Benefits & Executive Compensation
Deep Dive

Tobacco Penalty Suit Frenzy Reveals Post-Loper Bright Disarray

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The swell of litigation against employers that penalize smokers on their healthcare plans has created a laboratory for testing how much sway federal regulators have over judges after the US Supreme Court scuttled agency deference.

In more than 75 proposed class actions, employers are accused of charging higher healthcare premiums to tobacco-using workers without satisfying the legal criteria governing such employee wellness programs. The cases — which rely on federal statutes, regulations from the US Labor Department, and agency statements made in connection with those regulations — have spawned a tangle of conflicting district court rulings, with appeals pending in the First, Second, Sixth, and Seventh circuits.

The cases come in the long shadow of the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo* , which overturned the decades-old *Chevron* doctrine of deferring to administrative agencies' interpretations of unclear laws. They're forcing judges to grapple with how persuasive federal regulators are now that there's no obligation to defer to them.

"There's a natural inclination on the part of some courts to be reluctant to second-guess the regulators," said Andrew L. Oringer, partner and general counsel at Wagner Law Group. "*Loper Bright* says what it says, but it's brand new and it's a whole new paradigm. For some judges, it's hard to get comfortable with the notion of being authorized to second-guess a regulator."

Retroactive Reimbursement

Federal law allows employers to charge higher fees to smokers on their healthcare plans so long as certain conditions are met. The lawsuits claim these penalties — which typically range between $10 and $50 per biweekly paycheck — are invalid if they're not refunded once employees complete a quit-smoking program.

This claim is rooted in the statutory text of the Employee Retirement Income Security Act and regulations from the Labor Department, both of which mandate that employees who satisfy an alternative standard receive the “full reward” available to nonsmoking employees. It’s bolstered by language in the preamble to the department’s 2013 wellness program regulations, which specifically mentions retroactive reimbursement as a way for employers to fulfill their duties.

District courts have diverged in their handling of these claims, disagreeing on both the meaning of “full reward” and the persuasive value of regulatory text and preambles following *Loper Bright*.

“Early decisions were more receptive to the plaintiffs’ legal theory, but the trend has become more mixed,” said Ashley E. Johnson, a partner with Gibson Dunn & Crutcher LLP and co-chair of its ERISA litigation practice. “The courts that have favored defendants have been unwilling to impose requirements based on the regulatory preamble, which is where the idea of retroactive reimbursement comes from.”

No Consensus

Ruling for employees, federal judges in Virginia, Pennsylvania, Missouri, and Texas have held in early decisions that “full reward” likely includes retroactive reimbursement, but they’ve varied in their willingness to defer to the Labor Department.

Eastern District of Virginia Judge David J. Novak afforded the department some deference, saying its regulations “did not suddenly lose their force and effect in the immediate aftermath of *Loper Bright*.” US Judge Jeffrey L. Schmehl in Pennsylvania sided with Rentokil NA Inc. employees without explicitly deferring to the DOL, but he emphasized that *Loper Bright* didn’t revoke his ability to “draw on the Departments’ body of experience and informed judgment.”

In contrast, other decisions — including three issued this month — have rebuffed the agency’s views, holding that “full reward” doesn’t require retroactive reimbursement.

“If Congress intended the statute to provide the reward retroactive for the entire plan year, then it could have easily stated as much,” Northern District of Ohio Judge David A. Ruiz wrote in dismissing a case against Progressive Corp.

Most courts that have sided with plaintiffs have either deferred to the regulatory preamble or deemed it a “good reading” of the statute, according to Gibson Dunn’s Johnson. The courts that have declined to follow the preamble and looked only at the statute have “leaned toward defendants, typically by saying there’s no explicit mention of retroactivity in the statute,” she said.

Judges have fractured on other legal theories driving these cases, including the claim that employers charging tobacco penalties must tell workers that notes from their doctors will be accommodated when deciding whether to assess the charges.

US Judge Hala Y. Jarbou in Michigan greenlighted a case accusing Meijer Inc. of flouting this mandate, calling the Labor Department regulation imposing it “valid.” District of Minnesota Judge Nancy E. Brasel dismissed similar claims against Target Corp. after finding no such requirement in ERISA’s text and declining to defer to the department’s regulation.

Three Paths

Courts are still in the early stages of grappling with how to think about agency pronouncements following *Loper Bright*, Oringer said.

“*Loper Bright* itself doesn’t render irrelevant what the regulators think, and courts have struggled with that,” he said. “Now the question they’re facing is, when I learn from the regulator but don’t defer to the regulator, where do I come out?”

Federal appeals courts have yet to weigh in on this line of cases. The US Court of Appeals for the First Circuit has the chance to go first, with arguments scheduled for September in a case against Bally’s Management Group LLC.

The wide divergence in lower court rulings highlights the three paths open to judges in the aftermath of *Loper Bright*, Oringer said.

“You can ignore the regulator completely, or you can effectively defer to the regulator as courts were required to do under *Chevron*, or you can learn from the regulator and yet come to your own conclusion, which is where we seem to be heading,” he said. “I think we’re in a wait-and-see mode at a very early stage of development of post-*Loper Bright* thinking.”

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