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By Sara Hansard, Ben Miller and Lauren Clason

Deep Dive

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- ESG 401(k), Obamacare regulations among those under threat
- In Focus: Chevron, Loper & Agency Deference (Bloomberg Law subscription)

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Benefits experts see several policy areas to watch after back-to-back US Supreme Court rulings bolstering legal challenges to agency regulation.

New attacks against key rules on fiduciary responsibility and sustainable retirement investing, as well as Obamacare and mental health parity regulations, among others, loom after the high court June 28 overturned a longstanding doctrine requiring courts to give way to agency interpretations of ambiguous laws.

The court's decision in *Loper Bright v. Raimondo* will bolster new legal challenges to some of the most hotly contested rules crafted at the US Department of Labor's Employee Benefits Security Administration and the Department of Health and Human Services.

"Now that the doctrine has been eliminated, certainly you will see more people challenging the idea of DOL's view of the world," said David Levine, principal at Groom Law Group and co-chair of its employers & sponsors group. "I would like to say it will force them to have a more robust regulatory process, that's my positive spin on it."

The justices' discarding of *Chevron* packs an even stronger punch when combined with the court's July 1 decision in *Corner Post v. Board of Governors* that appears to dramatically expand the statute of limitations for lawsuits challenging agency rules under the Administrative Procedure Act.

The DOL declined to comment on the impact the Supreme Court's ending of *Chevron* will have on its rulemaking. The IRS and HHS did not immediately respond to requests for comment.

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Blocking Rules

A recently finalized Biden fiduciary rule is the target of two new legal challenges that could turn the end of the *Chevron* to their advantage. Life insurer groups seek to block the Biden rule, which would apply fiduciary duties when offering investment advice to previously unaffected sectors of the retirement industry.

The new DOL rule attempts to avoid a similar fate to a 2016 version that was struck down by the US Court of Appeals for the Fifth Circuit, explicitly focusing on an investor's expectations about the quality of advice they receive, which aren't laid out in the original text of the Employee Retirement Income Security Act itself.

"Where the Supreme Court came down on *Chevron* could directly impact arguments made in cases challenging the fiduciary rule," Levine said.

Besides that rule, other new retirement-related rules like EBSA's qualified professional asset manager exemption may be vulnerable following the rollback, he said.

It only took hours after the justices handed down their *Loper Bright* ruling for a group of red state attorneys general to file a letter to the Fifth Circuit, citing the end of *Chevron* to support their ongoing challenge to the DOL's environmental, social, and corporate governance rule.

Judge Matthew Kacsmaryk of the US District Court for the Northern District of Texas applied *Chevron* deference when ruling that EBSA had not overstepped its authority under ERISA in its rule that allows more ESG considerations in 401(k)s.

The DOL shot back July 1, arguing that deference isn't necessary to prove the ESG rule doesn't overstep the APA. The doctrine was not invoked by the agency in its latest appeals court argument, the DOL said.

The end of *Chevron* may not have as much of an impact in circuits where deference hasn't historically factored into past rulings on agency rulemaking challenges, said Dana Muir, professor of business law at the University of Michigan's Ross School of Business, who signed an amicus brief in the case in favor of the DOL.

The Fifth Circuit ruled in 2023 against the Securities and Exchange Commission's stock buyback rule without regard for *Chevron* deference, and has also failed to apply it in other instances, like the ruling that nullified the Obama-era iteration of the DOL's fiduciary rulemaking, according to Muir.

Health-Care Threats

Affordable Care Act regulations have long been a magnet for legal challenges, but without *Chevron*, the government has less ground on which to stand in defending reams of rulemaking under the landmark law.

Under the ACA, insurance companies are required to cover some preventative care services with no out-of-pocket patient costs. In a move that's already driven lawsuits, HHS opted to empower an independent task force of experts to specify the services included, which have ranged from HIV prevention drugs to mental health screenings.

The Fifth Circuit recently rescued the preventive services mandate from a lower court's decision to vacate it entirely, but remanded key questions in the case that leave room for post-*Chevron* legal jockeying.

Loper Bright could provide legal ammunition for those who claim the task force's work comprises agency-mandated regulatory overreach, benefits attorneys said.

Actions taken by the Biden administration to incorporate the expanded definition of sex discrimination from the Supreme Court's 2020 decision in *Bostock v. Clayton County* into a key ACA provision could also be at risk.

A recent rule allowing ACA Section 1557 nondiscrimination provisions to apply to gender identity and sexual orientation may mean health plans' denials of coverage for gender-affirming surgery are deemed discriminatory.

"I'm sure that's a conclusion that will be challenged," said Roberta Casper Watson, leader of the Wagner Law Group's health and welfare group.

'Silence in the Statute'

The ACA sought to encourage the use of flexible spending accounts for workers' medical costs, another area where an agency—in this case the IRS— has spoken in the absence of statutory language.

"The IRS basically invented health flexible spending accounts," said Watson. The accounts allow people to pay for health services not reimbursed by insurance on a pre-tax basis.

"The IRS has pretty much worked out the details of health FSAs," Watson said, such as when health flexible spending accounts are subject to the Consolidated Omnibus Budget Reconciliation Act (COBRA) allowing people to keep their health plans after they leave an employer.

Another target could be the rules (RIN 1210-AC11) the Biden administration proposed last August to comply with the Mental Health Parity and Addiction Act (MHPAEA), a 2008 law that requires an equal playing field between mental health and medical and surgical health care plan limitations.

"There are components of it that are derived from either ambiguities in the statute, or silence in the statute," said Ryan Temme, a principal with Groom Law Group.

The statute doesn't distinguish between quantitative treatment limitations such as how many office visits are covered, and non-quantitative treatment limitations, such as prior authorization for coverage, according to Temme.

"There are some who are surprised that the parity regulations created that distinction," he said.

The proposed tri-agency MHPAEA rules may be susceptible to court challenges following the end of *Chevron* if they are finalized, Temme said.

The Supreme Court ruled in *Corner Post* that the clock starts on the statute of limitations under the APA when the injury was incurred, not when the regulation was imposed, giving litigants more time to sue agencies.

Even if an employer started sponsoring a group health plan this year, it could have grounds to sue over the 2008 mental health law, Temme said.

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