Questioning Authority

High court ruling that limits grip of federal agencies could affect regulatory landscape for self-insured employers

Written By Bruce Shutan

Before Donald Trump won a second term as president and vowed to continue disrupting politics, the U.S. Supreme Court seeded a major disruption limiting the authority of federal regulators that continues to reverberate across the self-insurance industry.

In late June 2024, the justices overturned a 40-year-old judicial precedent known as Chevron deference – named after the American multinational energy corporation. In Chevron U.S.A. v. Natural Resources Defense Council, courts were directed to defer to federal agencies' interpretations of ambiguous laws. That practice ended with a 6-3 decision led by Chief Justice John Roberts in Loper Bright Enterprises v. Raimondo. Although widely applauded, it also has stirred questions about compliance with both old and new employee benefit laws.

As such, Loper Bright presents both challenges and opportunities for self-insured health plans, as observed by Kristy Wrigley-Durer, senior counsel at Crowell & Moring. She suggests working closely with corporate counsel or government affairs experts to closely monitor what's happening in the courts in terms of the impact on existing regulation and being nimble in responding to any changes. She's also sanguine about a new pathway to challenge any issued guidance that is considered less favorable and work toward getting out in front of issues by influencing new legislation.

One such opportunity involves reforming pharmacy benefit management practices, which she describes as a hot topic with bipartisan support in Congress. "We're going to see something on that and probably not just PBMs, but all service providers to ERISA plans," she surmises.

Fred Karlinsky, shareholder and chair of global insurance regulatory and transactions with Greenberg Traurig, describes the post-Chevron deference climate as a positive development that will help level the playing field when it comes to challenging agencies since courts will view cases from a more de novo perspective, which removes any reliance on previous case law. He adds that it doesn't mean courts won't take into account an agency's position; it just removes the practice of deferring to an agency's interpretation of a statute or regulation.

"I think that keeps true the notion that there are three separate but co-equal branches of government" wherein each one will stay in its lane to work in the best possible way, Karlinsky says. In effect, he believes it will help protect innovation and be good for consumers of products and services in the self-insurance space.

His experience with this issue actually dates back to 2017 and 2018 when serving on Florida's Constitution Revision Commission during which time voters overwhelmingly supported a ballot measure overturning Chevron deference in Florida.

FOCUSING ON NEW REGS

What the Loper Bright case essentially means is it will be easier to argue that newer issued regs are arbitrary and capricious than those that have been in place for at least three years or more and were subject to Chevron deference, explains SIIA Washington Counsel, Chris Condeluci. One example is that the provider community has filed a lawsuit over surprise-billing rules in the No Surprises Act and could challenge other parts of the law now that Chevron deference has been overturned. The other involves mental health parity.

"We thought that the administration exceeded its authority and rewrote the statute through the reg – irrespective of Chevron deference," he says. "We would have argued that anyway but feel that much more confident in our legal arguments in trying to get the reg set aside based on Chevron deference and a recent lawsuit spearheaded by the ERISA Industry Committee [ERIC]."

ERIC filed a lawsuit in January that seeks to invalidate the final rule issued under the Mental Health Parity and Addiction Equity Act of 2008 and the Consolidated Appropriations Act of 2021, known as the CAA. The lawsuit argues that the rule exceeds the Department of Health and Human Services authority, violates the due-process clause in the Fifth Amendment, is "arbitrary and capricious," and violates the Administrative Procedure Act.

Tom Christina, executive director of the ERISA Industry Committee's Legal Center, hopes there's a rethinking of these regulations, which self-insured health plans consider highly draconian. "They were drafted in the hopes of impeding non-quantifiable treatment limitations," he says. Noting that the process of dialoguing with these agencies about these limitations is very prolonged, he says it suddenly picks up speed "almost before the employer knows that they find themselves staring at a determination that they're in violation, which is a very big deal under the regulations." That's because employers are required to inform plan participants within just 10 days of receiving notice that they have violated the statute.

"None of this has any basis in the statutory language, in particular the remedy of notifying your employees," Christina says. "You could read the act 100 times and won't find anything that even suggests that the regulatory agencies have that power."

Mental health parity is the one area where industry practitioners expected some of the first Loper Bright challenges as they would apply to ERISA plans, Wrigley-Durer observes. "It's interesting to note that the DOL finalized those rules after the Loper Bright decision, and Loper Bright doesn't seem to have particularly tempered their approach," she explains. That case didn't necessarily remove the authority of

agencies, she says, adding that they're still issuing guidance. "It simply noted that they don't get to interpret law, which is the role of the courts."

Overturning Chevron deference has thus far not "opened the floodgates" to ERISA litigation of any kind, including litigation involving self-insured health plans, Christina notes. Loper Bright, however, has quite a few escape hatches, he adds. He's not surprised that a few district courts upheld the application of claims procedures regulations after the Loper Bright case was decided.

There have also been other ERISA cases in which he says enunciate principles that, if applied to self-insured health plan cases, would dampen the effects of Loper Bright. As one example, he cites a recent court decision upholding some Pension Benefit Guaranty Corporation (PBGC) regulations that faithfully follow Loper Bright – stressing "the longevity of those regulations as a reason for upholding them."

While that case involved PBGC regulations pertaining to withdrawal liability in multiemployer pension plans, he explains that it illustrates how courts have limited the effect of Loper Bright on any area within ERISA, which would include self-insured health plans.

Christina suggests the chief implication would be to expect that long-standing regulations, including claims procedures, will be upheld, while fairly recent regulations are more vulnerable to being challenged in court. The best example he can think of involves analyses of non-quantitative treatment limitations for the purpose of achieving mental health parity.

When the Department of Labor issued regulations under ERISA 408(b)(2) in 2012 setting out disclosure obligations for retirement plan service providers, it noted that special guidance would be forthcoming to address the uniqueness of health plans. Part of the challenge is that the DOL may be thinking post-Loper Bright about whether it still has the authority to issue guidance, according to Wrigley-Durer. If Congress passes legislation on PBM reform or service provider disclosures, she expects clarity on what the DOL needs to do in terms of issuing guidance about those disclosures, their level of authority and even how aggressive they want the DOL to be.

In addressing concerns about recent ERISA preemption battles in various states, Wrigley-Durer says it's a statutory issue and is not likely to be implicated by regulations. Noting how ERISA has been around for 50 years, she doesn't expect that there will be huge swings in preemption challenges other than "it's interesting to watch what's happening in the PBM space because that's the first real place we're seeing it being chipped away at a bit."

MORE RIGOROUS REVIEW

Since the Loper Bright ruling is still relatively new, Wrigley-Durer believes it remains to be seen whether it could have a chilling effect on the development of products and services to contain group health plan costs. But she adds that there could be some hesitation to take potentially risky positions based on existing guidance if there's any concern that it could later be challenged.

It's worth noting that the Supreme Court itself hadn't actually cited Chevron in nearly a decade before the Loper Bright decision. "So, there are a good number of practitioners in the space who don't really view it as that big of a deal," she says. "I think we'll need a few court cases under our belt to see if it really starts shaking out that way."

Christina also believes that, at least during the Trump administration, federal agencies are going to be much more rigorous about ensuring that their regulations conform to statutory language or at least have a basis in the statute before they even issue net by notice of proposed rulemaking.

"It's going to have an effect on the executive branch's thinking about how to go about regulating, and that'll be across the board, particularly because there will be a lot of OMB and DOGE supervision," he opines. "Loper Bright is going to be foremost in the minds of regulators."

The first step he'd recommend for self-insured health plans is to continue to assume the validity of all existing regulations, then give any proposed regulations much more than a cursory glance by having outside counsel review the proposal.

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"In the future," Condeluci predicts, "people are going to be very quick to file a lawsuit against a reg even if it's pretty crystal clear that the department got it right." As for whether Loper Bright complicates compliance with older regs, he says employers are still expected to comply, even if there's a lawsuit filed against a particular regulation.

"You must comply until a court says that you don't have to comply anymore," he says, noting that it applies to ERIC's mental health parity litigation. "It doesn't matter if there's a lawsuit filed. It's still business as usual." It's also important to understand that litigation takes a long time, and regs still apply until an appeals court invalidates them, he adds.

CHANGING OF THE GUARD

Condeluci doesn't think significant reductions in the federal workforce will have much of an impact on compliance. Instead, the background, experience and policy priorities of agency personnel moving into senior roles will have a much greater influence over what happens next inside the beltway.

At the top of that list is Lori Chavez-DeRemer, a former Republican U.S. Rep. from Oregon, who now serves as labor secretary and is a big proponent of requiring provider network owners to share health claims data with self-insured plans and their business associates. Another key player is Daniel Aronowitz, who was nominated to serve as assistant secretary of labor for the Employee Benefits Security Administration, which has jurisdiction over rules and compliance relating to self-insured health plans. He has expertise in stop-loss insurance and fiduciary liability and has been a critic of the plaintiffs' bar going after plan sponsors over fiduciary breach issues.

His view of Robert F. Kennedy Jr., who heads the Department of Health and Human Services, is that he probably will wield more influence over public health programs than the commercial insurance market. What will be more impactful is those in senior roles who report to him, he adds.

Years before any type of judicial deference was in effect, Karlinsky notes that there was more cooperation in Congress, which ran more efficiently. "Hopefully, we'll get back to that type of an era where some of these interpretations frankly aren't even necessary moving forward," he adds. ■

Bruce Shutan is a Portland, Oregon-based freelance writer who has closely covered the employee benefits industry for more than 35 years.