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Wage Cases To Follow As Justices Rein In Agencies

By **Jon Steingart**

Law360 (July 15, 2024, 2:18 PM EDT) -- A trio of U.S. Supreme Court rulings this term that dulled administrative agencies' power are likely to make an impact on how the U.S. Department of Labor enforces wage and hour law.

The highest profile ruling came June 28 in the **joint decision** in Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce, when the justices overruled the court's 40-year-old precedent establishing Chevron deference. Chevron required courts to defer to an agency's reasonable interpretation of a statute when faced with ambiguity in the legislative text.

Now, courts are supposed to conduct their own statutory interpretation without giving special deference to an agency's perspective, which courts may elect to adopt or ignore.

The June 27 SEC v. Jarkesy decision **chipped away** at agencies' authority to assess civil penalties for violations of the laws under their purview via in-house adjudicatory systems.

And the July 1 decision in Corner Post Inc. v. Board of Governors of the Federal Reserve System said the Administrative Procedure Act's six-year statute of limitations for suing to block a rule does not begin to run until a challenger experiences harm from it. The high court rejected arguments that the clock should start ticking as soon as an agency finalizes a rule, effectively exposing rules to litigation for more than six years.

Each of the high court's decisions is likely to resonate across many federal agencies. Here, Law360 reviews six cases involving the DOL where their application is already becoming a point of contention.

5th Circ. Eyes Overtime Rule and End of Chevron

The Fifth Circuit **proactively asked** both sides to file briefs on whether Loper Bright has any impact as it reviews whether the DOL acted within its authority under the Fair Labor Standards Act when it adopted a **salary threshold** as an element of its test for overtime coverage in 2019. The 2019 overtime rule was the ninth time the DOL had raised the salary threshold since 1938, and it issued a 10th overtime **rule this year** that produced an increase July 1, with a second hike scheduled for Jan. 1.

The court is hearing **a case** in which a fast food business owner said the FLSA's dividing line between employees who are entitled to overtime or exempt from it is whether the worker is engaged in exempt duties. Robert Mayfield, the owner, acknowledged that the law gives the secretary of labor authority to issue definitional regulations but said that doesn't authorize issuing a rule that uses a salary threshold test because the statute doesn't mention someone's pay level.

He appealed to the Fifth Circuit after a Texas federal court held in September that binding circuit precedent **shuts down** his argument. U.S. District Judge Robert Pitman said the Fifth Circuit rejected a similar idea in 1966, nearly two decades before Chevron, holding in Wirtz v. Mississippi Publishers Corp. that using salary threshold as an element of the overtime eligibility test was a rational way to distinguish between exempt and nonexempt jobs.

The briefs are due July 15, and the court is scheduled to hear oral arguments Aug. 7.

The case is Mayfield et al. v. U.S. Department of Labor et al., case number 23-50724, in the U.S. Court of Appeals for the Fifth Circuit.

Chevron Off the Table for Independent Contractor Rule

A business coalition said the high court's reasoning for abandoning Chevron in the Loper Bright decision supports its suit challenging the DOL's 2024 independent contractor rule. The rule, which **took effect** March 11, repealed a test the agency adopted under former President Donald Trump to determine whether to classify a worker as an employee or an independent contractor.

Employees are entitled to the FLSA's minimum wage and overtime protections and are covered by other laws that incorporate its scope. Independent contractors are not entitled to protections that are required for employees.

The Coalition for Workforce Innovation, an advocacy group that says its members include large companies and associations such as Lyft Inc., the Society for Human Resource Management and the Retail Industry Leaders Association, leads the suit. It said in a July 1 **filing** that the Supreme Court held that Chevron was problematic because it let agencies revise their interpretations at will, without regard for any changes that regulated entities made to come into compliance.

In line with the high court's reasoning, the DOL's decision to change its mind in the 2024 rule should be thrown out because the agency didn't demonstrate that it took regulated entities' reliance on the prior rule into account, the coalition said.

In response, the DOL said in a July 5 filing that Loper Bright **is irrelevant** to the case because the rule didn't invoke Chevron.

Instead of Chevron deference, the agency said the rule deserves Skidmore deference, a looser lens that allows a court to factor an agency's judgment into a ruling but doesn't require yielding to it.

The case is Coalition for Workforce Innovation et al. v. Su et al., case number 1:21-cv-00130, in the U.S. District Court for the Eastern District of Texas.

5th Circ. Reviews Tipped Worker Rule That Chevron Upheld

The Restaurant Law Center filed a **letter brief** with the Fifth Circuit on July 2, arguing that Loper Bright precludes giving special deference to the DOL's positions as the court reviews a rule that limits paying subminimum wage to tipped workers.

"Instead, it is the court's paramount role to decide all relevant questions of law, interpret the statutory text, and determine whether a regulation meets any of the standards set forth by the [Administrative Procedure Act] for invalidating a regulation," the law center said.

The law center and the Texas Restaurant Association sued just before the rule took effect in December 2021. They argued that the rule, which prohibits paying subminimum wage when someone engages in a substantial amount of untipped work, **adds restrictions** that have no basis in the FLSA's text. The law center is the policy arm of the National Restaurant Association.

But a Texas federal court held in July 2023 that the statute's definition of a tipped worker as an "employee engaged in an occupation" that brings in tips **is ambiguous**, resting its analysis on the Chevron framework. U.S. District Judge Robert Pitman sided with the agency's argument that Congress authorized it to issue regulations defining what it means to be engaged and the characteristics of a tipped occupation and held the rule was a faithful fulfillment of its mandate.

The U.S. Department of Justice, which represents the DOL, filed **a response** dated July 10 arguing that Loper Bright is irrelevant because the tipped worker rule doesn't implicate Chevron.

The rule isn't an agency interpretation that resolves a statutory ambiguity because it is actually the agency **fulfilling a task** Congress gave it when lawmakers amended the FLSA in 1966 to create the subminimum wage and directed the DOL to issue regulations, the DOJ said. The rule is the latest installment in a series of guidance materials and regulations that traces back to the 1966 amendment, the government said.

The court **heard oral arguments** April 29 and may rule at any time.

The case is Restaurant Law Center et al. v. U.S. Department of Labor et al., case number 23-50562, in the U.S. Court of Appeals for the Fifth Circuit.

Labor Department's In-House Courts Under Review in 2 Cases

Equipped with the Jarkesy ruling, the Third Circuit and the federal district court for Washington, D.C., are moving ahead with a pair of separate cases filed by businesses that were assessed civil penalties by the DOL's in-house adjudicatory structure.

Institute for Justice, a libertarian law firm that seeks to rein in what it sees as government overreach, represents both companies as they make similar legal arguments arising out of different factual scenarios.

In both cases, the companies said they were unconstitutionally denied a jury trial before an impartial court when they contested penalties the Wage and Hour Division assessed them for violating temporary guest worker program requirements. Sun Valley Orchards LLC, which operates a farm in New Jersey, challenged findings that it ran afoul of the H-2A program, which lets an employer bring agriculture workers into the country. C.S. Lawn and Landscape Inc., a Maryland-based landscaper, violated requirements of the H-2B program, which authorizes nonagriculture workers.

Both companies requested a trial before a DOL administrative law judge but lost. They appealed to the department's Administrative Review Board, where they lost again.

Sun Valley sued the DOL in New Jersey federal court, and C.S. Lawn sued in Washington. The New Jersey court **held** in July 2023 that the DOL's adjudicatory structure was constitutionally sound and teed up the company's appeal to the Third Circuit, while the Washington case is still pending.

The Supreme Court agreed to consider Jarkesy in June 2023, just as the DOL cases were getting started in their respective courts. **Both lower courts** agreed to **stay their matters** pending the high court's decision.

Institute for Justice, Sun Valley, C.S. Lawn and a business that had been assessed penalties by the U.S. Department of Homeland Security filed an **amicus brief** in the Supreme Court's Jarkesy case arguing against in-house adjudication. The judicial branch should administer that process because agency judges are executive branch employees, which tilts their bias toward enforcement policies of their political leaders, the companies said.

Now that the high court has decided Jarkesy, Sun Valley, C.S. Lawn and the DOL can file briefs that address how it affects the department's adjudicatory structure.

Sun Valley's principal brief is due in the Third Circuit on or before Sept. 9, and the DOL's is due 30 days after the company's is filed. C.S. Lawn's brief is due in Washington on Sept. 16, and the DOL's is due Nov. 1.

The cases are Sun Valley Orchards LLC v. U.S. Department of Labor et al., case number 23-2608, in the U.S. Court of Appeals for the Third Circuit, and CS Lawn & Landscape Inc. v. U.S. Department of Labor et al., case number 1:23-cv-01533, in the U.S. District Court for the District of Columbia.

3rd Circ. Asked to Revive Attack on Healthcare Worker Overtime Rule

The Third Circuit is considering whether the Corner Post ruling means it should revive a pair of suits attacking a **2013 rule** that expanded overtime rights for home care workers. The rule narrowed the definition of a companionship worker, which is a category that's exempt from the FLSA premium pay requirement.

A Pennsylvania federal court held in July 2022 that the suits, which three companies that employ in-home care workers filed in October and November 2020, **could not proceed** because they were untimely. Following Third Circuit precedent, the court said in its consolidated ruling that the Administrative Procedure Act's six-year statute of limitations began to run when the agency published

the rule in the Federal Register in October 2013, which meant a suit filed after October 2019 would be untimely.

The companies — Intra-National Home Care LLC, Americare Home Healthcare Services LLC and Agewell Home Helpers Inc. — had argued unsuccessfully that their suits were timely because the starting point for the statute of limitations should be the moment when a business realizes it has a claim.

Intra-National and Americare did not even exist in 2013, so beginning the clock in that year would deprive them of the full six-year period, they said.

In the Third Circuit now, the companies filed a **letter brief** July 1 saying that the Corner Post ruling is directly relevant to their case because the Supreme Court determined that the statute of limitations begins to run when a company is harmed by a rule.

But the DOJ, representing the DOL, **responded** the next day that the Corner Post ruling noted that a company that wishes to challenge a rule may do so if it's subjected to an enforcement proceeding.

The fact that Agewell chose to challenge the rule by filing a suit, even though the company knew it was under DOL investigation, casts doubt on whether its case can stand, the government said.

The Third Circuit **heard oral arguments** in July 2023 and may rule at any time.

The case is Intra-National Home Care LLC et al. v. U.S. Department of Labor et al., case number 22-2628, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Neil Cohen and Emma Brauer.
