How Recent Changes to Administrative Law May Alter Labor and Employment Law as We Know It

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July 29, 2024

Few legal developments sound more sleep-inducing than "changes to federal rulemaking authority." But don't mistake dullness for a lack of impact: a pair of Supreme Court decisions just issued will arguably have the single greatest impact on employment law in decades.

This sea change comes in two parts. Many readers will already be familiar with the groundbreaking *Loper Bright Enterprises, Inc. v. Raimondo* decision, which threw out the Court's long-standing "*Chevron* deference" doctrine. *Chevron* required courts to pay special deference to a federal administrative agency's interpretation of applicable law within its enforcement purview on the theory that an agency specializing in, say, environmental regulation has a special expertise in the environmental laws it enforces. That rule is gone: now, the agency might be right, but so might be any other litigant opposing it.

The real "sleeper," however, is actually the combined effect of *Loper* and another decision, *SEC v. Jarkesy*, issued by the Court just before *Loper*. In *Jarkesy*, the Supreme Court held that when the Securities and Exchange Commission (SEC) seeks civil penalties against a defendant in a securities enforcement action, the Seventh Amendment entitles a defendant to a jury trial: it must bring the case in federal court as opposed to before administrative law judges in the SEC's in-house forum. While *Jarskesy* applies on its face only to the SEC and the particular enforcement proceeding at issue in that case, there is no real reason its logic would not apply to any administrative proceeding before any federal agency empowered to issue fines.

In fact, *Jarskesy* is very similar to the Court's recent decision in *Starbucks v. McKinney*, where the Supreme Court held that the National Labor Relations Board (NLRB) must adhere to the same test as other parties when seeking a preliminary injunction, as opposed to a more relaxed test that seemed biased in favor of an agency just because it was the enforcer.

So think about that: first, federal agencies' opinions about what the law means aren't entitled to any special deference (*Loper*); and second, federal agencies have to duke it out in court rather than in their own in-house quasi-tribunals that offer fewer procedural safeguards to the party against whom enforcement is sought (*Jarskesy*). *Loper Bright*, *Jarkesy*, and *McKinney* are all suggestive of a critical trend that ultimately favors employers, not the agencies that are so often perceived as their adversaries in all but name.

Here's why this matters for employers. Administrative trials are very common in labor and employment law. The kinds of safeguards employers can leverage in real litigation—discovery,

evidentiary rules, the right of appeal, and the list goes on—are very much stunted in administrative tribunals, if not entirely absent. If the Supreme Court applies the logic of *Loper* and *Jarskesy* to administrative agencies generally, including the EEOC, NLRB, OSHA, and DOL, to name a few—then we are in a whole new landscape, one that afford employers not only a fairer chance to fight in real litigation, but to argue persuasively for interpretations of applicable law that aren't as likely to be shot down just because a federal agency disagrees.

What Happened in *SEC v. Jarkesy*?

In 2013, the SEC filed an administrative action against hedge fund manager, George Jarkesy and his company, Patriot28. The administrative judge found that Jarkesy violated the anti-fraud provisions of federal securities law. After Jarkesy appealed, the SEC ordered Jarkesy to pay a civil penalty of $300,000 in addition to other equitable relief. Jarkesy and his company appealed to the Fifth Circuit, which ruled in their favor. The Fifth Circuit held that the use of administrative law judge's violated Jarkesy's right to a jury trial. The SEC sought Supreme Court review of the Fifth Circuit's decision, and the Court granted certiorari.

The Supreme Court agreed with the Fifth Circuit and held that the use of the administrative proceeding where civil penalties were at stake is unconstitutional. The Court's reasoning was rooted in the Seventh Amendment's guarantee of the right to a jury trial in suits at common law, including claims where a party seeks monetary relief designed to punish or deter conduct. The Court also concluded that the SEC's anti-fraud provisions replicate common law fraud claims. In *Jarskesy*, the SEC sought civil penalties for alleged fraud, implicating the Seventh Amendment right to a jury trial. The Court also reasoned that the "public rights" exception does not apply, which is an exception allowing Congress to assign the matter to an agency without a jury. Thus, since the SEC fraud claim and civil penalties fell within the purview of the Seventh Amendment, the defendant, and now defendants going forward, are entitled to jury trials as opposed to proceedings before the in-house administrative law judge

What Should Employers do Going Forward?

As of now, the impact of *Jarkesy* combined with *Loper Bright* remains to be seen. However, with the in-house administrative proceedings under scrutiny, employers should be paying attention to any future cases involving challenges to federal labor and employment law agency actions, particularly those challenging administrative proceedings. Since federal labor and employment law involves administrative proceedings before bodies such as the NLRB and OSHA, any future decisions curtailing the use of those proceedings would alter the landscape of labor and employment law, benefiting employers.

For questions and guidance about the impact of *Jarkesy* or administrative proceedings in federal labor and employment law, please contact a member of Kelley Drye's Labor and Employment team.