SUMMER 2024

Gislason & Hunter, LLP

eLAW
LABOR & EMPLOYMENT

Avoiding Liability in Job Postings and Solicitations

by Adam N. Froehlich

When you think about potential sources of employment liability, your job posting and solicitation practices might not be front of mind. But with new legislation in Minnesota requiring disclosure of pay in postings beginning on January 1, 2025, and recent high profile discrimination cases related to job postings, it is an important time to review the ways in which you bring in talent to ensure legal compliance.

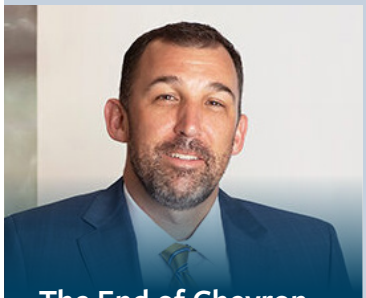
EFFECTIVE JANUARY 1, 2025, EMPLOYERS OF 30 OR MORE EMPLOYEES IN MINNESOTA MUST DISCLOSE COMPENSATION DETAILS IN JOB POSTINGS

In the 2024 legislative session, the Minnesota legislature passed, and the governor signed, SF 3852. Among other things, SF 3852 creates Minnesota Statutes section 181.173, which requires any "person or entity that employs 30 or more employees at one or more sites in Minnesota" to disclose "the minimum and maximum annual salary or hourly range of compensation" and "a general description of all of the benefits and other compensation...to be offered to a hired job applicant" in the job posting, whether the recruitment is done by the employer or a third party. The statute requires a "good faith estimate" of the compensation available, and salary ranges may not be open ended. If an employer does not intend to list a pay range, the employer may list a fixed pay rate.

No later than January 1, 2025, employers of 30 or more employees need to comply with section 181.173, or risk enforcement action by the Department of Labor and Industry or the Attorney General. The language of the statute does not restrict the requirement to postings for jobs within the state of Minnesota; the statute appears to apply to any job posting made by or on behalf of an employer of 30 or more persons in Minnesota. Covered employers who recruit for positions working outside of Minnesota may wish to seek further legal

Avoiding Liability continued on page 2

INSIDE



GISLASON & HUNTER LLP

Labor & Employment Law

Cory A. Genelin
Brittany R. King-Asamoa
Adam N. Froehlich

gislason.com

AVOIDING LIABILITY

continued from page 1

advice on the applicability of section 181.173 to postings for work performed outside of Minnesota. It is important to note as well that Minnesota's law goes further than that of other states with similar requirements, in that Minnesota requires employers to post information related to all benefits and other compensation, in addition to pay, including but not limited to any health or retirement benefits. Implementation of this statute will undoubtedly come with some uncertainty and growing pains, not the least of which will be what constitutes a "good faith estimate" of the available compensation. Employers should document their basis for coming up with posted pay ranges, which may include things like the pay rate of people previously or currently holding the position advertised or the amount budgeted for a position. Those details do not need to be included in the job posting but should be retained in case of any state investigation.

DISCRIMINATION, AND OTHER PROHIBITED ACTS, ARE JUST AS ILLEGAL IN JOB POSTINGS AS IN OTHER CONTEXTS

It may go without saying for many people, but generally applicable laws, such as prohibitions on discrimination, restrictions on questioning immigration status, et cetera, still apply when you're doing something as simple as posting a job. In a recent, particularly egregious example, a Virginia based company posted a job advertisement which stated that eligible candidates needed to be "US Born Citizens [white] who are local within 60 miles from Dallas, TX [Don't share with candidates]."[1] The company settled with the Department of Justice in May of 2024, agreeing to pay a civil penalty and train its employees on the requirements of the Immigration and Nationality Act.[2] At the risk of stating the obvious, job requirements like that should never be found in a job posting, nor should they exist in any way. However, more innocuous examples may run afoul of the law as well. For example, a job posting which seeks "recent college graduates" may unlawfully show a preference for or discourage someone from applying based on their age.[3]

To avoid potential liability arising from your job postings, ask yourself: "Would this be a problem if I said this to a current employee or to an applicant in an interview?" If the answer is yes, it probably should not be in your job posting. Keep qualifications objective and avoid any terms which could relate to a protected class. Following your existing anti-discrimination policies in job posting, solicitation, and recruitment should provide adequate protection in those contexts, provided those policies are up to date.

BE AWARE OF INDUSTRY-SPECIFIC REQUIREMENTS WHICH MAY BE APPLICABLE TO YOU

Your specific industry may have unique job and solicitation requirements, which you need to be aware of if you have a role in bringing employees into your organization. If you are unsure about any of these requirements, you should consult with your attorney to ensure compliance.

One example of an industry-specific recruitment requirement in Minnesota applies to migrant seasonal agricultural labor. Whenever an employer "induce[s] an individual" over the age of 17 to travel "more than 100 miles to Minnesota from some other state" to perform seasonal agricultural labor "by an offer of employment or of the possibility of employment," the employer must provide the individual with an employment statement in English and the worker's preferred language, listing a variety of information related to the terms of employment.[4] This requirement was recently updated in 2023 from applying only to cannery workers, to apply to all recruited migrant agricultural workers. The employment statement must list the date and place at which the statement was completed and provided to the migrant worker, suggesting that the information cannot be provided as part of a job posting, but it also seems possible that a job posting could "induce" someone to travel to Minnesota based on an offer of the possibility of employment. Employers who engage in recruiting migrant agricultural workers should consult with their attorney to ensure that they are in compliance with this recent development in Minnesota Law. In addition, employers who utilize third-party recruiters should inquire as to the recruiter's practices in order to avoid potential liability.

As with many things, there are exceptions to the rule, which may vary your requirements when it comes to complying with the laws applicable to job postings and solicitations. For example, you may have bona fide occupational qualifications which may transform what would otherwise be unlawful discrimination into a lawful requirement of employment. Employers who find themselves dealing with such exceptions should carefully document the reasons for such qualifications, thoroughly consider whether or not the qualifications are actually necessary or merely represent a preference, and engage legal counsel.

CONCLUSION

Job postings and solicitations can give rise to liability for employers, just as many other day-to-day operations. For the most part, following existing policies will keep you on the right side of the law, when it comes to avoiding liability for things like discrimination. However, the state of Minnesota has recently focused more on the recruiting and solicitation process with things like the new requirement to post compensation information and the 2023 expansion of disclosures to recruited migrant agricultural workers, meaning employers need to pay additional attention to their recruitment and solicitation policies and procedures to remain in compliance with all facets of the applicable law. ■

[1] *Jon Haworth, Company That Posted Discriminatory 'Whites Only' Job Ad Settles With Federal Government, ABC News, May 28, 2024, 4:19 AM, https://abcnews.go.com/US/company-posted-discriminatory-whites-job-ad-settles-federal/story?id=110601691.*

[2] *Id.*

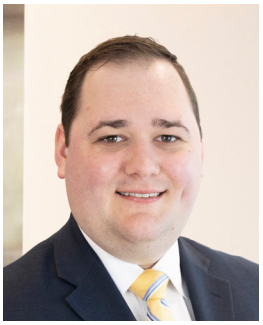
[3] *See Prohibited Employment Policies/Practices, United States Equal Emp. Opp. Comm'n, https://www.eeoc.gov/prohibited-employment-policiespractices (last visited July 8, 2024).*

[4] *Minn. Stat. § 181.85, 181.86.*

Artificial Intelligence in the Workplace

CRAFTING A COMPANY AI USE POLICY

by Adam N. Froehlich



When ChatGPT launched in late 2022, a wave of generative artificial intelligence ("AI") innovation followed—and it looks like it is here to stay.[1] Other popular generative AI tools you may be familiar with include DALL-E, Google's Gemini, and Microsoft's Copilot.[2] AI presents a number of concerns for businesses, including data privacy and security, accuracy and accountability, and legal compliance.[3] The number of cautionary tales about relying on AI, particularly generative AI, continues to grow. Research has shown that the use of ChatGPT in the workplace has grown rapidly, and 11% of the time the information employees are putting into ChatGPT is confidential.[4] 68% of employees who use ChatGPT at work do so without telling their supervisor.[5] At the same time, AI is a highly useful business tool that can boost productivity, cut costs, grow profits, and enhance processes.[6] In addition, many employees are worried that AI will replace them, in whole or in part, at some point in time.[7] When considering and crafting an AI use policy, employers must recognize and balance all of these competing interests to protect the company, harness the potential benefits and competitive advantages of AI, and manage employee expectations.

BEFORE YOU DRAFT: WHAT DO YOU NEED FROM A WORKPLACE AI POLICY?

With that background knowledge in mind, the next step in formulating an AI policy for your organization is to look inward and ask:

- How are you using AI today?
- How do you want to use AI in the future?
- Do you have sensitive data that needs to be protected from AI tools?
- What are the biggest risks AI presents to your organization?

Having a firm grasp on the answers to these questions will guide you in deciding what your AI use policy will look like. Consult with those responsible for IT and data privacy in your organization, as well as business unit leaders to determine the roles they see for AI, both currently and in the future. Knowing what you need from your workplace AI policy can guide you in the drafting process as you evaluate the risks and benefits, determine who needs to use AI and for what tasks, and consider how to guide employees' conduct related to AI.

AI LEGAL CONSIDERATIONS

Private-sector use of AI is not highly regulated at this point in time, but AI is on the radar of state governments, and many are taking action in certain industries and contexts.[8] The Federal government is similarly exploring AI policymaking.[9] For companies doing business internationally, many other countries and the EU are ahead of the curve, and have taken AI-specific regulatory action.[10] Before drafting a workplace AI use policy, you should make sure you are aware of any laws related to AI in the jurisdictions where your business operates. Even if you are not impacted by any specific laws now, it is likely that state and Federal laws will be passed in the future which will impact your workplace AI use policy, at which point reevaluation of the policy will be necessary.

Not all laws which need to be considered when drafting a workplace AI use policy are AI-specific. Data protection, consumer protection, anti-discrimination, and other general laws regulations affecting your business should be considered when evaluating an AI policy and AI tools. This will vary industry-to-industry and business-to-business.

Artificial Intelligence continued on page 4

ARTIFICIAL INTELLIGENCE

continued from page 3

KEY WORKPLACE AI POLICY COMPONENTS

A workplace AI use policy should outline reasonable use guidelines, restrict data inputs, protect intellectual property, and require employee review and disclosure. Like any good policy, your workplace AI use policy should define its purpose and scope, define key terms, identify related training, and describe or refer to reporting procedures and consequences for violations. Depending on the policy and the nature of your workplace, you may want to outline general principles, list approved AI tools, and identify who must approve the use of AI. Restricting data inputs and protecting intellectual property may best be couched in confidentiality, with reference to any confidentiality and data use policies you may already have. Similarly, you may need to incorporate document retention and intellectual property policies. ■

[1] *Kevin Roose, How ChatGPT Kicked Off an A.I. Arms Race, NEW YORK TIMES, Feb. 3, 2023, https://www.nytimes.com/2023/02/03/technology/chatgpt-openai-artificial-intelligence.html.*

[2] *Dall-E is a neural network that generates images from text descriptions. DALL-E, OPENAI, Jan. 5, 2021, https://openai.com/research/dall-e. Gemini is a generative AI chatbot, similar to ChatGPT, from Google. Gemini, GOOGLE, https://gemini.google.com/ (last visited Feb. 26, 2024). Copilot is a chatbot powered by GPT-4 and DALL-E 3, combining the capabilities of both. Copilot, MICROSOFT, https://copilot.microsoft.com/ (last visited Feb. 26, 2024).*

[3] *R. Scott Raynovich, The Top Five Real Risks of AI to Your Business, FORBES, June 22, 2023, 1:29 p.m.,https://www.forbes.com/sites/rscottraynovich/2023/06/22/the-top-five-real-risks-of-ai-to-your-business/?sh=5cd98e331e4a; Edward Segal, 10 Threats That the Use of AI Poses for Companies and Organizations, FORBES, May 2, 2023, 9:32 a.m., https://www.forbes.com/sites/edwardsegal/2023/03/02/10-threats-that-the-use-of-ai-poses-for-companies-and-organizations/?sh=683dfb403c7a; Kay Firth-Butterfield, Impact of Artificial Intelligence and Business Concerns, WORLD INTELL. PROP. ORG., https://www.wipo.int/tech_trends/en/artificial_intelligence/ask_the_experts/techtrends_ai_firth.html. (last visited Feb.23, 2024).*

[4] *Cameron Coles, 11% of Data Employees Paste Into ChatGPT is Confidential, CYBERHAVEN, Feb. 28, 2023, https://www.cyberhaven.com/blog/4-2-of-workers-have-pasted-company-data-into-chatgpt.*

[5] *Sarah Jackson, Nearly 70% of People Using ChatGPT at Work Haven't Told Their Bosses About It, Survey Finds, Mar. 21, 2023, 5:18 P.M., https://www.businessinsider.com/70-of-people-using-chatgpt-at-work-havent-told-bosses-2023-3.*

[6] *Thomas H. Davenport & Rajeev Ronanki, Artificial Intelligence for the Real World, HARV. BUS. REV., Jan.–Feb. 2018, https://hbr.org/2018/01/artificial-intelligence-for-the-real-world; Take Advantage of AI and Use it to Make Your Business Better, IBM, Aug. 15, 2023, https://www.ibm.com/blog/take-advantage-of-ai-and-use-it-to-make-your-business-better/; Brenna Sniderman, et al., Generating Value from Generative AI, DELOITTE, https://www2.deloitte.com/us/en/insights/topics/digital-transformation/companies-investing-in-ai-to-generate-value.html (last visited Feb. 23, 2024).*

[7] *Michele Lerner, Worried About AI in the Workplace? You're Not Alone, AM. PSYCHOLOGICAL ASS'N, Sept 7, 2023, https://www.apa.org/topics/healthy-workplaces/artificial-intelligence-workplace-worry.*

[8] *Artificial Intelligence 2023 Legislation, NAT'L CONF. OF STATE LEGIS., Jan. 12, 2024, https://www.ncsl.org/technology-and-communication/artificial-intelligence-2023-legislation.*

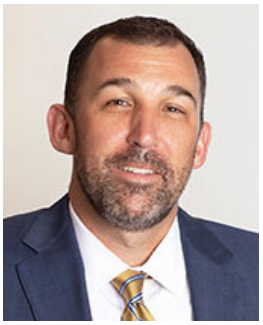
[9] *See Blueprint for an AI Bill of Rights, THE WHITE HOUSE, https://www.whitehouse.gov/ostp/ai-bill-of-rights/ (last visited Feb. 26, 2024).*

[10] *Joe Mariana, et al., The AI Regulations That Aren't Being Talked About, DELOITTE, https://www2.deloitte.com/us/en/insights/industry/public-sector/ai-regulations-around-the-world.html (last visited Feb. 26, 2024); Bill Whyman, AI Regulation is Coming—What is the Likely Outcome?, CENT. FOR STRATEGIC & INT'L STUDIES, Oct. 10, 2023, https://www.csis.org/blogs/strategic-technologies-blog/ai-regulation-coming-what-likely-outcome.*

The End of Chevron

THE END OF DEMOCRACY OR THE REBIRTH OF THE RULE OF LAW?

by Cory A. Genelin



"*Chevron* deference" and the end of Chevron deference has been all over the news since the United States Supreme Court published its June 28, 2024 decision in *Loper Bright Enterprises v. Raimaondo, Secretary of Commerce*. As with most media coverage of the law, most of the reporting I've seen has been overly simplistic at best, and downright deceptive at worst. Politically, the end of *Chevron* is described by one extreme as "the end of democracy!" and by the other as a revival of the rule of law. Both sides are correct in that the end of *Chevron* will mean dramatic changes to how Americans are governed. So, I thought it would be helpful for our readers, and challenging for me, to see if I could give a plain English explanation of just what the Supreme Court actually did in this case. (And when I say plain, I mean PLAIN: oversimplified and severely edited for brevity and clarity. This article is not a history thesis or a memorandum of law.)

HOW I THOUGHT GOVERNMENT WORKED (BEFORE I WENT TO LAW SCHOOL)

We all learned in elementary or junior high civics that a fundamental element of American government is "the separation of powers," meaning that, unlike the kingdoms of Europe, or the empires of ancient times, the powers of the American government would be divided among three separate branches. The legislative branch (the House and Senate) would create the law, but would not enforce it, and would not interpret it. The executive branch (the President and appointed officers) would enforce the law but would not make the law and would not interpret it. The judicial branch (the courts) would interpret the law, but would not make or change it, and would not enforce it.

WHAT IS ADMINISTRATIVE LAW?

For the first 125 or so years or so of the Federal Government, things functioned more or less as we were told in elementary civics. Then came the "progressive era." In the late 1800's and early 1900's, politicians began openly advocating for a more "active" government, which would exercise more control over the growing industrial economy. To keep up with the rapid pace of industrial development, the old system of laws being created by one branch and enforced by another was simply too slow and too cumbersome. Meanwhile, legislators wanted to control and regulate minute details of American life, but didn't want to be bothered with drafting the detailed legislation themselves.

THE ARGUMENT FOR ADMINISTRATIVE LAW AND DEFERENCE

(While *Chevron* is about Federal law, I'll use two examples from state law simply because they are probably more familiar to the reader.)

The State legislature knew that Minnesota's natural resources were being depleted. Specifically, fishermen were catching and keeping all the fish they possibly could, and fish populations were being destroyed. The legislature knew that one of the solutions was to make it illegal to keep more than a certain number of fish. The legislature could pass a statute setting a limit on fish. They could bring in experts, talk to their constituents, and try to find a number that both worked to sustain the walleye population, and made fishermen and conservationists happy.

This of course would probably take an entire legislative session to assemble and digest the relevant data and come up with a proper limit. And once established, it might need to be changed. Maybe the limit was too high, or too low; or maybe what we actually need are different limits for different lakes. To adjust over time, the limit would have to be debated every year. And of course the legislators themselves are not experts in biology, fishing, or law enforcement; so the chance of them coming up with the correct limit is quite small.

Instead, the legislature can pass a very broad statute without much detail. Imagine they call it simply "The DNR Act" and it says something like "(1) We hereby establish the Department of Natural Resources. (2) The Department will hire experts and study the lakes and fish. (3) The Department's experts shall set limits on the number of fish people can harvest, so as to maximize the number of fish harvested by recreational anglers in the long run." This is called an "enabling statute" because it empowers the executive branch (the DNR is part of the executive branch) to make law. The laws made by the executive branch are called "rules" rather than "statutes" but regardless of the label, they have the force of law and can have criminal penalties.

This makes sense on a certain level. Most of us don't want our legislators spending every session debating next year's walleye limits, and we want those limits set by people who understand biology and fishing.

Another example is Workers' Compensation. The Minnesota Legislature passed Chapter 176 which builds a framework for the system, but leaves many details for the experts in the Department of Labor and Industry to fill in. For example: should a grade 2 acromio clavicular separation (a shoulder injury) give a worker a

The End of Chevron continued on page 6

THE END OF CHEVRON

continued from page 5

3 percent disability rating or 6 percent? MN DOLI decides that, not the legislature.

The Workers' Compensation system actually takes things a step further. Not only does the executive branch engage in lawmaking, it also has its own court system. Workers' Compensation cases are not tried by the judicial branch. They are tried by Administrative Law Judges in Administrative hearings. The basis for this is that it allows decisions to be made by specialists in this area rather than by a district court judge who may have no experience in this unique area of law. As to Workers' Compensation, rules are made, enforced, and interpreted all within the same (executive) branch.

Hundreds of state and federal administrations have such systems that empower (presumptive) experts in each field to make rules, enforce those rules, and adjudge disputes about those rules and their enforcement.

INTERACTION BETWEEN ADMINISTRATIVE LAW AND THE JUDICIAL BRANCH

Fortunately, there are limits. None of these administrative law systems are completely independent of the actual judicial branch. To use our examples above, if the DNR's rule-makers declare that one may not keep more than 6 walleye, and if the DNR's enforcers accuse a person of keeping 7 walleye, the matter will be tried to a judicial branch court. Even with Workers' Compensation where cases are first tried by the executive branch, parties can ultimately appeal to the judicial branch.

DEFERENCE

So at some point, judicial branch courts are in a position to evaluate the rules, enforcement actions, and adjudication of these administrative agencies. The question then arises—should judicial branch courts "defer" certain things to these administrative agencies because they are the experts? This question is particularly important when lawsuits are about the validity of the rules themselves.

For example, let's say I get ticketed for keeping 7 walleye in a day, in violation of the 6 walleye limit. I challenge the ticket. I admit that I kept 7 walleye in a single day, but I argue that the DNR's rule is illegal, because (according to the simple language in my hypothetical enabling statute above) the DNR was supposed to "set limits on the number of fish people can harvest, so as to maximize the number of fish harvested by recreational anglers in the long run" and I argue that a limit of 7 would actually do that. Let's further say that I actually have some good evidence on my side; maybe I bring in 5 biologists who testify that if we were allowed to keep 7 fish, the population would not be affected and 6 instead of 7 would actually accomplish the goal of the legislation—more harvested fish.

In that case, should the court treat me and the DNR as equals and have a week-long trial over whether 6 or 7 is the best limit? Or should the court "defer" to the DNR and simply say "the DNR set the rule using the best data available to it, and they have the power to do that, and the rest of us need to follow the rule."? Most of us would say the latter and courts have traditionally agreed. The important point here is that in this case we are arguing about facts; and courts have long deferred to administrative agencies on questions of fact. Neither *Chevron*, nor *Loper Bright* change any of that.

Let's change the story a bit. Let's say I find out that when the DNR made the 6-walleye rule, it calculated that a limit of 8 would actually "maximize the number of fish harvested by recreational anglers in the long run." Let's say then that the DNR's bald eagle expert sent a memo to the rule-makers saying, "eagles also eat walleye, and a limit of 8 won't leave enough walleye for the eagles." Let's further say that the rule-makers specifically said, on the record, that preserving fish for the eagles was why they made the limit 6 instead of 8. Should the judicial branch court "defer" to the DNR on this issue? Remember, the legislature gave them only one criterion to use in setting limits—maximizing the harvest for recreational angers—and instead they used a different criterion. Even though fish for eagles might be an important goal, the courts have traditionally NOT deferred to administrations where they have gone beyond what the legislature told them to do. Again, neither *Chevron*, nor *Loper Bright* change any of that.

Now let's change the story again to make it a closer call. Let's say that when the legislature passed the DNR Act 75 years ago, it wasn't just worried about declining numbers of walleye, it was also worried about declining numbers of turtles. (But the hypothetical enabling statute above is still the same—it says

The End of Chevron continued on page 7

THE END OF CHEVRON

continued from page 6

"fish" not "turtles.") And 74 years ago, when the DNR made its first walleye limit, it also put a limit on turtle harvest, and that limit has been in place for 74 years. And this summer, I harvest more than the limit of turtles and get a ticket. I challenge the ticket on the basis that "the statute says 'fish' not 'turtles' and a turtle is not a fish. So the DNR has no power to make any rule about turtles, so the rule is illegal, so I didn't violate the law." The DNR responds: "The legislature gave us the power to enforce and interpret the DNR Act. When the legislature wrote "fish" it meant all aquatic creatures that people fish for. We have the record from the debates about the bill and some of the legislators actually mention turtles and even clams in their speeches. We've consistently interpreted and applied the DNR Act that way for 74 years and we're the experts." Should the judicial branch defer to the executive branch on this? The meaning of the statue is a question of law.

And remember, deference isn't directly about who wins and who loses. Even without deference, the DNR still might be able to prove its case. But with enough deference, the executive branch wouldn't even have to prove its case; the law would be what the DNR says it is because they are the experts. This is where *Chevron*, and *Loper Bright* matter.

CHEVRON DEFERENCE

Which brings us to the *Chevron* case from 1984. (Again reader, I'm editing heavily here for brevity and clarity.) In *Chevron*, the Federal Legislature had passed the Clean Air Act which (among other things) said that companies could not do anything to increase pollution from a "stationary source" of pollution.

Chevron had a refinery which, of course, made pollution. The pollution came out of the 10 smokestacks attached to the refinery. Two of the smokestacks were old and their filters were worn out. The engineers at Chevron did some math and science stuff and figured out that the refinery would make less pollution if it shut down the two old smokestacks and routed the exhaust through the other 8. So the refinery would produce less total pollution; but the remaining 8 smokestacks would each individually produce more pollution than they were before.

Whether or not Chevron could do this depended on what the legislature meant by "stationary source." Is there 1 source in this story—the refinery—or are there 10 sources—each smokestack? If the refinery is the only source then Chevron can do this because they are reducing the pollution from the source. If the stacks are the sources, then they can't do this because all 8 remaining stacks would produce more pollution than they were before.

The Environmental Protection Agency—the agency tasked with enforcing the Clean Air Act—interpreted the Clean Air Act to mean that the refinery was a single source. It's also important to note that the EPA had been interpreting and applying the law this way for many years. An environmental protection group sued on the theory that the EPA was mis-interpreting the CAA and in fact each smokestack was a source. You can probably think of many reasons to consider the refinery a single source, or to consider each smokestack a source. But the point of *Chevron* deference was that those arguments didn't really matter.

In the 1984 case of *Chevron v. NRDC*, the United States Supreme Court essentially said that as long as the administrative agency has some reasonable explanation for its interpretation, then its interpretation is correct, and courts won't even entertain an argument that the agency was wrong. In their words:

> *Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.*
>
> *When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."*

THIS JUSTIFICATION HAS MANY GLARING HOLES IN IT

"Judges are not experts in the field [of environmental protection.]" Well, sure. But that applies to nearly everything a judge does. A single judge in a single week will hear cases about car accidents, murder, child support, a farm trust, and a corporate merger. No one thinks a single judge is expert in all of these things, yet they still apply their judgment as superior to the people involved in the case. And so what if one party is an expert in the field at issue and the other is not? That doesn't mean that the expert automatically wins. If one party is an expert, they probably made a good decision, and they probably have the facts on their side, and they

The End of Chevron continued on page 8

THE END OF CHEVRON

continued from page 7

probably will win the case; but they don't *automatically* win.

"[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." (In other words, the Court thought it was important that, rightly or wrongly, the EPA had been interpreting the statute as they did for a long time.) Do the rest of us get to do that? Can an employer win a discrimination case simply because the discriminatory policy has been in place for a long time without challenge? Can a manager continue a discriminatory policy because her predecessor did things the same way?

"In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do." Huh? Isn't that the point of judges—to have controversies decided by a neutral third party? Again, could an employer say "listen, judge, I know you think I fired the plaintiff in retaliation for filing a work comp claim; and I know you think that's a bad thing, but you have no dog in this fight, and I do. You need to respect my legitimate policy choices."? If we citizens don't get that deference, why should federal agencies get it?

THE END OF CHEVRON

With the June 28, 2024 decision in *Loper Bright v. Raimondo, Chevron* deference is no more. Going forward, administrative agencies will be treated like the rest of us. When there is ambiguity in the statutes they are fighting over, the courts will fill in the blanks, not the agencies themselves. The Court reasoned that when it comes to interpreting statutes and applying independent judgment, judges are always the best experts.

HOW DOES ADMINISTRATIVE LAW AFFECT EMPLOYMENT LAW?

Minnesota DEED, DOLI, DHR; the Federal EEOC, DOL, OSHA, and on and on. These are all administrative agencies that engage in making rules, enforcing them, and sometimes adjudicating them. None of the rules put out by these agencies will be immediately repealed because of the *Loper Bright v. Raimondo* decision. However, going forward, any employer fighting these agencies over the validity of their rules will be on a much more even playing field. Employers will still be fighting an agency with unlimited resources, but at least they won't walk into court as the presumptive loser. The impact of *Loper Bright v. Raimondo* will probably take decades to be fully seen. Over time, agencies will have their more ambitious rules overturned. This will (hopefully) encourage them to take a much narrower view of their statutory authority and we may see fewer and narrower rules.

CONCLUSION

As you can see from my writing, I'm glad *Chevron* deference is dead and I agree with the current court's reasoning. For those worrying about what the end of *Chevron* will mean (or for those arguing with someone who thinks it's "the end of our democracy!") consider this: *Chevron* deference wasn't created until 1984. Our republic survived just fine for a couple of centuries without *Chevron* deference; we'll be fine. ■

Save the Date

EMPLOYMENT LAW SEMINAR
WINTER 2024
Monday, October 7, 2024
Mayo Clinic Health System Event

Watch for more information at gislason.com or on Facebook and LinkedIn.

LOCATIONS

MANKATO OFFICE
111 South 2nd Street, Suite 500
Mankato, MN 56001
507-387-1115

NEW ULM OFFICE
2700 South Broadway
New Ulm, MN 56073
507-354-3111

gislason.com