SCOTUS Delivers a Win for Businesses Challenging Federal Agency Actions: 4 Key Takeaways for Employers

Insights
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The Supreme Court recently handed a victory to employers by giving them more tools to challenge federal agencies during administrative proceedings. Employers likely know how daunting it can seem to challenge federal officials – whether you're facing an action from the Department of Labor, NLRB, OSHA, EEOC, or some other regulatory body. As we predicted back in January, SCOTUS opened up some avenues for employers to contest administrative proceedings in court without having to wait for the administrative process to play out. The ruling didn't go as far as some of the more conservative Justices would have liked — and we were surprised to see the unanimous opinion penned by liberal Justice Elena Kagan — but the April 14 decision provides some good news that you can add to your litigation arsenal. What do you need to know about the decision and its impact on employers?

Why is the Issue Significant?

A number of federal regulatory agencies oversee workplace dealings and have the authority to bring claims against employers. Most notably, employers face the potential of a federal agency challenging their labor relations practices, wage and hour compliance, workplace safety standards, and general human resources activity.

Disputing a federal agency's action is difficult, particularly since agencies create, interpret, and enforce their own rules. Unfortunately, employers are often forced to compromise when faced with regulatory challenges given the procedural nature of such claims and the resources necessary to defend against them.

Oftentimes, the legal battle is so cost-prohibitive it has been referred to as a "bet the farm" scenario, with companies first having to pay attorneys to jump through legal hurdles before being able to challenge the federal agencies in court. Even succeeding in a later legal challenge won't result in recovering the amount spent in defending the case.

Where this becomes the most troubling is when there are underlying constitutional issues involved. Here's what SCOTUS considered in these cases and how it ruled:

- **Process forced challengers to wait for final orders.** The two companion cases before the Supreme Court — *Axon Enterprise v. Federal Trade Commission* and *Securities and Exchange*

Commission v. Cochran — involve similar laws outlining how "final orders" from those agencies are to be challenged. In both cases, those final orders had to be challenged in the court of appeals.

- **The FTC case.** In *Axon*, the FTC was investigating Axon Enterprise to determine whether its acquisition of a competitor violated federal antitrust laws, which Axon protested.
- **The SEC case.** Similarly, in *Cochran*, a Texas accountant, Michelle Cochran, was accused of misconduct by the SEC. The agency sanctioned her and forced her to go through a lengthy administrative proceeding and SEC appeals process.
- **Constitutional issues raised about use of administrative law judges.** Although several issues were raised in each case, SCOTUS focused on whether challenges to both the FTC's and SEC's use of administrative law judges could properly be heard by a federal district court without the need to first go through the agencies' respective processes.
- **Conflicting appellate court rulings.** Notably, the appellate courts gave conflicting results. The 9th Circuit found in favor of the FTC; however, the 5th Circuit allowed Cochran to pursue her constitutional challenge against the SEC without first going through the agency's administrative processes.
- **SCOTUS sides with challengers.** In welcome news for employers, SCOTUS ruled in favor of the challengers in these companion cases allowing them to bring their constitutional claims against the government without having to go through burdensome administrative processes. This means employers could find themselves in a more advantageous position when it comes to battling it out with these agencies in these situations.
- **District court jurisdiction over "far-reaching" constitutional claims.** In the unanimous opinion, Justice Kagan wrote for the Court, "We now conclude that the review schemes set out in the Exchange Act and the FTC Act do not displace district court jurisdiction over Axon's and Cochran's far-reaching constitutional claims."

How Did We Do With Our Predictions?

As we noted in January after oral argument, many of the Court's conservative justices seemed ready to side with the government's challengers. And we correctly predicted that the Court would hold that the challenges to both the FTC's and SEC's use of administrative law judges could properly be heard by a federal district court without the need to first go through the agencies' respective administrative processes.

Notably, the Court's more liberal justices were much more sympathetic to the government and the practical issues that could arise in allowing constitutional claims to survive in court while administrative proceedings were pending. So, it was surprising that the decision was unanimous.

While we didn't expect Justice Kagan to pen the opinion, we did correctly predict that she would side with the challengers in a more limited way than some of the conservative Justices.

In her opinion for the Court, Kagan said Cochran and Axon asserted a "here-and-now injury" from "being subjected to an illegitimate proceeding, led by an illegitimate decisionmaker." She held that such injury is "impossible to remedy once the proceeding is over, which is when appellate review kicks in. Judicial review of the structural constitutional claims would thus come too late to be meaningful."

As we expected, some of the more conservative Justices would've gone a step further.

For example, Justice Clarence Thomas said in a concurring opinion that he had "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end."

Additionally, Justice Neil Gorsuch said he would scrap the "judge-made, multi-factor balancing test" that the Court applied. He pointed to statutory language stating that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

"Not *may* have jurisdiction, but *shall*. Not *some* civil actions arising under federal law, but *all*," he wrote.

4 Key Takeaways for Employers

Here are four key takeaways for employers from SCOTUS's ruling in these companion cases:

1. With this victory, employers can bring certain constitutional claims against governmental actions immediately without having to go through a lengthy and burdensome administrative review process.
2. Any employers currently facing an administrative procedure before a federal agency, such as the NLRB, Department of Labor, OSHA, or EEOC, should reexamine whether the *Axon* opinion provides an avenue to bring a more sweeping constitutional challenge in their particular case.
3. Employers should not assume they are necessarily bound by an existing administrative process and should keep an eye on future litigation stemming from *Axon* directly challenging other federal agency authority. For example, if an employer finds itself on the receiving end of a new agency initiative in the future, such as the FTC's proposed ban on non-compete agreements, *Axon* may provide a basis to bypass the FTC administrative process to directly challenge the initiative.
4. While the Supreme Court emphasized the nature of the challengers' structural constitutional claims, the Court did note that the expense and burden of lengthy administrative proceedings alone was not enough to justify intermediate judicial review.

Conclusion

Fisher Phillips will continue to monitor developments in this area and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or the authors of this Insight.

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