Legal Update Article

# The U.S. Supreme Court Overturned Chevron: What That Means for the NLRB

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The U.S. Supreme Court's decision in *Loper Bright Enterprises et al. v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, Nos. 21-5166/22-1219, (June 28, 2024) overturning the *Chevron* doctrine left open the future scope of judicial deference to National Labor Relations Board decisions. On July 5, 2024, in *Hotel De La Concepcion v. NLRB*, No. 22-01272, the U.S. Court of Appeals for the D.C. Circuit issued a ruling that minimizes the impact of *Loper Bright* on Board decisions.

**The Court of Appeals Decision**

In *Hotel De La Concepcion*, the employer sought review of a Board decision finding it violated the National Labor Relations Act by, among other actions, unilaterally reducing work schedules and temporarily closing a department. The employer claimed it had the right to act unilaterally under its collective bargaining agreement with the union representing its employees. The Board rejected the employer's contention. The employer appealed the decision to the D.C. Circuit, but the Court enforced the Board's decision. However, when it addressed the scope of its review of Board decisions, the Court observed that it reviews Board decisions with a "very high degree of deference." The Court amplified this observation by stating that it sets aside a Board decision only if the decision "departs from established precedent without reasoned justification, or when the Board's factual determinations are not supported by substantial evidence."

Curiously, the Court's opinion does not discuss, or even cite, the *Loper Bright* decision. Moreover, the Court's opinion omits any reference to the U.S. Supreme Court's ruling in *Ford Motor Co., v. NLRB*, 441 U.S. 488 (1979), which preceded promulgation of the *Chevron* doctrine and established the foundation for generous judicial deference to Board decisions. Instead, the Court cites to established circuit precedent which predates the *Loper Bright* opinion.

**Impact on the Board**

Given the Court's clear pronouncement in *Loper Bright* that administrative agencies are not due special deference, it initially appeared that *Ford's* continued viability was in doubt and that Board cases would be subject to increased judicial scrutiny. Now, the D.C. Circuit has signaled that the special deference accorded to Board decisions will continue to be recognized by that court and perhaps other federal courts unless the Supreme Court clarifies the issue by either overruling or reaffirming *Ford.*

The decision in *Hotel De La Concepcion* pertains only to the Board's quasi-judicial role in unfair labor practice proceedings. The decision does not impact the exercise by the Board of its administrative rule-making authority. *Loper Bright* can still be read

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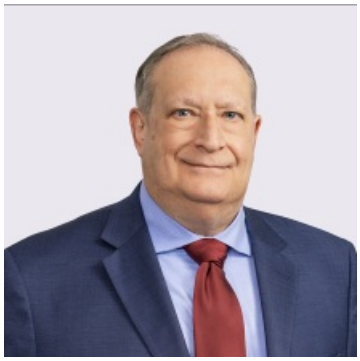

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to circumscribe the Board's rule-making authority by subjecting it to a greater degree of judicial scrutiny. The distinction is important because the Board has increasingly turned to rulemaking as an avenue for making changes in Board law and procedure. The immediate impact of *Loper Bright* on the Board may still be seen as it defends some of its latest rulemaking, including its 2023 joint-employer standard and new precedent outlining when bargaining orders may be issued to circumvent a union election.

**Key Takeaways**

The decision in *Hotel De La Concepcion* is limited to cases arising in the D.C. Circuit. Since any Board decision can be appealed to the D.C. Circuit, employers seeking to avoid an adverse ruling by the Board must carefully consider whether to invoke the jurisdiction of that circuit on appeal. Whether courts in other circuits follow the lead of the D.C. Circuit is an open question. The prospect of conflicting circuit court opinions on the issue of deference to the Board may in the short-term lead to less predictability. However, such conflicts increase the likelihood that the Supreme Court will feel compelled to address the continued vitality of its *Ford* decision.

For now, the Board likely will continue to issue decisions as it has in the past. Employers should still follow current Board precedent unless, and until, a court rejects it. That said, the *Loper Bright* decision may make it easier for employers to challenge Board regulations, and thus may limit the ability of Board to reshape labor law to the degree with which it has over the last 40 years.

Please contact a Jackson Lewis attorney with any questions.