Employers Await Supreme Court's Ruling on the Future of 'Chevron' Deference

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When Congress passes legislation, it frequently directs that one or more federal agencies promulgate regulations both implementing the law and filling in details Congress may have left unaddressed. When agencies promulgate these regulations, it often falls to federal courts to review whether those regulations are based upon an appropriate interpretation of the statutes Congress enacted. Inevitably, the executive and judicial branches of government will sometimes have differing interpretations of the language in these statutes. The U.S. Supreme Court considered this interplay of powers in its decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). There, the court announced a two-step framework that courts have since utilized to review an agency's statutory interpretation, an approach commonly called "Chevron deference." This analysis requires courts to first ask whether Congress directly and unambiguously addressed the question at issue. If Congress' intent is unclear because the statute is silent or ambiguous, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." If so, the court is to defer to the agency's interpretation, even if the court would have independently come to a different conclusion.

Chevron deference has frequently been challenged and critiqued since the court established the doctrine in 1984. In two pending cases, *Loper Bright Enterprises v. Raimondo* (No. 21-5166); and *Relentless v. Dep't of Commerce* (No. 22-1219), the Supreme Court will consider whether to significantly modify the doctrine, or even abandon it completely. In both cases, the court will squarely consider "[w]hether the court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Decisions are expected later this term.

Both *Loper* and *Relentless* concern the National Marine Fisheries Service's (NMFS) interpretation of the Magnuson-Stevens Act (MSA). The MSA does not specifically state that fishing vessel owners are financially responsible for the costs of federal inspection efforts. In February 2020, NMFS published an amendment to its rules establishing a process for "industry-funded monitoring" across New England fisheries. 85 Fed. Reg. 7,414 (Feb. 7, 2020). The practical result of this rule change was to require that federal observers be placed on board fishing vessels, with their salaries funded by fishery owners, estimated at $710 per day. Petitioners are fishery owners challenging this rule change and the imposition of responsibility for payment of the federal observers' salaries.

Petitioners in both cases urge the court to overrule *Chevron*, arguing it violates the duty of judicial review declared in *Marbury v. Madison* by permitting the executive branch to interpret laws, as well as the legislative function of Congress by permitting the executive branch to effectively write laws. Further, they argue that because of this deference to the executive branch, agency interpretations frequently change when there is a change in party control of the White House, affecting the composition of such agency's

leadership. Respondents reply that *Chevron* is a bedrock principle of administrative law, consistent with the Administrative Procedure Act (APA).

Oral argument in both cases was held on Jan. 17, and the justices seemed split. Justices Sonia Sotomayor and Elena Kagan expressed doubt about "mak[ing] an assumption that there is a best answer," stating, "I don't know how you can say there's a best answer when justices of this court routinely disagree and we routinely disagree at 5-4. Is the best answer simply a majority answer? I don't think so." On the other side, Justice Brett Kavanaugh commented that *Chevron* deference at times "ushers in shocks to the system every four or eight years when a new administration comes in."

Not surprisingly, given the potentially significant stakes, the court received numerous amicus briefs, including several from employer and industry groups advocating both sides of the issue. These amici debated the impact of *Chevron* deference, and its potential overruling, on the employment law sphere, raising broader issues concerning the separation of powers, to requirements imposed on faith-based employers, to the recent instability in rulings under the National Labor Relations Act (NLRA) and other employment laws.

Those amici in favor of overturning *Chevron* included the National Right to Work Legal Defense Foundation and the Christian Employers Alliance. These groups argued, among other things, that *Chevron* deference "requir[es] the judiciary to shirk its duty to say what the law is," "forces judges to uphold interpretations that they believe are wrong," and "cedes to agencies the authority this court has reserved to Congress: the ability to resolve the most highly contentious social and cultural 'decisions of vast economic and political significance.'"

The NLRA was a common theme among those amici advocating an abandonment of *Chevron* deference. A brief on behalf of the Coalition for a Democratic Workplace and seven other associations representing employers, although cast as "in support of neither party," argued that while the National Labor Relations Board's "case-by-case approach resembles the common law, the board does not adhere to the same stare decisis principles as do courts." Thus, "whenever a new [politically-appointed] board majority disagrees with a prior precedent, it often overrules that precedent" and *Chevron* "has enabled the NLRB's unworkable track record of frequent flip-flopping." The National Right to Work Legal Defense Foundation echoed this argument: "The rulemaking and adjudications in which the NLRB engages are not based on any sort of technical 'expertise' … but rather are based on the agency's political makeup … They are exercises in political will."

Those defending *Chevron* deference included several small business associations and the American Federation of Labor and Congress of Industrial Organizations. They replied that "overturning the *Chevron* framework will likely create a regulatory landscape that is prone to whiplash changes as courts overturn or enjoin regulations more frequently. Such changes could turn otherwise fair and beneficial requirements into onerous burdens with which small businesses struggle—or even fail—to comply." These groups, as well as respondents, contend that Congress necessarily writes laws broadly and "[i]n the dynamic context of labor relations, this court has long recognized that '[t]he responsibility to adapt the [NLRA] to changing patterns of industrial life is entrusted [by Congress] to the board.'"

Finally, those supporting respondents argue that "[o]verturning *Chevron* would not only subject future agency actions to heightened scrutiny, it would open up each of those prior agency constructions to new judicial scrutiny under whatever standard this court adopts." Indeed, the NLRB is reportedly preparing to argue that the board should still be afforded judicial deference even in the event that *Chevron* is overruled, in part to protect its earlier pronouncements.

The future of *Chevron* deference will plainly have significant impacts on labor and employment law. Not only is there the court's history of deference to the NLRB in its interpretation of the NLRA, but *Chevron* deference is also regularly invoked in cases concerning interpretations by the Equal Employment Opportunity Commission (EEOC), Occupational Health and Safety Administration (OSHA), and the U.S. Department of Labor (DOL). Consider, for example, the EEOC's recent regulations under the Pregnant Workers Fairness Act. Should employers challenge those rules, the fate of *Chevron* may determine how much, if any, judicial deference the EEOC would enjoy. Employers—like many others—await the court's decision.

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