

FOX (MOSTLY) REMAINS IN THE HENHOUSE: SCOTUS SAYS AGENCIES (SORT OF) KNOW BEST

Insights
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By a 9-0 vote, the U.S. Supreme Court ruled today that by and large, the courts should continue deferring to a federal agency's reasonable interpretation of its own ambiguous regulations, leaving a good deal of power in the hands of agencies despite an outcry that this doctrine interferes with governmental separation of powers. In the last workplace law decision of the Supreme Court's term, it also ruled *stare decisis* cuts strongly against overruling *Auer* and that the Court would need a particularly "special justification" to reverse *Auer*. Although the underlying case was not employment-related, today's decision in *Kisor v. Wilkie* could have far reaching impact on employers and workplace law compliance.

While the Supreme Court affirmed that the power to interpret regulations rests with the agency that promulgated them, it also clarified federal courts' responsibility for thoroughly assessing the ambiguities in such regulations along with the reasonability of agency interpretations flowing therefrom. This means that employers now have an opening to increase their participation in regulatory guidance so as to shape policy at agencies such as the Department of Labor, the Equal Opportunity Commission, the National Labor Relations Board, and the Occupational Safety and Health Administration.

HOW AUERWE HERE?

The Supreme Court's rulings in *Bowles v. Seminole Rock & Sand Co.* (1945) and *Auer v. Robbins* (1997) have long

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required courts to defer to an agency's interpretation of its own ambiguous regulations, provided such interpretation is neither plainly erroneous nor inconsistent with the regulatory framework. But this deference has been under attack as constitutionally suspect for some time now, with some arguing that it runs afoul of the separation of powers doctrine. The argument is that courts have inappropriately abdicated their authority to interpret the law by allowing the same agency that promulgated a regulation the power to also interpret and enforce it.

The Supreme Court agreed to wade into the debate to reconsider the powerful administrative doctrine. To do so, it used a Department of Veterans Affairs (VA) regulation governing standards for reconsideration of disability benefits claims. James Kisor, a Vietnam War veteran, was denied federal service-related disability benefits for post-traumatic stress disorder in 1983 due to lack of diagnosis concerning his disability. In 2006, he reopened his disability claim and was awarded partial benefits based on new evidence of PTSD.

However, the VA later denied Kisor retroactive benefits from 1983 through 2006. The agency found that the additional service records he provided to support the right to benefits for this time period were not "relevant" as defined by a pertinent federal statute, which provides for VA reconsideration of a previously decided claim if the agency "receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim." The VA accordingly denied the claim for retroactive benefits because it concluded that none of the proffered "new" records demonstrated that it had made a mistake in 1983 when it found that Kisor did not suffer from PTSD.

Kisor appealed the VA's determination to the U.S. Court of Appeals for the Federal Circuit, arguing that the records were, in fact, relevant because they tended to make a fact more probable. The VA countered by arguing that later-tendered records must prove or disprove a matter in issue in order to be considered relevant. Finding both statutory constructions reasonable, the court held the regulation was ambiguous (i.e., subject to more than one reasonable meaning) and thus turned to the agency's interpretation of its own regulation to settle the issue.

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The VA's interpretation was that "relevant" meant "non-cumulative and pertinent to the matter at issue" in the case. It used this definition to deny Kisor's benefits claim because it had already concluded that the additional service records were not relevant because they contained information that was already known, acknowledged, and undisputed back in 1983 when Kisor's claim was first adjudicated. The court held that the VA's interpretation was neither plainly erroneous nor inconsistent with the agency's regulatory framework, and therefore upheld the denial. Kisor then requested review by the Supreme Court, which accepted the case and today rendered its ruling.

SUPREME COURT: *AUER* DEFERENCE SURVIVES BUT SHOULD BE NARROWED

In an anomalous posture before the Court, neither party specifically defended the way *Auer* deference has been applied, effectively conceding that it is imperfect. While Kisor argued the standard was inconsistent with the Administrative Procedure Act (APA) while also running afoul of the constitutional separation of powers and due process doctrines, the VA urged the justices to clarify and narrow rather than eliminate the doctrine altogether.

In its ruling, the Court vacated the U.S. Court of Appeals for the Federal Circuit's decision and remanded the case for further proceedings. The Court held the appellate court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation at issue really has more than one reasonable meaning. The Court further held the Federal Circuit assumed too quickly that *Auer* deference should apply in the event of genuine ambiguity. Instead, a court must assess whether the interpretation is of the sort that Congress would want to receive deference.

As a result of the opinion in *Kisor*, reviewing courts should only defer to an agency's interpretation if, after exhausting all the "traditional tools" of construction: (1) the regulation is truly ambiguous; and (2) the interpretation was issued with fair notice to regulated parties, is not inconsistent with the agency's prior views, rests on the agency's expertise, represents the agency's authoritative or official position, and the agency's reading of the rule reflects its "fair and considered judgment."

In essence, the Court struck a balance between overturning decades-old precedent and adhering to the monopolized power of agencies to issue vague regulations, informally interpret those regulations to make law outside of the APA, and demand courts defer to an agency's interpretation. The Court hopes that such a compromise will encourage agencies to regulate with clarity and specificity at the outset, yet it reserves to agencies the power to refine their own regulations with expert input as issues arise. Meanwhile, rightful judicial authority is retained to ultimately evaluate and overrule, in proper circumstances, self-serving legal interpretations.

EMPLOYERS BE BOLD: PARTICIPATE OR CHALLENGE AGENCY INTERPRETATIONS

Increased judicial scrutiny over the administrative state will likely create one of two paths—it will either incentivize agencies to promulgate regulations with more precision and to issue guidance following formal rulemaking standards, or it will expose agencies to increased challenges and correction through federal courts, thus fostering further instability. Employers may well benefit from either path, whether through the increase in regulatory certainty and transparency, or the platform to shape sub-regulatory guidance through litigation.

Take for example, the uncertain legal position employers faced in 2016 when the USDOL proposed “the new overtime rule” in stark contrast to the prior administration's preferences. If the new *Kisor* standard had been in place, the USDOL may have taken a more concerted approach to implement such a rule rather than face a multitude of lawsuits and the risk of increased scrutiny of its position only to find itself enforcing an unworkable judicial construct. If the USDOL or other federal agencies continue issuing guidance on untenable grounds, employers now have the power to push back knowing that courts have been instructed to more strictly scrutinize agency interpretations.

In one fell swoop, *Kisor* holds agencies more accountable and clarifies when a Court should afford *Auer* deference. A court must carefully consider the text, structure, history, and purpose of a regulation before applying *Auer* deference. Moreover, employers will have the chance to provide more meaningful input when the USDOL, EEOC, NLRB, and OSHA elect to use formal rulemaking procedures, and to

confidently challenge when agency interpretations are at odds with the current regulatory scheme, avoiding the blind deference afforded by prior Court precedent.

SOME POSSIBLE TARGETS

We have forecasted the specific areas of law that may face heightened scrutiny under the new *Kisor* standard; it may be worth paying attention to the following:

- **Americans with Disabilities Act (ADA):** The EEOC has an expansive delegation of authority when it comes to Title I of the ADA (the portion of the statute relating to employment discrimination). Some have criticized the agency's regulations promulgated through this authority, especially in the wake of the ADA Amendments Act passed in 2008, including those related to the concepts of undue burden, transient conditions, and reasonable accommodations as they relate to unpaid leave.
- **Wellness Programs:** Under the ADA and the Genetic Information Nondiscrimination Act (GINA), the EEOC has promulgated controversial regulations that impact employer wellness programs. While the most recent version of these rules were vacated by a court decision in 2017, [the agency recently announced](#) that we can expect a new set of rules by December 2019.
- **Joint Employment:** Both the [USDOL](#) and the [NLRB](#) have recently floated regulations to alter the federal interpretation of joint employment. The *Kisor* standard may result in renewed interest by the judiciary to insert itself into this fray.
- **Workplace Safety Penalty Amounts:** While the federal Occupational Safety and Health (OSH) Act caps penalties at \$7,000 for serious and "other than serious" violations, and \$70,000 for repeat or willful violations, [OSHA recently increased those maximums](#) to \$13,260 and \$132,598 pursuant to a different statutory authority. No doubt employers would appreciate courts examining the agency's authority to promulgate such a rule under the new standard.
- **Various Other Workplace Safety Rules:** Beyond the penalty issue, there are a variety of current rules issued by OSHA that could be the subject of renewed judicial interest. They include rules related to what it means to be

a “repeated” violation under the OSH Act, how to handle lock-out tag-out regulations (specifically which equipment components in close proximity to each other constitute a “machine” for purposes of the standard), and possibly the controversial “[anti-retaliation](#)” rules, especially as they relate to post-accident drug testing.

- **Wage And Hour Rules:** The USDOL regulations cover many wage and hour rules that may be subject to increased scrutiny under the new *Kisor* standard, including those covering [tip credits](#), hours worked, and overtime-only exemptions.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.