

Post-Chevron Enforcement Awareness: A Privacy & Technology Practitioner's Guide

BakerHostetler

Booz
Allen

workday



Caroline McGlynn, Esq.
Booz Allen
Global Head of IR Bus. Dev.



Christina Bixby, Esq.
Workday
Assist. Gen. Counsel for
Cybersecurity Legal



Nichole Sterling, Esq.
Baker & Hostetler LLP
Partner

Overview



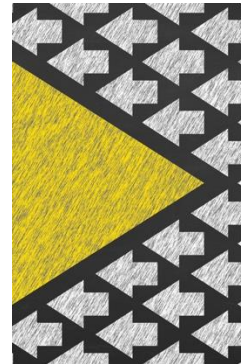
Chevron Deference –
What was it?



Loper Bright –
Important Takeaways



Impact on Federal
Agencies Regulating
Privacy, Data Protection &
Cybersecurity



New Legal Challenges,
Impact on State Laws &
Regulations, & Strategies
to Consider

Chevron Deference

- SCOTUS ruling in *Chevron* is 40 years old
- Two-step process –
 - ❑ Did Congress address the issue in law-making?
 - ❑ If no, court should defer to agency interpretation
- Gave federal agencies primary role in interpreting and enforcing ambiguous regulations
- Resulted in pronounced power for and deference to federal agencies



How Was *Chevron* Applicable?

- Federal agencies
- With enforcement authority
- Ambiguous statutes and regulations
 - Unless unreasonable or impermissible position or violation of another statutory obligation
- Gave unelected officials positions that were nearly shielded from review



What Does *Loper Bright* Do?

- Found *Chevron* inconsistent with APA
 - Courts should decide questions of law
- And *Marbury v. Madison* (from 1803!)
 - Courts should say what the law is
- Instead of “respect” for agency expertise, *Chevron* “demands binding deference”
- After *Loper Bright* courts can consider agency interpretation but should independently make decisions about ambiguous laws



Example: CISA rulemaking on CIRCIA

- 133 pages in the Federal Register – commentary explaining CISA’s interpretation of CIRCIA and why it took certain positions
- Example where CISA exceeded authority with explanatory comments:

CIRCIA requirement

- When defining what qualifies as a “substantial cyber incident,” CISA “**shall**” consider the “sophistication or novelty of the tactics used”

CISA’s Rule

- Broadens the rule to cover incidents regardless of sophistication
- Commentary explains that “CISA believes there is value in receiving reports on all types of substantial cyber incidents, whether the tactics used are sophisticated or not, novel or not.”

Litigation Tracker – As of Today

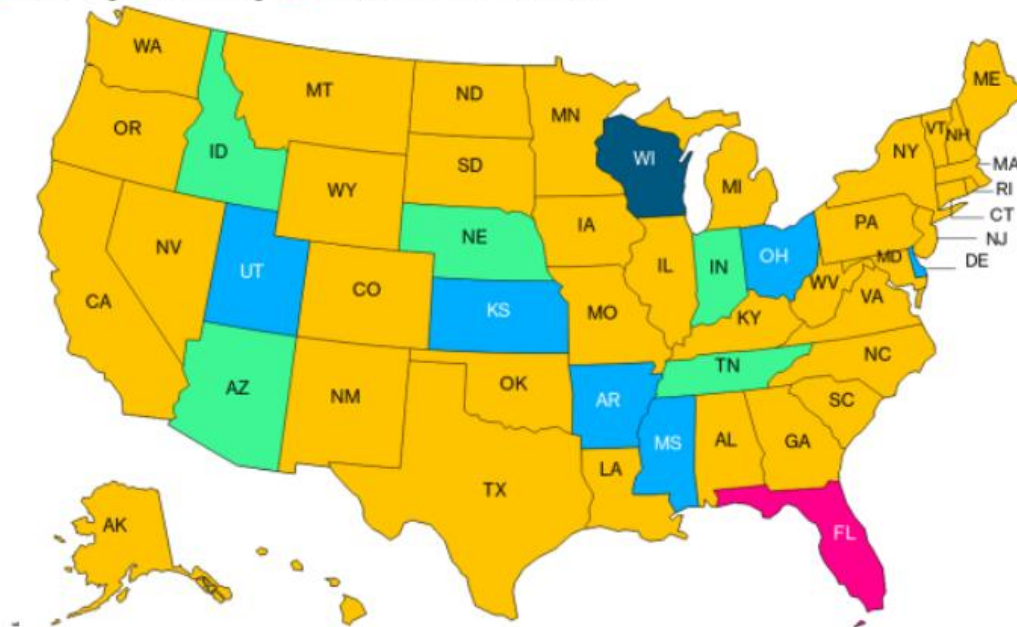
- **125 docket entries** across federal courts citing *Loper Bright* filed since June 28; examples include:
 - FDA, HHS, Army Corps of Engineers, DOJ/BATF, FDIC, SBA, State Department, CFPB, FERC
- Including cases filed before June 28: **595 dockets** where *Loper Bright* is cited in federal court cases

What's Happening in the States?

States Move to End Agency Deference

Lawmakers, judges and voters weakened or eliminated pro-agency court rules.

■ State statute
 ■ State statute, State high court ruling
■ State high court ruling
 ■ Constitutional amendment



Sources: Center for Practical Federalism, Pacific Legal Foundation.

Bloomberg Law

- No direct impact on agency deference under state law
- But...*Loper* has revived efforts by free-market groups seeking to scale-back deference in the states
- 2018 – Arizona enacted first law banning agency deference in most disputes
- Several other states followed suit through legislation, high-court rulings, or constitutional amendment
- Expect a patchwork of approaches to continue

QUESTIONS and/or COMMENTS?

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