

United States Supreme Court Confirms and Limits Court's Deference to Agency Guidance

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On June 26, 2019, the U.S. Supreme Court confirmed the continued viability of *Auer* deference, an interpretive doctrine that requires courts to defer to an agency's reasonable reading of a genuinely ambiguous regulation. In confirming the use of *Auer* deference, the Supreme Court also narrowed its scope, setting out clear limits to courts' use of this doctrine. This decision came in the case *Kisor v. Wilkie*, which involved an ambiguous regulation of a Department of Veteran Affairs rule.

In affirming *Auer* deference as a viable interpretive tool for courts to employ when deciding on two readings of a genuinely ambiguous rule, the Court reasoned that Congress generally wants agencies to play the primary role in resolving these questions. As the body that promulgated the rule at issue, the agency is in the best position to know the regulation's original meaning and possess the expertise needed to interpret rules on specific subject matters. Determining the meaning of an ambiguous rule often requires policy-based judgment calls – a job more appropriate for politically accountable agencies than appointed judges. Finally, deferring to an agency's interpretation of a rule promotes consistent application of those rules as an agency's guidance has greater cover than a single district court.

In confirming the use of *Auer* deference, the Court was also insistent on its limits. There are several instances in which *Auer* deference is not warranted. First, the regulation in question must be genuinely ambiguous even after a court has exhausted all of its traditional tools of construction. Second, the agency's interpretation must be reasonable. Third, the agency's interpretation must be an "official" or "authoritative" position taken by the agency rather than an ad hoc statement by an agency employee that does not necessarily reflect the agency's official views. Fourth, the agency's interpretation must rely on its specific expertise. Finally, the agency's interpretation must reflect fair, considered, and consistent judgment.

The Court's decision in *Kisor* is a significant one for employers because the DOL and EEOC have issued detailed regulations bearing on various employment statutes, and Courts often look to these regulations in deciphering employment law claims. When the regulation itself does not answer the question, parties may ask the Court to defer to the agency's guidance on its regulations, be it in the form of a regulatory appendix, compliance manual, or other policy guidance documents or statements. The Supreme Court's decision in *Kisor* allows this – but with clear limits.

Take the Seventh Circuit's recent decision in *Richardson v. Chicago Transit Authority* (decided just prior to *Kisor* but consistent with *Kisor*'s holdings), which held that obesity is not a disability under the ADA if there is no evidence of an underlying physiological condition. In arguing that his obesity should constitute a disability, the plaintiff pointed to EEOC interpretive guidance that, he contended, indicated that a person has an ADA impairment if his weight is outside of a normal range. The Seventh Circuit held that even if the EEOC guidance did state this, the Court would not defer to the agency's guidance because it was inconsistent with the text of the regulation. The regulation defined impairment as a "physiological disorder or condition." Determining that this regulation was not truly ambiguous, *Auer* deference was not justified.

So what should employers take away for the *Kisor* case? Agency guidance, appendixes, and other policy statements should not be ignored. While there are strict limits to the application of *Auer* deference, courts will continue to defer to an agency's interpretations of its own rules in certain situations.

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