Employee Benefits Update

July 2024

The Fall of *Chevron* Could Mean Successful Challenges to Rulemaking and an Increase in Subregulatory Guidance

On June 28, 2024, in *Loper Bright Enterprises v. Raimondo*, the Supreme Court issued a much-anticipated opinion overruling the doctrine of judicial deference under *Chevron v. EPA*. Without *Chevron*, which required courts to defer to reasonable agency interpretations of the law when Congress did not clearly address an issue, agencies are left with deference under *Skidmore v. Swift & Co.* Under *Skidmore*, the rulings, interpretations, and opinions of an agency are not controlling, but they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" with the persuasive weight depending on the agency's thoroughness in consideration, consistency in position, and validity of its reasoning.

The employee benefits world is heavily dependent on, and used to receiving a significant amount of, agency guidance, meaning the effects of the *Loper* decision likely will be felt immediately and into the future. For example, the course of litigation involving controversial regulations recently issued by the agencies regarding ESG retirement plan investments, fiduciary status when making investment recommendations, and a multiemployer plan's calculation of withdrawal liability likely will be affected. Additionally, as the regulators are currently working on promulgating rules required under SECURE 1.0 and SECURE 2.0, as well as finalizing regulations under the Mental Health Parity and Addiction Equity Act (MHPAEA), the *Loper* decision will undoubtedly be on their minds. Below are a few major areas in which employers and practitioners could see a near-term impact as a result of the fall of *Chevron*.

ESG Rule

In late 2022, the Department of Labor (DOL) issued a final rule permitting benefit plan fiduciaries to consider environmental, social, and governance (ESG) factors when analyzing investment options and qualified default investment alternatives, as long as those factors are economically relevant. Further, the rule states that in the event ESG and non-ESG investment options equally serve the financial interests of the plan, the fiduciary is permitted to select an ESG option that offers collateral benefits.

In 2023, attorneys general from 26 Republican-led states filed suit in the Northern District of Texas – styled *State of Utah et al. v. Walsh* – challenging the ESG rule, arguing that the rule is inconsistent with the Employee Retirement Income Security Act of 1974 (ERISA). On September 21, 2023, the district judge in *Walsh* upheld the rule, holding that the DOL's interpretation of the statute was reasonable under step two of the *Chevron* framework.

The case is now on appeal to the Fifth Circuit. The same day the *Loper* decision was issued, the plaintiffs in *Walsh* filed a letter with the court arguing the district court's ruling is inconsistent with the *Loper* decision, and that the court cannot defer to the DOL's interpretation of ERISA. Certainly, this will be a significant argument in the case moving forward.

Retirement Security Rule

On April 25, 2024, the DOL finalized a rule – called the Retirement Security Rule ("Fiduciary Rule") – aimed at expanding the scope of who is an investment advice fiduciary under Title I and Title II of ERISA. Before this rule, in 2016, the DOL had promulgated a similar rule, which was struck down in 2018 by the Fifth Circuit in *Chamber of Commerce v. Dept. of Labor*, holding that the 2016 rule failed *Chevron's* second step.

Two lawsuits have been filed in the Eastern and Northern Districts of Texas challenging the new Fiduciary Rule. Because the *Chamber* court found that the DOL's 2016 rule was not a reasonable interpretation of the law – and therefore did not hold up under *Chevron* – it is not clear whether or how much of a practical impact *Loper* will have on the outcome of the case. But now those courts will not be required to defer to the DOL's interpretation of ERISA and the Internal Revenue Code, even if the rule now constitutes a permissible or reasonable construction of the law. With a heightened focus on *Skidmore*, DOL's lack of consistency in the current rulemaking with the prior final rule from 1975 may further support a court not giving much weight to DOL's new interpretation of ERISA.

Withdrawal Liability Condition to SFA Rule

In March 2021, the American Rescue Plan Act (ARPA) was signed into law. ARPA provided, among other things, Special Financial Assistance (SFA) to financially troubled multiemployer pension plans, which would be dispensed by the Pension Benefit Guaranty Corporation (PBGC). Congress specifically authorized PBGC to issue rules requiring reasonable conditions on multiemployer plans to receive SFA, including conditions relating to withdrawal liability (which is based, in part, on a plan's underfunding). On July 8, 2022, PBGC issued a regulation requiring multiemployer plans that receive SFA to phase in the SFA when determining plan assets for calculation of withdrawal liability.

PBGC's rule has been challenged by the debtors and other stakeholders in the Yellow Corporation Chapter 11 bankruptcy in Delaware, in which the claims of the multiemployer plans swamp the general unsecured claims pool. If PBGC's regulation applies to calculate these plans' withdrawal liability claims, the SFA the plans have already received would not be considered plan assets, artificially increasing the underfunding of the plans and, by extension, the withdrawal liability claims. If the regulation is upheld, other creditors would get less, and equity holders likely would get nothing. However, if PBGC's regulation were set aside, the SFA plans received would be counted as plan assets, the plans' claims would be significantly smaller, and the debtors allege that creditors would be paid in full and equity holders would enjoy a significant recovery.

A significant, if not dispositive, issue, then, is whether PBGC's regulation is valid. Without *Chevron*, the court is not required to defer to PBGC's interpretation of what the law permits or requires regarding calculation of withdrawal liability, arguably making it easier for a judge to rule that PBGC's regulation is inconsistent with ERISA. At most, the court could apply *Skidmore* deference when considering PBGC's position. A decision to set aside PBGC's regulation would have significant implications not only for the stakeholders in the Yellow bankruptcy, but for all employers who contribute to these troubled pension plans.

Ongoing Rulemaking

Under *Chevron*, agencies went to great lengths to ensure a robust notice-and-comment rulemaking process that would enjoy judicial deference. After *Loper*, agencies could ultimately decide to refocus their efforts on subregulatory guidance in the form of FAQs, notices, or similar methods, knowing that the significant amount of additional work they put into formal rulemaking may not result in a material difference in the likelihood of success if challenged in court. This may be particularly true for subregulatory guidance that results from a notice-and-comment process. The subregulatory route may be particularly appealing to agencies that are understaffed and already behind on their regulatory agendas. An increase in subregulatory guidance could be a loss for the regulated community to the extent it is less thoughtful or done without the input typically provided through notice-and-comment rulemaking, but in a best-case scenario could mark a return to more frequent and timely guidance that is limited to the most pressing questions.

Additionally, in today's litigious environment, parties may look at prior issued regulations that may have survived under *Chevron* but might not after *Loper*. Even regulations issued long ago may not be safe from a challenge after the Supreme Court's July 1, 2024, decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, in which the Court held that the six-year statute of limitations to bring an Administrative Procedure Act claim does not begin to run until a party is actually harmed, even if the final agency action was over six years prior to the lawsuit.

Thompson Hine Takeaways

To be sure, the fall of *Chevron* deference is making headlines, and it does take an arrow out of the quiver of agencies defending their regulations or other legal interpretations. But, reliance on *Chevron* has decreased over the years as the doctrine's application has been eroded by the courts. Therefore, while we expect the decision to provide momentum to challenge more controversial regulations and to be used robustly to support current challenges, *Loper's* impact on the already high pace of litigation challenging regulations over the longer term may not be as significant as it may now seem. By contrast, we would not be surprised to see agencies conclude that in at least some cases a robust rulemaking process is not worth the effort, resulting in fewer rulemaking projects and an increase in the pace and volume of subregulatory guidance, particularly following enactment of new laws or a change in administration. Over time, we may also see the courts develop layers of deference under *Skidmore*, which could then re-incentivize agencies to engage in a robust rulemaking process.

FOR MORE INFORMATION

For more information, please contact the authors or your regular Thompson Hine attorney.

Katherine B. Kohn
202.973.2782
Katherine.Kohn@ThompsonHine.com

Dominic DeMatties
202.973.2744
Dominic.DeMatties@ThompsonHine.com

Nate Ingraham
202.973.2784
Nate.Ingraham@ThompsonHine.com

*****