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# EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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## WHAT IS THE PRACTICAL EFFECT OF THE SUPREME COURT OVERRULING CHEVRON DOCTRINE DEFERRING TO AGENCY INTERPRETATIONS?

In the 6-3 decision of the Supreme Court in *Loper Bright Enterprises v. Raimondo* (6/28/24), the Court stated that the *Chevron* decision improperly transferred the power to interpret the law from the judiciary to federal agencies. "*Chevron* was a judicial invention that required judges to disregard their statutory duties," Chief Justice John Roberts wrote. He said judges "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."

This result should not come as a shock, as the courts have been signaling for years that the *Chevron* Doctrine would likely be changed. As a result, the Chevron approach faced increased decline as judicial precedent, particularly given the increased reliance on the Major Questions Doctrine suggesting that agencies can only regulate issues of "vast economic and political significance" if Congress clearly and explicitly delegated that power, and the Non-Delegation Doctrine which addresses whether Congress can delegate power to other branches of government. Further, not every administrative action case resulted in a *Chevron* analysis, as *Chevron* only applied when an agency interpreted an ambiguous or silent statute, and even then in limited circumstances. The doctrine did not apply when Congress expressly delegated an issue to an agency, where an agency's interpretation was an informal, non-binding guidance, or where the agency was interpreting its own regulations.

The Supreme Court announced that this ruling would "not call into question prior cases that relied on the *Chevron* framework." While the meaning of this limitation is not entirely clear, it suggests that the overruling of the *Chevron* Doctrine will not be used to retroactively challenge prior judicial resolutions of the issues. Agencies will also still be allowed to issue guidance interpretations even though they will not be binding. The opinion stated at several places that judges could still defer to an agency's interpretation of a statute if they find it persuasive under another doctrine known as the Skidmore Doctrine, which suggests judges consider a federal agency's interpretation when deciding what a statute or term means.

### Effects on Labor & Employment Law

There are significant effects of this case on labor and employment law. Over the last year, the Biden Administration published major rules on overtime, worker classification, joint employment, pregnancy accommodation, prevailing wages, and non-compete agreements. In a couple of these new rules, like white-collar exemptions from overtime, and the Davis-Bacon prevailing wage rules, slightly different issues will arise since the Department of Labor (DOL)

was delegated a certain amount of discretion in those areas, but the decision will still encourage courts to make sure the DOL does not exceed its delegated authority. The *Chevron* ruling in unlikely to affect decisions at the National Labor Relations Board (NLRB), however, as the Supreme Court deferred to the Board's interpretation of federal labor law under a different line of cases long before the 1981 *Chevron* decision.

## COURT ISSUES INJUNCTION AGAINST FTC'S NON-COMPETE BAN

On July 3, 2024, a federal judge in Texas issued an injunction preventing the Federal Trade Commission (FTC) from enforcing its rule banning non-compete agreements, preventing the rule from taking effect in September while the court considers if the FTC has authority to issue the rule. The judge stated: "The court concludes the text and the structure of the FTC Act reveal the FTC lacks substantive rulemaking authority with respect to unfair methods of competition. The court concludes the Commission has exceeded its statutory authority in promulgating the non-compete rule, and thus plaintiffs are likely to succeed on the merits."

Editor's Note: It should be noted that the preliminary injunction does not apply to all employers, but only the parties to the case. Although there is no nationwide preliminary injunction, the court sends a strong message that the FTC rule is unlikely to be upheld in court. This result was anticipated by the FTC's Republican Commissioners, who voted against the rule, arguing in dissenting statements that the ban exceeds the agency's authority and shows an effort by the "administrative state" to make new law without Congressional approval.

## NLRB ADMINISTRATIVE LAW JUDGE RULES AGAINST NON-COMPETE AND SOLICITATION CLAUSES UNDER LABOR ACT

On June 13, 2024, an NLRB administrative law judge ruled that J.O. Mory, Inc. violated the National Labor Relations Act by maintaining unlawful non-compete and solicitation policies. The judge explained that the non-compete agreement would cause a reasonable employee to refrain from engaging in protected activities because if an employee knows they are barred from being involved with a company that operates a similar business to the employer, they will be more fearful of being fired and less willing to rock the boat, as they face the prospect of being unable to find any work in their geographic area if they are fired or forced to leave their job. The provisions prohibiting employees from soliciting their co-workers to leave the employer and requiring that employees disclose solicitations to the employer also interfere with protected activities, like telling co-workers about union benefits, participating in and recruiting others to work at another employer in an effort to unionize, and making concerted threats to quit. The judge ordered the employer to cease and desist from enforcing the unlawful activity and offer reinstatement to the unlawfully terminated employees, making them whole for loss of earnings and financial harm suffered.

Editor's Note: The NLRB General Counsel has been advocating this type result, but this is the first NLRB ruling on the subject, although it comes from an administrative law judge rather than the Board itself. The NLRB issued a press release on this case, suggesting its importance to the Board. It should be noted that the case was analyzed under the concept of overbroad policies, but an employer will find difficulty drafting more narrow rules to comply with this doctrine. The full Board will undoubtedly review this case, but the current makeup of the Board seems to support almost any doctrine that favors union organizing.

## OSHA RELEASES FIRST-EVER HEAT RULE

On July 2, 2024, the Occupational Safety and Health Administration (OSHA) published its Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings proposed rule. The rule is quite broad in protecting workers from extreme heat. It would not apply to "sedentary" or remote workers, emergency response workers, or employees at indoor job sites where temperatures are kept below 80º Fahrenheit. The rule must go through a notice and comment period, but OSHA indicates it will continue to hold employers accountable for violations of the General Duty Clause implicated by heat-related injuries and illnesses.

The proposal would set the trigger temperature at 80º, and employers would likely need to distribute at least one quart of cool water per hour to each worker and provide cool break areas. If the index reaches 90º or more, an acclimatization program would be necessary to ease new or returning employees into working in hot conditions. For conditions likely to reach the 80º trigger, employers would need to implement a heat injury and illness prevention plan, which requires employee involvement and must be in writing for employers with 11 or more workers. For both indoor and outdoor workers in temperatures of 90º and higher, employers would have to allow employees to take at least one 15-minute paid rest break every two hours. Employers would need to monitor workers for signs of heat stress by assigning a supervisor to be an observer, or establishing a buddy system for workers to watch out for each other.

## TEXAS COURT BLOCKS DOL SALARY LEVEL RULE FOR EXEMPT EMPLOYEES, BUT ONLY ENJOINS IT AS TO STATE OF TEXAS EMPLOYEES

A federal judge in Texas has ruled that the Department of Labor (DOL) likely exceeded its authority in implementing its final rule raising the minimum salary level for "white collar" exemptions. *State of Texas v. U.S. Dep't. of Labor*, E.D. Tex. (6/28/24). The court, however, refused to issue a nationwide injunction, so the new salary rule goes into effect elsewhere. Many other cases are pending on the same issue.

Editor's Note: It should be noted that this decision is the first to apply the Supreme Court ruling in *Loper Bright Enters. v. Raimondo*, which overruled the *Chevron* Doctrine of deference to federal agencies.

## UNION MOMENTUM IN SOUTHERN ORGANIZING CHILLED BY MERCEDES VOTE

Unions have been on a "roll" in recent months, seemingly winning big strikes and major organizing campaigns. The United Auto Workers (UAW) is one of the leaders of this momentum, winning a major strike against the "Big Three" automakers and winning a union vote at Volkswagen in Chattanooga, Tennessee recently. Most predicted this momentum would continue in an election held at the Mercedes-Benz plant in Vance, Alabama, but the workers there voted to remain union-free by almost 60% of the vote. The UAW has also suffered some other recent setbacks, as workers at a Nissan facility in New Jersey voted to decertify the union. Union President Shawn Fain is under investigation by a monitor appointed by a federal court as a follow up to multi-year corruption scandal in the union which saw several of its officers go to jail. Fain personally is being investigated for favoritism to his fiancé.

Editor's Note: As expected, the UAW claimed the election at Mercedes was unfair, which unions always do when they lose. They are seeking support from their friends at the NLRB. It has also been revealed that Virginia Foxx, Chairwoman of the House Education and Workforce Committee, is looking into talks between a senior White House official and Germany about the union election at the Mercedes plants in Alabama. Allegedly, U.S. National Security Advisor Jake Sullivan prodded Germany to investigate allegations of union suppression at the plant, at the behest of UAW President Fain. Foxx wrote Sullivan, "It also suggests the UAW sought to use your influence in the White House's bully pulpit to impact the union representation election." The UAW has become very important to the Biden Administration in delivering its working-class members in Midwestern swing states.

## SUPPLEMENT - CHILD LABOR

This is an update on the situation involving a child labor issue at a poultry plant in Alabama. There was a "raid" with a civil search warrant on May 1, 2024, by the Department of Labor (DOL). The DOL investigators claimed to have uncovered a number of minor children working in violation of the child labor laws and claimed the company was liable for these minor children under a strict liability test without regard to the knowledge of the employer. The DOL sued seeking the "hot goods" remedy of shutting down the 1,000-person facility for 30 days and seeking disgorgement of profits as part of the remedy in its application for a temporary restraining order and preliminary injunction. The customers of the facility were also contacted by the DOL both by telephone and by letter, urging them not to ship the products received from the facility.

Hearings were held before Judge Coogler, Northern District of Alabama, on May 14-15, 2024, and Wimberly & Lawson defended the case. There is a ruling from Judge Coogler dated July 2, 2024, totally rejecting all of the claims and ruling for the company. The ruling can be summarized as follows.

1. It is clear that the DOL cannot establish a substantial likelihood of success because Plaintiff cannot establish that the company acted with the requisite scienter, rejecting Plaintiff's argument that the FLSA imposes strict liability for child labor violations.

2. Plaintiff presented no evidence that Defendant knowingly employed any person under 18 years old.

3. Defendant attempted to verify the information supplied through the E-Verify system, and rejecting this documentation could have exposed Defendant to liability for discrimination under the Immigration Reform and Control Act.

4. To the extent Plaintiff argues that Defendant had reason to know that it was employing minors based on the workers' "appearance and mannerisms," the court disagreed, stating that the proposed test would unfairly affect those individuals' employment opportunities, essentially discriminating against those individuals on the basis of appearance.

5. The judge significantly ruled that of the five alleged minors that the investigation discovered working at the Jasper plant during the execution of the search warrant, none of them were working in prohibited jobs as defined by the applicable regulations. The judge found that the DOL's interpretation of the regulations is contrary to their plain text.

6. In addition to not establishing a substantial likelihood of success on the merits, Plaintiff did not establish that the threatened injury to commerce outweighed the harm that would be inflicted on Defendant, or that granting relief would not be adverse to the public interest. The evidence presented demonstrated that the requested 30-day stay of the hot goods injunction would have resulted in $63 million in economic damages to the company, and in addition, millions of pounds of chicken carcasses would have been placed in landfills, and the amount of economic and fiscal waste would simply have been astronomical. The situation would have even created a shortage of chicken on the market, leading to a drastic price increase in an already inflation-ridden economy.

7. The requested "disgorgement" remedy that Plaintiff sought, would have inflicted unjustifiable harm. Taking profit without a full and fair hearing following discovery would have violated due process.

This ruling is about as strong as one ever sees. Larry Stine did a great job in defending the case. We believe this is a great victory for not only the company, but for the industry in general. The DOL has also been exposed in its inadequate investigations and draconian remedies in the absence of proof. DOL also misinterprets the applicable statutes, as indicated in the ruling. I thought you would want to know all of this information.

The company has also filed a counterclaim against DOL under the Federal Tort Claims Act for intentional interference of the relationship between the company and its customers. It alleges that DOL wrongfully and intentionally telephoned customers and wrongfully and intentionally sent letters to customers asserting that the company violated child labor laws before completing an investigation or assessing penalties and before giving the company the opportunity to have a hearing on the alleged violation, and before obtaining an injunction restraining violation of child labor laws. All the actions were particularly wrongful since the judge ruled that the company had not violated the law in any way.

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