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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3 Atty Takeaways On What's Ahead As ERISA Turns 50

By **Kellie Mejdrich**

Law360 (August 30, 2024, 5:12 PM EDT) -- As the Employee Retirement Income Security Act turns 50 years old on Labor Day, attorneys reflecting on five decades of development of the federal employee benefits law see a complex path ahead for both litigation and policy.

ERISA was created as a safeguard against some of the worst private pension abuses that had left retirees without any of the security they were promised in exchange for their years of service. Besides setting up regulations for vesting, termination, insurance and reporting of pensions, ERISA defined the fiduciary duties of individuals handling retirement plan assets enforced through civil and criminal penalties.

But within four years, the makeup of retirement accounts subject to ERISA completely shifted, because Congress enacted the Revenue Act of 1978 and added Internal Revenue Code Section 401(k), setting the stage for defined contribution plans to eclipse defined benefit pension plans, spurred on by tax incentives.

Nearly 50 years after the statute was enacted, the world "in every way, shape and form is a different world," said Marcia Wagner, founder and managing partner of the Wagner Law Group.

"I think it's a testament to the great men who wrote this statute that it has survived for 50 years," Wagner said. "From my perspective, I think because ERISA has survived for 50 years, clearly, the basic principles of ERISA have been adopted by our society in a bipartisan manner, and those basic principles are fairness and equity — from the employer, and the employee, and the government perspective."

With workers now on the hook for deciding how much of their income to defer for future retirement, employees themselves also now look at benefits differently, attorneys say.

"People are now responsible for their own retirement," said J.J. Conway of J.J. Conway Law, a longtime ERISA practitioner who focuses on worker-side health and welfare benefit claims. "I think that there's going to be some reexamination of the way that retirement benefits work over the next 50 years. That's inevitable. And obviously it's going to be guided by ERISA, and it's going to be guided by ERISA's fiduciary standard."

Here are three key takeaways from top attorneys about what's next for ERISA on its golden anniversary.

Loper Bright Threatens ERISA Regulations

Top of mind for employee benefits attorneys representing both workers and employers is an emerging threat from lawsuits that might topple agency regulations interpreting ERISA, now that the U.S. Supreme Court did away with the so-called Chevron doctrine via decisions in Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce.

Previously under Chevron, the justices held that if Congress hadn't directly "spoken to the precise question at issue," courts must defer to a federal agency's interpretation of the law, which the two decisions repealed. Loper Bright also directed judges to exercise independent judgment when deciding if an agency's interpretation of a policy is within its statutory authority under the Administrative Procedure Act.

Already, challengers of ERISA regulations with pending lawsuits, as well as defendants in ERISA suits, have rushed to cite the decisions as helpful to their positions. That includes Macy's Inc., which was granted permission to file a brief on Loper Bright on Aug. 28 in a **lawsuit from the U.S. Department of Labor** against the retail giant alleging the company's monthly nicotine surcharge violated ERISA, which the DOL first filed in 2017.

The decision also **rekindled a challenge to DOL rulemaking** on retirement plan investment that explains how ERISA plan managers can — but don't have to — consider environmental, social and governance or ESG factors when selecting plan investments. The Fifth Circuit in July remanded the challenge to Texas court, instructing it to reconsider its decision that had decisively upheld the rule in light of Loper Bright.

Jerry Schlichter, founding and managing partner of Schlichter Bogard LLP, a pioneer in class action litigation challenging employers' retirement plan management, said there's a "real risk of problems" for ERISA because of the Chevron deference repeal.

"It could mean you get all kinds of decisions by different judges in different parts of the country without national, consistent standards ... it's a tremendously uncertain situation in light of that as to where things will end up," Schlichter said.

Wagner of Wagner Law Group agreed that the Chevron deference repeal was a potential game changer for ERISA.

"Chevron deference is something that, I think, is going to change the practice of ERISA law and the way it's interpreted greatly," she said.

Diane Dygert, chair of Seyfarth Shaw LLP's employee benefits and executive compensation department, said she's also watching to see how ERISA legislation develops in the wake of the Chevron repeal.

"Congress probably has to fix the law. And we are, I think, in an era of more activist courts as well," Dygert said. "So, [judges] are going to make decisions ... not necessarily having to give deference to the regs if they don't find it in the letter of the law itself."

Individual Arbitration Push

Another major issue for ERISA attorneys is how there could be a fundamental change to the class action format that federal benefits suits have proceeded under. It's possible employers could enforce agreements in plan documents requiring individual arbitration of ERISA claims that waive the right to class or representative actions.

Part of what's driving that change are recent decisions from the U.S. Supreme Court upholding forced arbitration for a greater number and type of claims under the FAA. That includes a pivotal 2013 decision from the Supreme Court's conservative majority in American Express Co. v. Italian Colors Restaurant, which blocked card merchants from pursuing antitrust class actions against American Express. A 5-3 majority led by the late Justice Antonin Scalia declined to apply the vindication doctrine, which justices called a "judge-made exception to the FAA."

That eventually led a Ninth Circuit panel in 2019, in a partially unpublished opinion in Dorman v. Charles Schwab Corp., to compel to individual arbitration a proposed ERISA class action alleging mismanagement of a 401(k) plan in 2019. In that decision, the Ninth Circuit also issued a published opinion in that 2019 case revoking its holding in 1984 case Amaro v. Continental Can Co., which held that ERISA claims weren't arbitrable, citing the Supreme Court's decision in Italian Colors.

But now in California court, there are competing district-level decisions on whether ERISA class actions can be forced into solo arbitration at the district level and on appeal. And since that Ninth Circuit decision, five other appellate courts — the **Sixth**, **Second**, **Third**, **Tenth** and **Seventh** — have all ruled against forcing arbitration of ERISA claims.

Charles Field, partner and chair of the financial services litigation practice at plaintiffs firm Sanford Heisler Sharp LLP, said threats to workers' rights to a representative action under ERISA was on his

mind as ERISA hits the 50-year milestone.

"The defense bar has made many efforts to try to water this statute down, and the statute itself has prevailed, and it still lives, and it's still a strong statute," Field said. "And there are still efforts to further water it down, as evidenced by these efforts to require waivers of representative actions."

Field is representing workers in a proposed class action against The Capital Group Companies Inc. alleging 401(k) mismanagement. A California federal judge in August **denied an employer-side motion to compel** arbitration, which the Capital Group has appealed to the Ninth Circuit.

Field said he sees renewed support for keeping ERISA actions in court in the Supreme Court's 2022 decision Viking River Cruises Inc. v. Moriana, which held that a representative action couldn't be waived under the FAA. Field said the right to a representative action was also "a bedrock principle under ERISA," pointing to how the law gives participants the right to bring claims on behalf of the plan and requires breaching fiduciaries to "make good to the plan all losses related to their breach."

Field said the Viking River decision reasoned that "if you required people to waive their rights to bring a representative action in any form, then you could never seek planwide relief, right?"

"And, and that's what the drafters, the original drafters, were worried about, [which] was protecting the entire plan," he said.

Jim Wooten, a professor of law at the University at Buffalo School of Law and an ERISA expert, pointed out how many Supreme Court decisions expanding the availability of arbitration occurred after ERISA was enacted, so the issue wasn't in the background while the law was being drafted.

"Certainly the people who drafted ERISA didn't see this coming," Wooten said.

Wooten said federal courts' willingness to largely enforce forum selection clauses in ERISA lawsuits also brings out conflicts with what ERISA's drafters would have understood regarding beneficiaries' access to federal courts.

"Participants are supposed to have ready access to the federal courts, and they don't have ready access to the federal courts if they can be sent 2,000 miles away to file their lawsuit," Wooten said.

Health and Welfare Litigation Structure Questions

Another emerging issue ERISA practitioners see developing has to do with how in-court proceedings have evolved on ERISA health and welfare benefit claims, with many attorneys, legal scholars and now some appellate court judges arguing that the standard of review should change.

Attorneys refer to how the way courts process claims over health and welfare benefits such as health insurance, life insurance, and disability benefit claims, typically focuses on reviewing an insurance company's administrative record and process for the claim instead of proceeding to a jury trial. Another core issue in these cases is that court doctrine has developed to require plan participants to administratively exhaust their claims, which isn't something actually mandated in the statute of ERISA but has become the standard through court doctrine.

"The courts transformed what would normally have been a breach of contract action, with a jury trial, into not quite trust law — because these aren't trusts like pension plans — but into a sort of quasi-administrative law," said Mark DeBofsky, a shareholder at DeBofsky Law Ltd. whose plaintiff-side practice focuses mostly on disability benefit claims. "And the courts look to the most analogous kind of claims that they were used to dealing with, which were social security disability claims that were before the federal courts on judicial review."

But DeBofsky and other attorneys argue it is the wrong standard to apply to these types of disputes, and some judges are beginning to agree with them.

"The courts have treated these claims like they're administrative law claims and the courts have also, except in those states that have made discretionary clauses unlawful, deferred to the decision rendered by the insurance company, if the policy says that the insurance company has the discretion

to interpret the policy and make eligibility determinations," DeBofsky said.

"The courts have entirely forgotten that these insurance companies are no way, now how, like federal administrative law judges," DeBofsky added.

That idea has recently gained some traction among federal judges, including U.S. Circuit Judge John Nalbandian of the Sixth Circuit. In a 2023 decision, Tranbarger v. Lincoln Life & Annuity Co., which affirmed an insurance company's win against a single-plaintiff in an ERISA disability benefits dispute, Judge Nalbandian wrote a concurrence that said "perhaps the Supreme Court should revisit how courts review ERISA cases."

Judge Nalbandian's concurrence built off of another Sixth Circuit concurrence in another single-plaintiff ERISA disability benefits dispute, from Sixth U.S. Circuit Judge Amul Thapar in the 2020 decision Wallace v. Oakwood Healthcare Inc. Judge Thapar had called ERISA's administrative exhaustion requirement in his concurrence a "judge-made doctrine" and urged courts to reconsider whether to apply it.

Plaintiff-side ERISA attorney Conway of J.J. Conway Law, who represented disability benefits claimant plaintiff Cheryl Wallace in the case against Oakwood Healthcare, described debate over the standard of review for health and welfare benefit claims as "the big question mark" for ERISA ahead. Conway said Judge Thapar's concurrence "opened up the door to saying, 'Listen, we should really reexamine this — whether summary judgment is the appropriate standard for ERISA cases.'"

Conway said he saw "pluses and minuses" to both options.

"On the plus side, if you could open it up to full litigation, you could have ... a fuller experience for the client, on the plaintiff side," Conway said. "But on the other hand, it's going to incentivize defense firms to get into this as a big litigation practice."

--Editing by Amy Rowe and Emma Brauer.
