

Employee Relations LAW JOURNAL

Yet Another U.S. Supreme Court Decision Will Allow Employers to Challenge Federal Regulations More Easily: 5 Steps to Plan for the New Future

By Ree Harper and Seth D. Kaufman

*In this article, the authors suggest steps employers can take following the U.S. Supreme Court's recent decision in *Corner Post Inc. v. Board of Governors*.*

All eyes were on the U.S. Supreme Court's decision to overturn a decades-old legal doctrine and redefine the balance of power between federal agencies and courts, but the Court also snuck in another ruling that will allow employers to challenge federal rules long after they are finalized. The Supreme Court ruled on July 1, 2024, that the six-year statute of limitations to contest regulatory actions under the Administrative Procedures Act (the APA) does not start ticking until someone is actually injured by the regulation, which could stretch the timeframe to file suit by years, giving employers yet another weapon to fight back against federal agency overreach. What do you need to know about this decision, and what five steps should you take as a result?

1-2 PUNCH

By now, you have probably heard about the Supreme Court's June 28, 2024, decision in *Loper Bright Enterprises v. Raimondo* that upended the legal world. The ruling significantly reduced the power of federal regulators and placed more authority in the hands of judges – a move that will have a major impact on workplace regulations for years to come.

The authors, attorneys with Fisher Phillips, may be contacted at rharper@fisherphillips.com and skaufman@fisherphillips.com, respectively.

The Court overturned the decades-old *Chevron* doctrine which had required courts to defer to a federal agency's position on the law when a statute is ambiguous and open to interpretation. Instead, the Supreme Court tossed out that standard in favor of judicial interpretation, enabling courts to make their own interpretations, possibly striking down long-standing agency rules.

But probably lost in the shuffle was the Court's July 1, 2024, decision in *Corner Post Inc. v. Board of Governors*. The key points you should know are:

- In 2011, the Federal Reserve Board issued a regulation governing the fees that merchants must pay whenever their customers use a debit card.
- 10 years later, a North Dakota truck stop – which did not even open as a business until 2018 – joined a lawsuit to challenge that regulation.
- Lower courts rejected the truck stop's lawsuit because federal law requires parties to file actions to challenge regulations under the APA within six years of them becoming law.
- But the Supreme Court dealt another blow to federal agencies by ruling that the six-year-clock actually starts running when a party is injured by the regulation in question (not when the regulation was promulgated, as the lower court held), giving the green light for the truck stop's case to continue.

Without this decision, the truck stop's challenge to the regulation would have been time-barred in this case. Its only option for challenging the regulation at some point in the future would have been limited to defending itself in the event of an enforcement proceeding, which may or may not have ever come.

HOW WILL THIS IMPACT YOU?

You now have a new weapon in your arsenal. All of a sudden, the universe of longstanding federal rules that are now vulnerable to attack in court has been expanded, giving your organization a potential new bite at the apple for an APA challenge that may not have previously existed.

And now that the *Chevron* doctrine has been eliminated and you have new arguments to make against federal rules and regulations, this decision will expand your ability to pursue such claims. With these two decisions, the Supreme Court lowered the bar and then opened the door wider for you.

WHAT SHOULD YOU DO POST *LOPER* AND *CORNER POST*?

Here's a five-step plan for operating in this new era.

1. Review Your Existing Regulatory Compliance Practices Anew

- First, identify any areas where your organization might be vulnerable to injury because of existing federal regulation – especially those that may predate your company or have been accepted as unchangeable. You should also identify any areas where a change in regulatory requirements could provide a benefit to the organization.
- Consult with your counsel to evaluate these potential vulnerabilities and strategize on possible challenges to existing regulations.

2. Evaluate the Potential Business Impact

- Hand in hand with counsel, analyze how potential regulatory changes could impact your business operations.
- Assess the risks of litigation, including whether your attention may be diverted from your core business activities, and whether you want your organization to be on the forefront of a regulatory challenge.

3. If Necessary, Prepare for Litigation

- If you decide the benefits of pursuing litigation outweigh the costs and risk, make sure to build a proactive legal strategy to challenge unfavorable regulations.
- Work with your counsel to document the ways that your organization has been “injured” by the regulation in question through adverse impacts or other damage.

4. Strengthen Your Advocacy Efforts

- Engage with policymakers in an effort to influence regulatory policies and protect your business interests.

- Collaborate with peers by joining forces with other businesses and industry groups to amplify your voice when it comes to regulatory discussions.

5. Stay Informed

- Because judicial interpretations will likely vary across jurisdictions, it is important to keep abreast of changes and interpretations in administrative law and federal regulations.
- If you start partnering with industry or other trade associations, leverage their unique and specialized resources to stay updated on legal developments as well.

Copyright © 2024 CCH Incorporated. All Rights Reserved. Reprinted from *Employee Relations Law Journal*, Winter 2024, Volume 50, Number 3, pages 14–17, with permission from Wolters Kluwer, New York, NY, 1-800-638-8437, www.WoltersKluwerLR.com

