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How Employee Benefits Rules May Fare in the Post-'Chevron' World

By Israel Goldowitz
The Wagner Law Group

Anticipating how the Supreme Court's June 28 decision in Loper *may affect administration of federal agencies' employee benefits regulations, The Wagner Law Group's Izzy Goldowitz tees up queries.*

The Supreme Court's long-awaited decision in *Loper Bright Enterprises v. Raimondo*, overruling its landmark 1984 decision in *Chevron USA v. Natural Resources Defense Council*, held that a court considering a federal agency's regulatory interpretation of a statute must follow the "best" reading of the statute, not just a "permissible" reading.

This raises the bar for federal agencies, including those administering employee benefits laws. Agencies did not always rely on *Chevron*, and the Court had not deferred to an agency interpretation under *Chevron* for nearly a decade. Nevertheless, the *Loper* decision has already had an effect in ERISA litigation, as we discuss below, and we identify some other potential effects.

The 'Loper' Decision

Loper Bright Enterprises and Relentless, Inc., operate in the Atlantic herring fishery. The companies separately challenged a National Marine Fisheries Services regulation that required them to pay for an onboard federal observer to enforce overfishing rules, which cut deeply into the companies' profits. The D.C. and First Circuit Courts of Appeals held that the regulation was "reasonable" or "permissible." A dissenting First Circuit judge agreed with Relentless that the statute's authorization of an observer charge in three other situations, including for foreign vessels and in the North Pacific fishery, meant that the agency was not authorized to impose such a charge in the Atlantic fishery. Without addressing the particulars, the Supreme Court reversed the appeals court decisions and remanded the cases.

The Court's Explanation

The Court started with the understanding of the Framers, including Federalist author Alexander Hamilton and Chief Justice John Marshall, that the courts and not Executive Branch officials are the authorities on the meaning of the laws. Though courts traditionally gave great respect to the contemporary interpretations of the Executive Branch, the Court continued, they were not bound by those interpretations. This continued through the New Deal, the Court said, as in *Skidmore v. Swift and Co.* (1944) — agency interpretations have "power to persuade, if lacking power to control" — though the courts would treat agency finding of fact as conclusive where Congress so provided and would defer to "fact-bound" conclusions in specialized areas.

In 1946, the Administrative Procedure Act codified this understanding, the Court continued, by providing that the courts were to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." In a "telling" omission, the Court said, the APA prescribed "no deferential standard for legal questions," though the Act "does mandate that judicial review of agency policymaking and factfinding be deferential (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion," and agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

In some cases, Congress delegates authority to an agency to "give meaning to a particular statutory term," to "'fill up the details' of a statutory scheme," or "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable,'" the Court said, quoting precedent decisions. In such cases, a court fulfills its interpretive role by "recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority' …, and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries," the Court held, citing its 1983 decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* The Court in *State Farm* said "the agency must examine the relevant data and

articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made' … Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

What 'Chevron' Held, What 'Loper' Rejected, and What 'Loper' Preserved

Chevron added a two-step structure for analyzing an agency's interpretation of its organic statute:

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. *If the intent of Congress is clear, that is the end of the matter*; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, *if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute*." [emphasis added]

Loper rejects that structure:

"*Chevron* defies the command of the APA that 'the reviewing court' — not the agency whose action it reviews — is to 'decide all relevant questions of law' and 'interpret … statutory provisions.' … It requires a court to ignore, not follow, 'the reading the court would have reached' had it exercised its independent judgment as required by the APA. …"

"*Chevron* cannot be reconciled with the APA … by presuming that statutory ambiguities are implicit delegations to agencies. … Courts understand that statutes, no matter how impenetrable, do — in fact, must — have a single, best meaning. … It therefore makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible."

The Court acknowledged, however, that Congress can and often does confer discretionary authority on agencies, "subject to constitutional limits." "But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA."

How Will ERISA Agencies' Rules Fare Under 'Loper'?

Department of Labor

ERISA §505 says: "[T]he Secretary [of Labor] may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records…" (p. 273).

In a 2018 challenge by the Chamber of Commerce, the Fifth Circuit reluctantly followed *Chevron* but nonetheless rejected DOL's "unreasonable" reinterpretation of "investment advice" under ERISA so as to confer fiduciary status on entities seeking a rollover from an ERISA plan to an IRA.

Now, post-*Loper*, the Federation of Americans for Consumer Choice has challenged DOL's revised fiduciary rule as beyond the agency's authority, as arbitrary and capricious under the APA, and, moreover, as "impermissible."

A Texas district court in *Utah v. Walsh* cited *Chevron* along with the APA and the "reasoned decisionmaking" standard in upholding DOL's rule permitting consideration of environmental, social, and governance (ESG) factors in investment options, but on appeal the Fifth Circuit in *Utah v. Su* has now vacated the district court's judgment and remanded "in light of the Supreme Court's decision in *Loper Bright*."

Query: As DOL has no specific regulatory authority to define "fiduciary" or a fiduciary's investment duties, unlike other key terms and concepts under ERISA Title I, will DOL's interpretation of ERISA now need to be "the best," not just "permissible," and will that make a difference?

Treasury and the IRS

I.R.C. §7805(a) authorizes "all needful rules and regulations for the enforcement of" the Code. Treasury/IRS has not confronted a post-*Chevron* challenge to an employee benefits rule to our knowledge. SECURE 2.0 contains more than 40 delegations to Treasury to issue regulations or other guidance on such subjects as saver's and student loan matching contributions, emergency savings accounts, hardship withdrawals, partial

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annuitization and QLACs, recoupment of overpayments and other corrections, and reporting and disclosure, in some cases with reference to existing regulations or guidance. No doubt other Treasury or IRS rules or guidance will be needed.

Treasury claims only interpretive status for its rules under §7805(a), but the Supreme Court had applied *Chevron* to Treasury rules since 2010 when it decided *Mayo Foundation for Medical Education and Research v. United States*.

Query: Will the Court revert to the pre-*Chevron* standard for tax regulations issued under §7805(a), principally that "[a] regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent." (*National Muffler Dealers v. United States* (1979))?

Pension Benefit Guaranty Corporation

ERISA §4002(b)(3) says: "To carry out the purposes of this subchapter, the [PBGC] … has the power—… to adopt, amend, and repeal, by the board of directors … such … bylaws, rules, and regulations as may be necessary to carry out the purposes of this subchapter …." (p. 399).

The PBGC's rule for valuing benefit liabilities in a terminated single-employer plan, 29 C.F.R. pt. 4044 subpart B, is expressly authorized by statute. ERISA §4001(a)(18) (p. 397). But the rule, recently updated to require use of modern mortality assumptions, relies on a controversial methodology and imperfect data, among other flaws.

The PBGC's proposed rule for valuing vested benefits for withdrawal liability purposes, also expressly authorized (ERISA §4213(a) (p. 499)), draws on the single-employer plan valuation rule. It is mainly designed to address adverse court decisions, a so-called "fighting reg," as is the single-employer rule to some extent.

The PBGC's rule for phasing in special financial assistance as a plan asset for withdrawal liability purposes is based on ERISA §4232(m)(1) ("[PBGC] may impose, by regulation or other guidance, reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to … withdrawal liability.") But the statute does not authorize PBGC to change the definition of withdrawal liability.

Query: Will these rules be judged under the "reasoned decisionmaking" standard, and will these criticisms carry the day?

General Questions

How long does an affected party have to challenge an agency rule, and where it may bring such a challenge?

A sleeper from the recent Supreme Court term, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, holds that a party has six years from the time it is affected. The bankruptcy court in the *Yellow* case has preliminarily decided that such a challenge (in that case, to the PBGC's special financial assistance phase-in rule) can be raised in a bankruptcy claims contest, not just in an Article III court. The court recently heard argument on the merits, including whether PBGC's general or specific rulemaking delegations applied.

Will previous decisions upholding agency rules under Chevron *be revisited?*

Loper states: "The holdings of those cases that specific agency actions are lawful … are still subject to statutory *stare decisis* despite our change in interpretive methodology."

What weight will be given to rules based on general delegations, such as ERISA §505 and §4002(b)(3), and I.R.C. §7805(a)?

These ERISA general delegations presumably will be given less weight than delegations defining specific terms or prescribing rules under specific provisions.

What weight will be given to subregulatory guidance, such interpretive rules and enforcement guidelines?

Presumably, such guidance will continue to have "power to persuade, if lacking power to control" under *Skidmore*, depending on such things as "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."

What weight will be given to agency adjudications, formal (with a trial-type hearing) and informal?

In formal proceedings, fact findings should continue to be upheld under the APA if they are supported by substantial evidence, viewing the record as a whole, under the Supreme Court's 1951 decision in *Universal Camera Corp. v. National Labor Relations Board*. In informal proceedings, as then-D.C. Circuit Judge Antonin Scalia wrote in 1984, the arbitrary and capricious standard "takes up the slack, so to speak, enabling the courts to strike down, as arbitrary, agency action that is devoid of needed factual support" (*Ass'n of Data Processing Organizations v. Board of Governors of the Federal Reserve System*).

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Will the Court continue to defer to an agency interpretation of its own rules in appropriate cases, as it held in its 2019 decision in Kisor v. Willkie*?*

Justice Kagan's dissent in *Loper* cited *Kisor*, but only as an example of stare decisis. While upholding the "*Auer* doctrine," which had been in effect for more than 20 years, *Kisor* imposed a higher standard: that the rule be ambiguous, that the agency interpretation be reasonable, and that it represent the agency's "authoritative" or "official" position," implicate agency expertise, and reflect "fair and considered judgment" (which would be lacking if it is meant to influence litigation or would unfairly surprise the regulated community).

Will the Court continue to rely on agency views outside the contours of a given rule as a "compass" in technical ERISA matters, as it did in its 2007 decision in Beck v. PACE Int'l Union *(holding that a merger of plans is not a proper way to close out a terminating defined benefit plan)?*

ERISA is complex and technical, as are many federal statutes. Judges may take all the help they can get on ERISA, and they may continue to acknowledge its importance.

Will the Court continue to defer to agency "judgments about how the real world works" where Congress has made a broad delegation, as in its 1990 decision in PBGC v. The LTV Corp. *(upholding PBGC's restoration of a terminated plan when the sponsor established follow-on plans that would reduce employee resistance to plan termination)?*

LTV relied heavily on *Chevron*, including its emphasis on agency expertise. But *LTV* involved an express delegation with a broad mandate ("… [PBGC] is authorized [when it] determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status") 29 U.S.C. §1347, which may continue to be judged under the "reasoned decisionmaking" standard.

Will the Court simply interpret the statute without comment on the weight of agency views?

That has happened often, as in the 2017 decision in *Advocate Health v. Stapleton* (agreeing with the agencies that the definition of "church plan" includes plans of church-affiliated hospitals), and we expect it will now happen more often.

What will Congress do?

Congress may decide to reinstate *Chevron*, under Senator Elizabeth Warren's (D-Mass.) Stop Corporate Capture Act. It may decide to require an agency to justify its rules to Congress, as in Senator Bill Cassidy's (R-La.) Upholding Standards of Accountability Act. Or, it may continue to pass substantive legislation as part of must-pass budget bills by a narrow margin, leaving it to the agencies and the courts to sort things out. In that case, it probably won't write clearer laws, and post-*Chevron* challenges to agency rules will likely increase.

And most important:

What should an employer do?

Employers and their counsel can weigh in on employee benefits regulations and other guidance as well as legislation that may affect their business. Prepare a comment on a proposed rule. Prepare or join in a friend-of-the-court brief for or against a final regulation. Write to Congress. Engage with ERISA agencies on regulatory matters that are no longer subject to *Chevron* deference.

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Author Information

Israel (Izzy) Goldowitz, with more than 40 years of experience in employee benefits, is a partner with The Wagner Law Group in the firm's Washington, DC office, which includes three former DOL lawyers and three former PBGC lawyers with decades of experience in formulating ERISA policy, writing ERISA regulations, and litigating the validity of those regulations.

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