

# Why Chevron Reversal May Make Retirement's 'Most Cautious' Players More Risk-Averse

ERISA experts also suggest that longer-term court rulings could lessen regulatory flip-flopping.

Reported by ALEX ORTOLANI

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The U.S. Supreme Court's overturning of a longstanding standard of deference to federal agencies may make those in the already cautious 401(k) plan industry all the more "plain vanilla," according to experts.

In late June, the Supreme Court struck down the so-called *Chevron* doctrine through a decision in *Loper Bright Enterprises v. Raimondo*. That ruling overturned almost 40 years of precedent requiring the federal judiciary to defer to federal agencies' "reasonable interpretations" of federal laws, shifting instead to the previous standard, based on a 1944 ruling in *Skidmore v. Swift & Co.*, by which courts can consider—but do not need to defer to—an agency's interpretation.

In the highly litigious arena of qualified retirement plan advisement and management—where courts already often differ on rulings—the *Chevron* reversal may spur more lawsuits and even more conflicting judicial findings, according to Fred Reish, a partner at Faegre Drinker Biddle & Reath LLP.

"Every regulation is up for grabs now," Reish says. "Unfortunately, the Supreme Court didn't give clear guidelines to how the district courts should consider the rules [because it used] words like 'respect' or 'inform'—undefined terms that mean something more than, 'Ignore what the agency has done,' but something less than deference."

In the immediate aftermath, experts agree that the Department of Labor and the IRS will both be subject to greater scrutiny—and therefore may need to take even greater care—in creating rules and regulations. Open court filings against the DOL are already raising questions as to whether the decision will play a role—one regarding the DOL's environment, social and governance guidelines for 401(k) plan investing, and another challenging its recent Retirement Security Rule that changes the definition of a retirement investment fiduciary.

In the longer term, according to Reish, there are likely to be conflicting court opinions that may linger for years until making their way to the Supreme Court, the final arbiter.

"That will create uncertainty for plan sponsors and fiduciaries and may make them even more cautious, when they are already the most cautious of any of the major players in the retirement plan world," he says.

In making plan decisions, it could cause advisers and sponsors to "gravitate toward more vanilla answers," says Reish, even as many providers and asset managers are offering innovative products seeking to increase retirement savings and use.

In the shorter term, she notes, it is “highly likely” that more regulatory action will be challenged by the plaintiff’s bar, with the outcome of those challenges “difficult to determine,” depending in part on how the courts use the *Skidmore* standard.

“It’s still early days,” agrees David Levine, a principal and ERISA defense attorney with the Groom Law Group. “But the takeaway on this from a plan sponsor perspective is that you’re still going to have [regulatory] rules, though now decisions will really come down to the litigation.”

Levine notes that this is not new in qualified retirement, with the plaintiffs’ bar already challenging regulatory guidelines from the DOL and IRS on a regular basis. Levine noted recent lawsuits alleging the longstanding practice of using forfeitures to reduce future employer contributions or pay expenses as violating ERISA. But now, with the departments not having *Chevron* to rely on, “it could lead to more uncertainty.”

The courts, he says, may still side with regulators, but it is also likely that differences will emerge across districts, states and appellate circuit courts, further complicating the picture for plan fiduciaries.

“We may get very different standards in different circuits, and it may take a long time to sort out,” he says. “That can be challenging, as well as costly, for plan sponsors. They don’t have unlimited money to fund these plans. ... In a worst-case [scenario], they may end up deciding to make benefits a little less rich in the future.”

## Junior Varsity No More

Not all ERISA experts see the rule ramping up fiduciary plan confusion—at least, not more than usual.

“I’ve been surprised at what has already been written on the results saying that ‘the floodgates have opened’—it seems like overreaction,” says Daniel Aronowitz, president of Encore Fiduciary, who posted his thoughts in a [July 11 blog post](#). “I think the decision was correctly decided. The *Chevron* deference was essentially allowing regulators to decide what the law is, which should be up to Congress. Regulators are not supposed to be junior varsity Congress.”

Aronowitz sees the *Loper Bright* ruling as reinforcing the separation of powers between policymakers and the courts. Meanwhile, he notes the already existing flood of litigation both in direct response to DOL regulation—such as the fiduciary rule and ESG guidance—and against 401(k) plan fiduciaries.

“I don’t see how we can possibly have more litigation than we already do,” says Aronowitz, whose [firm tracked](#) 48 defined contribution-related lawsuits in 2023, as plaintiffs’ attorneys continued to manage the 89 suits filed in 2022.

The ERISA expert points to recent lawsuits that do not involve *Chevron* deference, including challenges to 401(k) plan forfeiture use and challenges to pension risk transfers by firms including [AT&T](#) and [General Electric](#).

“Most fiduciary litigation attacks soft spots in fiduciary law that already rely on judgment and discretion [as opposed to regulatory deference],” he says. “We’re going to be in the courts either way. ... Now, the court will have more sway to decide what makes sense.”

Aronowitz also disagrees with the idea that “judge shopping” will happen more often, as he already see it with cases such as an ESG-related lawsuit filed in Texas against [American Airlines](#).

## Plain Vanilla

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“Instead of issuing guidance, which may have a much higher likelihood of getting blocked, now they can spend that time writing a memo that they publish as guidance,” he says.

Leen also sees, in the long term, a potentially positive outcome by which changes to White House administrations will not have as much of an effect on regulatory flip-flopping, such as in ESG considerations in retirement plans.

“You could see a back and forth happening forever that puts plan fiduciaries in a difficult spot,” he says. “In the long run, it is going to be helpful to get court decisions.”

That said, Leen notes, there will be different judges issuing nonbinding decisions potentially for years, so he agrees that “there will be uncertainty until” such cases reach the Supreme Court.

From a plan fiduciary perspective, one possible response to the ruling may be “the selection of plain vanilla options” for retirement plans and administration, says Wagner of the Wagner Law Group.

“To the extent that plan fiduciaries are concerned about litigation risk, they may be less inclined to adopt an optional standard with a high likelihood of being challenged,” she says. “Even under *Chevron*, it was a difficult task to predict how a district court would rule in a particular case.

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