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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Former DOL W&H Head Talks Shop On Agency Rulemaking

By **Daniela Porat**


Paul DeCamp

Law360 (August 27, 2024, 2:12 PM EDT) -- Paul DeCamp, a former administrator in the U.S. Department of Labor's Wage & Hour Division, said the overturning of Chevron deference will lead to better rulemaking.

The DOL's rules on key wage and hour issues are in legal crosshairs, and a common theme across these suits is whether the DOL has the authority to engage in certain rulemaking. One challenge to the department questions whether the Fair Labor Standards Act allows the DOL to create salary requirements for white-collar exemptions — a hallmark of the exemptions for decades.

These types of arguments got a boost in June after the U.S. Supreme Court in Loper Bright Enterprises et al. v. Raimondo overturned Chevron deference — a doctrine that courts should defer to agency interpretations of statutes when there is ambiguity in the statute.

DeCamp represented restaurant industry groups in a successful push to overturn the DOL's 2021 DOL tip credit rule, which further limited the circumstances when an employer can pay the tipped minimum wage of $2.13 an hour. The appellate court struck down the regulation Friday.

Here, Law360 speaks with DeCamp, who was head of the Wage & Hour Division during the George W. Bush administration and is now a member of management-side firm Epstein Becker Green PC, about the future of agency rulemaking.

How does your past experience as a W&H administrator inform your practice today and how you think about the DOL's power?

My time with the department made me much more aware of both the historical and the institutional concerns that the department has when trying to enforce a statute, oftentimes, one that Congress wrote many decades ago, as in the case of the FLSA.

It gave me a better appreciation for the realities of how rulemaking happens, which gives me a better take on how to understand pushing back on rules. What I mean by that is, as a private practice lawyer before having any experience with the department, I just assumed naively that regulations came about because people in the agencies sat and thought about the law and tried to come up with the most legally accurate approach to implementing a statute.

When I was at the agency, I came to understand that what tends to drive rulemaking is policy first and law second. That's not to say that law is not an important consideration, but it's not typically the driving factor. It's not an academic exercise to figure out what the right answer is, so much as it is an effort to put a policy imprint on a statute. And having understood that, based on having worked at the department, it gave me a better appreciation for seeing where the agency's blind spots are, as well as recognizing where policy disputes are driving particular provisions in regulations.

How has the overturning of Chevron deference changed the game for the DOL and its rulemaking?

The demise of Chevron is not something that will be welcome news at the department or at any department or any executive agency, at least in the short term. But in the longer term, I think what it will do is generate better rulemaking.

It'll generate regulations that adhere more closely to the statutory text and legislative history, and it will cause agencies to be more careful and more thoughtful and measured in how they analyze and respond to comment or feedback during the notice and comment process. This is because now agencies will no longer be able to issue a final rule confident in the armor that the courts had given them before … in essence, a heavy thumb on the scale in terms of upholding regulations if they passed a bare minimum threshold of rationality.

Instead, the agency is going to have to make sure that it can justify, particularly in the first instance, its authority to regulate in the space as an initial matter, as a threshold matter. Once it gets to the point of having convinced the court that the agency has the authority to regulate on a particular topic, now we perhaps shift to the Administrative Procedure Act's arbitrary and capricious standard, where there is more of a presumption that the agency's action is valid. But the agency is going to have to do some work to get to that stage in the analysis, whereas originally under Chevron, they oftentimes did not have to do much to prove that they could regulate in the space.

What do you make of the Fifth Circuit's ruling in your case against the DOL's tip credit rule?

The Fifth Circuit's ruling is, I think, a window into how courts are going to approach analyzing regulations in a post Chevron world. It all begins with the statute. The court focused very intently on the precise words used in the statute, as well as the relationship of those statutory words to what the Department of Labor did to try to evaluate whether the department stayed within the lines.

The statutory definition of tipped employee focuses on whether an employee is engaged in an occupation in which he or she customarily and regularly receives a certain amount of tips.

The department focused on exactly the wrong thing. Congress said, focus on the occupation. The Department of Labor said, no, thank you. We're going to focus on tips. So this is why the Fifth Circuit said, department, you got this totally wrong. There was room for you to draw lines, but not these lines. You were answering the wrong question. The question the department was trying to answer in the regulation was, to what extent is the worker pursuing tips? The court said the question you should have been asking is, how do we tell whether a person is engaged in an occupation? So the department focused on the wrong thing. They wrote their own law instead of implementing the law the Congress wrote.

Do you think the opinion will be appealed to the U.S. Supreme Court?

I think an appeal is unlikely. First of all, there's no direct circuit split. The Fifth Circuit's ruling is the only appellate court ruling addressing the validity of this regulation, particularly after the overruling of Chevron. Second this case does not get better for the Department of Labor the higher up it goes. When we think about what the Supreme Court and its current jurisprudence on deference to agencies looks like, that landscape would not be particularly hospitable to this particular regulation.

Given the Supreme Court's current focus on making sure that agencies stick to the authority that Congress gave them, I don't think the Solicitor General's Office would want to get this case anywhere close to the Supreme Court because I think they would be looking at a judicial beat down of epic proportions.

What do you think about the Mayfield et al. v. U.S. Department of Labor case, which raises the threshold question of whether the FLSA's directive for the department to define the overtime exemptions can include salary specifications?

The overtime rule at issue in the Mayfield case, which is the [2019] version of the overtime rule that was in effect before the current rule went into effect, raises a very interesting challenge for the courts.

The overtime rule does stand apart from other Department of Labor regulations that are currently under challenge in the courts, largely because there is a broad delegation of authority to the secretary [of labor] to define and to delimit the scope of the exemptions. That is, however, with the caveat … that defining and delimiting what it means to be employed in a bona fide executive, administrative or professional capacity doesn't necessarily mean the authority to define or to delimit a salary requirement. In other words, does capacity mean only the duties, or does capacity extend broadly enough to also encompass salary?

The Mayfield case also presents a very challenging issue, which is even if one assumes that the statutory text allows the department to have a salary or other compensation component to the exemption analysis, and assuming that we get past the major questions issue of, did Congress mean for the department to have this authority, there is still the question of, okay, is that too much authority to give to an executive agency? Is that essentially legislating such that we have a nondelegation problem?

It's a very interesting set of challenges, one that becomes only more interesting and even more difficult for the department when we look at the new overtime rule, which I think is even more vulnerable to challenge because it [differs from] prior rules in some very significant ways. [*The overtime rule, which went into effect in July, raises the threshold for overtime exempt workers. The threshold goes up again Jan. 1 and starting in July 2027 will increase every three years.*]

What do you think about the ongoing challenges to the department's other rules?

In the new [overtime] rule, the department went in a different direction and applied a standard for setting the salary level that really excluded a lot more people who, without dispute, currently perform executive duties or administrative or professional duties. So the department's approach now, coupled with the automatic triennial increases, really makes this a unique rule in terms of no longer being able to take shelter in the notion that Congress has basically acquiesced to what the courts and the department have done with the salary level over the last 80 years.

When we talk about the independent contractor rule, that one is challenging because there's next to no statutory text for the department to interpret. What the department is interpreting in the independent contractor rule is simply the statutory term "employee." That's it. The term "independent contractor," that phrase does not appear in the Fair Labor Standards Act. So the regulation is not an interpretation of the statutory term independent contractor, because that's just not in the FLSA. It is all about who is or is not an employee.

It's not uncommon for there to be some measure of gray zone cases in any regulation, but with the independent contractor rule, the gray space is exceptionally wide relative to what we see with other regulations. It's not a rule so much as an invitation to litigation and a test of a business's risk tolerance.

What role should the DOL and the Wage and Hour Division play?

The Wage and Hour Division should keep doing what it's been doing for more than 80 years, which is enforcing the FLSA. There's nothing wrong with that. And frankly, in most instances, I think the Wage and Hour Division gets it right when it issues regulations.

There are, in a few key instances, times where the department [oversteps] and where they go outside the bounds of what the FLSA allows.

Again, I don't think any of this is for any bad, malign purposes. I think the department is trying to protect workers. But in their zeal to do that, they go too far sometimes, and when that happens, it's my job to rein them in.

--Editing by Roy LeBlanc.
