PITTA LLP
Labor, Employment & Employee Benefits Law Firm

EMPLOYEE BENEFITS

IN FOCUS

FOR CLIENTS & FRIENDS

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**THE DEATH OF *CHEVRON* CREATES UPHILL BATTLES FOR <u>EMPLOYEE BENEFITS REGULATORS</u>**

The Supreme Court of the United States' June 28, 2024 decision in *Loper Bright Enterprises v. Raimondo*, Docket No. 22-451, 603 U.S. --- (2024) will likely have drastic effects on federal agency regulation and, consequently, employee benefits. The decision overturned the *Chevron* deference, under which courts were required to defer to agency interpretations of ambiguous federal statutes so long as those interpretations were reasonable. *See Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Going forward, courts will rely on their own judgment when reviewing the reasonableness of an agency's actions.

The impact of *Loper Bright* on legal challenges of rules promulgated by the Department of Labor ("DOL" or "Department") and other federal agencies was almost immediate. Just hours after the decision came down, the State of Utah and energy lobbying groups cited *Loper Bright* in a letter to the United States Court of Appeals for the Fifth Circuit, arguing that the district court impermissibly deferred to the DOL's interpretation of the Employee Retirement Income Security Act of 1974, *as amended from time to time* ("ERISA"), in reviewing a Department rule on environmental, social, and corporate governance considerations in retirement investments. *See State of Utah v. Su*, Docket No. 23-11097 (5th Cir. Oct. 30, 2023). On the same day, a group of New Jersey hospitals referenced *Loper Bright* in their lawsuit filed in the United States District Court for the District of Columbia challenging the Secretary of Health and Human Services' interpretation of Medicare reimbursement laws. *See HMH Hospitals Corp. et al. v. Becerra*, Docket No. 1:24-cv-01901 (D.D.C. June 28, 2024).

Also subject to post-*Chevron* scrutiny is the *Retirement Security Rule: Definition of an Investment Advice Fiduciary* ("401(k) Advice Rule"), which the DOL finalized in April 2024 and was set to go into effect September 23, 2024. The 401(k) Advice Rule, which was reported on in July's edition of Employee Benefits In Focus and may be read in its entirety here, would expand the reach of ERISA's strict fiduciary standards to include more providers of retirement advice, including those who give one-time recommendations to roll assets over into an individual retirement account. The goal of the 401(k) Advice Rule was to expand protections for retirees. Two Texas judges have since paused implementation of the 401(k) Advice Rule, holding that legal challenges to the Rule are likely to succeed.

In the first case, *Federation of Americans for Consumer Choice Inc. v. Department of Labor*, Docket No. 6:24-cv-00163 (E.D. Tex. July 25, 2024), Judge Jeremy Kernodle temporarily stayed the effective date of the Department's 401(k) Advice Rule and that of an amendment to Prohibited Transaction Exemption 84-24 ("PTE 84-24 Amendment"), which would require insurance agents to adhere to certain standards, make certain disclosures, and operate under a supervisory program in order to qualify for the

exemption. In granting the stay, Judge Kernodle cited *Loper Bright* and refused to defer to the Department's interpretation of ERISA. Instead, he held that the DOL's 401(k) Advice Rule conflicts with ERISA's definition of "fiduciary" as interpreted in the Fifth Circuit's prior decision of *Chamber of Commerce v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018), whereby the Court vacated a similar Obama-era rule seeking to expand the definition of "fiduciary." Despite the DOL's attempt to differentiate the 401(k) Advice Rule from the Obama-era rule, the Court rejected the Department's argument that the transactions covered by the 401(k) Advice Rule qualify as relationships of "trust and confidence" as contemplated by ERISA's language. Judge Kernodle also agreed with the Plaintiffs' argument that the DOL's PTE 84-24 Amendment is "arbitrary and capricious" in that it imposes conduct standards based on the 401(k) Advice Rule's "overbroad" definition of fiduciary.

In the second case, *American Council of Life Insurers et al v. United States Department of Labor et al.*, Docket No. 4:24-cv-00482 (N.D. Tex. July 26, 2024), Judge Reed O'Connor cited neither *Loper Bright* nor *Chevron*. However, he did not need to, as he "agree[d] with and fully incorporate[d]" Judge Kernodle's analysis regarding the 401(k) Advice Rule and PTE 84-24 Amendment into his ruling and ordered the stay of the effective date of additional related amendments to prohibited transaction exemptions for the same reasons.

These rulings, which have halted the implementation of the DOL's 401(k) Advice Rule, illustrate how courts, especially those conservative Circuits, will use *Loper Bright* as license to approach agencies' interpretations of federal statutes with increased scrutiny. Consequently, agencies like the DOL likely will need to reassess their approach to interpreting old laws in new ways that continue to protect Americans in a rapidly changing world.

## APPLIED BEHAVIORAL ANALYSIS THERAPY CONTINUES TO BE A COVERAGE CHALLENGE FOR GROUP HEALTH PLANS

The Mental Health Parity and Addiction Equity Act of 2008, *as enacted* ("MHPAEA"), does not require group health plans and/or plan sponsors to provide coverage of any mental health or substance use disorder benefits ("MH/SUD") to their participants and dependents. However, once a group health plan decides to offer any MH/SUD benefits, the group health plan must comply with MHPAEA and ensure there is parity between the medical/surgical benefits and MH/SUD benefits offered. Specifically, MHPAEA requires that the financial requirements and non-quantitative treatment limitations ("NQTLs") imposed on MH/SUD benefits are not more restrictive than the predominant financial requirements and NQTLs applied by the group health plan to substantially all medical/surgical benefits in a classification – meaning parity may be found if the NQTLs applied to MH/SUD benefits are also applied to at least two-thirds of a group health plan's medical/surgical benefits within that classification.

Diagnoses of children in the United States of Autism Spectrum Disorder ("ASD") continues to rise – in 2020, one in every thirty-six children were diagnosed with ASD. In

2017, one in seven children diagnosed with ASD with group health plan coverage had treatment claims totaling approximately $20,000. With more children being diagnosed and the costs of ASD treatment continuing to rise, plan sponsors are in the position of actively trying to balance costs while offering compliant MH/SUD benefits. One ASD service that group health plans are grappling with is Applied Behavioral Analysis Therapy ("ABA Therapy") – a type of therapy used to treat children with autism and other developmental disorders. Plans are heavily scrutinized by applicable governmental agencies desiring to see this treatment offered by the plans as part of their MH/SUD benefits.

The Consolidated Appropriations Act of 2021 mandates that plans prepare a comparative analysis of their NQTLs and gives the Department of the Treasury, the Department of Labor and the Department of Health and Human Services (collectively, "the Departments") enforcement power under MHPAEA to request and review a plan's comparative analysis and requires the Departments to produce annual reports to Congress of their findings. In the Congressional reports submitted to date, the Departments have outlined compliance issues for group health plans as they relate to coverage of ABA Therapy. The most common issues noted by the Departments were blanket exclusions of ABA Therapy or separate, additional limitations before ABA Therapy benefits were covered (*i.e.*, review of ABA Therapy providers' treatment plans or notes) which were beyond the requirements for coverage of medical/surgical benefits. Remedial measures required by the Departments of the group health plans included the removal of the blanket exclusions of ABA Therapy, amendment of the plan of benefits to include ABA Therapy in the group health plan's covered MH/SUD benefits and the removal of any additional treatment limitation requirements imposed by plans on ABA Therapy benefits that are not imposed on covered medical/surgical benefits.

For group health plans that offer MH/SUD benefits, plan sponsors should review plan documents to ensure there are no blanket exclusions of treatments for ASD, and if the plan of benefits does provide for ASD treatment, ensure there are not specific exclusions of ABA Therapy, as such exclusions would violate MHPAEA. Plans should work with their service providers to review the cost-saving measures utilized and to determine whether those measures are being appropriately applied to both MH/SUD and medical/surgical benefits.

## "AS SOON AS PRACTICABLE" MEANS JUST THAT IN DEFEATING LATE WITHDRAWAL LIABILITY CLAIM

The U.S. Court of Appeals for the Third Circuit has ruled that a pension fund must assess withdrawal liability against a withdrawing employer "as soon as practicable" under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") in order to preserve its claim, regardless of whether the employer was prejudiced by any delay. *Allied Painting & Decorating, Inc. v. Int'l Painters and Allied Trades Industry Pension Fund*, No. 23-1537 (3d. Cir. July 11, 2024).

Allied Painting & Decorating, Inc. ("Allied" or "Employer") withdrew from the Painters Industry Pension Fund (the "Fund") in 2005. The Fund discovered Allied's withdrawal in 2011 but did not assess withdrawal liability upon the Employer until 2017.

The Employer requested review, which the Fund rejected, and an arbitrator issued an award in favor of the Fund for $427,195 in withdrawal liability, reasoning that although the Fund did not assess liability “as soon as practicable” as required by MPPAA §1399(b)(1), Allied was not prejudiced by the Fund’s delay. The District Court vacated the award, holding that the arbitrator applied the doctrine of laches incorrectly, and the Fund timely appealed.

Circuit Judge Mattey, joined by Judges Hardiman and Phipps, affirmed the District Court’s decision to vacate the award, however, for different reasons. Looking to the text of MPPAA, the Court noted that MPPAA §1399(b)(1) requires that notice and demand of withdrawal liability be made by pension funds “as soon as practicable” after a withdrawal. Because MPPAA provides that the Federal Arbitration Act (“FAA”) only applies “to the extent consistent” with MPPAA, the Court could not apply the heightened deference to the arbitration award typically applied under the FAA. Accordingly, the Court reviewed the award *de novo*. The Appeals Court further held that “as soon as practicable” does not include a harm or laches component. Accordingly, both the arbitrator and District Court erred by importing such a standard into MPPAA. The Court acknowledged that “practicable” could be read to include a laches element but rejected that reading on the following hypothetical: “Decades pass” between Diligent Employer’s withdrawal and Sleepy Fund’s assessment. Meanwhile, Diligent Employer escrowed the amount last estimated and retained its records. Under a laches theory, MPPAA would forgive Sleepy Fund and punish Diligent Employer, an untenable result in equity or policy. Therefore, since all parties agreed that the Fund did not assess “as soon as practicable,” that undisputed fact “ends the case” and requires vacatur of the award. The Court of Appeals warned: “As soon as practicable [...] is a requirement of MPPAA §1399(b)(1). If this statutory requirement is not met, the fund’s claim for the employer’s withdrawal liability must fail.”

It would be a mistake to dismiss *Allied Painting* as an anomaly and ignore the Appellate Court’s legal reasoning. Elimination of the laches or harm element from the analysis of whether a fund’s claim is timely would significantly sharpen the need for pension funds to act diligently and quickly. That said, the Third Circuit acknowledged that “practicable” does not mean “immediate” which rather affords “some flexibility in gathering the information and performing the complex calculations necessary [...]”. Consequently, pension funds should diligently document their process and reasoning and calculate a withdrawal liability assessment against a withdrawing employer within a justifiable period.

## A FEW REMINDERS

**(Based on calendar-year plans)**

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

## AUGUST

### DEFINED CONTRIBUTION PLANS

- **Second Quarter Pension Benefit Statements**
  - August 14, 2024 is the deadline by which a participant-directed plan must furnish the benefit statements for the second calendar quarter.

## SEPTEMBER

### HEALTH AND WELFARE PLANS

- **Summary Annual Report ("SAR")**
  - September 30, 2024 is the deadline by which health and welfare plans must distribute the SAR to all plan participants.

### DEFINED BENEFIT PLANS

- **Actuarial Certification**
  - September 30, 2024 is the last day by which the actuary must certify the 2024 AFTAP to avoid October 1, 2024 presumption that the 2024 AFTAP is less than 60%.
- **SAR**
  - September 30, 2024 is the deadline by which the SAR must be distributed to all plan participants unless the defined benefit plan is covered by the Pension Benefit Guaranty Corporation's ("PBGC") termination insurance program; PBGC-covered DB plans are required to furnish their participants with an annual funding notice instead.

### DEFINED CONTRIBUTION PLANS

- **SAR**
  - September 30, 2024 is the deadline by which the SAR must be distributed to all plan participants.

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