

A hand in a dark suit jacket is shown from the wrist up, pointing upwards with the index finger. The years 2021, 2022, 2023, 2024, and 2025 are overlaid on the hand, with 2024 being the largest and most prominent. The background is a blurred outdoor scene with greenery.

# BUSINESS IN 2024

WEEKLY WEBINAR SERIES

The logo consists of a stylized asterisk or star shape made of six 3D-looking rectangular blocks arranged in a circular pattern.

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# Your Host



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# TODAY'S AGENDA

**Kristen Smith – (12:00PM-12:05PM)**

- Introduction

**Nicholas Jacobson – (12:05PM-12:15PM)**

- July 2, 2024 Litigation Update: SCOTUS Overturns Chevron and SDNY Addresses Standard for Imputing Liability for Harassment to Employers

**Elizabeth Morgan – (12:15 PM-12:25PM)**

- New Challenges to Family Business Succession Planning: Life Insurance and Tax Implications

**Thomas Eron – (12:25PM-12:35PM)**

- NLRB Update

**Colin Leonard – (12:35PM - 12:45PM)**

- Understanding the Basics of Joint Employment in New York

# July 2, 2024 Litigation Update: SCOTUS Overturns Chevron and SDNY Addresses Standard for Imputing Liability for Harassment to Employers



## Nicholas P. Jacobson

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## ***Loper Bright Enterprises v. Raimondo/Relentless Inc. v. Dept. of Commerce***

- Companion cases brought by herring fishing companies and vessels challenging actions of the Secretary of Commerce and National Marine Fisheries Service in establishing an industry-funded monitoring program
- Program required fishing companies to bear costs of onboard monitors from the NMFS

## *Loper Bright Enterprises v. Raimondo/Relentless Inc. v. Dept. of Commerce, cont.*

- Overruled Supreme Court's decision in *Chevron v. Natural Resources Defense Council*
  - Chevron doctrine:
    - Applied where a statute was silent or ambiguous on a specific issue
    - Required courts to defer to an implementing agency's interpretation so long as it was permissible under the statute, even if a court interpreted the statute differently



## *Loper Bright Enterprises v. Raimondo/Relentless Inc. v. Dept. of Commerce, cont.*

- SCOTUS held 6-3 that courts must not give deference to agency interpretations of the statutes they administer
- Found that it was inconsistent with the Administrative Procedure Act (“APA”)
  - APA establishes procedures that must be followed by federal agencies and instructs courts on the review of agency actions
- Held that the APA directs courts to decide legal questions in their own judgment
  - Can still consider agency expertise, practice and consistency
  - Agencies still entitled to make policy decisions where they have been granted that authority

# *Loper Bright Enterprises v. Raimondo/Relentless Inc. v. Dept. of Commerce, cont.*

- Why is this important?
  - Many agencies rely on deference when adopting rules or deciding issues before them
- Now those rules and decisions will be easier to challenge because the agency must demonstrate that they are consistent with the best interpretation of the applicable statute, rather than a reasonable interpretation of the statute
  - Could affect current litigation with the DOL regarding overtime exemptions and independent contractor classification, with the NLRB over joint employment rules, and with OSHA over a rule allowing union reps to accompany inspectors



## *M.H. v. Starbucks Coffee Company*

- Starbucks made motion to dismiss sexual harassment claims brought by a former barista under the NYHRL (among other claims)
- In rendering its decision, court considered whether the Plaintiff had alleged facts sufficient to impose liability on Starbucks for the harassing conduct of its employee
- Standard for imputing liability for coworker-on-coworker harassment to employer somewhat unclear after 2019 amendments to NYHRL

## *M.H. v. Starbucks Coffee Company, cont.*

- Faragher-Ellerth Defense – applies under Title VII
  - No tangible employment action (ex discharge, demotion)
  - Employer exercised reasonable care to prevent and correct harassing behavior
  - Employee unreasonably failed to take advantage of protective or corrective opportunities provided by the employer
    - Failed to report harassment to employer
- Similar standard under NYHRL pre-2019 amendments
  - Employer is not liable unless it “became a party” to the harassment by “encouraging, condoning or approving it”

## *M.H. v. Starbucks Coffee Company, cont.*

- 2019 Amendment to NYLRH: N.Y. Exec. Law § 296(1)(h):
  - The fact that an employee “did not make a complaint about the harassment to such employer ... shall not be determinative of whether such employer ... shall be liable”
- Raised question as to whether standard for imputing liability to employer for coworker harassment had changed
- *M.H. v. Starbucks* reaffirmed that employer must “condone, encourage or approve” of coworker-coworker harassment to be liable

## *M.H. v. Starbucks Coffee Company, cont.*

- Plaintiff alleged that despite having received numerous reports of harassment by coworker (who was shift lead), it engaged in a pattern of failing to adequately investigate or discipline him
- Held that allegations were “far from airtight” but sufficient to survive dismissal
- Takeaways:
  - Having adequate procedures to prevent and remedy harassment amongst employees can provide a defense to liability
  - Failing to adequately respond to reports of inappropriate conduct by an employee could in some circumstances be seen as condoning it, opening up the employer to liability

# New Challenges to Family Business Succession Planning: Life Insurance and Tax Implications



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# NLRB Update



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NLRB Orders  
Red Rock Hotel  
to Recognize and  
Bargain with  
UNITE HERE





## Red Rock Timeline

October 2019: Union files NLRB Election petition (1340 employees)

December 2019: Union loses the election 627 to 534

2019-2020: Union files multiple ULP charges

July 2021: US District Court issues 10(j) injunction

April 2022: ALJ Decision

June 2024: NLRB Decision – first application of *Cemex*

# ***Cemex Construction: The New Union Representation Process (August 2023)***

- After the union demands recognition, the employer **must** :
  - file an NLRB petition for an election within two weeks; or
  - recognize and bargain with the union.
- If the employer is found to have committed an ULP, the Board will dismiss any pending election petition and issue a bargaining order.
- Currently on appeal to the 9<sup>th</sup> Circuit Court of Appeals

# Red Rock Rationale

- The NLRB (as well as the ALJ and the District Court) found egregious ULPs
  - Implementation of significant benefits before the election
  - Threats to withdraw benefits if the union won the election
  - Unlawful discipline and layoffs
  - Served employees free steaks, branded “Vote No”
- Bargaining Order justified under *Cemex* as well as *Gissel* (prior standard)

# NLRA 10(j) Injunction Developments

- What is it?
  - Interim judicial relief to maintain/restore the *status quo*
- *Starbucks v. McKinney* (U.S. Sup. Ct., June 2024)
  - No special deference to the NLRB in issuance of an injunction, which is an “extraordinary” equitable remedy
- *Sacks v. I.N.S.A, Inc.* (D. Mass., May 2024)
  - 10(j) injunction applying *Cemex*

# Take-aways

- Current *NLRB* and GC are aggressively advancing their agenda, including through court proceedings
- *Cemex* (and other recent developments) make the path easier for unions
- Employers need to be prepared

# Understanding the Basics of Joint Employment in New York



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# Questions?



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## New Challenges to Family Business Succession Planning: Life Insurance and Tax Implications

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## Understanding the Basics of Joint Employment in New York

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### **New York Employment Law: The Essential Guide**

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

# Thank You

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