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What A Post-Chevron Landscape Could Mean For Labor Law

By **David Broderdorf, Michael Kenneally and Monica Ratajczak** (April 1, 2024, 4:26 PM EDT)


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In January, the U.S. Supreme Court heard argument in two cases — Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce — asking whether the court should overrule or substantially modify federal courts' practice of deferring to statutory interpretation and regulatory actions by administrative agencies.[1]

Under the high court's landmark 1984 decision in Chevron USA Inc. v. Natural Resources Defense Council Inc., federal courts ordinarily accept a statutory interpretation that the relevant administrative agency adopts in a rulemaking or formal adjudication unless the interpretation contradicts the statute's unambiguous meaning on the specific issue or is otherwise unreasonable.

The Chevron doctrine has come under increasing criticism from some in recent years — including from current members of the Supreme Court — in part because it allows executive branch officials, not legislators, to exert massive, quasi-legislative control over major policy decisions. The justices' willingness to hear these cases could suggest that a majority may be ready to curtail, or even discard, the Chevron doctrine.

With those rulings expected by the end of June, it is not too soon to consider the potential impact of an end to Chevron deference. One agency that could witness a sea change is the National Labor Relations Board.

Under current Supreme Court precedent, courts ordinarily assess the board's interpretations of the National Labor Relations Act under the Chevron framework.[2]

The result is "the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application," as stated by the Supreme Court in its 1995 ruling in NLRB v. Town & Country Electric Inc.[3]

The overruling of Chevron would likely upset this status quo. To be sure, the board's attorneys are already previewing potential arguments that the board merits deference even if Chevron falls.[4]

Still, it seems doubtful that courts will continue to place a heavy thumb on the scale in favor of the board's interpretations of the NLRA if other administrative agencies stop receiving equivalent deference.

The Supreme Court is more likely to announce a rule that applies universally, to the board and other agencies alike.

Removing the thumb from the scale would leave reviewing courts with more traditional tools of statutory interpretation, which is precisely why labor law might experience massive change if Chevron falls.

When the NLRA is viewed through the prism of its plain statutory language and Supreme Court precedent interpreting that language, it is a very different, and much narrower, law than what labor law practitioners experience today when handling unfair labor practice charge investigations and litigation.

Many modern positions adopted by the board and its general counsel seem unmoored from the original understanding of the NLRA, dating back to the Supreme Court's 1937 ruling in NLRB v. Jones & Laughlin Steel Corp. that the law, as originally understood, was constitutional.[5]

Below, we explore how the board has expanded the NLRA beyond its plain language and the Supreme Court's decisions. Decades of judicial deference to agency policy preferences — and ongoing involvement in the executive branch — have made these step-by-step expansions possible. Each incremental movement in precedent fails to account for what has amounted to radical movement in law over time.

But a return to the NLRA's roots would rein in much of the board's modern precedent and restore a perspective that has been lost regardless of the presidential administration in power.

Protecting Virtually any Employee Activity Related to Workplace Issues

Even though employee rights under Section 7 of the NLRA are explicitly premised on a public policy to allow unionization and collective bargaining where employees so choose, the board for decades has construed the statutory phrase "other concerted activities for the purpose of collective bargaining or other mutual aid or protection" to extend further.

On this view, the concept of protected concerted activity is virtually limitless in the modern workplace. It extends to individual complaints and even objections to the maintenance of employee handbook language — even when the complaints or objections are divorced from actual or intended group action, much less group action that could lead to unionization or collective bargaining.[6]

The plain statutory language does not support the board's expansive interpretation of Section 7. Nor is there any evidence that Congress — when it passed the original NLRA in 1935 or substantially modified it in 1947 — had any intention for the board to police a host of individual employee conduct in the workplace having nothing to do with forming a union or engaging in collective bargaining.

On the contrary, the statute itself frames its objectives in terms of collective bargaining and unionization:

> encouraging the practice and procedure of collective bargaining and ... protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[7]

In its 2018 Epic Systems Corp. v. Lewis decision — a rare example of a refusal to apply Chevron in the board's favor because of potential damage to a distinct federal statute — the Supreme Court itself emphasized the error in the board's modern view of Section 7: "Section 7 focuses on the right to organize unions and bargain collectively."[8]

Not only that, the court stressed that its prior "Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace."[9]

As Epic Systems teaches, union organizing and collective bargaining "are the bread and butter of the NLRA."[10] So, in a post-Chevron world, practitioners can expect to see fundamental challenges to the board's massive body of case law policing employer actions or handbook rules involving individual employees, without any direct connection to or potential for union formation or collective bargaining — or analogous conduct.

Special Protections for Employee Misconduct

In addition to its expansive interpretation of Section 7, the board for many decades has, with few exceptions, protected certain employee misconduct in the course of Section 7 activity.

Such misconduct includes harassing, insulting and vulgar behavior, which the board has nonetheless treated as part and parcel of legitimate labor law activity and worthy of protection.[11]

This attitude has often placed employers in challenging positions by limiting their ability to enforce legitimate policies on workplace civility and discharge their distinct obligations under equal employment opportunity laws.

In the NLRA's earliest days, however, the Supreme Court explained in 1937's NLRB v. Jones & Laughlin Steel Corp. that the statute "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them," and that "the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than [unlawful] intimidation and coercion."[12]

Then, in 1947, Congress amended Section 10(c) of the NLRA to make explicit that employers may discipline or discharge employees for cause. This amendment was "sparked by a concern over the Board's perceived practice of inferring from the fact that someone was active in a union that he was fired because of anti-union animus even though the worker had been guilty of gross misconduct."[13]

Even so, the board often treats Section 10(c) as applicable only in cases where it finds that employees did not engage in Section 7 activity — as expansively defined — or where the employer proves the activity had no possible connection to the challenged adverse action, which may entail proving a negative.

Without Chevron, the board's minimizing of employee misconduct and Section 10(c) could see more robust challenge. After all, it is hard to discern the public policy behind the board's decisions in this space, given the NLRA's narrow legislative intent. And at a minimum, it may be hard for courts to justify a reflexive acceptance of the board's views on labor laws and their effect on modern workplace dynamics.

NLRA's Ban on Unilateral Employer Action Absent Union Consent or Bargaining to Overall Impasse

Last for purposes of this article, but not the least, is the NLRB's broad interpretation of the basic duty to bargain under Section 8(a)(5).

To today's board, this duty requires many employers not just to give notice and opportunity to bargain over material changes to mandatory subjects of bargaining, but to refrain from making any changes without union permission or an overall impasse on all bargaining issues.

In other words, the board deems it a "failure to bargain" even if bargaining occurs for weeks or months on a topic, and a resulting change "unilateral" regardless of union input.

Because of this categorical rule, employers in first contract negotiations or successor contract negotiations can be blocked from moving forward or face years of litigation, and liability, despite having bargained over important business or economic needs.[14]

This approach to collective bargaining is not supported by the statutory language or public policy. The statutory text simply states that employers cannot "refuse to bargain collectively with the representatives of his employees."[15]

The board's modern precedent is rooted in no statutory text, and it routinely finds violations regardless of the employer offering to bargain or engaging in good faith bargaining.

Yet the Supreme Court has long made clear that the NLRA embraces freedom of contract with regard to unionization and collective bargaining and demands neutrality of the board when it deals with the bargaining process or its outcomes.

According to the Jones & Laughlin decision, the NLRA "does not compel agreements" between an employer and the employees' bargaining representative, nor does it "prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.'"[16]

On the contrary, according to the Supreme Court's NLRB v. Insurance Agents' International Union decision in 1960, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."[17]

Accordingly, the court ruled in H.K. Porter Co. Inc. v. NLRB in 1970:

[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.[18]

Under Supreme Court precedent set in First National Maintenance Corp. v. NLRB in 1981, the bargaining process is supposed to strike a balance between "labor-management relations and the collective bargaining process," on the one hand, and "the burden placed on the conduct of the business" on the other.[19]

But at the board, decision after decision on employers' duty to bargain has favored leverage for labor unions at the expense of business imperatives.

If courts return to statutory and precedential first principles, rather than reflexively defer to the board, they can restore the NLRA's balance between workplace democracy and what the First National Maintenance ruling described as "the running of a profitable business."[20]

Conclusion

This article has only scratched the surface of a few of the board's current statutory interpretations and their loose connection to the NLRA's text or original purposes.

In a world without Chevron, labor law practitioners can more freely challenge long-held assumptions about the NLRA when handling NLRB investigations or litigation.

Chevron may give the board considerable legal leeway in shifting labor law toward the board's desired ends. But if Chevron disappears, labor law may have to reorient around the best reading of the NLRA's language and applicable Supreme Court precedent.

This outcome would also have several welcome effects. It would stabilize the administration of federal labor law, halting the constant pendulum swing between shifting presidential administrations, which creates whiplash for employers, employees and unions alike.

Additionally, it would promote adherence to statutory text rather than creative prosecutorial theories that expand the NLRA's reach and make legal compliance more difficult.

We may be going "back to the future" in 2024 — just shy of the NLRA's 90th anniversary — and practitioners must be ready.

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[1] See Loper Bright Enters. v. Raimondo, No. 22-451 (U.S.) (argued Jan. 17, 2024); Relentless, Inc. v. Dep't of Comm., No. 22-1219 (U.S.) (argued Jan. 17, 2024).

[2] E.g., Lechmere, Inc. v. NLRB, 502 U.S. 527, 536 (1992); NLRB v. United Food & Com. Workers Union, Loc. 23, 484 U.S. 112, 123 (1987). But see, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574-75 (1988) (holding that the principle of constitutional avoidance overrides normal Chevron deference).

[3] NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89-90 (1995).

[4] Parker Purifoy, Labor Board Has Fallback if Justices Overturn Agency Deference, Bloomberg Law, Feb. 27, 2024, 4:40 PM EST, https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/BNA%200000018d-ec27-dc3f-abed-fe7f8cab0001.

[5] See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[6] See, e.g., Stericycle, Inc., 372 NLRB No. 113 (Aug. 2, 2023); Miller Plastics Products, Inc., 372 NLRB No. 134 (Aug. 25, 2023); American Federation for Children, Inc., 372 NLRB No. 137 (Aug. 26, 2023); Home Depot USA Inc., 373 NLRB No. 25 (Feb. 21, 2024); see also Cintas Corp. No. 2, 372 NLRB No. 34 (Dec. 16, 2022).

[7] 29 U.S.C. §151.

[8] Epic Sys. Corp. v. Lewis, 584 U.S. 497, 511 (2018).

[9] Id. at 517.

[10] Id. at 515.

[11] E.g., Lion Elastomers LLC, 372 NLRB No. 83 (May 1, 2023).

[12] Jones & Laughlin, 301 U.S. at 45-46.

[13] NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 401 n.6 (1983).

[14] E.g., PPG Industries Ohio, Inc., 372 NLRB No. 78 (Apr. 13, 2023); Wendt Corp., 372 NLRB No. 132 (Aug. 26, 2023); Tecnocap LLC, 372 NLRB No. 136 (Aug. 26, 2023); CP Anchorage Hotel 2, 371 NLRB No. 151 (Sept. 29, 2022).

[15] 29 U.S.C. § 158(a)(5).

[16] Jones & Laughlin, 301 U.S. at 45.

[17] NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488 (1960).

[18] H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99, 108 (1970).

[19] First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 678-79 (1981).

[20] Id. at 679.