HRLaws

November 2023 | Vol. 20, No. 11

FEDERAL
Employment Law Insider

An update on new federal law and regulation affecting your workplace

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FortneyScott

ADMINISTRATIVE AGENCIES

Supreme Court will consider *Chevron* doctrine, role of 'administrative state'

by the editors of FELI

The very way we are governed—the balance of power between the three arms of government—will be before the Supreme Court this term. The case is Loper Bright Enterprises v. Raimondo, and on its face, it concerns a regulation that determines who pays for the federal agents who monitor catches on fishing boats. The implications of the Court's ruling will determine how laws are drafted, how regulations are crafted, and how courts will review them for decades to come.

Chevron doctrine

The issue underlying the case is the Chevron doctrine. That doctrine has been relied on by judges to decide when an agency—the Occupational Safety and Health Administration (OSHA), the Office of Federal Contract Compliance Programs (OFCCP), the Wage and Hour Division (WHD), the Department of Labor (DOL) itself—properly issues a regulation that implements the intent of the statute and stays within the boundaries the law establishes. This particularly matters when the language of the statute leaves room for interpretation or is otherwise ambiguous. At that point, a court becomes involved to make the final determination.

In Chevron v. Natural Resources Defense Council (1984), there was a dispute about the proper interpretation of the Clean Air Act (CAA) by the Environmental Protection Agency (EPA). The CAA required certain states to create permit programs for "new or modified major stationary sources" that emit air pollutants. The EPA promulgated a regulation defining "stationary source." The National Resources Defense Council (NRDC) filed a petition for judicial review arguing the EPA violated the CAA in defining "stationary source" in its regulations.

In a unanimous decision written by Justice John Paul Stevens, the Supreme Court upheld the EPA's regulations because its definition of "stationary source" was considered a "permissible construction of the statute." Under the Chevron doctrine, courts should defer to a federal agency's expertise as long as the interpretation comports with the statute and is otherwise reasonable.

Chevron, which created the ground rules for government regulation and judicial review, is anchored in judicial restraint and is a recognition of the limits of judicial expertise. In Loper Bright, that ruling is being challenged directly.

Loper Bright

A group of commercial fishing companies challenged a rule issued by the National Marine Fisheries Service, the federal agency responsible for overseeing marine resources. The rule requires the fishing industry to pay for the costs of observers who monitor compliance with fishery management plans. The companies objected to the fees and claimed the agency had no right to impose them.

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Relying on Chevron, a divided panel of the U.S. Court of Appeals for the District of Columbia rejected the companies' challenge to the rule. It explained that the fishery law makes clear the government can require fishing boats to carry monitors, although it acknowledged the law doesn't specifically address who must pay for the monitors. However, the court concluded the agencies' interpretation of the fishery law as requiring industry-funded monitors was reasonable in light of the rest of the statute. Therefore, it deferred to that interpretation.

The fishing companies appealed to the Supreme Court, asking it both to strike the regulation and to overrule Chevron. On October 13, 2023, the Court agreed to hear the case in concert with Relentless, Inc., et al., Petitioners v. Department of Commerce, et al because Justice Ketanji Brown Jackson cannot participate in Loper Bright.

Future of the administrative state

The reason this case is considered so significant is the potential impact of reversing *Chevron*. Conservative jurists have been attacking the "administrative state" for decades. In Justice Neil Gorsuch, they have a galvanizing leader who believes too much authority has been granted to "faceless bureaucrats" and that constitutionally appointed judges are the appropriate persons to make sure the will of the elected representatives in Congress is properly carried out. This view of government also requires Congress to become more specific in its laws when delegating authority to regulate. The current state of Congress is but one critique of the Court's optimistic vision of the legislature.

The diminution of the Chevron doctrine will expose countless regulations to judicial review. Modern government—the entire way our government has been approving drugs, issuing health and safety standards, environmental standards, accessibility rules, everything from clean air to zoological research—is in play. The case is likely to be argued in the fall, with a decision to follow sometime in 2024. ✣

LABOR LAW

NLRB rulings face review in post-*Chevron* legal context

by the editors of FELI

The National Labor Relations Board (NLRB) is an agency that most clearly represents the political beliefs of the administration it serves. Relying almost exclusively on decisions rather than regulations to establish Board policy, the routine shifts in its membership result in pendulum-like changes in Board positions. In the past, and reliant on the Chevron doctrine, courts have largely deferred to the Board's decisions, inasmuch as the NLRB was established to animate the rights established in the nation's labor law. However, the convergence of an aggressively activist Board and a Supreme Court increasingly skeptical of expansive agency conduct may lead to some epic conflicts.

Biden Board rewrites the law

In the past two years, America's labor laws have undergone wholesale change. Hallowed precedents and recent rulings alike have been or will soon be cast aside as the Board pursues its vision of a more "union-friendly" legal framework.

Anodyne employee handbooks are now chronic sources of unfair labor practices (Stericycle). Independent contractors are redefined (Atlantic Opera), abusive speech is tolerated (Lion Elastomers), and consequential damages are imposed (Thryv). Captive audience speeches are barred (Garten Trucking), and commonplace severance agreements deemed suspect (McLaren Macomb). Individual complaints for nonemployees are regarded as concerted protected activity (Miller Plastic Products and American Federation for Children). Joint employment is found with no regulatory basis (Cognizant Technology Solutions and Google LLC), and, most recently and expansively, the bargaining orders are imposed (Cemex).

This is by no means a complete list, but it features many of the cases that are considered to be likely candidates for Supreme Court review.

Starbucks still the target

Not surprisingly, two cases involving Starbucks may provide an early test of the Board's new case law.

In one, the union narrowly lost an election in Great Neck, New York, and filed unfair labor practice charges. The NLRB chose not to seek a new election but rather is requesting a bargaining order under *Cemex*, claiming the unfair labor practices have made an untainted election impossible. The case has yet to be heard at the hearing officer stage and is, thus, years away from final adjudication, but the stage is set. And the employer is one who is willing to litigate all the way to the Supreme Court, as it is doing elsewhere.

Starbucks is involved in a case ripe for Supreme Court review. The matter focuses on a 10(j) injunction ordering it to rehire terminated workers. The injunction was successfully proposed by the Board and approved by the U.S. 6th Circuit Court of Appeals. Starbucks is seeking to have the injunction lifted. It claims the 6th Circuit uses a different, lower standard for injunctions than in other circuits and asks the Court to resolve this split and decide that another, higher standard should be applied to its case.

Petitions for certiorari have been filed, and simply learning if the Court wishes to hear such a case will be an indication of its willingness to become an active presence in the labor sphere.

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FEDERAL CONTRACTOR CORNER

Three courts focus on President Biden's federal contractor minimum wage EO

by H. Juanita Beecher, FortneyScott

President Joe Biden issued an Executive Order (EO) in April 2021 mandating the minimum wage for certain federal contractor workers at $15 per hour. Since the EO became effective, multiple lawsuits have been filed claiming the president didn't have the authority under the federal Procurement Act to set the minimum wage for federal contractors.

Most recently, a Texas federal district court ruled on September 26, 2023, that Texas, Louisiana, and Mississippi weren't required to comply with the order. In addition, two cases that supported President Biden's authority to issue such EOs in Arizona and Colorado are being argued in the U.S. 9th and 10th Circuit Courts of Appeals. The Department of Labor (DOL) is expected to appeal the Texas decision to the 5th Circuit, which has previously held President Biden didn't have the authority under the same Act to issue federal contractor vaccine mandate.

Numerous OFCCP settlements before end of FY2023

After a very slow start, the Office of Federal Contract Compliance Programs (OFCCP) finished its fiscal year (FY) 2023 with an avalanche of settlements. It had so many settlements before the end of September that it's still issuing press releases on them. So far, these are the latest:

- Allied Universal agreed to pay $411,000, to revise its recruiting and selection procedures, and to hire 28 of the applicants to settle allegations of race discrimination against 1,459 Black applicants.
- Florida International University agreed to resolve allegations that it paid women midlevel executives less than males by paying $575,000 to 163 employees, by examining its pay practices for midlevel executives annually, and by setting aside $125,000 for potential compensation adjustments.
- Pfizer Inc. agreed to pay $2M to resolve allegations it underpaid 86 female employees, to set aside $500,000 for additional salary adjustments, and to implement an internal auditing and reporting system that measures the effectiveness of its total affirmative action program.
- US Foods agreed to pay $721,000 to nearly 1,000 women to resolve claims it discriminated against female applicants during the hiring process at five facilities as well as offering jobs to 46 workers.
- Pitney Bowes agreed to pay $1.59M to settle allegations of hiring discrimination against Blacks, Hispanic, and white applicants applying for warehouse mail sorter positions.
- Daikin Industries agreed to pay $100,000 in back wages and interest to 98 Black applicants to settle allegations of hiring discrimination as well as to extend three job offers to class members.
- B. Braun Medical agreed to pay $75,984 to 24 qualified female applicants not hired during the 2020 conciliation period and will collaborate with the DOL to assist women to obtain certifications and training to fill warehouse associate roles. It also must set aside $35,000 per year to support transportation and childcare subsidies for those in training.
- Unifirst Corp. agreed to pay $226,341 to 48 female production department employees to resolve gender-based pay discrimination as well as reviewing its policies and practices including base salaries of production department employees for compensation disparities.
- National Opinion Research Center agreed to pay $95,000 to 107 Asian applicants to resolve alleged hiring discrimination, to review its hiring policies and procedures to ensure they are free of discrimination, and to train all managers, supervisors, and other company officials who oversee hiring.
- LabCorp agreed to pay $525,000 to 205 Black and 13 Asian applicants as well as to extend job offers to 34 Black and three Asian class members to resolve hiring discrimination as well as ensuring its hiring practices and procedures do not discriminate.

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Supreme Court will have its say

Because there are so many levels of review for an NLRB decision, it often takes years for a ruling even to become eligible for Supreme Court review. But there are indications that this Supreme Court might act and, if it overturns or diminishes *Chevron*, lower courts may follow.

Epic Systems Corp. v. Lewis, decided in 2018, may be a harbinger. There, the Court declined to defer to the Board's expansive reading of the National Labor Relations Act (NLRA). In place of the Board's ruling, the Supreme Court adhered to a narrow reading of the statute, specifically cautioning the Board not to seek the broadest possible interpretation of the words of the law. The degree to which the Court concludes its advice has been heeded will be at the core of future cases deciding the substance of labor law in the US. ✤

REGULATIONS

Crucial regulations nearing publication

by the editors of FELI

While many believe the "government" is at a standstill because of the chaos in the House of Representatives, the fact is the Executive Branch is hard at work putting crucial workplace regulations into final form. Independent contractor status, overtime eligibility, and joint employment are all in the pipeline.

Independent contractor rule

The Department of Labor's (DOL) regulation defining independent contractors will be issued first. Scheduled for publication imminently, it will close one of the most convoluted paths to publication of any recent regulation.

In January 2021, in the final days of the Trump administration, a new rule was issued with a March 2021 effective date. It focused on just two "core factors" and was regarded as "employer friendly," emphasizing actual control over the terms and conditions of work.

Shortly after President Joe Biden took office, the DOL delayed the effective date of the rule until May 7, 2021. Then, on May 5, it announced it was withdrawing the final independent contractor rule, just one day before the delayed effective date was to take place. At this point, an unusually lengthy court battle ensued, successfully challenging the new Administration's efforts, and only now concluding with the new, much-delayed rule.

Elements of the rule

The DOL's proposed rule, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, reverts to the economic reality test used before the 2021 rule. Specifically, the DOL seeks to return to a "totality-of-the-circumstances" analysis by establishing a nonexhaustive, six-factor test in which no single factor is dispositive.

The six factors include:

- Opportunity for profit or loss depending on managerial skill;
- Nature and degree of control, which need not be direct *or* exercised;
- Investments by the worker and the employer (to determine whether an individual is economically dependent on the employer);
- Degree of permanence of the work relationship;
- Extent to which the work performed is an integral party of the employer's business; and
- Skill and initiative.

The rule is certain to be challenged in court, and the degree of judicial deference given to the agency remains to be seen. The rule could have a significant impact on a number of industries, particularly in the "gig economy."

Overtime rule

On August 30, 2023, the DOL issued a notice of proposed rulemaking (NPRM) establishing new thresholds for overtime pay. The proposal is similar to a 2016 rule promulgated by the DOL under the Obama administration that was ultimately set aside by a federal court in Texas. The comment period for the NPRM lasts until November 7, 2023.

Elements of the overtime rule

The DOL is proposing to amend the Fair Labor Standards Act's (FLSA) exemptions for executive, administrative, and professional workers by:

- Increasing the current threshold to qualify for exempt status from $684 a week or $35,568 per year to $1,059 per week or $55,068 per year;
- Raising the highly compensated employee total annual compensation to $143,988;
- Restoring the applicability of the overtime requirements to workers in the U.S. territories subject to the federal minimum wage; and
- Automatically adjusting the threshold every three years.

As is currently the case, to be exempt from the overtime requirement, employees must perform certain job duties and generally must be paid on a salary basis. Some employees, such as learned professionals, artists, and outside sales employees, aren't subject to salary tests. Others, such as certain computer employees, are subject to special, contingent earning thresholds.

The same objections that were raised in 2016 will be raised again. A serious question remains about whether the DOL has the statutory authority to index the overtime threshold. Those seeking to oppose the new rule will now also be able to refer to Justice Brett Kavanaugh's recent dissent in the *Helix Energy* case, which maintained that the DOL doesn't have the authority to issue a salary-basis or salary-level test at all.

Joint employer rule

In September 2022, the National Labor Relations Board (NLRB) issued an NPRM on joint employment. Under the new rule, evidence of an entity's potential, unexercised, and indirect control over any working condition could be deemed sufficient to confer joint employer status.

Since then, the Board has extended the comment period but appears to have done little else. This may be because it has decided to address the joint employment issue through its adjudicatory power. In *Cognizant Technology Solutions and Google LLC*, for example, the Board certified a unit of what the employer thought were independent contractors for a union election. The joint employment issue will be heard as part of the postelection litigation. ✣

KICKER

Title VII, ADA, SEC on Supreme Court docket

by the editors of FELI

The U.S. Supreme Court is poised to issue still more rulings that will shape the role of the government and the rights of citizens in the coming term. In addition to weighing the utility of the Chevron doctrine and its role in assessing government regulation (see "Supreme Court will consider Chevron doctrine, role of 'administrative state'" on page XX of this issue for a separate discussion of that case), among the cases affecting the workplace are those that will determine the breadth of the reach of Title VII of the Civil Rights Act of 1964, the role of "testers" under the Americans with Disabilities Act (ADA), the constitutionality of Securities and Exchange Commission (SEC) enforcement, and the burden of proof for whistleblowers under the Sarbanes-Oxley Act.

Involuntary transfer as adverse action

Since its inception in 1964, courts have generally required employees filing a case under Title VII to show an "adverse employment action." Although that term does *not* appear in the statute, most courts have ruled that only "ultimate" employment decisions—those that cost jobs or reduced pay or benefits, for example—could be adjudicated. Not every appellate court agreed. The U.S. 6th and D.C. Circuit Courts of Appeal held that any form of discrimination was prohibited by the law, even if it didn't directly involve a loss of pay or status. The Justice Department also supports this position.

Jatonya Clayborn Muldrow, a female police sergeant with the St. Louis Police Department, challenged her involuntary transfer from one division to another, claiming she was transferred solely because of her sex. Even though her rank and pay were unchanged, she claimed her transfer led to lesser responsibilities and violated Title VII's protection of her "terms, conditions, or privileges of employment."

The 8th Circuit disagreed, holding that "an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action." This split among the circuit courts led to the Supreme Court case.

A principal reason this case has attracted so much attention is its impact on recent challenges to diversity, equity, and inclusion (DEI) programs in the wake of the Supreme Court's decision banning race as a factor in college admissions. If the Court accepts a broad reading of Title VII, an employee excluded from any DEI program because of a protected characteristic (race or sex) could bring a reverse-discrimination claim even if exclusion from the program didn't cause any tangible harm. An ensuing flood of litigation has the potential to bring such programs to a halt. Muldrow v. City of St. Louis.

Testing, testing

Another case about someone who has suffered a justiciable claim involves rights under the ADA. Deborah Laufer is a self-confessed "tester"—that is, she visits hotel websites seeking information about accessibility, which the ADA requires. When hotels don't provide the information, she often files suit. The issue before the Court is whether she has "standing" to sue because she never intended to visit any of the hotels and was never unable to access any hotel. In short, the Court will determine whether she has suffered an injury under the ADA.

There are dueling Supreme Court decisions about whether someone can sue about "informational" injuries, and both sides are claiming dire consequences of ruling for the other party. The reality is that access to court in our increasingly litigious society is a matter of considerable importance, and the outcome of this case is being closely watched by the plaintiffs' bar, among others. Acheson Hotels, LLC v. Laufer

ALJs and SEC enforcement

This is another case, like the one involving *Chevron*, that challenges the authority of executive agencies. In this complicated case, the principal issue before the Court is whether the SEC enforcement process, which is

administered by administrative law judges (ALJs) rather than federal district court judges, is constitutional. In more legalistic terms, this case concerns Congress' power to delegate certain responsibilities to executive agencies.

In an SEC enforcement proceeding, ALJs found that George R. Jarkesy, Jr., had committed fraud and meted out significant punishments. He appealed the decision to the 5th Circuit, claiming not only that the proceeding deprived him of his right to a jury trial but also that the entire SEC enforcement process was unconstitutional. According to his claim, Congress improperly delegated authority to the SEC to establish its administrative enforcement process (e.g., no federal district courts), including insulating ALJs from being removed. In a sweeping decision, a divided 5th Circuit agreed with every challenge. The SEC sought review by the Supreme Court.

The constitutionality of using ALJs to adjudicate matters outside of the federal court system has come before the Supreme Court on a several occasions, with ambiguously conflicting outcomes. However, the Court has recently showed increasing skepticism at the expansion of administrative authority. Its decision to hear this case indicates it may be prepared to definitively decide the validity of the SEC's administrative law process. Its decision on this group of related questions may significantly alter and further limit the scope of administrative proceedings in many other government agencies. Securities and Exchange Commission v. Jarkesy.

Whistleblowers and retaliatory intent

This case involves the burden of proof in a whistleblower case and will indicate the Court's willingness to protect whistleblowers and pursue alleged corporate wrongdoing.

Trevor Murray worked as a strategist in UBS' commercial mortgage-backed securities business. Under SEC regulations, he was required to certify that his reports were produced independently and that they accurately reflected his own views.

Murray claims his superiors pressured him to skew his research, which he believes to have shown alleged fraud on shareholders. He asserts he repeatedly reported this conduct to his supervisor, who ignored him. After the company fired him, he sued, alleging his termination was a response to his complaints about fraud in violation of the Sarbanes-Oxley Act's antiretaliation provision.

A district court jury ruled for Murray, but UBS appealed, arguing the district court erred by failing to instruct the jury that he had to prove its retaliatory intent to prevail. For his part, Murray claimed a proper reading of the statute required him to show only that his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint."

The U.S. Court of Appeals for the 2nd Circuit agreed with UBS and vacated the district court's judgment. The Supreme Court will resolve a split in the circuits. Murray v. UBS Securities, LLC.

Conclusion

The Supreme Court is poised to substantially affect employment law and the federal enforcement scheme that has been in place since 1937. Employers need to keep a close eye on the potential impact of these decisions. ✣

INSIDE THE EEOC

EEOC issues updated harassment guidance

by H. Juanita Beecher, FortneyScott

On October 2, the Equal Employment Opportunity Commission (EEOC) issued its proposed "Enforcement Guidance on Harassment in the Workplace," which updates its existing workplace harassment guidance from 1999. The updated guidance expands on the guidance proposed during the Obama administration with the experiences of #MeToo, the pandemic, and the expansion of Title VII of the Civil Rights Act of 1964 under *Bostock*.

Expands types of characteristics protected. The new harassment guidance expands the type of characteristics protected from harassment to include epithets regarding sexual orientation or gender identity and intentional or repeated use of names or pronouns inconsistent with the individual's gender identity, as well as denial of access to bathroom or other sex-segregated facility consistent with the individual's gender identity.

Conduct outside office. With many businesses turning to remote working arrangements during and after the pandemic, the EEOC added harassment occurring in the virtual work environment. The guidance expands hostile work environment claims to include conduct that occurs outside the employee's regular workplace, such as harassment that takes place over work emails or during videoconferences. The increased use of social media and text messaging among employees can create liability for employers if conduct outside the work has consequences in the workplace or contributes to a hostile work environment. The guidance makes clear that harassment can result from a harassing social media post if it is subsequently repeated or commented on in the workplace.

Enforcement trends. Meanwhile, the EEOC increased its enforcement efforts in fiscal year (FY)

2023, filing 143 new employment discrimination lawsuits. Its newly finalized strategic enforcement plan for 2024-2028 will prioritize "vulnerable and underserved" workers such as people with intellectual and developmental disabilities, workers facing disabilities related to mental health, individuals with arrest or conviction records, LGBTQI+ individuals, temporary workers, older workers, low-wage workers, and persons with limited literacy or English proficiency, as well as workers affected by pregnancy, childbirth, or related medical conditions.

Takeaways. The proposed guidance provides employers with recommendations on how to develop antiharassment policies. A policy should also contain a complaint process that offers multiple avenues for reporting harassment, identifies points of contacts for making complaints, and provides confidentiality and antiretaliation protections for employees. Employers should review their current policies to ensure they address all the aspects of harassment identified by the new guidance.

Mixed response to EEOC PWFA proposed regulations

Both Republican and Democratic state attorneys general (AGs) weighed in on the inclusion of abortion as one of the numerous conditions covered by Pregnant Workers Fairness Act (PWFA). The Republican AGs claimed the insertion of abortion violated the major questions doctrine, while the Democratic AGs argued it was legally sound. Republican leaders of the House Education and Workforce Committee also argued abortion wasn't written into the text of the law and therefore should be removed from the final rule.

Another area of contention in the comments is how long employees and applicants can forgo their essential functions. The PWFA defined the period such essential functions can be suspended as "in the near future," while the EEOC's proposed regulations defined that period as 40 weeks. The proposed regulations then provide that the 40-week period can restart after their return to work. The Republican House leaders argued that mandating accommodations for nearly two years would be unworkable for most employers.

Finally, the Democratic AGs asked the EEOC to add examples on telework, lactation, and work-related travel and expand protection from no-fault attendance polices for pregnancy-related absences.

Recent settlements

Public Service Company of New Mexico agreed to settle an Americans with Disabilities Act (ADA) lawsuit claiming it forced workers out of their jobs if they couldn't return to work at 100% capacity. It agreed to pay $750,000, overhaul its accommodation policies, and require supervisory employes and HR staff to undergo ADA training.

Riverwalk Post-Acute Nursing Home agreed to settle an EEOC racial harassment lawsuit alleging that racial slurs were directed toward Black staff members. It agreed to pay $865,000 to affected Black employees and reinstate former employees. The company will retain an equal employment opportunity (EEO) monitor and will revise its policies to eradicate race discrimination from its workplace.

Dollar General agreed to pay $1 million to resolve allegations that it refused to hire employees with vision impairments for warehouse work and asked unlawful questions about applicants' family medical histories. The company will provide annual training to all HR employees and anyone else involved in hiring at its distribution center and will no longer require applicants for warehouse jobs to undergo pre-employment medical exams.

Lilly USA agreed to pay $2.4 million to settle an age discrimination lawsuit filed on behalf of pharmaceutical sales representative applicants who were denied positions because of hiring preferences for millennials. The company will provide EEO training to managers and HR professionals.

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VIEW FROM K STREET

A House in tatters

by Burton J. Fishman, FortneyScott

After watching the 15 ballots required to elect Kevin McCarthy as Speaker of the House, mere months ago, and then learning that he had traded the powers of the office for the trappings of power, we had to know that trouble was brewing. When it was confirmed that McCarthy sold his authority to a clique of right-wing election deniers of various stripes, we knew he didn't have the ability either to govern his fractious party or to remain in office. However, when the inevitable happened—when the demands of governing collided with the sheer will to disrupt—when McCarthy was tossed for the sin of recognizing that the majority party must govern, like it or not, few of us expected the vacuum that the Republicans have created and have allowed to persist for weeks.

There is, of course, never a good time for the leader of the free world, the fortress of democracy, a light among the nations, to be without a functioning legislature. However, with a government shutdown looming, Ukraine at the brink, Israel at war, and the Middle East at the point of explosion, perhaps even those who most loudly insist on the irrelevancy of Congress and the federal government may pause to consider our perilous state. Monies to support our allies and fend off our foes cannot be appropriated. A budget to keep the remaining functions of government running—to pay our troops, air traffic controllers, VA hospitals, the National Institutes of Health (NIH), research centers, farm subsidies—in addition to all the sustenance provided to the old, the ill, to those in need—is yet to be considered. These are unusually challenging times.

So, it's imperative to try to figure out just what this chaotic internecine battle is about, as hard a task as that is. To what end have the Republicans deposed their last three Speakers? What goal do they seek to achieve with a fourth? In a divided government, with a Democratic Senate and a Democratic president, just what policy goals do they seek to achieve in the first place? In all the blather spilled before us, no one has even approached the issue. The inability to provide a meaningful response makes the chaos deepen because it is without purpose.

The longer the House cannot function, the more painfully obvious it is that its majority party—the Republicans—is not governing and, perhaps, cannot govern. What is worse, the longer the House cannot function, the more it appears that the majority party cares more about its internecine struggle than it cares about governing.

Many thought that the two-year terms of Representatives are too short to enable an effective, informed House. It's apparent, however, that we cannot bear another year of this mis-governance, cannot wait another year to have our voices heard and votes tallied. We have learned that a house divided cannot stand. Just what is to be done with a House in tatters, and a floundering majority, aimless, purposeless, rudderless, and leaderless? The cares and troubles of the world will not wait.

As was asked a century ago in the midst of revolutionary turmoil: What is to be done? ✣

FEDERAL EMPLOYMENT LAW INSIDER (ISSN 1085-9152) is published monthly for $525 per year by **BLR®—Business and Learning Resources,** 5511 Virginia Way, Suite 150, P.O. Box 5094, Brentwood, TN 37024-5094. Copyright 2023 BLR®. Photocopying or reproducing in any form in whole or in part is a violation of federal copyright law and is strictly prohibited without the publisher's consent.

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