JENNER & BLOCK

Loper Bright Matters: Fifth Circuit Vacates Agency Action That Had Survived Under *Chevron* Deference

Client Alerts

September 13, 2024
By: Gabriel K. Gillett, Ian Heath Gershengorn, Anand Viswanathan, Michael D. Pearson

In a long-awaited decision in *Restaurant Law Center v. US Department of Labor*,[1] the US Court of Appeals for the Fifth Circuit vacated a US Department of Labor (DOL) regulation governing the way tipped employees are paid, finding the rule violated the Administrative Procedure Act (APA). The result is a major win for the restaurant industry. But it is also significant more broadly—for both the restaurant industry and every other industry facing government regulation: the case may be the first example since the Supreme Court's decision in *Loper Bright* where an agency action was lawful based on the application of *Chevron* deference but unlawful when a court exercised its independent judgment as *Loper Bright* requires. While this may be the first such example, it will not be the last.

The "Tip Credit" and the 80/20/30 Rule

The Fair Labor Standards Act (FLSA) permits employers to pay "tipped employees" at a rate of $2.13 per hour, as long as the combination of their hourly wage and tips equals at least the $7.25 hourly minimum wage. This provision is commonly known as the "tip credit." In 1988, the DOL issued sub-regulatory guidance known as the "80/20" rule, providing that no more than 20 percent of a tipped employee's time could be spent on non-tipped activities that support tip-producing work (such as bussing tables or washing dishes).

Beginning in 2009, the DOL's interpretation of the relevant FLSA provision began to oscillate with each new presidential administration. Republican administrations rescinded the 80/20 guidance and Democratic administrations reissued it, until the DOL promulgated a new final rule in 2021. Known as the "80/20/30 rule," the 2021 final rule codified the 80/20 guidance and imposed a new restriction, limiting to 30 minutes the amount of continuous time during a shift a tipped employee may spend performing non-tipped activities that support tipped work.

Applying *Chevron* Deference, District Court Rejects Industry Challenge

Restaurant industry groups, including the Restaurant Law Center, sought to enjoin enforcement of the DOL's final rule before it took effect, but the Western District of Texas denied their motion for a

preliminary injunction. A Fifth Circuit panel reversed this denial and remanded the case to the district court. The district court then upheld the rule. To reach that conclusion, the court found that the dispute centered on "the meaning of the statutory phrase 'engaged in an occupation' and the term 'occupation,' both of which are used in the definition of 'tipped employee' but are undefined in the FLSA."[2] The court found those terms to be ambiguous, and thus applied the rule of *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—which required the court to defer to the agency's reasonable interpretation of an ambiguous statute even if the reviewing court would have interpreted the statute differently.

With *Chevron* Overturned, the Fifth Circuit Vacates 80/20/30 Rule

While the Restaurant Law Center's appeal was pending, the Supreme Court overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*.[3] Under this new regime, the Court explained, "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[4] While "[c]areful attention to the judgment of the Executive Branch may help inform that inquiry," and "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation." Courts "need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[5] In other words, instead of approving an agency's interpretation of an ambiguous statute as permissible, courts must "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[6]

Applying this new interpretive framework and exercising its own independent judgment, without deciding whether the statutory language was ambiguous, the Fifth Circuit held that the 80/20/30 rule was inconsistent with the FLSA's text and vacated the rule. The Fifth Circuit acknowledged that the "longstanding" 80/20 rule was "of some vintage."[7] The court also acknowledged that "even in the absence of *Chevron*, courts are well-advised to consider agency 'interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time.'"[8] Such "longstanding agency practice might have the 'power to persuade,'" the court explained, even if it "has never had the 'power to control.'"[9] But the court found that principle of little help to the DOL because, starting in 2009, the agency's previously "uninterrupted" guidance "began to oscillate with every change in presidential administration."[10] For this reason, among others, the court declined to credit the agency's current interpretation.

Why This Case Matters—The New Post-*Chevron* Legal Landscape

More than just a victory for restaurant and hospitality employers, this case marks a turning point in how courts will handle agency regulations after *Loper Bright*. In what will be the first of many post-*Chevron* decisions, the court exercised independent judgment to determine what it considered to be the best reading of a statute. The court did not decide whether the statute was ambiguous or

clear. That question is now beside the point because courts can no longer simply defer to agencies when statutes are ambiguous.

The decision also serves as another high-profile example of how businesses across the spectrum are increasingly finding success when challenging agency action.[11] That success may in turn encourage more challenges to agency action and more plaintiffs may be timely in bringing those challenges. Under the Supreme Court's decision in *Corner Post, Inc. v. Board of Governors of Federal Reserve System*,[12] unless Congress has established an agency-specific scheme for review, an APA challenge can be brought by a plaintiff that is newly subject to agency action—such as a business not in existence when the agency action occurred or was long ago upheld. If this unanimous decision issued by an ideologically diverse panel that included appointees from both Republican and Democratic administrations is any guide, judges may be willing to seriously consider such challenges—especially in cases where an agency's interpretation has been inconsistent over time.

Footnotes

[1] -- F.4th --, 2024 WL 3911308 (5th Cir. Aug. 23, 2024)

[2] *RLC*, 2024 WL 3911308, at *5.

[3] 144 S. Ct. 2244 (2024)

[4] *Id.* at 2273.

[5] *Id.*

[6] *Id.* at 2266.

[7] *RLC*, 2024 WL 3911308, at *8.

[8] *Id.*

[9] *Id.*

[10]*Id.* at *2

[11] *See, e.g.*, *Ryan, LLC v. FTC*, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating FTC rule banning non-compete agreements); *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097 (5th Cir. 2024) (vacating SEC rule regulating private fund advisors); *Union Pac. R.R. Co. v. Surface Transportation Bd.*, 2024 WL 3869770, at *1 (8th Cir. Aug. 20, 2024) (vacating rule regarding shipping rates).

[12]144 S.Ct. 2440 (2024)

Related Attorneys

Gabriel K. Gillett

Partner
ggillett@jenner.com
+1 312 840 7220

Ian Heath Gershengorn

Partner
igershengorn@jenner.com
+1 202 639 6869

Anand Viswanathan

Partner
aviswanathan@jenner.com
+1 202 639 6044

Michael D. Pearson
Associate
mpearson@jenner.com
+1 312 840 7252

Related Capabilities

Appellate and Supreme Court

Post-*Chevron* Task Force