

The ERISA Edit: Employee Benefits Highlights to Watch for in 2024

Employee Benefits Alert

01.04.2024

Happy New Year! We expect 2024 to be an active year for employee benefits litigation, rulemaking, and government enforcement, with no shortage of state legislation impacting benefits and potentially raising preemption challenges. Here are some highlights we will be watching for this year:

Supreme Court Jurisprudence

On January 17, 2024, the U.S. Supreme Court will hear argument in [Loper Bright Enterprises v. Raimondo](#), No. 22-451, and [Relentless, Inc. v. Department of Commerce](#), No. 22-1219, two consolidated cases in which the Court will decide whether to overrule *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which has governed the federal courts' review of implementing agencies' interpretations of purportedly ambiguous statutes for four decades. At a minimum, the Court is likely to at least clarify whether "statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the [same] statute . . . constitute[s] an ambiguity requiring deference to the agency." Although both cases involve commercial fishing companies that have challenged a rule issued by the National Marine Fisheries Service, the Supreme Court's decision will impact the entire federal administrative sphere and will almost certainly affect the deference afforded by the federal courts to the U.S. Department of Labor's (DOL) interpretation of ERISA.

The Supreme Court will also [reenter the abortion rights arena](#) this term. In November 2022, the Alliance for Hippocratic Medicine (Alliance) and others sued the U.S. Food and Drug Administration (FDA), challenging the agency's 2000 approval of the abortion medication mifepristone. Danco Laboratories, LLC, which manufactures the abortion pill Mifeprex, later intervened. In April 2023, the U.S. District Court for the Northern District of Texas imposed a nationwide ban on mifepristone; on appeal, the U.S. Court of Appeals for the Fifth Circuit issued a decision that kept mifepristone on the market but blocked the FDA from expanding further access to the drug, which the FDA had done since 2016. The FDA and Danco asked the Supreme Court to address whether the Alliance and the other petitioners even have standing to challenge the FDA's decisions and, if so, whether the FDA exceeded its power and regulatory safeguards when it made mifepristone more accessible. The Court granted both petitions and consolidated the cases going forward (Nos. 23-235 & 23-236). Oral argument has not yet been set, but a decision is expected by summer.

District and Circuit Court Litigation

On the trial court front, we anticipate a continuation of the class action litigation challenging retirement plan fees and investment performance, with the likelihood of more cases progressing beyond the motion to dismiss phase, although, as a recent flurry of settlements could indicate, the cases may not actually reach the merits. We won't be surprised by more lawsuits alleging the use of unreasonable actuarial assumptions by pension plan fiduciaries to calculate retirement benefits. Moreover, we expect a continued abundance of individual and class action benefit denial cases focused on mental health treatment, raising questions as to medical necessity guidelines, administrative exhaustion, remedies, and pleading standards. We also expect an uptick in litigation filed by plan fiduciaries seeking access to health plan claims data. An [expansion of the 401\(k\) fees litigation to the health plan arena](#) could be the next front in ERISA class action suits, with challenges to the reasonableness of fees paid by health plans to their service providers and third parties. Expect these cases to allege an array of fiduciary breach and prohibited transaction claims, with plan sponsors and fiduciaries serving as both plaintiffs bringing some of the lawsuits and defendants in class litigation filed by participants.

We also anticipate litigation over transgender minors' access to gender-affirming surgeries and hormone therapy to continue to gather steam. In September 2023, [the Sixth Circuit okayed bans on gender-affirming care](#) for minors in Tennessee and Kentucky, see *L.W. v. Skrametti*, 83 F.4th 460 (6th Cir. 2023), and three groups of petitioners have since asked the Supreme Court to step in. Petitioners in one case (No. 23-466) challenged the Tennessee law in district court and before the Sixth Circuit; petitioners in the second case (No. 23-492) challenged the Kentucky law in district court and before the Sixth Circuit; in the third case (No. 23-

477), the U.S. Department of Justice (DOJ), which had intervened in the Sixth Circuit case, separately petitioned the Supreme Court for review. In the meantime, [the Eighth Circuit is set to decide *Brandt v. Griffin*](#), No. 23-2681, challenging Arkansas's Act 626, which bans gender-affirming care for minors, and similar cases are working their way through the courts in more than a dozen other states, including Alabama, Florida, Idaho, Indiana, Kentucky, Montana, Nebraska, North Carolina, Oklahoma, and Texas.

Litigation challenging other state and federal laws and regulations impacting employee benefits plans will also be an area to watch. As discussed below, legal challenges under the Administrative Procedure Act (APA) are anticipated for at least two DOL regulations expected to be finalized in 2024, and ERISA preemption litigation involving state laws that seek to regulate pharmacy benefit managers (PBMs) continues to percolate in the federal courts. In [Pharmaceutical Care Management Ass'n v. Mulready](#), 78 F. 4th 1183 (No. 22-6074, Aug. 15, 2023, 10th Cir.), the Tenth Circuit held that ERISA preempted most of the Oklahoma Patient's Right to Pharmacy Choice Act because that state law interfered with central matters of plan administration by restricting the manner in which plans could structure their pharmacy networks. Last month, the Tenth Circuit denied the Oklahoma insurance commissioner's petition for an *en banc* rehearing of the appeal and on January 2, 2024, denied his motion to stay the court's August 15 decision while to the state seeks an appeal of that decision in the Supreme Court. Oklahoma is expected to file a petition for a writ of *certiorari* in the Supreme Court asking the high court to reverse the Tenth Circuit. Multiple organizations and entities in addition to the parties to the case are expected to file briefs giving their views on whether the case warrants further review by the Supreme Court.

Agency Rulemaking

DOL and the Departments of Health and Human Services (HHS) and the Treasury (collectively, the Departments) will be working down to the wire to finalize new regulations and guidance in advance of the November 2024 elections and the potential turnover in administrations early next year. Two major rules are likely to be finalized in the first half of 2024 – [one from DOL](#) amending the regulatory definition of an investment advice fiduciary under ERISA and the Internal Revenue Code and related prohibited transaction exemptions and [one from the Departments](#) amending the 2013 regulations promulgated under the Mental Health Parity and Addiction Equity Act (MHPAEA) and implementing related provisions of the Consolidated Appropriations Act, 2021 (CAA). (See our analysis of the MHPAEA proposed rule [here](#), [here](#) and [here](#)). These final rules are anticipated to significantly expand the regulatory compliance obligations on plan fiduciaries and service providers to plans, and on certain investment professionals giving advice to plan participants and individual retirement account (IRA) owners, and both final rules are likely to face court challenges under the APA and other laws.

The investment advice fiduciary definition proposal, which received over 19,000 public comments, states that DOL intends the rule to become effective 60 days after publication of the final rule in the Federal Register. The MHPAEA proposed rule contains an applicability date of the first day of the first plan year beginning on or after July 1, 2025. The Departments sought comment on whether additional time would be needed by regulated parties to come into compliance and most commenters urged to Departments to extend the applicability dates. Whether that will be done, and whether legal challenges to the final rules will delay their application dates, remains to be seen. What is certain is that both final rules, if left standing, will require plans, fiduciaries, service providers, and much of the financial industry to make major changes to their policies and practices to ensure compliance.

Government Enforcement

We should learn more in the coming weeks about DOL's ERISA enforcement priorities for the new year, but we expect that MHPAEA enforcement will continue to be a top priority. Given DOL's focus on health plan provider networks in the pending MHPAEA rulemaking proposal, the accuracy and adequacy of those networks will likely be a hot topic for DOL enforcement in 2024. We remind plan sponsors, fiduciaries, and administrators of the network accuracy provisions added to ERISA through the CAA, ERISA sections 720 (a) and (b), and 29 U.S.C. § 1185i (a) and (b), which require plans to have processes in place to verify and update the accuracy of provider directory information every 90 days and to respond to participant and enrollee telephonic and web-based inquiries regarding provider network status. When out-of-network services are provided to participants and enrollees who relied on inaccurate provider network information, plans may not impose cost-sharing greater than what would apply to in-

network services and the services must be treated as in-network for purposes of deductible and out-of-pocket maximum calculations. Plans should expect scrutiny of their compliance with these provisions, which went into effect in 2022.

Plan cybersecurity is another area ripe for federal enforcement audits, as private cybersecurity and data privacy litigation continues to proliferate. In April 2021, DOL issued cybersecurity sub-regulatory guidance to plan fiduciaries, service providers, and participants in the form of [Tips for Hiring a Service Provider with Strong Cybersecurity Practices](#), [Cybersecurity Program Best Practices](#), and [Online Security Tips](#). While geared toward retirement plans and their fiduciaries, this guidance provides insight into how DOL will assess compliance with fiduciary obligations related to cybersecurity by health plan fiduciaries as well. In 2022, the ERISA Advisory Council [issued a report](#) urging DOL to provide greater resources and clarity on fiduciary obligations with respect to cybersecurity risks to health plans. Thus far, no guidance specific to health plans or updates to the 2021 guidance has been issued, likely due to a lack of agency bandwidth and not a lack of DOL enforcement interest in this area. HHS is also actively investigating [breaches of unsecured protected health information](#) involving plans, healthcare providers and others under the Health Information Technology for Economic and Clinical Health (HITECH) Act and related Health Insurance Portability and Accountability Act (HIPAA) provisions.

While questions remain regarding DOL's investigative authority over plan cybersecurity, very few courts have addressed this issue and DOL has made clear its view that cybersecurity is part of plan administration subject to ERISA section 404(a)(1) fiduciary duties of loyalty and prudence. It is advisable that plan sponsors and fiduciaries proactively and regularly assess their plans' cybersecurity policies and practices before DOL undertakes an audit of those policies and practices and before any data breach occurs, which will likely trigger participant complaints and DOL scrutiny.

In the News

Joanne Roskey [discusses](#) anticipated final rules interpreting ERISA expected in 2024 in *Law360*.

Theresa S. (Tess) Gee, Joanne Roskey, Anthony F. Shelley, and Dawn E. Murphy-Johnson [authored](#) the 2023 edition of *ERISA: Department of Labor Investigations and Litigation*, published by the Practising Law Institute.

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