***Employee Benefits and Executive Compensation* Podcast Series:**
Regulatory Uncertainty: Benefits-Related Legal Challenges in a Post-Chevron World
Hosts: Jim Earle, Lynne Wakefield, and Lydia Parker
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Lydia Parker:

Hi, everyone. Welcome to today's special podcast with three members of the Troutman Pepper Employee Benefits and Executive Compensation team. So today, we're going to unpack what's on top of mind, top of inboxes for the last several weeks, which is development surrounding Chevron deference and its recent overturn in a landmark case of *Loper Bright*. I'm Lydia Parker, I'm a partner in the Troutman Pepper Employee Benefits and Executive Compensation Group. I'm joined by two of my colleagues, Jim Earle and Lynne Wakefield. Jim and Lynne, do y'all want to give just a quick introduction?

Jim Earle:

Sure. Thanks, Lydia. So, this is Jim Earle. Glad to be here today. This is an interesting topic. My practice focuses primarily on executive compensation, especially for public companies, although I also assist clients with fiduciary and other matters related to their 401(k) plans. This practice is primarily a federal law regulatory practice, largely depends on rulemaking from agencies like the IRS, SEC, DOL. So, this is a topic of a particular impact to what I practice at.

Lynne Wakefield:

I'm Lynne Wakefield. I'm also a partner in the Employee Benefits and Executive Compensation Group. My practice focuses on qualified retirement plan and health and welfare plan compliance, and I also advise companies on fiduciary and plan governance issues.

Lydia Parker:

Perfect. Thank you. So, the main focus of today's episode is going to be a Q&A with Jim and Lynne. I'll serve as your moderator. But before we get into the weeds of what to expect after the fall of *Chevron*, it's probably helpful to just briefly set the stage and give background on Chevron deference, its erosion, and then the two recent Supreme Court decisions, *Loper Bright* and *Corner Post*.

Jim Earle:

Yes. I suppose that you want to start this really going back, since I'm the old guy, I'll talk about the history. *Chevron* is really the culmination for many decades, going back to early 1900s of expanded reliance by Congress on the power of administrative agencies to interpret and imply the law. You can think back to the new deals, expansions of federal government power on the oversight of markets as an example. As agency rulemaking grew in importance, the courts struggled with how the courts themselves would review those rules. This resulted in inconsistent

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and fragmented approaches applied by the courts, and deciding how much deference they would give those rules in the agency.

So, in the 1940s, we did have an important decision from the Supreme Court Skidmore, where the court did take on at least a beginning of how courts might consider giving deference to agency rules. In Skidmore, while the courts still ultimately were the determiners of the meaning of statutory terms, the Supreme Court allowed courts as a tool to consider and give some deference to agency rulemaking, depending on how the court viewed the persuasiveness of the agency's interpretation of laws. Taking into account multiple factors, like agency expertise and the technical nature of the issue at hand.

Lynne Wakefield:

Yes. So, then we kind of fast forward a little bit to 1984, when the Supreme Court introduced a more streamlined approach with *Chevron*. So, what *Chevron* did really was to establish a bright line rule. So, when Congress enacts an ambiguous statute that's meant to be implemented by an agency, the court should interpret that ambiguity as a delegation of authority to that agency to resolve the ambiguity. So, under this standard, courts were generally required to defer to the agency's interpretation. That framework allowed agencies to adjust their interpretations over time, and also allowed the agencies to take different interpretations under different administrations.

So, for nearly 40 years, Chevron deference really became a cornerstone of administrative law, providing agencies with really a great deal of leeway in interpreting statutes. But during those 40 years as well, *Chevron* also had its critics and challenges. I mean, its scope has been gradually narrowed over time. So, for example, it eventually became clear that agency interpretations of ambiguous statutes needed to be adopted through formal rulemaking processes, including public comments. So, we also had the major questions doctrine, which traces back to the early 2000s, and basically says that, if an agency's interpretation is likely to have a significant impact, courts should not just defer to the agencies. So, basically, we have *Chevron*, and then we've had, over the years, a watering down version, or a watered-down version of *Chevron* for the past several years.

Lydia Parker:

I think that brings us to the present day, when Supreme Court decision in *Loper Bright* marked the end of the *Chevron* era by expressly overturning it. In doing so, the court ruled that *Chevron* was inconsistent with the Administrative Procedures Act, which gives the reviewing court the authority to decide all relevant questions of law and interpret statutory provisions. In particular, Chief Justice Roberts indicated that court should exercise their independent judgment in deciding whether an agency has acted within its statutory authority. But it doesn't have to, and it doesn't need to defer to an agency interpretation, just because the statute is ambiguous.

Then, in addition to *Loper Bright*, it was also issued contemporaneously, within just a couple of days of the decision in *Corner Post*. First, the Board of Governors of the Federal Reserve System. Before *Corner Post*, challenges under the Administrative Procedures Act had to be filed within six years of an agency adopting a new rule. After *Corner Post*, the statute of limitations doesn't begin until the party bringing the actions suffers the harm that gives rise to the claim. So, that decision effectively eliminated the statute of limitations, at least as it relates to

challenges against agency rules. So with that background in mind, Lynne and Jim, how do you both view both *Loper Bright* and *Corner Post* in terms of scope and impact in general?

Lynne Wakefield:

Yes. Thanks, Lydia. So, I mean, I think, as Jen was mentioning, given the role that federal regulations play in the employee benefits and executive compensation practice, I think the impact of both *Loper Bright* and *Corner Post*, I mean, it's huge, it's significant. I mean, essentially, the definitive authority to determine what particular statutory provisions mean is being shifted away from the agencies and back to the courts. I think we all know the statutes in this space are frequently ambiguous and subject to multiple possible conflicting interpretations, such that we could and we likely will see circuit splits and different outcomes from the courts in terms of what statutory provisions mean.

So, with this continued statutory and regulatory developments, the compliance burden on plan sponsors is already so significant. I hope it's not the case, but my concern is that these cases are going to create an additional level of uncertainty for plan sponsors in determining their compliance strategies, and could ultimately have a chilling effect on compliance overall.

Lydia Parker:

Yes, that makes complete sense. It's hard enough to comply with one interpretation, let alone multiple conflicting interpretations.

Jim Earle:

Absolutely. I agree with everything you said, Lynne. Although, I do think there are some places where there's technical rule making, especially in certain technical tax regulations, or I don't think *Loper Bright* is going to have a big impact. Like the Section 409A regulations, I have a hard time imagining anybody taking the time and effort to go after those post-*Chevron*. But I think anytime, there is a politically charged rule reflecting some polarizing policy view. I mean, you can bet that rule is going to be challenged in the courts, I think. We have those come up in our space plenty of times.

Underlying all this to me, and I'll get on my soapbox a second is, I think *Loper Bright* and *Chevron* come from two very different views about how courts actually or should function. I mean, the Supreme Court is underpinning in *Chevron*. It said this in other cases after *Chevron*, supporting *Chevron*, like *Brand X* is that, underlying *Chevron* is that, really the court should not be the ones making difficult policy choices that are needed to interpret some of these rules and laws, and that difficult policy choices are better left to the agencies than the court. So, it was actually a view of judicial conservatism.

So, it's interesting that it switched, but the Supreme Court was acknowledging that judicial decisions about interpretation of law are colored by policy. The Supreme Court felt those policy choices were best left to political bodies, like federal agencies, rather than judges. So, interestingly, if you go to *Loper Bright* now, Judge Roberts, writing for the majority has a very different world view. At one point, he says that courts understand that statutes, no matter how impenetrable do in fact must have a single best meaning. So, he's thinking that judges are impartial umpires, sitting above the political fray.

My own view is that, the world we're in is more like the one envisioned by the court in *Chevron* than in *Loper Bright*. I mean, judges are human beings with perspectives, assumptions, leanings, like anyone else. Those leanings cannot help come out in their decisions, and actually see this playing out right now in some rules in our space, having to do with the Federal Trade Commission banning non-competes, which is expected to come effective soon September 4th. There are several litigants already challenging the FTC's authority to issue that rule, based on a dispute about the scope of delegated authority per some technical reading of statutory language in the Federal Trade Commission Act.

We've got one judge in Texas who's looked at that statutory language and decided that the FTC clearly does not have the authority to issue that rule. But then, we got this judge in Pennsylvania looking at the exact same statutory language, and that judge has ruled that the FTC clearly does have the needed authority. Same words they're looking at and exactly opposite judicial conclusions. So, what is the single best meeting of the statute? I guess we'll just have to wait and see how the dispute works its way up the appellate chain, and at some point, probably decided by the Supreme Court.

Lynne Wakefield:

Yes. Jim, I hear you. Maybe I'll pull out my boxing gloves and we can spar a little bit. But on your point, about 409A, I feel like very little of what we do in our space anymore is like cut and dry like that. I think there are so many rules and regulations coming out that are politically charged and flip flopping back and forth from administration to administration. I think, Lydia, that's kind of where you're going to go next.

Lydia Parker:

Yes. That's a perfect segue to think about how these cases, and particularly *Loper Bright*, how they impact our space in particular. So, Lynne, why don't you talk a little bit about the qualified plan of health and welfare space. Jim, why don't you go first from an exec comp and maybe an investment and fiduciary perspective.

Jim Earle:

Yes. Sure. Lynne, the ping ponging I'll get to of rules is definitely a concern and an issue. It's an interesting, I think, challenging issue. But yes, I just mentioned the FTC non-compete ban as one area that's having a real life, real time effect. In the fiduciary and retirement plan space, we got a couple of these politically charged rules that are ping ponging around right now. We've got the rule from the Department of Labor, the fiduciary rule that defines who a fiduciary is with respect to certain investment decisions. This rule has been going back and forth between administrations, going back to the Obama administration, and the current version of rule, which the Biden administration put out is itself being challenged.

This ping ponging of rules is definitely one of the reasons that the majority in *Loper Bright* says, the court should divine the single true meaning of statutes, so that we have some certainty and definitiveness. I think there's some trade offs to that, but it's a fair point. In contrast to *Chevron*, as Lynne mentioned in some of the subsequent cases like *Brand X*, which actually explicitly acknowledge that the thinking that agencies ought to be able to change their rules over time to address changing facts for changing policy perspectives. So, it's an interesting tension there.

There's a similar thing going on with the DOL rule that has to do with ESG related investment factors being relevant to making fiduciary decisions when selecting investment vet measures in retirement plans. The DOL under the Trump administration said, "No, those were never relevant factors for those fiduciary decisions." The DOL under the Biden administration passed a rule said, "Yes, it can be as a tiebreaker, when all the other financial factors are otherwise even. So, this rule is right now is in the courts under challenge, and will now not be given any Chevron deference.

In the exec comp space, another one I could see coming up. So, last year, companies had to adopt a claw back policy under the Dodd Frank Act that gets triggered anytime a public company has a financial restatement. And as a result of financial restatement, executives or others have received payments that were greater than they would have under incentive compensation plans. There were some SEC rules implementing that requirement hasn't really had an opportunity to be challenged yet, but there were some controversial features to those rules. The SEC decided that the triggering event could be less material types of restatements called little restatements.

They decided that the financial measures that would have to get recalculated could include stock price performance measures like relative TSR measures. Neither of those things were obvious from the statute. Both are kind of questionable from the underlying policy of Dodd Frank Act. But we just haven't had time yet, because these policies are new. No one's had a restatement to actually try to have to implement the policy. When that happens, my money is on an executive saying, "You can't do this to me and challenging the rule."

Lydia Parker:

Yes, that makes sense. Lynne, I know we've been answering questions already on the impacts of *Loper Bright*. What are you seeing from a qualified plan and health and welfare plan perspective?

Lynne Wakefield:

Yes. I mean, I think Jim already mentioned two of the most likely candidates from a qualified retirement plan perspective, which are the fiduciary rule and the ESG regulations. Another one we've already seen in the qualified retirement plan space relates to challenges to the PBGC regs, relating to multi employer claim withdrawal liability calculations. So, for instance, in July, we saw Yellow Corp argue that the PBGC overstepped by trying to modify pre-existing law to calculate unfunded vested benefits under ARPA by excluding bailout funds from the calculation. I mean, it makes sense to me that these PBGC regs are going to be challenged given the dollar amounts involved in Yellow Corp's case, $7.8 billion in withdrawal liability claims. There's real money at issue there.

From a health and welfare plan perspective, I think a number of regulations are ripe for challenge. So, we've already seen three District Court opinions in joining enforcement of the final Section 1557, non-discrimination regulations that were issued in May. These opinions from these district courts kind of similar to what Jim was saying before, they vary. They vary in terms of both sort of the substantive scope and the geographic scope of the injunction and the enjoinder.

So, as an example, in Tennessee versus Becerra, the district court for the southern district of Mississippi ordered that the July 5th effective date of the final rule is stayed nationwide, and enforcement is enjoined nationwide. But limited to the scope of the injunction and the enjoinder to just the gender identity provisions in the regulations. So, broad geographic scope, narrow scope substance. But then, in Texas versus Becerra, the district court for the eastern district of Texas limited the geographic scope of the ruling to covered entities just within Texas and Montana, but determined that it was not entitled to pick and choose which portions of the regs it wished to remain. So, it instead stayed the entire rule, rather than limiting the scope to the rule's gender identity provisions.

So, one can see how those decisions could leave a nationwide employer that's subject to 50 and 57 with questions about what exactly it's supposed to be doing. The other set of regs that immediately comes to my mind is the highly anticipated final mental health parity regulations on non-quantitative treatment limitations that are expected to be issued pretty much any day now. The proposed regs that came out were super complex and controversial, and the issue of mental health parity compliance is really becoming an even greater focus at the plaintiff's bar.

So, I think depending on how the final regulations land with the benefits community, I would not be surprised at all to see a challenge here. Again, I mean, this is an area that's already really, really hard, really technical, difficult for plan sponsors to comply with. If we get a finalized set of regs that's immediately challenged, it's going to lead to even greater uncertainty from a compliance perspective, and query, plan sponsors may be kind of frozen in terms of what they're supposed to be doing from a compliance perspective.

I guess, a few other things that come to my mind in the health and welfare plan space as potential targets for challenge include some of the ACA regulations, the no surprises act, and transparency, and coverage regulations. Then, also the new HIPAA privacy regulations related to reproductive health care.

Lydia Parker:

Yes, that's helpful. I think, as a takeaway to y'all's point, it's kind of most key and particularly controversial regulations that have been issued in the past few years are subject to a revisit from the courts. An agency's interpretation is less likely to be upheld without that Chevron deference. So, it's interesting. I know some of the things that we've talked about are kind of theoretical in nature. We haven't seen too many challenges yet, but what have you kind of already seen practically arise with your clients since *Loper Bright*.

Lynne Wakefield:

Not my client, but I mentioned the challenges to the PBGC regulations that are already out there on the withdrawal liability calculations. We also have some clients who have been wading through the analysis on the Section 1557 regulations in light of the district court opinions. I think it's a factor, when you're trying to decide whether to comply, how to comply. If there's going to be a substantial financial investment in compliance, in terms of putting together a compliance structure. And it's not clear whether the regs are actually going to be around for very long. I mean, it's hard to think sometimes justify or convince management on how to proceed on some of this stuff as a practical matter. So yes. I mean, we'll have to wait and see, but I think those are the two issues, I think that that have come to light most immediately.

Lydia Parker:

Yes. Jim, anything from your perspective?

Jim Earle:

Yes. By the way, Lynne, while you were talking about courts, some staying things in a narrow geographic scope, broadly in others, staying or vacating rules geographically broadly, but in a narrow way, on a narrow substance, that's one of the real challenges in all this, I think. I mean, it's this uncertainty that in the time it's going to take for issues to resolve, because it's got to go through the courts.

I think the FTC non-compete ban is the one where we have this immediate practical impact, where we're kind of living it with clients. Because right now, we've got the court in Texas, which very narrowly banned. It had put a stay on the rule only for the litigants in that litigation. But has said that by August 30th, the court plans to rule substantively on the matter, and based on what they've said, it could very well be the case. They vacate the rule nationally, or some lesser version of that. Meanwhile, in Pennsylvania, the court is saying, "Yep, be ready to move forward."

Clients actually have to act now, because there's a September 4 effective date, if nothing changes. Before that effective date, clients have to send a notice out to certain subsets of employees that have broadly defined non-compete clauses, telling them those non-compete clauses are not enforceable from and after September 4. You can't just push a button and do that automatically. So, you got to get ready to do it. With this ongoing pinging of courts in opposite conclusions, clients are very confused. We're telling folks, "You got to prepare for the worst. You got to assume this law is going to go into effect. Get your ducks in a row to comply in case it does." But meanwhile, we have to be very vigilant, follow what the courts are saying, and then let clients know quickly once we have some greater clarity.

Lynne Wakefield:

Not to get too philosophical, but makes me think about from at least from a qualified plan and a health and welfare plan perspective. The whole point of ERISA is to have sort of a federal scope of laws, that makes it easy for large companies to comply on a nationwide basis. I feel like this is one of the many areas where we're starting to see where it's crumbling a little bit.

Lydia Parker:

I know we're always kind of focused on our clients and impact to our clients. But, what do you all see? How do you see the courts reacting to this new flexibility, or should I say, old flexibility? Since we're going back to the Skidmore days. How will Congress and the agencies have to adjust to account for that?

Jim Earle:

I'll jump in here. I do think – I mean, *Loper Bright* clearly is a real shift of power away from agencies and into the courts. I think, especially to the Supreme Court, because we have a circuit court system now with different circuits that have different angles and different

reputations. I mean, there's probably going to be a lot of – there is already forum shopping when you're going to challenge these politically charged rules and try to go to the forum with the court system and the appellate system that's most likely going to rule in your favor. At the end of the day, if there's splits in circuits, it's going to have to go to the Supreme Court. So, it's not clear to me how much the old Skidmore deference is really going to reemerge in all of this.

I saw an article recently that said that, of the 20 post *Loper Bright* decisions this summer that were considering agency interpretation of the statute, only one of them even mentioned Skidmore. I don't think it was actually applying Skidmore. So, I think we're going to see rules get made up, and I think it's a way for Supreme Court to have its final say on the single best meaning of statutes.

Lynne Wakefield:

Yes. I agree with Jim. I think this represents a true shift in power back to the judicial branch. I wonder if this is going to change the way that agencies set doctrine. I mean, we could see a shift away from the formal rulemaking we've seen in recent years with the notice and comment periods to other methods of establishing agency positions, like sub-regulatory guidance, FAQs. Another possibility is that the agencies will step up enforcement activities and actions. as a way to establish policy and precedent. I mean, we've already seen that to a certain extent with the mental health parity, non-quantitative treatment limitations, where the agency is really taking a more active role. So maybe that's another way that they can assert their position.

Lydia Parker:

Not quite ideal for clients, if that's the way. We're getting tight on time. Any other kind of departing thoughts or practical tips for our listeners as we wrap up?

Jim Earle:

Well, I'll just say, I guess my own two cents that I think, I mean, *Loper Bright* clearly is going to result in the incremental increase in individual litigant challenges of agency rules. And, like I said, there's still going to be forum shopping going on. All of that, all those challenges are going to result in delays in the impact of new rules as disputes work through the court system, which is not exactly noted for its speed.

I don't think we're going to see total chaos. I do think there's countervailing weights. It's not free to litigate. Litigants got to have a real meaningful interest and be willing to spend the money on whatever the issue is. So, I am also very interested to see what Lynn noted about how agencies adapt to this new environment. In exec comp, we say incentives matter, and I do think *Loper Bright*'s incentives do create incentives for agencies to move away from formal rule making to [inaudible 0:24:39] regulatory guidance. Although, there could still be times when regulatory agency wants to get public input before issuing a rule, and wants to go through that regulatory process, even though it's costly and timely. But I would be interested to see how the agencies adapt. It'll be a dynamic environment.

Lynne Wakefield:

Jim is such an optimist in saying that there's not going to be any chaos. I think those listeners who are still with us would probably agree that there's never a dull moment in the world of benefits and exec comp. I mean, I think it's definitely fun to kind of theorize about potential impacts and implications, but really, I mean, only time is going to tell how all of this shakes out. I think, in the meantime, like from a compliance perspective, and for our clients, the most important thing is to always try and focus on reasonable, good-faith compliance, kind of taking into account the guidance in front of you, and all of the relevant facts and circumstances, even as these laws around us are challenged and continue to evolve.

Jim Earle:

And stay connected with your attorneys, because we're watching this.

Lydia Parker:

That leads me into our closing. Thank you both so much for the insight, for joining us today. Of course, and as always, if you have any questions, please feel free to contact one of us or any member of the Troutman Pepper Employee Benefits and Exec Comp team.

Jim Earle:

Thanks, guys. See you.

Lynne Wakefield:

Thanks, everyone.