

Litigation, Professional Perspective - Implications of Overruling Chevron for OSHA Enforcement Actions

Implications of Overruling Chevron for OSHA Enforcement Actions

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This term, the Supreme Court is poised to decide whether to overturn entirely, or narrow, *Chevron* deference—that is, the principle that courts must defer to an agency's reasonable interpretation of an ambiguous statute. As with other administrative agencies, an overruling or narrowing of *Chevron* deference is likely to have significant implications for the Occupational Safety and Health Administration (OSHA). But those implications will be affected by the particular structure created by the Occupational Safety and Health Act (OSH Act), which divides authority between the Secretary of Labor and the Occupational Safety and Health Review Commission.

Notably, several circuits have granted *Chevron* deference to OSHA's interpretation of the OSH Act, even though those positions were only advanced in the form of citations and administrative litigating positions, not any more formal process. Overruling or limiting *Chevron* may put an end to the practice of deferring to statutory interpretations advanced in the form of OSHA citations. This would present a significant opportunity for parties defending against OSHA citations, who should carefully consider whether those citations are consistent with the statute.

***Chevron* Deference & OSHA Enforcement Actions**

In *Chevron*, the Supreme Court held that, where a statute is ambiguous, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron, U.S.A., Inc. v. NRDC*, [467 U.S. 837, 844](#) (1984).

The application of *Chevron* to OSHA is complex because of the structure of the OSH Act, which divides authority between the Secretary of Labor and the Occupational Safety and Health Review Commission (OSHRC), a three-person commission—whose members are appointed by the President—charged with adjudicating citations issued by OSHA. [29 U.S.C. § 661](#). As a result of two foundational Supreme Court cases, this feature has led to a circuit split, with some courts granting *Chevron* deference to interpretations of the OSH Act advanced in the form of OSHA citations, while others decline to provide such deference.

The first key Supreme Court decision is *Martin v. Occupational Safety and Health Review Commission*, [499 U.S. 144](#) (1991), where the Court held that decisions of OSHRC are not entitled to deference. The Court further held that the Secretary of Labor's interpretations of OSHA regulations are potentially due deference, reasoning that it was the Secretary, not the Commission, to whom Congress delegated "the power to make law and policy." While *Martin* addressed deference in interpreting agency regulations, subsequent circuit courts have extended its reasoning to *Chevron* deference. See, e.g., *Price v. Stevedoring Servs. of Am.*, [697 F.3d 820, 833](#) (9th Cir. 2012), noting that "circuit courts have relied on *Martin* to withhold both *Chevron* and *Skidmore* deference from OSHRC."

The second key decision is *United States v. Mead Corporation*, [533 U.S. 218](#) (2001), where the Court addressed the types of agency decisions that qualify for *Chevron* deference. The Court held that agency action qualifies for *Chevron* deference only:

[W]hen it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

The combination of *Martin* and *Mead* have significant implications for how *Chevron* deference operates with respect to OSHA. First, because adjudications are carried out by OSHRC, and under *Martin* OSHRC decisions are not entitled to deference, those adjudications cannot be the source of statutory interpretations warranting *Chevron* deference.

Second, a circuit split has developed with respect to deferring to the Secretary of Labor. Some courts have relied on *Mead* to hold that various categories of OSHA action, including the issuance of citations, do *not* give rise to *Chevron* deference, because such actions are not sufficiently formal to qualify for deference under *Mead*. Thus, courts have repeatedly held that positions of OSHA advanced, for example, only in administrative litigation do not warrant *Chevron* deference under *Mead*. See, e.g., *Chao v. OSHRC*, [540 F.3d 519, 526-27](#) (6th Cir. 2008); *George Harms Const. Co. v. Chao*, [371 F.3d 156, 161-62](#) (3d Cir. 2004); *Chao v. Russell P. Le Frois Builder, Inc.*, [291 F.3d 219, 227-28](#) (2d Cir. 2002).

However, at least three circuits have held that interpretations of a statute advanced in an OSHA citation can warrant *Chevron* deference, even though the issuance of a citation is akin to the mere filing of an administrative complaint. In reaching that conclusion, these courts relied on the following passage from *Martin*, which they read as indicating that the *Mead* standard for *Chevron* deference is met:

[W]hen embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress. . . . Under these circumstances, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard.

Thus, the Second Circuit has held that an OSHA interpretation that OSH Act, rather than the Mine Safety and Health Act, applies to certain activity qualifies for *Chevron* deference, because that interpretation was “embodied in a series of citations for safety violations.” *Secretary of Labor v. Cranestville Aggregate Companies, Inc.*, [878 F.3d 25, 33](#) (2d Cir. 2017). Likewise, the Fifth Circuit upheld OSHA’s authority “to issue a citation to a general contractor at a multi-employer construction worksite who controls a hazardous condition at that worksite, even if the condition affects another employer’s employees,” relying on *Chevron* deference. *Acosta v. Hensel Phelps Constr. Co.*, [909 F.3d 723, 727](#) (5th Cir. 2018). The D.C. Circuit has similarly applied *Chevron* deference to an OSHA interpretation relating to the statute of limitations. *AKM LLC v. Secretary of Labor*, [675 F.3d 752, 754-55](#) (D.C. Cir. 2012). Each of these cases is premised on the notion that sufficiently formal OSHA interpretations, including in the form of issued citations, is sufficient to warrant *Chevron* deference.

Deference to OSHA Citations & Potential Post-*Chevron* Implications

Deference to OSHA interpretations embodied in citations is currently in significant tension with *Mead*. As noted, under *Mead*, delegation of authority to “make rules carrying the force of law” must be demonstrated, such as “by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.” [533 U.S. at 227](#).

The issuance of a citation is not readily comparable to conducting an adjudication or notice-and-comment rulemaking. Citations are issued unilaterally by OSHA, without a direct opportunity for input by the cited party—much less other regulated parties. Citations are typically rather short, typically consisting of only a few sentences of narrative explanation as to the nature of the alleged violation. A citation is also non-final, as it only becomes a “final order” if the cited party fails to timely contest it. [29 U.S.C. § 659\(a\)](#).

In short, OSHA citations “are not binding or precedential,” and “do not arise out of a formal procedure intended to foster the fairness and deliberation that should underlie a pronouncement of law.” *Knox Creek Coal Corp. v. Secretary of Labor*, [811 F.3d 148, 159-60](#) (4th Cir. 2016). For those reasons, it is anomalous to accord *Chevron* deference to OSHA positions simply because they are reflected in citations.

A ruling overturning *Chevron* would plainly put a halt to the practice of deferring to OSHA citations. A ruling limiting *Chevron* to specified situations would also likely, depending on its rationale, undermine the basis for the decisions electing to defer to OSHA citations. For example, a ruling limiting *Chevron* deference to formal interpretations developed only after an opportunity for formal notice and comment would render citations ineligible for *Chevron* deference. This would mark an important change in those circuits where courts have deferred to OSHA citations that advance an interpretation of the statute.

Practical Considerations

As a practical matter, in a post-*Chevron* environment, practitioners should carefully scrutinize OSHA positions and interpretations advanced in enforcement cases to determine whether they are consistent with the OSH Act. While most OSHA enforcement actions turn on interpretations

of OSHA regulations and the underlying facts, there are important issues of statutory interpretation that can arise in OSHA enforcement cases, as the cases discussed above make clear. Those issues include fundamental questions about OSHA's authority, such as its authority to issue citations to one employer based on risks posed to another employer's employees, and the statute of limitations applicable to issuance of OSHA citations.

Practitioners defending against an OSHA citation should consider the following in a post-*Chevron* world:

- **Compare the Citation to the Statute.** In evaluating the propriety of a citation, practitioners should make sure to carefully review the statute for potential defenses or arguments that OSHA's citation has impermissibly exceeded the statute. While OSHA's regulations will likely remain a key focus in enforcement cases, in a post-*Chevron* world the statute itself will play a more important role.
- **Think Big.** OSHA practitioners should take a broad view when considering potential defenses to a citation. In a post-*Chevron* world, the fact that OSHA has taken a position for many years will no longer suffice alone: longstanding assumptions about agency authority and its interpretation of the OSH Act will be open to potential challenge.
- **Consider Challenging the Underlying Rule.** In at least some circumstances, it may be possible to challenge the underlying rule on which an enforcement action is premised. See *Kiewit Power Constructors Co. v. Secretary of Labor*, [959 F.3d 381](#) (D.C. Cir. 2020). In a post-*Chevron* world, those rules may themselves receive less or no deference. Practitioners should thus consider whether to bring any challenges to the underlying regulation in defending against a citation.

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