ACC NRC: Preparing for Pre- and Post-Election 2024

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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

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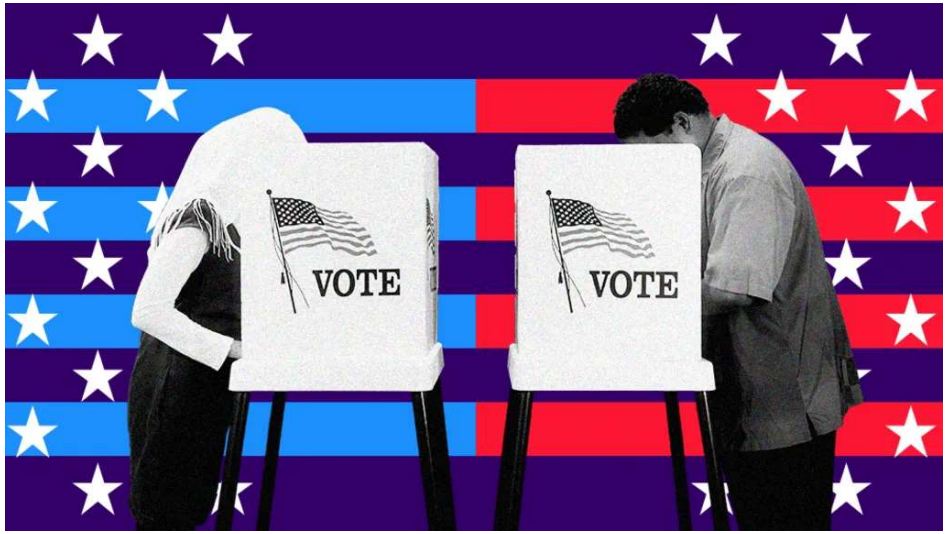
Agenda

- Overview of the Current Political Climate in the U.S.
- Political Speech and Employment Issues
- Overview of *Chevron*
- Post-Election 2024 Agency Rulemaking and Enforcement after *Loper Bright*
- Congress' Response to *Loper Bright*
- Lobbying after Election 2024 in a Post-*Chevron* World

Election 2024: Overview of the Political Climate

Uncertain Times in the U.S.

- Americans are divided on many political issues.
- Information and misinformation are spread rapidly on social media and other medial platforms.
- “Culture Wars” have resurged.
- Businesses need to be prepared to navigate the changing political climate and efficiently manage operations no matter what happens on November 5, 2024.
  - The changing political landscape affects your various business operations, including government relations and workforce management.
- Dealing with Political Discourse



Political Speech and Employment

Private Employers

- Private Employers can generally engage in political activity in the workplace but there are limitations on their ability to restrict employee political speech
- Section 7 of the NLRA
  - Applies to union and non-union workforces
  - Protects non-supervisory employees' rights to engage in protected, concerted activity for mutual aid or protection
    - Employees have the right to concertedly raise concerns about terms of and conditions of employment
    - General to be protected under the NLRA, political speech or conduct must (1) be concerted; (2) have a close nexus to the employment; and (3) involves terms and conditions of employment under the employer's control.

Private Employers

- The NLRB General Counsel, Jennifer Abruzzo, has stated that she wants to expand Section 7's concept of Protected Concerted Activity to social justice actions and political speech.
- *Home Depot U.S.A., Inc.*, 373 NLRB No. 25 (2024)
  - The NLRB held that Home Depot violated the National Labor Relations Act when it discharged an employee for refusing to remove the hand-drawn letters "BLM" — the acronym for "Black Lives Matter" — from their work apron. Several other employees at the same store also displayed "BLM" markings on their work aprons at about the same time.
  - According to the Board, the employee's refusal to remove the BLM marking was "concerted" because it was a "logical outgrowth" of prior concerted employee protests about racial discrimination in their workplace and because it was an attempt to bring those group complaints to the attention of Home Depot managers.

Private Employers

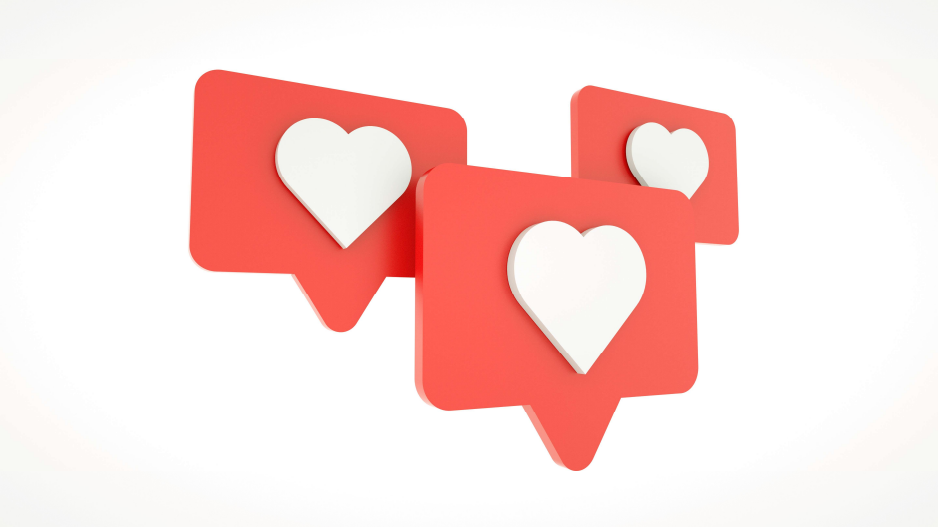
- *SFR, Inc. d/b/a Parkside Café*, 373 NLRB No. 84 (August 21, 2024)
  - Employees participated in BLM protests outside of work and during off-duty hours. The manager believed that the pandemic closure were due to the protests where COVID spread. He instituted a "protest tax" where any employee who went or intended to go to a BLM protest should resign. Three employees resigned. Two employees believed they had been fired. The manager indicated to them via text that he was not firing anyone.
  - The ALJ concluded that the activity was not protected under Section 7 because there was ***no connection*** between the BLM protests in this case and concerns about racial injustice at Parkside Café. The Board affirmed the decision.
  - The ALJ and Board also noted that the manager's statements were protected under ***Section 8(c)*** of the NLRA, which provides that ***"[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice," if "such expression contains no threat of reprisal or force or promise of benefit."***

Private Employers

- The NLRB General Counsel, Jennifer Abruzzo, has stated that she wants to expand Section 7's concept of Protected Concerted Activity to social justice actions and political speech.
- Section 7 of the NLRA also prohibits employers from restricting non-supervisory employee political speech during non-work times (breaks) and in non-work areas
- **NOTE: The First Amendment applies to Government Action and not private entities.**

Social Media and Off-Duty Conduct

- Social Media and the EEOC's Workplace Guidance to Prevent Harassment issued April 29, 2024
  - Employers may be liable when the off-duty personal social media conduct has consequences in the workplace and therefore contributes to a hostile work environment
  - Supervisor harassment outside the workplace is more likely to contribute to a hostile work environment
- Social Media Issues, Internal Company Emails, Chats and Section 7
  - Employers may implement social media policies limiting solicitation and distribution in work areas during work times.
    - Policy cannot discriminate against union activity. *Apple, Inc*. 373 NLRB No. 52 (May 2024)



Non-Profit Employers

- Nonprofits that are tax-exempt under section 501(c)(3) may not engage in any political campaign activity.
  - Employees of 501(c)(3) organizations can engage in political speech and conduct as long as it does not implicate the employer
  - 501(c)(4), (5), and (6) organizations are allowed to engage in some political campaign activity, and what an employee does or says on his or her own time is not likely to threaten the tax-exempt status.
  - Important to think about the organization's mission, strategy, and partners when regulating political speech

Federal Contractors

- Federal law prohibits Federal Contractors from making any contribution or promise to make such contribution to any political party, committee, or candidate for federal office or to any person for any political purpose or use. 52 U.S.C. § 30119; 11 C.F.R. § 115.2
  - This prohibition does not apply to State and local elections
- Employees of Federal Contractors have the same rights under the NLRA and applicable state laws

“You are not a Federal Contractor. You work for one.”

-Patrick Samsel, General Counsel, Fors Marsh

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Federal Contractors and Federal Employees

- Employees of Federal Contractors often work closely with Federal Government Employees in various Federal Agencies. It is important that employees of Federal Contractors understand the legal restrictions on political speech that apply to Federal Employees.
- **Hatch Act** - limits certain political activities of federal employees, as well as some state, D.C., and local government employees who work in connection with federally funded programs.
  - Except for the President and Vice President, all federal civilian executive branch employees are covered by the Hatch Act, including employees of the U.S. Postal Service.
  - ***Less Restricted vs. Further Restricted-*** Less Restricted employees may take an active part in partisan political management or partisan political campaigns. Further Restricted employees cannot. (usually applies to employees in intelligence and enforcement agencies)
  - An employee who violates the Hatch Act is subject to a range of disciplinary actions, including removal from federal service, reduction in grade, debarment from federal service for a period not to exceed 5 years, suspension, letter of reprimand, or a civil penalty not to exceed $1000.

State and Local Protections of Political Speech

- California, Colorado, Connecticut, Illinois, Louisiana, Michigan, Nevada, New York, North Dakota, South Carolina and Utah prohibit employers from disciplining employees because of their political affiliation
  - Illinois - only prohibits employers from keeping a record of an employee's political associations, activities, publications, or communications
- **DC Human Rights Act-** prohibits discrimination based on political affiliation. "Political affiliation" means the state of belonging to or endorsing any political party.
  - This applies to employees and applicants.
- **Howard County, Maryland and Prince George's County, Maryland** – Political opinion is a protected category

State and Local Protections of Employee Voting

- **DC**
  - An employer must provide 2 hours of paid leave to vote in **any election**
  - The employer may require the employee to request leave a reasonable time in advance and specify the hours during which the employee may take the leave.
- **Maryland**
  - Employer must provide any employee who claims to be a register voter in Maryland 2 hours paid leave from work on election day to cast a ballot if the employee does not have 2 hours of continuous off-duty when the polls are open.
  - Employers may require proof that the employee voted or attempted to vote
- **Virginia**
  - No Voting Leave Statute

Post-Election Issues after *Loper Bright*

Chevron's Impact on the Rulemaking Process

- *Chevron* gave agencies significant latitude in their interpretation and promulgations of regulations.
  - The decision was based on the idea that Congress had delegated the power to make policy decisions to the agency when the meaning of law was ambiguous.
  - The *Chevron* doctrine provided a two-step inquiry for courts reviewing agency regulations: 1) whether Congress spoke directly to the issue in the underlying statute, if so, the court must enforce the unambiguously express intent of Congress; 2) if the statute was ambiguous or silent, the court was required to defer to a "reasonable" interpretation by the agency even if the court would have reached different conclusion.
- The agencies could be confident that as long as its interpretation of a statute was reasonable, it was likely to be upheld.
- Therefore, the agencies could issue bolder interpretations – either more or less expansive– without being overturned.

The Impacts of *Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce*

- In *Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce*, the Supreme Court overruled the long-standing *Chevron* doctrine.
  - While an agency's interpretation may persuade a court, it will not be presumed to be correct.
  - It is almost guaranteed that this decision is going to lead to an avalanche of cases challenging agency rulemaking.
- More likelihood that stays of new rules will be issued during pendency of appeals
- It remains unclear how courts will apply *Loper* without specific guidance from SCOTUS, and there will likely be major circuit splits that SCOTUS will need to resolve

Additional Loper Impacts

- SCOTUS did state that courts may still apply the standard set forth in *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944), which states that a court may uphold a regulation if it finds the agency's interpretation of the statute "persuasive."
  - This provides some level of judicial deference as opposed to agency deference given in *Chevron*
- The case and its impacts will likely be related to prospective and pending rules, or those for which the SOL has not run.
  - *Loper* also held that the SOL for challenges to agency rulemakings is triggered when the plaintiff is injured, not when the rule is adopted
- Enforcement cases and remediation actions/orders should not be impacted unless/until successful appeals affecting these actions occur
- Agencies will need to be more careful to craft rules more tailored to the statute
- It is MORE important now to be involved in the agency rulemaking process

Other Administrative Procedure Act Decisions

- *Corner Post Inc. v. Board of Governors of the Federal Reserve Board*
- *SEC v. Jarkesy*
- *Ohio v. Environmental Protection Agency*
- *Axon Enterprise v. FTC*

How will Congress respond to *Loper* Post- Election 2024?

- More technical resources and expertise devoted to crafting legislation in the first place?
- More express delegations to agencies and express recognition of the role of agency discretion?
- Will *Loper* prove to be an incentive or disincentive to bipartisan compromise and legislative action?
- *NS v. Chada*: Previous Congress Reaction versus *Loper Bright*
- Post- Election House
- Post-Election Senate

Internal Congressional Power Shift

- House and Senate Leadership
- Congressional Committees
- Staffing Issues
- Recent Proposals for Congress

Lobbying After Election 2024 in Post-*Chevron* Congress

- Congressional Staffing Issues
- Policy Knowledge
- Technical Expertise
- Legislative Drafting *(Snyder v. United States)*

Questions?

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