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Supreme Court's 2024 term could transform labor and employment law

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- The Supreme Court issued four decisions narrowing agencies' power to make policy through formal rulemaking and adjudication.
- In the short term, these decisions could make it harder for agencies to defend major rules on overtime, joint employment, prevailing wages, pregnancy accommodation and noncompete agreements.
- In the long run, the decisions could push agencies to make policy in other ways, such as strategic lawsuits and informal guidance.

At the end of its 2024 term, the U.S. Supreme Court handed down four decisions limiting the power of federal agencies. While none of those decisions involved a labor and employment agency, all of them could transform labor and employment law.

The decisions will make it harder for labor and employment agencies to make policy with formal rules or adjudication. The decisions could also invite challenges to some agencies' basic structures.

These developments could force federal agencies to find new ways to make policy. Agencies may file more strategic lawsuits, use more informal guidance, and push more policy decisions to the states. But agencies might also push forward with traditional rulemaking, setting up more challenges in court. Here's what to watch for.

How did the Supreme Court narrow agency power?

The biggest decision came in *Loper Bright Enterprises v. Raimondo*,[1] where the Supreme Court held that judges cannot defer to an agency's interpretation of the law. Instead, judges must exercise their "independent judgment" and give statutes their "best meaning."

Judges can still consider agency guidance when that guidance is persuasive, longstanding, and consistent. But they cannot treat that guidance as "binding"; they must interpret statutes for themselves.

Next, in *Securities and Exchange Commission v. Jarkesy*,[2] the Supreme Court narrowed the range of penalties that agencies can impose through their own adjudicative processes. Many agencies, including the SEC, enforce statutes through in-house quasi-courts staffed by administrative law judges.

These "ALJs" are not "real" judges under the U.S. Constitution, with lifetime appointments; instead, they are agency employees with some statutory removal protection. They decide cases using administrative procedures and without a jury. In *Jarkesy*, the Court noted that SEC ALJs have used purely administrative processes to impose, among other things, civil penalties.

And because civil penalties are a "legal" remedy, they could have been tried in front of a jury at common law. The Seventh Amendment[3] of the Constitution guarantees that all "suits at common law" can be tried to a jury. The Court therefore concluded that the SEC's in-house process was unconstitutional.

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Third, the Court signaled that judges should demand better explanations from agencies during the rulemaking process. In *Ohio v. Environmental Protection Agency*,[4] it struck down the EPA's "good neighbor" plan under the Clean Air Act because the agency "ignored" important problems raised during the public-comment period.

The Court explained that agencies cannot ignore major issues raised by commentors. They must at least acknowledge the issues and explain why they chose not to adjust their rules in response. If an agency overlooks or "side steps" a major problem, the Court said, the final rule is "arbitrary and capricious" and cannot be enforced.

Finally, in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[5] the Court expanded the window for rulemaking challenges. The question in *Corner Post* was when a plaintiff can sue to challenge a rule under the Administrative Procedure Act (APA).

The APA has a six-year statute of limitations, which means companies or individuals have six years to file a lawsuit. In *Corner Post*, the Court held that the six-year period starts running only when the challenger is injured by the rule. That means a challenger can potentially sue to block a rule that has been on the books for many years.

How do these decisions affect labor and employment law?

Though none of these decisions involved labor and employment law, all of them will affect labor and employment agencies.

Agencies like the Department of Labor (DOL), the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), and the Occupational Health and Safety Administration (OSHA) will face new constraints on their discretion. They will have to find new ways to develop policy. They may even face new attacks on their basic structures.

To start, agencies will have a harder time making rules. Until *Loper Bright*, federal labor and employment agencies were used to deference from courts. For example, the DOL writes rules on a kaleidoscope of subjects, ranging from mine safety to temporary work visas. And it often defends those rules by asking courts to defer to its judgment.

Similarly, the EEOC and OSHA have often asked for deference when interpreting their own statutes and written binding rules. Even the NLRB asks courts to defer to its administrative orders, which are tools it uses to interpret the law.

Now, however, the agencies can no longer expect to go into court with a leg up. Instead of defending their rules as "reasonable" interpretations of a statute, they will have to defend their rules as the "best" interpretations. And they will be on equal footing with parties trying to challenge the rules. Those parties will offer their own interpretations of the statute, and it will be up to a court to decide which interpretation is best.

That shift could affect some rules immediately. Under the Biden administration, labor and employment agencies have been active rule makers. In the last 12 months, they have published major rules on overtime,[6] worker classification,[7] joint employment,[8] pregnancy accommodations,[9] prevailing wages,[10] and noncompete agreements.[11]

Those rules have all been challenged in court, and the lawsuits are still pending. In each, the challengers claim that the agency misread the underlying statute. Each case will offer an early test of how the balance has shifted. The results could lead agencies to make fewer major rules.

Agencies will also have fewer options to enforce existing rules. Under *Jarkesy*, agencies cannot collect civil fines — or any other "punitive" remedy — through their in-house processes. That result would affect about two-dozen agencies, including the DOL.

The DOL collects civil fines[12] through a variety of administrative programs, including its H-2B visa program. That program was already under attack[13] before *Jarkesy*, and it is likely to come under even heavier fire now.

Challenges to administrative remedies, however, could be the least of the agencies' problems. Though *Jarkesy* addressed only civil penalties, it left in place other parts of a much broader decision by the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit held[14] not only that the SEC's system violated the Seventh Amendment, but also that its administrative law judges had been invalidly appointed.

The court reasoned that because the judges were protected by two layers of "for cause" removal, they were too independent from the president's control. And that independence violated Article II[15] of the U.S. Constitution, which directs the president to "take care" that all federal laws are enforced.

Like the Supreme Court, the Fifth Circuit limited its decision to SEC ALJs. But its rationale could apply just as well to other ALJs, such as those at the DOL or NLRB. In fact, plaintiffs are already challenging those judges' status. By not addressing the issue, the Supreme Court kept these challenges alive.

The Supreme Court also suggested a third line of attack. In a lengthy concurrence, Justice Gorsuch suggested that the SEC's in-house system violated Article III[16] of the Constitution because it allowed administrative officials to adjudicate "private rights."

Article III gives all "judicial power" under the Constitution to federal courts. In Justice Gorsuch's view, judicial power is the power to resolve disputes involving core private rights, including life, liberty, and property. So only federal courts can adjudicate disputes involving those rights.

That rationale might apply equally to some labor and employment agencies, including the NLRB. Many NLRB cases involve balancing[17] statutory against property rights, so much of its activity could run[18] afoul of Justice Gorsuch's view of Article III. Justice Thomas has expressed similar views[19] in earlier cases. And plaintiffs are already picking up the argument.

How will labor and employment agencies react?

Whether these challenges succeed or not, agencies will likely have a harder time making policy through rulemaking and adjudication. That doesn't mean they'll be complacent. Facing the same economic, social, and political pressures to change policy, 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 Bright* said that courts can no longer treat agency interpretations as binding. But it said nothing about nonbinding interpretations. 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,[20] opinion letters,[21] and administrator's interpretations.[22] 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 Bright* 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[23] to expand state antidiscrimination law to cover the developers of certain "automated decisionmaking tools" (read: AI). In Seattle, the Office of Labor Standards has collected[24] rulemaking authority under 14 different city ordinances.

And in New York City, the Department of Consumer and Worker Protection has effectively written its own minimum-pay standard[25] for app-based delivery workers. Nothing in *Loper Bright* affects the power of these agencies. With federal agencies more hemmed in, state agencies may see a chance to fill the gap.

There is still a question about how wide that gap will be. Many commentators[26] have argued[27] that formal deference rules, while infinitely fascinating to admin-law nerds, really don't matter.[28] What matters instead is social, policy, and political salience.

If judges come into cases with strong views about the merits, they may find their way to the decision they think 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.

What should employers watch for?

The next few months will say a lot about where labor and employment policy goes. The NLRB, EEOC, DOL, and OSHA already face challenges to major rules. Those rules could prove harder to defend under the Court's recent decisions. And in the long term, these agencies will have to rethink their policymaking strategy.

Littler's WPI is following these developments closely and will report major updates. In the meantime, employers should work closely with their counsel to determine how these developments affect their businesses.

Notes:

[1] https://bit.ly/3XVhnqt

[2] https://bit.ly/4cznVj2

[3] https://bit.ly/3S2YA8Q

[4] https://bit.ly/3xH0s0c

[5] https://bit.ly/4f1T3Jm

[6] https://bit.ly/4bGCcsI

[7] https://bit.ly/3zDt6zP

[8] https://bit.ly/3Y1RSng

[9] https://bit.ly/46050eA

[10] https://bit.ly/3W2Mu0N

[11] https://bit.ly/3UUYyQU

[12] https://bit.ly/3zMm6QZ

[13] https://bit.ly/3xVWikZ

[14] https://bit.ly/4bzoDve

[15] https://bit.ly/4fd6lOb

[16] https://bit.ly/45YegQz

[17] https://bit.ly/3zBfiWD

[18] https://bit.ly/4cUignk

[19] https://bit.ly/4bEgQfC

[20] https://bit.ly/4bzDcis

[21] https://bit.ly/3XUmerT

[22] https://bit.ly/3xluosR

[23] https://bit.ly/468qkyD

[24] https://bit.ly/3Y57A1b

[25] https://on.nyc.gov/3XXeK7q

[26] https://bit.ly/3Lh43VQ

[27] https://bit.ly/4634koN

[28] https://bit.ly/4eSLhBL

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