

Loper Bright Enterprises v. Raimondo

A brief introduction

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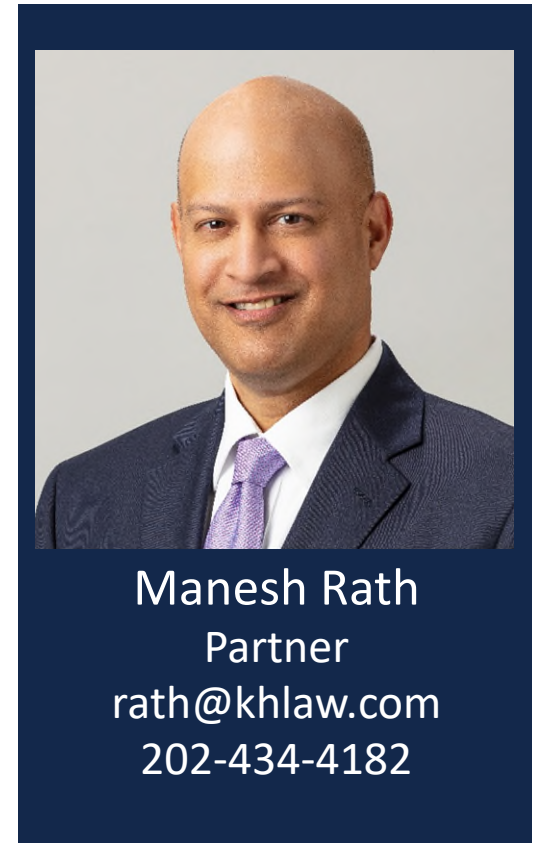


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath served for two terms on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016 through 2024, and in 2023, selected in his field as Lawyer of the Year; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



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What is the *Chevron* Standard?

- ◆ Supreme Court decision. 1984.
- ◆ *Chevron USA Inc. v Natural Resources Defense Council Inc.*
- ◆ In a suit challenging whether an agency's regulation was consistent with the intent of the statute, courts analyzed the challenge based on two questions:
 - A. Did Congress directly speak to a precise question at issue? Or was there an ambiguity in the statutory language?
 - B. Is the agency's interpretation a reasonable one?
- ◆ If the agency's interpretation was *a* reasonable interpretation, the Court should give deference to the agency's interpretation (even if the Court would have read the statutory language differently)

Administrative Procedures Act

- ◆ Under the APA, a reviewing court:
 - ◆ Must decide “all relevant questions of law,” and
 - ◆ Must interpret statutory provisions
- ◆ This is consistent with the general rules for statutory construction
 - ◆ Courts, not agencies, engage in statutory construction
 - ◆ Apply the plain meaning of allegedly ambiguous statutory language
 - ◆ Consider the legislative history of the statute
 - ◆ Between two interpretations, apply the one that would not lead to an unworkable result

The Supreme Court decision in *Loper*



- ◆ Question for Court: whether the National Marine Fisheries Service could set rates for an observer on fishing boats in the Atlantic fishing industry.
- ◆ Court:
 - ◆ *Chevron* is based on presumption that an agency has expertise in resolving statutory ambiguities. They do not; courts do.
 - ◆ The Constitution assigns to courts the role of deciding legal questions by applying own judgment, not by deferring to the executive. (*Marbury*)
 - ◆ Courts must apply traditional rules of statutory construction
 - ◆ Exceptions, preconditions in *Chevron* analysis caused courts to bypass *Chevron*. “Unworkable” (S. Ct has not deferred to an agency since 2016).
 - ◆ Agency interpretations may be useful if issued concurrently with statute, consistent over time.

AKM LLC dba Volks Constructors v. Sec'y of Lab., 675 F.3d 752 (D.C. Cir. 2012)

- ◆ Volks appealed OSHA citations for failing to maintain workplace injury records because they were issued beyond the six-month statute of limitations in the OSH Act.
- ◆ OSHA argued that the Act's five-year record retention provision made the recordkeeping errors "continuing violations" that tolled the statute of limitations until the end of the five-year period.
- ◆ Court: The citations were clearly time-barred under the OSH Act and OSHA's interpretation was unreasonable.
 - ◇ OSHA's reading could not "survive even with the aid of *Chevron*" because there was no ambiguity in the statute; Congress expressly intended for citations to be issued within six months.
 - ◇ "[T]he mere requirement to save a record cannot possibly impose a continuing affirmative duty to correct past failures to make the record in the first place."



Agric. Retailers Ass'n v. United States Dep't of Lab., 837 F.3d 60 (D.C. Cir. 2016)

- ◆ An OSHA interpretation memo revised the retail exception in the PSM standard, which subjected roughly 4,800 sites to the standard for first time.
- ◆ OSHA argued that the APA permitted the agency to issue interpretations without rulemaking.
- ◆ Court: OSHA's reliance on the APA was misplaced; the agency was required to undertake rulemaking pursuant to the OSH Act.
 - ◇ §655(b) of the OSH Act requires that *standards* be issued through rulemaking.
 - Standards are intended to abate a hazard.
 - ◇ The OSHA memo effectively established a new PSM standard because it intended to abate a hazard and it significantly expanded its scope.



Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., **595 U.S. 109 (2022)**

- ◆ OSHA issued an emergency rule compelling large businesses to require employees to either receive COVID-19 vaccination or undergo weekly testing.
 - ◇ The agency argued that the rule's mandates were within its power under the OSH Act to regulate occupational hazards.
- ◆ Court: The rule's mandates exceeded OSHA's authority under the OSH Act; the agency's interpretation that COVID-19 posed an occupational hazard was too broad.
 - ◇ The OSH Act empowers OSHA to protect employees from workplace hazards by promulgating and enforcing occupational safety and health standards.
 - ◇ No provision enables OSHA to address public health generally.
 - ◇ OSHA may impose such mandates on certain workplaces where the virus poses a "special danger."



Loper's Impact on OSHA Law

- ◆ This decision does not overturn all prior *Chevron*-analyzed cases.
- ◆ Of all federal agencies, OSHA may be higher than average in reliance on interpretations to create law.
- ◆ OSHA has urged the use of *Chevron* analysis in many of its defenses.
- ◆ Forthcoming challenges to new OSHA rulemaking may be impacted:
 - ◇ Walkaround rule (necessary = any positive contribution)
 - ◇ Heat stress (two causative components to heat stress)
 - ◇ Workplace violence (inconsistent policy positions over time)
- ◆ *Corner Post* decision implies that OSHA law stakeholders may have a chance to bring a challenge starting from the date of injury, not just the date the rule was finalized.

Thank You

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