

The Future Of ERISA If High Court Ends Chevron Deference

By **Naina Kamath and Julie Stapel** (March 15, 2024, 6:59 PM EDT)

The U.S. Supreme Court heard arguments on Jan. 17 in *Relentless v. U.S. Department of Commerce and Loper Bright Enterprises v. Raimondo*.

In both cases, a commercial herring fishing company challenged a regulatory requirement that the company cover the costs of an observer required to ride along on the fishing boat to confirm compliance with various regulatory requirements.

The statute imposing the requirement did not specify who should pay — the government or the fishing company. The National Marine Fisheries Service directed by regulation that the fishing company must pay for the observer.

Although *Loper Bright* and *Raimondo* do not involve the Employee Retirement Income Security Act of 1974, they address the extent to which a court must defer to regulatory agencies in the event of statutory ambiguity. The Supreme Court's resolution of that issue will affect how courts interpret ERISA regulations issued by the U.S. Department of Labor.

Chevron Deference Recap

The doctrine of Chevron deference, named for *Chevron v. Natural Resources Defense Council*, the 1984 court decision that established it, provides that a court will defer to the interpretation of the applicable regulatory agency when a statute is ambiguous. Once a statute is determined to be ambiguous, a court must decide if the agency's view is reasonable.

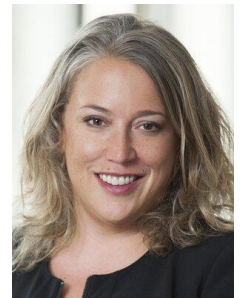
The fishing companies argued that it was time to end Chevron deference because it leads to uncertainty and inconsistency and can give federal agencies more authority than separation of powers should allow them to have.

The U.S. solicitor general, however, in defending Chevron deference and the NMFS, argued that (1) chaos would ensue if Chevron were repealed because litigants in past cases that relied on Chevron deference could come back and seek different outcomes and (2) federal agencies have special insights to help inform and guide courts, especially on technical matters.

The court's ruling could come anytime, but is likely to be in the spring or early summer. The court could agree to repeal Chevron deference entirely, leaving the federal courts to use other tools in interpreting ambiguous statutes. The court could also stop short of repealing it and instead give the lower courts



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more guidance on how to apply it.

What It Might Mean for Regulations Under ERISA

Although Relentless and Loper Bright do not directly implicate ERISA, a repeal of Chevron deference would almost certainly affect how courts treat regulations under ERISA, as well as scores of other federal laws.

Two current ERISA hot topics that come to mind — and there are certainly others as well — are the proposed Retirement Security Rule and the Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights rule.

If the court abandons or curtails the Chevron deference, ERISA regulations adopted by the DOL may be more heavily scrutinized, modified or vacated by federal courts.

The Retirement Security Rule

The DOL recently proposed the Retirement Security Rule, which significantly broadens the "investment advice" definition triggering ERISA fiduciary status and forces investment professionals to rely on the more restrictive conditions of Prohibited Transaction Exemption 2020-02.

The precursor to the Retirement Security Rule, the 2016 fiduciary rule, was vacated by the U.S. Court of Appeals for the Fifth Circuit. The status of Chevron deference could come into play if the Retirement Security Rule finds its way to federal court (which many expect).

The ESG Rule

A DOL regulation on fiduciary duties in the selection of plan investments went into effect in January 2023. Often referred to as the ESG rule, it has been challenged in federal district court by the attorneys general of 26 states.

In September 2023, the U.S. District Court for the Northern District of Texas in *State of Utah v. Walsh* held that the DOL did not exceed its authority in adopting the ESG rule and declined to vacate the ESG rule.^[1] The states urged the court to set aside Chevron deference and find that the DOL exceeded its authority.

The district court declined, however, noting in a footnote that Chevron remains a Supreme Court precedent that a district court is not free to disregard unless and until the court repeals it.

ERISA Implications

If Chevron were repealed, challenges to DOL regulations interpreting and implementing ERISA may become more frequent because challengers would be able to argue that the DOL's interpretations are not entitled to any special deference.

For example, if the Retirement Security Rule were challenged in federal courts, those challenging the rule may argue that the Department of Labor's interpretation of ERISA reflected in the Retirement Security Rule is unwarranted and inappropriate.

The DOL may argue, in response, that its interpretations of ERISA should be afforded deference as the DOL is the federal agency tasked with interpreting ERISA. Without Chevron deference, however, we expect that such arguments would be less likely to prevail.

Similarly, the pending appeal in *State of Utah v. Walsh* would likely be affected by a repeal of Chevron deference, particularly in light of the fact that the trial court expressly said that it rejected the plaintiffs' arguments to disregard Chevron deference since it is law until the Supreme Court repeals it.

Of course, there are regulations in many other areas as well, including the variety of new regulations required by the SECURE Act and SECURE 2.0. Also, it would not be only new regulations potentially up for challenge. As the solicitor general argued in *Loper Bright and Relentless*, a repeal of Chevron could open the gates to challenges to long-standing regulations as well.

Thus, a repeal of Chevron deference may lead to something of a chilling effect at the DOL if their regulations, which often take years to formulate, are consistently struck down.

Those who view the DOL as overreaching may find this chilling effect to be welcome. In many instances, however, employee benefit plan sponsors and service providers are hungry for regulations that will help inform implementation and operation of different aspects of ERISA, such that a chilling effect will just lead to continued or increased uncertainty and risk.

In some cases, a statute will specifically require that an administrative agency provide further guidance or interpretation in a regulation. Thus, it may not always be an option for the DOL simply not to regulate, but the frequency and likelihood of success of challenges to the regulations may lengthen the process for adopting regulations.

Conclusion

Chevron deference has been a key concept in administrative law for 40 years and has allowed many regulations to survive challenges to the administrative agency's authority. A repeal would affect all federal agencies, including the DOL.

The DOL is already no stranger to having its regulations challenged in federal court, especially its various attempts at the fiduciary rule and the challenges to its ESG rule.

The repeal of Chevron deference may increase the odds of success of challenges to those two rules and potentially encourage further challenges to DOL regulations, both regulations yet-to-come and longstanding regulations. Increased challenges, and the increased success of challenges, may affect how the DOL approaches and considers regulations.

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[1] <https://www.morganlewis.com/blogs/mlbenebits/2023/10/department-of-labors-esg-rule-survives-challenge-in-federal-district-court>.