Chevron Deference Overruled:

What Difference Does It Make for Occupational Safety and Health Matters?

Ronald W. Taylor
Partner rwtaylor@venable.com

Hayley F. Degnan
Associate hfdegnan@venable.com

VENABLE LLP

Topics of Discussion

I. A Brief History of Administrative Agency Deference

II. A Discussion of the *Chevron* Doctrine

III. Explaining the *Loper* Decision

IV. Considering *Loper's* Impact on OSHA

V. Takeaways for Employers

VENABLE LLP

Overview

- On June 28, 2024, the U.S. Supreme Court issued a landmark decision overturning *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 486 U.S. 837 (1984)
  - *Chevron* created a long-standing administrative law doctrine requiring courts to defer to an agency's interpretation of ambiguous law
  - Rather than afford deference to the agency, Courts will now exercise their independent judgment to determine the "best reading" of the law
- The Court's decision is anticipated to:
  - Lead to a slight downtick in broad agency action
  - Increase the frequency of challenges to agency action
  - Raise additional issues for litigation
  - Create less certainty for employers

VENABLE LLP

I. A Brief History of Administrative Agency Deference

What Existed Before Chevron?

VENABLE LLP

Deference to Agencies Over Time

- **1944**: *Skidmore v. Swift & Co.*, 323 U.S. 132 (1944) – Action regarding what constitutes hours worked under the Fair Labor Standards Act
  - Court held that "rulings, interpretations, and opinions" of the agency constitute "a body of experience and informed judgment to which courts and litigants may properly resort for guidance"
- **1945**: *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) – Action regarding the interpretation and application of Maximum Price Regulation No. 188 under the Emergency Price Control Act of 1942
  - Court held that an agency's interpretation of its own regulations has "controlling weight unless it is plainly erroneous or inconsistent with the regulation"
- **1984**: *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984)
  - Court held that courts must defer to an agency's reasonable interpretation of an ambiguous statute

VENABLE LLP

Deference to Agencies Over Time

- **1997**: *Auer v. Robbins*, 519 U.S. 452 (1997) - Action regarding interpretation of the salary basis test under the Fair Labor Standards Act
  - Court held that courts defer to an agency's interpretation of its own ambiguous regulations, unless the interpretation is plainly erroneous
- **2001**: *United States v. Mead Corp.*, 533 U.S. 218 (2001) – Action challenging a "ruling letter" issued by Customs headquarters
  - Court held that Chevron deference only applies to agency actions having the force of law. Other agency interpretations are subject to *Skidmore* deference
- **2019**: *Kisor v. Wilkie*, 588 U.S. 558 (2019) – Action challenging VA disability benefits award calculation
  - Court declined to overrule *Auer* deference, but held that a court should not afford deference unless, after exhausting all "traditional tools" of construction, the regulation is genuinely ambiguous, and the agency's reading is "within the bounds of reasonable interpretation"

VENABLE LLP

II. An Overview of the Chevron Doctrine

What Was Chevron Deference?

VENABLE LLP

The Chevron Case

Chevron involved a challenge to a regulation passed by the Environmental Protection Agency ("EPA")

- Issue: Whether the Clean Air Act permits the EPA to define "stationary source" to mean a whole industrial plant
- Decision: Yes, in a unanimous decision, the Court held that the EPA's definition was a "reasonable interpretation" of the term in the Clean Air Act
    - To reach its decision, the Court created a two-part test to determine when a court should defer to an agency's interpretation of law

VENABLE LLP

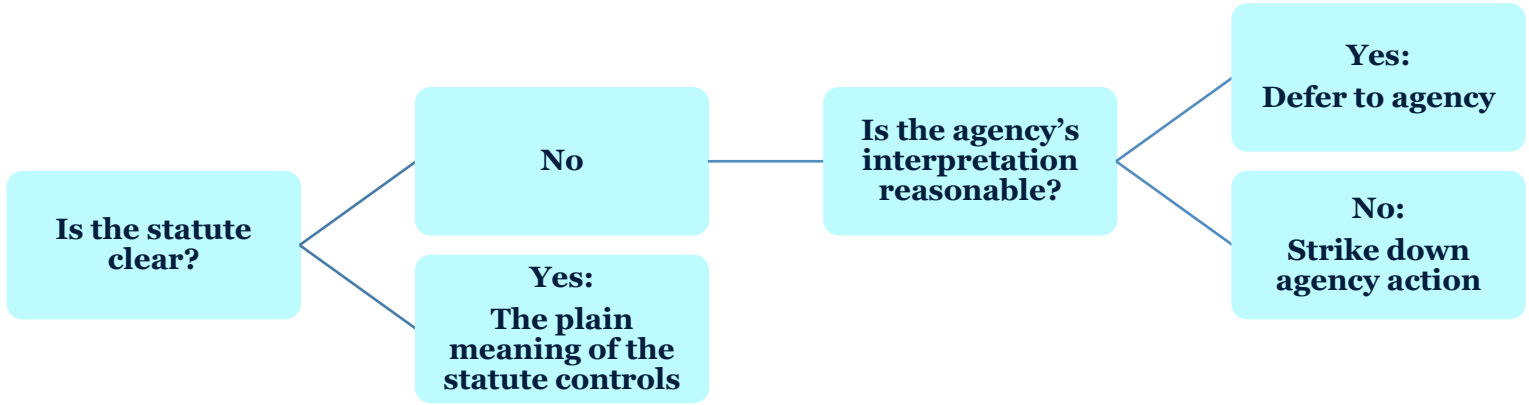
The Chevron Doctrine

- Under the "Chevron Doctrine," a court must defer to an agency's interpretation of law if:

  (1) the law is ambiguous, and

  (2) the agency's interpretation is "reasonable"

- Even if the court disagrees with the interpretation
- Low burden on agencies to demonstrate their interpretation is valid and should be upheld



VENABLE LLP

III. Explaining the *Loper* Decision

What Is Left Post-*Chevron*?

VENABLE LLP

The *Loper* Decision

- Two companion cases *Loper Bright Enters. v. Raimondo*, No. 22-451 and *Relentless, Inc. v. Department of Commerce*, No. 22-1219, challenging regulations requiring industry-funded monitoring across fisheries
  - In both cases, the lower courts granted summary judgment for the government, applying Chevron deference (*i.e.*, finding that the regulation was a reasonable interpretation of law), which the applicable Circuit courts affirmed
    - The Court vacated and remanded the cases

VENABLE LLP

The *Loper* Decision

- The Court overruled *Chevron*, holding that *Chevron* deference is irreconcilable with the Administrative Procedure Act ("APA")
  - Courts are required to exercise their "independent judgment" in interpreting the meaning of statutory provisions and determine the "best reading" of the law
  - However, courts may "seek aid" from agency interpretation
    - The Court highlighted than an agency's interpretation may be "especially informative" to the extent that it was issued "roughly contemporaneously with enactment of the statute and remained consistent over time" and relies on "factual premises within the agency's expertise"
      - Though the Court does not explicitly adopt *Skidmore* deference, it cited to the opinion when raising this point ("rulings, interpretations, and opinions" of the agency constitute "a body of experience and informed judgment…")
- The Court clarified that prior decisions that relied upon *Chevron* are not overturned

VENABLE LLP

IV. Considering *Loper's* Impact on OSHA

How Will the End of *Chevron* Deference Impact Agency Action?

VENABLE LLP

OSHA's Rulemaking and Interpretive Authority Generally

- OSHA is likely to face greater legal challenges to regulations and interpretations
- OSHA may be required to craft more narrowly-tailored regulations moving forward
  - Interpretations developed in the context of litigation should not be permissible
  - "Informal rulemaking," such as opinions expressed in interpretation letters may be questionable as support for OSHA actions
- May further delay rulemaking process

VENABLE LLP

OSHA's Existing/Proposed Regulations

- Walkaround Rule: Final rule published on April 1, 2024 that went into effect May 31, 2024, allowing employee representatives to participate in the inspection, who are not necessarily employees of the employer
  - Allows workers to designate a third party to accompany an OSHA inspector during a walk around, regardless of whether they are an employee of the employer or if the workplace is unionized
  - On May 21, 2024, a coalition of business groups filed a lawsuit in the Western District of Texas to challenge the final rule.
    - Argued that the rule exceeds OSHA's authority and violates the APA, which may be strengthened by *Loper*
- Heat Standard: Proposed rule published July 2, 2024, aimed at protecting workers from exposure to heat hazards in the workplace
  - OSHA may reconsider its proposed rule to avoid future challenges
  - The final rule is likely to be challenged

VENABLE LLP

OSHA's Existing/Proposed Interpretations

OSHA's Letters of Interpretation

- May be challenged
  - Longstanding Letters of Interpretation have greater chance of withstanding scrutiny
  - Creates less certainty for compliance and enforcement actions moving forward

VENABLE LLP

OSHA Enforcement Actions

- In *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991), the Court held that:
  - Court should defer to Secretary of Labor over OSHRC if conflicting interpretations
- Following *Martin* and *Mead*, a Circuit split developed regarding whether interpretations in an OSHA citation should receive deference
  - *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723 (5th Cir. 2018) – Relying on Chevron deference to uphold OSHA's authority to issue a citation to a general contractor at a multi-employer worksite
  - *AKM LLC v. Sec'y of Lab.*, 675 F.3d 752 (D.C. Cir. 2012) – "Because the Secretary of Labor has interpreted the Act and her regulations to pretermit the Act's statute of limitations, we first determine whether we must defer to her interpretation. Generally, the answer is yes so long as the statutes and regulations in question are ambiguous and the Secretary's interpretations are reasonable. This is so even if the Secretary's interpretation arises in an administrative adjudication rather than in a formal rulemaking process." (internal citations omitted)

VENABLE LLP

OSHA Enforcement Actions (Cont.)

- As a result of *Loper*, less deference may be afforded to interpretations in OSHA citations
  - Courts have relied on deference to affirm citations issued under multiemployer worksite policy, instance-by-instance policy, and General Duty Clause
- Lack of deference may also give rise to challenges to other enforcement actions, such as whistleblower claims (*e.g.*, whether an internal complaint is protected activity under applicable law)

VENABLE LLP

V. Takeaways for Employers

What Does This All Mean for Employers?

VENABLE LLP

Practical Considerations for Compliance

- Continue to adhere to all OSHA rules and standards, even those bolstered by *Chevron* deference
- Continue to use OSHA's Letters of Interpretation for compliance purposes (Fairness)
- Stay up-to-date on legal challenges to OSHA rulemaking
- Be prepared for the possibility of conflicting court decisions in the face of legal challenges
  - May give rise to more jurisdiction-specific interpretation of law

VENABLE LLP

Practical Considerations for Defending Against a Citation

- Lessened deference may become a settlement negotiation tactic
- Additional issues may arise in litigation
  - Employers may challenge the standard underlying the citation
    - *Kiewit Power Constr. Co. v. Sec'y of Lab.*, 959 F.3d 381 (D.C. Cir. 2020) – "Because we conclude that the Secretary's interpretation of the OSH Act is reasonable and therefore entitled to deference from the Commission, we grant the Secretary's petition for review, deny Kiewit's and reverse the Commission's decision."
  - Employers may argue that OSHA's citation has exceeded the statute
  - Employers may not need to count out a defense simply because OSHA has taken a longstanding position or adopted an interpretation for many years
- Can be beneficial and detrimental to employers
  - More bases to challenge an action/more time and expense litigating unsettled issues

VENABLE LLP

Not the End of OSHA

- On July 2, 2024, the Court declined to grant certiorari in *Allstate Refractory Contractors, LLC v. Su*, No. 23-819
  - The petition asked the Court to consider whether the delegation of authority to the Occupational Safety and Health Administration was unconstitutional
  - Justice Thomas wrote a dissenting opinion:
    - "The Occupational Safety and Health Act may be the broadest delegation of power to an administrative agency found in the United States Code"

VENABLE LLP

Questions?

VENABLE LLP