Breaking Ground After Chevron Demolished: What Construction Employers Can Expect in This Next Phase

Insights
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The Supreme Court's recent landmark ruling that gives employers a powerful tool to fight back against regulatory overreach will have a broad impact on just about every area of workplace law – and every industry. We're looking at the way industries will be specifically impacted now that federal agency rules and positions are more susceptible to attack after SCOTUS ditched the decades-old *Chevron* doctrine. This edition focuses on what construction employers can expect in the post-*Chevron* world and provides three steps these employers can take to stay ahead of the curve.

What Happened?

SCOTUS rocked the legal world on June 28 when it overturned the famous *Chevron* doctrine, holding that that courts may not defer to an agency's interpretation of an ambiguous federal statute. In *Loper Bright*, the Court said that from now on judges "must exercise their independent judgment" when ruling on cases involving agency rules, regulations, guidance, or other actions. In plain English, this ruling gives the courts – not administrative agencies – the power to say what the law actually is. You can read all about it here, including all the different ways that the workplace law landscape may soon change.

How Does This Impact Construction Employers?

Federal agencies that often regulate the construction industry, such as the Department of Labor (DOL), the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), and the Environmental Protection Agency (EPA), have become increasingly aggressive in their positions and enforcement actions. The end of *Chevron* means:

- **Less Regulatory Power**. The DOL, OSHA, MSHA, EPA, and other agencies will have less power to mold their own agendas because courts will have the final say on whether an agency's interpretation of the law should be upheld or struck down. Note, though, that unless a specific regulatory action is successfully challenged in court, nothing is stopping these agencies from continuing vigorous enforcement measures.
- **New Employer Toolset**. This change should level the playing field for employers as agency actions are more effectively challenged in court. Construction employers and their advocates are now in a better position to push back against overly burdensome regulations and government

overreach that could hinder business operations – such as OSHA's proposed national heat safety rule once it is finalized.

In fact, the Supreme Court has already ordered a case (*KC Transport, Inc. v. Su*) – which involves MSHA's broad interpretation of what counts as a "mine" under the Federal Mine Safety and Health Amendments Act (Mine Act) – to return to lower courts in light of the Loper Bright decision. Those courts can now interpret the Mine Act as they see fit – and hopefully in a way that does not give MSHA jurisdiction over a non-mining company's facility located over one mile from a mining extraction site. Click here to read more about how the new standard could be used to combat rules issued by OSHA and MSHA.

Are There Any Downsides?

While the death of *Chevron* is largely viewed as a win for construction employers, employers could see some negative consequences stemming from this change, including:

- **Regulatory Uncertainty**: The transition away from the *Chevron* doctrine may lead to a period of regulatory flux, as courts reassess existing agency interpretations. And not every agency action will be susceptible to the same kind of attack, as the laws that created the agencies and gave them power to issue rules are all a little different. This uncertainty can complicate compliance efforts and strategic planning for construction employers.
- **Inconsistent Jurisdictions**: Without a uniform deference standard, different courts in different states may interpret statutes in varied ways, creating a patchwork of compliance requirements across the country. This, of course, can be challenging for employers in the construction industry operating across multiple states.

Read more about how the end of Chevron deference could come at a cost.

Sidenote: What's Going on With Administrative Law Judges?

Just one day before the Supreme Court tossed out *Chevron*, it ruled that the Securities and Exchange Commission's use of administrative law judges (ALJs) to impose financial penalties on a party violates the Constitution's Seventh Amendment right to a jury trial. That decision could have implications for other agencies who use ALJs – including, potentially, OSHA and MSHA.

But the Court distinguished *SEC v. Jarkesy* from a 1977 case (*Atlas Roofing v. OSHRC*) that held the adjudicatory authority of the Occupational Safety and Health Review Commission did *not* violate the Seventh Amendment – and employers were therefore not owed a jury trial when contesting citations and penalties – due to an exception for cases involving "public rights." It remains to be seen whether *Jarkesy* will have any impact on OSHA's and MSHA's use of ALJs or review commissions (or if the public rights exception would apply to every case that comes before them), but it may pave the way for future constitutional challenges. This is particularly true given that the majority was not

complimentary of the *Atlas Roofing* decision, which may signal the Court's willingness to revisit it.

3 Practical Tips for Construction Employers

We encourage construction employers to take these three steps to remain agile during this period of uncertainty.

1. **Stay Informed and Proactive** – Ensure your legal team or external counsel provides regular updates on significant court decisions and regulatory changes (sign up for FP Insights here and check out the FP Toolbox Talks podcast here). Staying ahead of the curve will allow you to anticipate and prepare for potential impacts.
2. **Enhance Legal and Compliance Resources** – Consider expanding your in-house legal team or increasing collaboration with external legal counsel. Actively foster compliance by assigning a member of your team to review resources, identify areas where changes are proposed, and ensure real-time tracking of regulatory changes. Legal counsel can also help determine if you have any new arguments to challenge agency actions (such as OSHA or MSHA citations) and advise you on the level of risk associated with taking different stances under certain rules.
3. **Advocate for Clarity and Fairness** – Actively participate in industry and trade associations, which will lead the way in providing resources and advocacy support to help navigate the shifting regulatory landscape. Hand in hand with these organizations, you can engage with policymakers and advocate for clear, fair, and predictable regulatory frameworks. Effective advocacy can help shape regulations that support the growth and stability of the construction industry.

Conclusion

The Supreme Court's blockbuster decision marks a significant shift in the regulatory landscape, presenting both challenges and opportunities for employers in the construction industry. By staying informed and actively engaging in advocacy, employers can effectively navigate this period of change.

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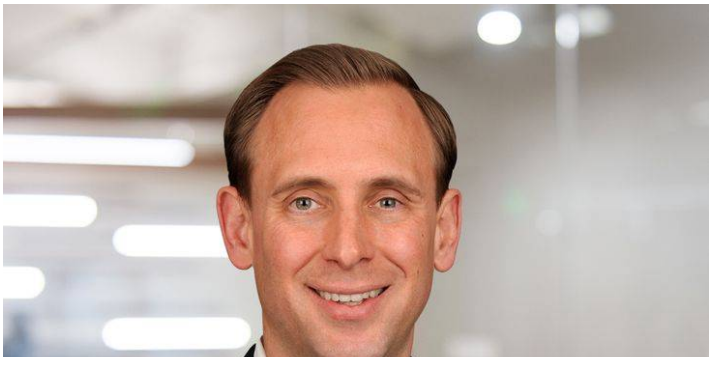

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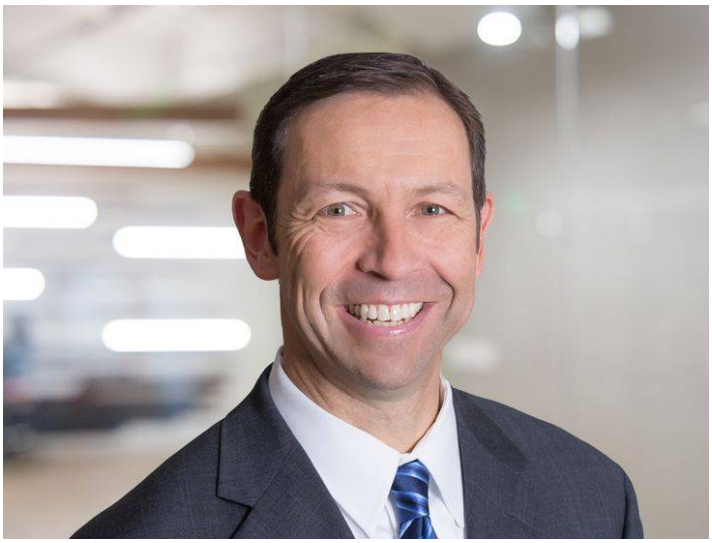

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