

Where Auer we after Kisor v. Wilkie'

September 30, 2019 Matthew Deffebach, Mini Kapoor, Christina Gad

PRACTICES Labor and Employment, OSHA

On June 26, 2019, the Supreme Court issued its decision in *Kisor v. Wilkie*, holding that courts should continue deferring to an administrative agency's reasonable interpretation of its own ambiguous regulations, but only if certain conditions are met. While not an employment-related case, the decision in *Kisor* has the potential to impact employers and compliance with rules and regulations issued by OSHA.

In 1983, James Kisor, a Vietnam War veteran, was denied federal service-related disability benefits for post-traumatic stress disorder. On a motion to reopen his application in 2006, Kisor submitted new records of his disorder and was awarded partial benefits. The Department of Veterans Affairs (VA) later denied Kisor's benefits from 1983 to 2006, and an administrative judge found that the new records were not "relevant" under the applicable federal statute. Kisor appealed the VA's determination to the Court of Appeals. The Court of Appeals affirmed the administrative judge's holding by applying what is known as *Auer* or *Seminole Rock* deference. The *Auer* deference instructs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Kisor sought review by the Supreme Court, arguing that *Auer* and *Seminole Rock* be overturned.

By a 5-4 vote, the Supreme Court declined to overturn its rulings in *Auer v. Robbins* (1997) and *Bowles v. Seminole Rock & Sand Co.* (1945), based on *stare decisis*. In the opinion written by Justice Elena Kagan, the Court noted *Auer* and *Seminole Rock*'s long-standing history and reasoned that to overturn these cases would be to overrule a "long line of precedents" which may "cast doubt on many settled constructions of rules." However, the Court limited the scope of the *Auer* deference and remanded the case back to the Court of Appeals to assess whether the agency's interpretation deserves such deference.

Under *Kisor*, an agency's interpretation will receive deference only if the regulation is "genuinely ambiguous," meaning ambiguity exists even after the court has gone through all the "traditional tools of interpretation." If genuine ambiguity remains, the interpretation must still be "reasonable." Even then, the agency's interpretation may not qualify for *Auer* deference, and the court must still conduct its own inquiry into whether *Auer* is applicable. The Court laid out the following guidelines:

- The agency's interpretation must fall within its "authoritative" or "official position."
- The interpretation must implicate the agency's "substantive expertise."
- The agency's reading must reflect "fair and considered judgment," while not creating "unfair surprise" to the regulated parties.

As a final note, Chief Justice Roberts and Justice Kavanaugh's concurring opinions made a special point of stating that while the *Kisor* decision referred to language in *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, its decision does not touch upon the issue of *Chevron* deference – the doctrine of judicial deference to an agency's interpretation of statutes enacted by Congress.

It is unclear if, and how, OSHA or other federal agencies will respond to *Kisor*. Generally, OSHA has relied on *Auer* deference in interpreting agency rules. It remains to be seen whether OSHA will publish updates or letters of interpretation to ensure deference of its interpretations.