

POTENTIAL IMPACT OF OVERTURNING CHEVRON

An OSH Professional Perspective

By James G. Borchardt and Sang Daniel Choi

OSH professionals are probably wondering what impact the recent U.S. Supreme Court ruling that overturned the 1984 Chevron decision might have on the safety and health of our workers and worksites. The authors seek to provide some clarity.

This article provides a synopsis of this landmark decision, offers a few OSHA examples, and explores potential changes OSH professionals may make in their day-to-day practice, as well as what impact this decision may have on the OSH profession overall.

Background

On Jan. 17, 2024, the U.S. Supreme Court began hearing arguments, and on June 28, 2024, the court issued its decision to overturn the 1984 landmark case of *Chevron v. Natural Resources Defense Council (Loper Bright Enterprises v. Raimondo, 2024)*. The 1984 Chevron decision required judges to give deference to federal agencies to interpret ambiguous federal laws including the OSH Act of 1970.

Since 1984, the Chevron decision has been cited more than 18,000 times in lawsuits involving many federal agencies (Ferguson, 2024a, 2024b; Howe, 2024). The first federal independent regulatory agency was the Interstate Commerce Commission established in 1887. As industry grew and the complexity of technology evolved, Congress deemed it appropriate for federal agencies to administer the details of federal laws to protect the public.

In the 1984 Chevron case, this long-standing practice was challenged, and the Supreme Court ruled that judges must defer to the interpretation of the federal agencies when the federal law was ambiguous (McKinney, 2018). In essence, federal agencies, not judges, were interpreting federal laws and sometimes their interpretations actually created law by going beyond the scope and intent of the law. The 2024 Supreme Court decision overturning *Chevron* found this long-standing practice was unconstitutional (i.e., only Congress can make laws and courts must interpret them).



This decision may have a positive effect on the OSH profession overall because courts can now consider the efforts of businesses beyond OSHA regulations.

It determined Chevron deference violated the Administrative Procedure Act (APA) of 1946. Chief Justice Roberts explained the APA “specifies that courts, not agencies, will decide ‘all relevant questions of law’ arising on review of agency action—even those involving ambiguous laws” (ASSP, 2024).

Recent Examples Involving OSHA

In May 2024, U.S. Chamber of Commerce reported that it and a business coalition filed suit against OSHA’s April 1, 2024, regulation, 29 CFR 1903, Worker Walkaround Representative Process, claiming it was inconsistent with the OSH Act of 1970 (Freedman, 2024).

In 1991, the Supreme Court ruled in *Martin v. Occupational Safety and Health Review Commission* that the court was not entitled to give deference to the Occupational Safety and Health Review Commission (Brugato, 2024). In 2001,

United States v. Mead Corp. clarified what types of agency decisions qualify for Chevron deference (Brugato, 2024).

Potential Changes for OSH Professionals

OSH practitioners defending against one or more OSHA citations should consider the following suggestions in a post-*Chevron* world, as specified by Brugato (2024):

- **Compare the citations to the specific OSHA regulations.** Identify potential defenses or arguments where the cited regulations are ambiguous and potentially exceed their specific wording.

- **Think outside the box.** Take a broad view of potential defenses or arguments to citations. OSHA’s long-standing authority and its previous interpretations of regulations are now open to challenge with courts making the final decision.

- **Consider challenging the underlying OSHA rule.** Since 1970, OSHA has issued many rules to explain the ambiguities of the OSHA regulations, but these “rules” are not part of the OSH Act of 1970 and can now be challenged in court.

Vantage Point

Vantage Point articles in *Professional Safety* provide a forum for authors with distinct viewpoints to share their ideas and opinions with ASSP members and the OSH community. The goal is to encourage and stimulate critical thinking, discussion and debate on matters of concern to the OSH profession. The views and opinions expressed are strictly those of the author(s) and are not necessarily endorsed by *Professional Safety*, nor should they be considered an expression of official policy by ASSP.

PROFESSIONAL SAFETY
JOURNAL OF THE AMERICAN SOCIETY OF SAFETY PROFESSIONALS

PSJ

Professional Safety journal is a valuable resource for research and topics that are relevant to safety professionals today. Access your digital edition to start exploring all that *PSJ* has to offer.



Visit the digital edition of the journal at <https://assp.us/2DOT0N>

Impact on the OSH Profession Overall

While the impact of this decision is complex and rapidly evolving, the authors believe this decision may have a positive effect on the safety and health of workers, worksites and the OSH profession overall because courts can now consider the safety and health efforts of businesses beyond OSHA regulations such as a company's use of voluntary standards including ANSI/ASSP A10 construction standards (e.g., ASSP TR-A10.100-2018, Prevention Through Design—A Life Cycle Approach to Safety and Health in Construction) as they do in the U.K., EU and other countries.

For example, Britain's Health and Safety at Work (HSW) Act states that employers have the legal responsibility for the safety and health of their employees and others but most of their duties are expressed as goals or targets that are to be met "so far as is reasonably practical" or through exercising "adequate control" or taking "appropriate and reasonable" steps (HSE, 2013, 2022). In the U.K., clients, designers, and contractors involved with construction work all have safety and health responsibilities to consider before starting work. For instance, designers are legally bound to "design out" safety and health risks during design development to reduce or eliminate hazards in the construction and end use phases via the Mobile Worksite Directive (also known as the Construction Design and Management regulations) in the U.K. (HSE, 2015).

Other safety and health activities such as contractors on non-government projects voluntarily use the U.S. Army Corps of Engineers EM 385-1-1 Safety and Occupational Health Requirements manual. The manual was first published in 1942 with safety and health requirements exceeding the OSH Act of 1970 regulations, resulting in better than the U.S. construction industry injury and fatality rates. Contractors can also voluntarily have their supervisors and employees complete OSHA Education Center's (2024) training courses on EM 385-1-1, namely the 16-, 24-, 40-hour courses and 8-hour refresher course.

With this article, the authors sought to provide OSH professionals with insight to help them navigate a post-*Chevron*

James G. Borchardt, CSP, CPE, has 54 years of safety, health and ergonomic experience in the industrial and construction insurance industry. Since 2000, he has served on various subcommittees of the ANSI A10 Construction Standards Committee. Since 2017, he has been the principal and managing consultant of Construction Ergonomics LLC. Borchardt is an emeritus professional member of ASSP's Quad Cities Chapter, and a member of the Society's Construction and Ergonomics Practice Specialties.

Sang Daniel Choi, Ph.D., CSP, CPE, is a professor in the Department of Global and Community Health in the College of Public Health at George Mason University. Choi has more than 25 years of teaching and research experience in the prevention through design and occupational and environmental safety and health fields. Choi is a professional member of ASSP's NOVA Chapter.

world as they consider the potential impact the recent decision may have on their day-to-day practice. **PSJ**

References

- ASSP. (2024, July 16). Supreme Court ruling likely will limit agency actions on safety and health. <https://assp.us/4dLSm5y>
- Brugato, T. (2024, March 28). Implications of overruling *Chevron* for OSHA enforcement actions. Bloomberg Law. <https://bit.ly/46MIBlo>
- Freedman, M. (2024, April 1). OSHA's "walk-around" regulation is government-imposed trespassing. U.S. Chamber of Commerce. <https://bit.ly/3M7EWFj>
- Ferguson, A. (2024a, July 1). SCOTUS overturns *Chevron* deference: What does it mean for OSHA? *Safety+Health*. <https://bit.ly/3As8FpQ>
- Ferguson, A. (2024b, July 3). SCOTUS decision may have ramifications for OSHA and MSHA. *Safety+Health*. <https://bit.ly/3WPAY95>
- Health and Safety Executive (HSE). (2013). Health and Safety Executive—A Guide to health and safety regulations in Great Britain (HSE 49). <https://bit.ly/3YL063s>
- HSE. (2015). The construction (design and management) regulations 2015. <https://bit.ly/3SQ0hqy>
- HSE. (2022). Workplace fatal injuries in Great Britain, 2022. <https://bit.ly/4fPPw1d>
- Howe, A. (2024, June 28). Supreme Court strikes down *Chevron*, curtailing power of federal agencies. *SCOTUSBlog*. <https://bit.ly/4cfjwJb>
- Loper Bright Enterprises v. Raimondo, 603 U.S. ____ (2024). <https://bit.ly/4cvl5ui>
- Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144 (1991).
- McKinney, R.J. (2018). Federal administrative law: A brief review. Law Librarians' Society of Washington, DC (LLSDC). <https://bit.ly/4fKhADg>
- OSHA Education Center. (2024). EM 385-1-1 training courses. <https://bit.ly/3SOD4F2>
- U.S. Army Corps of Engineers (USACE). (n.d.). Safety and occupational health. <https://bit.ly/3WM8wVQ>
- USACE. (2014). Safety and health requirements manual (EM385-1-1). <https://bit.ly/3X5Onve>
- USACE. (2024). Safety and occupational health requirements (EM385-1-1). <https://bit.ly/4cnJkuA>
- United States v. Mead Corp., 533 U.S. 218 (2001).

Cite this article

Borchardt, J.G. & Choi, S.D. (2024, Sept.). Potential impact of overturning *Chevron*: An OSH professional perspective. *Professional Safety*, 69(9), 45-46.