

Insights, News & Events

EMPLOYERS GAIN MORE TOOLS TO TACKLE REGULATORY OVERREACH, FROM PAY DATA REPORTING TO FEDERAL CONTRACT COMPLIANCE: 3 STEPS TO TAKE POST-CHEVRON

Insights
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The Supreme Court's recent landmark ruling that gives employers a powerful tool to fight back against regulatory overreach will have a broad impact on just about every area of workplace law – and every industry. We're looking at the way specific areas of workplace law will be impacted now that federal agency rules and positions are more susceptible to attack after SCOTUS ditched the decades-old *Chevron* doctrine. This edition will focus on how the new standard will affect potential federal pay data reporting requirements for large private employers – if this practice is revived – and compliance burdens for federal contractors and subcontractors. We'll also give you three steps you can take now to stay ahead of the curve.

What Happened?

SCOTUS rocked the legal world on June 28 when it overturned the famous *Chevron* doctrine, holding that that courts may not defer to an agency's interpretation of an ambiguous federal statute. In *Loper Bright*, the Court said that from now on judges "must exercise their independent judgment" when ruling on cases involving agency rules, regulations, guidance, or other actions. In plain English, this ruling gives the courts – not administrative agencies – the power to say what the law actually is. [You can read all about it here, including all the different ways that the workplace law landscape may soon change.](#)

What Might This Mean for Pay Data Reporting?

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- **New Rule Looming** – The Equal Employment Opportunity Commission's (EEOC's) effort to collect pay data with annual EEO-1 reports has been steeped in controversy for years. Although a change in presidential administrations after the 2016 election meant that the EEOC ended the practice shortly after it began, [the current administration wants to resurrect the pay data reporting requirement](#) for private employers with at least 100 employees and federal contractors and first-tier subcontractors with at least 50 employees. If this agenda item is ultimately finalized, the pay data would need to be submitted along with the demographic data you already provide about employee job titles, sex, and race/ethnicity.
- **SCOTUS Decision Creates Additional Hurdle for EEOC** – There have been lots of rumors about a revived EEO-1 Component 2 requirement since President Biden first took office – but a [recent regulatory agenda announcement](#) is the first official step we've seen. The EEOC said it expects to issue a proposed rule in January 2025, though the proposal will face many obstacles from a potential change in implementation after the upcoming election to lawsuits filed by business groups. It's no surprise that employer advocates have genuine concerns about cost, administrative burdens, and privacy – and we can expect covered employers to point to the new SCOTUS ruling in *Loper Bright* to bolster their argument that the agency doesn't have the authority to start collecting pay data again. [You can read more about the potential new rule here.](#)

How Will the SCOTUS Ruling Impact Federal Contractors?

Federal contractors often find it difficult to comply with costly and overly burdensome directives from the White House and federal agencies – particularly the Office of Federal Contract Compliance Programs (OFCCP). Here are some of the ways the end of *Chevron* deference may help contractors reduce these burdens in the future:

- **Fighting Overreach** – The contractor community has widely viewed the OFCCP as taking broad positions that go beyond its authority under the relevant laws and regulations – and we expect to see an uptick in challenges post-*Chevron*. Already, prior to *Chevron* being overturned, the agency had to walk back its position on disclosing compensation analyses during audits regardless of

attorney-client privilege. [You can read more about that topic here.](#)

- **Scrutinizing the Scope of Audits** – OFCCP [recently issued a new “scheduling letter”](#) greatly expanding both the breadth and scope of its compliance evaluations. Although these audits are fairly routine, federal contractors often experience significant disruption to their operations when required to assemble items in response to a scheduling letter. The scope of these audits could be in the crosshairs after the *Loper Bright*
- **Questioning Affirmative Action System** – Some observers even go so far as to wonder whether the Executive Order that created the lion’s share of the affirmative action system for federal contractors is an overbroad regulatory reach. Although the Supreme Court’s *Loper Bright* decision didn’t touch the Executive Branch, questions remain as to whether the Executive Order can be sustained when it’s not a codified law as the VEVRAA and Section 503 obligations were codified.

Is There a Downside to This New Reality?

While the end of *Chevron* is largely viewed as a win for employers, we could see some negative consequences stemming from this change, including:

- **Regulatory Uncertainty** – The transition away from the *Chevronto* doctrine may lead to a period of regulatory flux, as courts reassess existing agency interpretations. And not every agency action will be susceptible to the same kind of attack, as the laws that created the agencies and gave them power to issue rules are all a little different. This uncertainty can complicate compliance efforts and strategic planning for federal contractors.
- **Potential Delays in Rulemaking** – Now that *Chevron* has been overruled, agencies may be more cautious and thorough when developing new regulations in the face of greater judicial scrutiny.
- **Inconsistent Jurisdictions** – Without a uniform deference standard, different courts in different states may interpret statutes in varied ways, creating a patchwork of compliance requirements across the country. This, of course, can be challenging for employers operating across multiple states.

3 Steps You Can Take Now

Employers should note that the EEOC's and OFCCP's current approaches haven't changed yet – and the agencies haven't shown any signs that they intend to backdown. So, you can expect their strategies and priorities to remain unchanged for now as we wait for the post-*Chevron* reality to take shape. In the meantime, we encourage you to take these three steps to remain agile during this period of uncertainty:

1. **Stay Informed and Proactive** –Ensure your legal team or external counsel provides regular updates on significant court decisions and regulatory changes ([sign up for FP Insights here](#)). Staying ahead of the curve will allow you to anticipate and prepare for potential impacts.
2. **Enhance Legal and Compliance Resources** – Consider expanding your in-house legal team or increasing collaboration with external legal counsel. Actively foster compliance by assigning a member of your team to review resources, identify areas where changes are proposed, and ensure real-time tracking of regulatory changes.
3. **Advocate for Clarity and Fairness** –Actively participate in industry and trade associations, which will lead the way in providing resources and advocacy support to help navigate the shifting regulatory landscape. Hand in hand with these organizations, you can engage with policymakers and advocate for clear, fair, and predictable regulatory frameworks. Effective advocacy can help shape regulations that support growth and stability across industries.

Conclusion

The Supreme Court's blockbuster decision marks a significant shift in the regulatory landscape, presenting both challenges and opportunities for federal contractors. You can effectively navigate this period of change by staying informed and actively engaging in advocacy.

Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. We will continue to monitor the situation and provide updates as more information becomes available. Any questions may be directed to your Fisher Phillips attorney, the authors of this

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