

Use Of Injunctions Against Agency Rules Raises Eyebrows

By **Jon Steingart**

Law360 (April 3, 2024, 3:37 PM EDT) -- Challenges to rules issued by the U.S. Department of Labor and other federal agencies that seek preliminary injunctions have drawn increasing scrutiny as these cases have multiplied and courts issue orders with a nationwide impact, attorneys told Law360.

A suit alleging an agency violated the **Administrative Procedure Act** by acting arbitrarily and capriciously when it came up with a new rule often includes a motion for a preliminary injunction. Challengers to rules the DOL issued in recent years on **independent contractor classification**, **determining prevailing wages** under the **Davis-Bacon Act**, and **minimum wage** for federal contractors have sought injunctions.

Allison Zieve, director of the left-leaning Public Citizen Litigation Group, told Law360 that injunctions are a hot topic now because litigation is almost guaranteed following the rollout of a rule.

"The reason this has become a big deal is because it's barely an exaggeration to say that everything agencies do these days is challenged in court," she said. "Until recent years, I think it was much less common to ask for a preliminary injunction in an APA case."

U.S. Supreme Court Justice Neil Gorsuch is a **longtime critic** of nationwide injunctions, also known as universal injunctions, because they project judicial power beyond the geographic borders of a judge's district and affect all members of the regulated community, including those who aren't before the court.

"We've had, one might call it, a rash of universal injunctions," **he said** during March 26 oral arguments in a case challenging U.S. Food and Drug Administration actions that loosened restrictions on abortion pills. "And this case seems like a prime example of turning what could be a small lawsuit into a nationwide legislative assembly on an FDA rule or any other federal government action."

But Zieve said she thinks injunctions that courts order on agencies usually have to be broad because blocking some parts of a rule while allowing others to go forward, or enjoining enforcement as to one plaintiff but not other entities, would produce piecemeal enforcement that quickly becomes unmanageable.

On the other hand, the purpose of a preliminary injunction is to temporarily spare a party from the irreparable harm a rule would cause while the court hears its case, she said. Courts should interrogate whether a universal injunction is the only way to achieve that goal, she said.

"Always, and I think this is what Gorsuch is hung up on, the question is whether you're providing relief that's broader than necessary to remedy the injury that was actually experienced," she said.

For example, she pointed to an **employer's argument** that an **Affordable Care Act** requirement to cover HIV prevention medication with its insurance policy free of charge to patients violated its religious freedom. An injunction that releases it from the requirement would make more sense than enjoining the U.S. Department of Health and Human Services from enforcing the standard for every insurance policy, she said.

The scope of an injunction is something courts may consider when they decide whether to order one.

Paul DeCamp, a member of management-side firm Epstein Becker Green, told Law360 a nationwide injunction against an agency makes sense because it would be unworkable to have a patchwork of enforcement for some regulated entities but not others.

"There really should be only one interpretation of that rule that is consistent throughout the country, that the rule is either valid or it's invalid," he said. "It's difficult to envision a scenario where the agency is allowed to take action with regard to the regulation in some jurisdictions but not allowed to in others."

An organization that wants to sue to block a rule usually has options for where to file, giving it the choice between Washington, D.C., or the federal court in the district where it's based. A national organization that has chapters and members around the country may look for a court where it hopes that random judicial assignment will put its case before a judge who's likely to side with its arguments, then tap a member in that district to file a complaint there.

"It would be remiss of anybody bringing a lawsuit not to consider all of the aspects of the forum where they bring the case," DeCamp said. "That's just part of good lawyering."

Ronald Levin, an administrative law professor at Washington University School of Law, told Law360 that forum shopping may boost a plaintiff's odds of drawing a favorable judge, but random assignment of cases to jurists within a district usually means nobody knows ahead of time who will hear a case.

In some **federal courts in Texas**, plaintiffs can know with certainty which judge will hear their motion for an injunction because cases there are not randomly assigned, he said.

"It's pretty clear to me that shopping for an individual judge is stacking the deck unfairly," Levin said.

The possibility of unfair judge shopping is a consequence of Congress deciding that litigants challenging agency rules should be able to sue in their local federal court, rather than having to go to Washington, he said. There are sound reasons for that policy choice, which can put justice within reach for a local business that doesn't have the resources to litigate across the country in Washington but could go to the courthouse down the street, he said.

But the specter of forum shopping becomes more distasteful when it's obvious that a national organization has chosen a venue where it thinks it has an advantage, he said.

Legislation providing guidelines for how courts handle cases where a plaintiff seeks a broad injunction could undo some of the unfairness the judicial system allows now, he said.

"There's talk of a broader reform which would say, for example, that you would have a lottery to choose what circuit gets it," he said.

The judiciary already uses a lottery process to streamline matters when a rule is subject to a flurry of litigation around the country, as happened when challenges to the Biden administration's COVID-19 **vaccine-or-test rule** were consolidated in the Sixth Circuit in November 2021, he said.

Another idea is assembling a geographically diverse panel of judges to decide a motion for a sweeping injunction, he said.

At a minimum, judicial assignment rules should include **some randomness** so a plaintiff can't predict with total certainty which judge will hear their case, he said. Without that safeguard, plaintiffs may target a court and a judge with precision, he said.

--Editing by Aaron Pelc.