect any public input. This is a common theme among federal labor and employment agencies when issuing AI guidance.

For instance, DOL's Wage and Hour Division issued a field assistance bulletin (https://bit.ly/3XFhpC6) on AI earlier this year that failed to cite any resources the agency relied upon in making its assertions about how employers are using AI.

Fourth, the EEOC has not held any public hearings on AI since January of 2023, and that one non-technical public hearing failed to include any AI vendors that are actually involved with the development of AI tools. Fifth, the EEOC is hardly neutral when issuing guidance or filing amicus briefs. The EEOC rarely (almost never) files amicus briefs in support of employers.

Finally, and significantly, Congress has not issued any legislation expressly delegating AI regulation authority to the EEOC — or the DOL or NLRB, for that matter — thus potentially opening up any rulemaking or other guidance to attack as beyond the scope of the agency's authority.

Ultimately, these reasons may help explain why recent a federal district court opinion did not cite to or even acknowledge an EEOC amicus brief filed in an employment discrimination case involving AI allegations.

The fact that the court completely ignored the EEOC's amicus brief may signal courts are already less inclined to defer to agency interpretations, even in cases involving complex and technical issues like AI. This approach would further undermine agency ability to influence how AI regulations are interpreted and applied in the employment law context.

Will *Loper Bright* impact state administration of AI statutes, regulations, and guidance differently?

While *Loper Bright* appears to already be shaping the landscape of AI regulation and guidance at the federal level, states are not bound by the Supreme Court's ruling that judges may not defer to agency interpretations as if they are binding law.

Instead, some states have their own formulations of agency deference, codified in their administrative law or established by state judicial decisions, requiring state courts to continue deferring to agency interpretations of ambiguous statutes.

State agencies may therefore be more empowered than federal agencies to continue to regulate the field of AI. So far, most AI regulatory action has been on the state level, and these new laws and guidance documents from states will likely continue to proliferate.

Colorado's recently enacted consumer protections for artificial intelligence law: A case study

Colorado's newly enacted AI law (https://bit.ly/3TpxJEA) seeks to establish comprehensive regulations governing the use of AI, with a particular focus on transparency, accountability, and fairness.[2] The law (https://bit.ly/4dlVZih) requires companies to conduct impact assessments and implement safeguards to prevent bias and discrimination in AI systems, effective February 1, 2026.

As of 2021, Colorado courts explicitly do not defer to agency interpretations. Notably, the Colorado Supreme Court declined to defer to a state agency's interpretation of a statute in *Nieto v. Clark's Market, Inc.*,[3] stating instead it would consider agency interpretations to be "further persuasive evidence" for Colorado courts to factor into their determinations.

Therefore, although the AI law directs the state attorney general to promulgate rules to implement and enforce the law, and other Colorado state agencies could issue related guidance and regulations, there will be no expectation that Colorado state courts will defer to the agencies' interpretations of those rules.

The potential for differing interpretations between state and federal courts raises important questions about the future of AI regulation in the United States. Employers operating in multiple states may face conflicting requirements, making compliance even more challenging than it already is.

Employers may also be subject to varying legal standards where an individual seeks redress for purported AI-related injuries, depending on whether the case is heard in state or federal court.

Conclusion

As the legal landscape for AI regulation continues to evolve, both federal and state agencies regulating the workplace will need to adapt to the new reality following *Loper Bright*. It remains to be seen whether federal agencies will rely more on formal rulemaking processes or on less formal guidance documents, as they respond to *Loper Bright*. The burden will also land on Congress to legislate more clearly in all areas of the law, including AI.

States will continue to create their own AI regulations. The level of deference given to state agencies by state courts will depend on state judicial decisions regarding the reference the states' courts should give to state agency interpretations, or whether the state has codified agency deference in its administrative law.

The Colorado AI law serves as an example of states without agency deference continuing to legislate and implement regulations to enforce those laws.

For employers navigating this varied landscape, it is important to remain informed about both federal and state regulations. Legal

strategies will need to be tailored to the specific jurisdiction in question, and companies may need to implement more robust compliance measures to account for the varying standards that will emerge.

Notes:

[1] 144 S. Ct. 244 (2024).

[2] C.R.S. § 6-1-1701, et seq.

[3] 2021 CO 48, ¶¶ 38-39.

About the authors

Bradford J. Kelley (L) is a shareholder in **Littler Mendelson PC**'s Washington, D.C., office, where he advises clients on employment anti-discrimination matters and emerging technologies, including artificial intelligence, and their impact in the workplace. Previously, he was a senior official at the Equal Employment Opportunity Commission and the Labor Department's Wage and Hour Division. He can be reached at bkelley@littler.com. **Maria-Jose Malaver-Reyes** (R) is an associate in the firm's Denver office, where she represents and counsels clients on labor and employment matters. She can be reached at mmalaverreyes@littler.com. This article was originally published Sept. 4, 2024, on the firm's website. Republished with permission.

This article was published on Westlaw Today on September 18, 2024.