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THE 3 BIGGEST WAGE AND HOUR STEPS EMPLOYERS CAN TAKE IN A POST-CHEVRON WORLD

Insights
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Perhaps no area of workplace law is more heavily regulated than federal wage and hour law. Indeed, the U.S. Department of Labor's Wage and Hour Division has not only issued detailed regulations governing the Fair Labor Standards Act, but has also provided administrative interpretations, opinion letters and a field operations handbook, among other guidance — all of which play a large role in how employers and their attorneys handle day-to-day wage and hour compliance. This means we are about to experience a massive sea change in the way we all do business if — perhaps, more likely, when — the U.S. Supreme Court reshifts the administrative law landscape by overturning the *Chevron* doctrine. This article will provide a brief backdrop into the legal battle over the regulatory state and offer three steps organizations — and their inside and outside counsel — can take in the increasingly likely post-*Chevron* world.

Outsized Power for Decades

For nearly 40 years since the Supreme Court's 1984 decision in *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, administrative law has been relatively stable. The *Chevron* doctrine provides a two-step framework for courts to interpret statutes like the FLSA:

1. If the text of the statute directly speaks to the precise question at issue, then an agency and a court must give effect to the unambiguously expressed language of the statute; and

Related People

Matthew R. Korn
Partner
803.740.7652

Seth D. Kaufman
Partner
212.899.9975

2. If the court determines that the statute has not directly addressed the precise question at issue but is instead silent or ambiguous with respect to the specific issue, the court should defer to an agency's interpretation of the statute so long as that interpretation is permissible.

Because the FLSA is silent or ambiguous as to so much of the detail necessary to practically deal with wage and hour issues, courts have often applied the second step and deferred to the Wage and Hour Division's regulations and other interpretations.

Such deference to the division has provided stability throughout the years but has given it outsized power to set regulations that govern the workplace.

The commonly used so-called "white-collar" exemptions are a good example of how significant the division's administrative interpretations can be. The text of the FLSA exempts from overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity." But the FLSA does not provide any further explanation of what those terms mean.

Instead, the division devotes approximately 50 separate regulations, countless opinion letters and a 75-page chapter in its field operations handbook, among other materials, to interpreting and providing guidance on this one provision of the FLSA.

In fact, the foundational requirement that an employee must be paid on a salary basis to qualify for certain white-collar exemptions does not actually appear in the statute, and is entirely a creature of administrative rulemaking and interpretation.

Indeed, the division's recently issued rule to increase the exempt salary threshold of nearly 4 million workers is a prime example of a regulation that some believe goes too far. It is currently being challenged by a coalition of business groups with the hope that *Chevron* deference will not apply, and, under an alternative standard, the regulation will be struck.

What's Next?

Amid criticism of the *Chevron* doctrine that it provides too much deference to administrative agencies, such as that

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levied at the division's new salary threshold, two cases — *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. U.S. Department of Commerce* — are pending before the Supreme Court seeking to revisit or overturn the standard.

Although most commentators expect SCOTUS to overturn the *Chevron* doctrine, it is not entirely clear what test the high court will implement going forward.

Pre-*Chevron* Supreme Court precedent from the 1944 decision in *Skidmore v. Swift & Co.*, which was referenced in oral arguments for *Loper* and *Relentless*, may provide a clue. That standard mandated some deference to administrative agencies but held that the "weight" of such deference "in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, all those factors which give it power to persuade, if lacking power to control."

If SCOTUS returned to the *Skidmore* standard, whether an agency's interpretation holds will very much depend on the circumstances. This would mean different regulations or administrative interpretations would be given different weight depending on the circumstances of how those interpretations came to be or the nature of the case.

But it is unclear whether the Supreme Court will even return to the *Skidmore* standard — or adopt an entirely new approach to reviewing agency interpretations.

3 Steps Employers Can Take

Given this looming sea change, what should employers — and their inside and outside counsel — be on the lookout for in the increasingly likely post-*Chevron* world? Here are three steps an organization can take.

1. *Understand Potential Gray Areas in Compliance*

First and foremost, the division's administrative guidance that once seemed set in stone — whether formal regulations or informal interpretations — may not pass judicial scrutiny under a post-*Chevron* standard.

Accordingly, attorneys in the wage and hour space will need to keep up to date on any cases implicating the administrative interpretations their organization relies on. If a judge — even one far removed from the organization's

employees — determines that certain administrative guidance is no longer persuasive under a post-*Chevron* standard, another judge in the relevant jurisdiction may follow that analysis.

Once that decision is issued, an organization will have to evaluate whether it wants to rely on previous administrative guidance or a different analysis of the FLSA set forth by a judge. This also begs the question of what happens if judges in two different jurisdictions come out differently on whether to give deference to the division as to a particular issue, or what happens if judges in the jurisdictions both agree that deference to the division is unwarranted but come to differing conclusions on how to interpret the FLSA. An organization may be in a situation where it has employees in multiple jurisdictions with opposing interpretations of the FLSA.

In sum, the FLSA, already a complex law with plenty of gray, will become even more so. Organizations that can best manage the uncertainty will best limit their liability and minimize disruption to the business. This will involve effort on behalf of an organization's in-house and outside counsel but will also require coordination and communication between counsel and other parts of the organization, such as human resources and the business units, themselves.

It will be incumbent upon counsel to adequately evaluate and communicate the state of the law, the uncertainty, and possible paths forward. Any wage and hour practitioner has likely already had difficult conversations with clients or nonlawyers in their organization, and those conversations will exponentially increase in the post-*Chevron* world.

Moreover, organizations that are best prepared now with a good sense of wage and hour law and a strong base of compliance will be in the best position to deal with coming uncertainty.

Even though a sea change may be coming to wage and hour law after *Chevron*, now may be the exact right time for an organization to conduct an internal audit or compliance assessment to get a handle on its wage and hour practices and understand what the organization is doing well and where it has issues.

2. *Maintain Defenses for Willfulness and Good Faith*

Although it is always best for an organization's wage and hour practices to be compliant to begin with, black-and-white compliance may not be entirely possible — at least in the initial post-*Chevron* stages. The risk of FLSA missteps may simply be the norm where it is unclear what regulations and administrative guidance will be upheld or disregarded.

However, there are still internal steps an organization can take with the assistance of counsel to limit potential liability in the event it faces a wage and hour lawsuit. These steps will become even more relevant post-*Chevron*.

Liability under the FLSA can run for a three-year statute of limitations period and include any wages owed to an employee and an equal amount in liquidated damages. But neither the three-year statute of limitations nor liquidated damages is automatic.

In order for a three-year — as opposed to a two-year — statute of limitations period to apply, an employee-plaintiff must demonstrate that the employer's FLSA violation was willful. "Willful" means "that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by" the FLSA.

Moreover, though liquidated damages are presumed, such damages are subject to a rebuttable presumption and an employer can assert as an affirmative defense that it acted in good faith and had reasonable grounds for believing it was not violating the law.

Litigation regarding an employer's willfulness or good faith necessarily puts an organization's compliance efforts and decisions at issue, often including the privileged advice it receives from its in-house and outside counsel that must be waived in order to assert the defense.

But to the extent an organization becomes aware that a significant area of compliance may become less certain as courts take differing interpretations, you may want to consider how best to plan for putting your compliance efforts and decisions at issue to mitigate against any damages.

This could arise, for example, in a situation involving travel time for a per diem staffing company or in a case involving the handling of tips and tip pools for a restaurant.

You might want to consider offering up formal advice memoranda prepared by counsel for use in any litigation, understanding that privilege on this advice would be waived.

Even if an organization does not successfully navigate compliance, it at the very least can demonstrate good faith compliance efforts such that liability is reduced.

3. *Keep an Eye on State Wage and Hour Laws*

With all the focus on the FLSA, organizations cannot forget that certain states — and even local jurisdictions — have requirements that exceed the FLSA. However, many state laws still rely on interpretations of the FLSA where the language in the law is the same or similar to the FLSA. Necessarily, then, state wage and hour laws reliant on FLSA analysis are likewise reliant on the division's interpretation and guidance, and they, too, may also see a change in interpretation post-*Chevron*.

Of course, to the extent that federal courts begin abandoning the division's administrative interpretation of the FLSA in favor of their own analysis, there is no guarantee that state courts reviewing state wage and hour laws will follow suit.

This is especially the case if interpretation of the FLSA becomes more employer-friendly. Many state courts in areas with more onerous wage and hour laws retain a more pro-employee bent and may not be so quick to roll back employee protections.

Conclusion

Since wage and hour law is so heavily dependent on administrative regulations, interpretation and other guidance, the very likely upcoming upheaval in administrative law will almost certainly have a large effect on how organizations comply with the FLSA and state and local wage and hour laws.

The organizations that best handle a post-*Chevron* world are those that understand the full range of possible changes, have a good understanding of their current wage and hour compliance, are able to navigate through upcoming uncertainty, and think through how to use all the tools at counsel's disposal to limit exposure to the organization.

We will continue to monitor developments, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Wage and Hour Practice Group.

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