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Supreme Court rewrites the rules for judicial deference to agency interpretations

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The bête-noir of conservative jurisprudence is the "administrative state," fueled by judicial doctrines affording various degrees of deference to administrative regulations, interpretive guidelines, and pronouncements. Last Wednesday's U.S. Supreme Court decision in ***Kisor v. Wilkie*** dramatically rewrote the rules for judicial deference to agency interpretations, retaining so-called Auer deference in name only—with major implications for employers.

Three types of agency deference

Over the past century, the Supreme Court has established three levels of deference to administrative agencies:

***Chevron* deference:** The highest level of deference applies to an agency's interpretation of a statute administered by that agency when the statute is silent or ambiguous regarding the issue in question. It applies only where Congress delegated authority to the agency to make rules carrying the force of law, and where the interpretation is made pursuant to that authority— that is, by notice-and-comment rulemaking or formal adjudication. When ***Chevron* deference** applies, an agency interpretation is considered controlling and binding in judicial proceedings **"unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."**

***Auer* deference:** An intermediate level of deference applies where an agency is interpreting its own regulation. ***Auer* deference** is owed only when the regulation at issue is ambiguous and the interpretation reflects the agency's "fair and considered judgment on the matter in question" and is not "plainly erroneous or inconsistent with the regulation" or simply a "'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."

***Skidmore* deference:** The lowest level of deference is owed to other types of agency interpretations, such as opinion letters, operating manuals and enforcement guidelines. These types of interpretations are **"'entitled to respect' … only to the extent that those interpretations have the 'power to persuade.'"** The level of ***Skidmore* deference** given to an

agency interpretation is assessed by looking at numerous factors enumerated by the Supreme Court, including "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."

Kisor takes straight aim at *Auer* deference. The Supreme Court agreed to consider only one question: "Whether the Court should overrule *Auer* and *[Bowles v. Seminole Rock & Sand Co.]*."

You can't read the opinion without a scorecard

Most Supreme Court decisions are fairly straightforward: here's what the majority said, and any justices who didn't join the majority disagree. Some write out their disagreement, others do not. Not so with *Kisor*. The Court split into a kaleidoscope of views, some of which had enough votes to be a "holding," while others did not.

The key to making sense of *Kisor* is to start with three ideological camps on the current Supreme Court. One is the "Liberal Minority" (Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor). One is the "Conservative Minority" (Justices Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Clarence Thomas). Chief Justice John Roberts is a minority of one. Or, rather, a *majority* of one, since he is often the swing vote who creates the Court majority.

The "Liberal Minority" all joined in Justice Kagan's opinion that (1) *Auer* was correctly decided and, when correctly interpreted, is free from the constitutional and policy criticisms that have been leveled against it, (2) *stare decisis* – the principle that a court should normally follow its own precedent – requires adherence to *Auer*, but (3) *Auer* has not uniformly been interpreted in a restrictive enough way to insulate it from constitutional and policy criticisms.

The "Conservative Minority" all joined in Justice Gorsuch's opinion that *Auer* was not correctly decided and is riddled with constitutional infirmities. All except Justice Alito also agreed with Justice Gorsuch that (1) *Auer* is also deficient as a matter of policy, and (2) *stare decisis* does not compel adherence.

With Chief Justice Roberts playing the gadfly, the two camps combined to create three majorities: First, all nine justices agreed that **the lower court's decision** should be vacated, and the matter remanded for further proceedings. Second, Chief Justice Roberts joined the "Liberal Minority," which affirmed *Auer* on *stare decisis* grounds but announced a rigorous set of requirements that must be met before extending deference. Third, the Chief Justice joined the "Conservative Minority" to hold that the practical effect of these requirements was to render *Auer* and *Skidmore* deference nearly the same.

Five requirements for *Auer* deference

Chief Justice Roberts joined the "Liberal Minority" to clarify the requirements for *Auer* deference, establishing five strict requirements that must be met:

"Genuine Ambiguity": This is the foundation of Auer deference and the most critical of the new requirements. "[W]e presume that Congress intended for courts to defer to agencies when they interpret

their own ambiguous rules." Accordingly, "the possibility of deference can arise only if a regulation is genuinely ambiguous." This requirement is no mere formality. "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." If the regulation is unambiguous, "a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense."

"And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction. . . . [A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. . . . To make that effort, a court must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to Auer deference." (Citation omitted.)

An examination of the rule or regulation in question through the "traditional" or "standard" tools of construction is vital not only to a finding of genuine ambiguity, but also to the next requirement: Reasonableness: "If genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable.' . . . In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools."

Substantive Expertise: Because "[a]dministrative knowledge and experience largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency,'" "the agency's interpretation must in some way implicate its substantive expertise. . . . [T]he basis for deference ebbs when '[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary' duties or 'fall[s] within the scope of another agency's authority.'"

"Official Agency Position": "[T]he regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views. . . . Of course, the requirement of 'authoritative' action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers. . . . But there are limits. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context."

"Fair and Considered Judgment": "Finally, an agency's reading of a rule must reflect 'fair and considered judgment' to receive Auer deference. . . . That means, we have stated, that a court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalizatio[n] advanced' to 'defend past agency action against attack.' And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties."

Toward a "unified field theory" of agency deference

The "Conservative Minority" preferred to simply overrule *Auer*, applying *Skidmore* deference to agencies' interpretations of their ambiguous regulations. Instead, Chief Justice Roberts wrote a concurring opinion

arguing that, in effect, that is exactly what the majority had done.

The majority concluded that it "has cabined *Auer's* scope in varied and critical ways," so that "[w]hat emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear." Chief Justice Roberts wrote that "the distance between the [majority and minority] is not as great as it may initially appear," and that "the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation." Justice Kavanaugh, joined by Justice Alito, agreed with this first point in a separate concurrence in the judgment, and went a little farther with the second, writing, "If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation." Even Justice Gorsuch's opinion grudgingly conceded that "[t]he majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*. [T]hey will rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading."

It is, of course, counterintuitive that Skidmore deference would be easier to secure than *Auer* deference, given that the former is grounded solely in the "power to persuade" the courts, while the latter is grounded in congressional intent that courts defer to "agency expertise" under some circumstances. To be sure, the requirement for an official agency position in *Kisor* may not always fit the pronouncements to which *Skidmore* deference traditionally applies—such as "opinion letters…[,] policy statements, agency manuals, and enforcement guidelines." But the other *Kisor* requirements—a regulation that is genuinely ambiguous, an agency interpretation of that ambiguity that is reasonable, which represents the fair and considered judgment of the agency and is within the agency's subject-matter expertise—fit well with the traditional requirements for *Skidmore* deference.

There is a strong argument that *Kisor* restricts *Skidmore* just as much as it does *Auer*, and that the *Kisor* requirements apply equally to *Skidmore* deference, minus the "official agency position" requirement. First, the five requirements in *Kisor* neatly parallel *Skidmore's* requirements. Second, a majority of justices in *Kisor* stated as much. Third, because *Auer* and *Skidmore* focus on different (non-overlapping) categories of agency pronouncements that lack the force of law, one would expect the criteria for deference to substantially overlap. Fourth, anything less would create a potential end-run around *Kisor*.

On the chopping block: "Lazy deference" by courts

The majority repeatedly underscores the rigor that it expects lower courts to apply to all of *Auer's* requirements—especially the "genuine ambiguity" and "reasonable construction" requirements. "[A] court *must* exhaust all the 'traditional tools' of construction." It "cannot wave the ambiguity flag just because it found the regulation impenetrable on first read" and "must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation, *in all the ways it would if it had no agency to fall back on*." (Emphases added.)

The *reasons* for concluding a regulation contains a genuine ambiguity—not just the conclusion itself—are necessary to determine whether the agency pronouncement "come[s] within the zone of ambiguity the court has identified after employing all its interpretive tools." The unanimous judgment in *Kisor* reversed and remanded the lower court decision because the lower court did not conduct the required analysis. "It is not enough to casually remark, as the court did here, that '[b]oth parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable.' *Rather, the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning.*" (Emphasis added.)

Many (but certainly not all) decisions that are based on deference to an agency interpretation do little more than cite the agency guideline, announce that the court is affording deference (citing similar cases), and proceed to what is thought to be the harder task of applying the agency interpretation to the dispute. Every decision that does so is called into question by *Kisor*.

Also on the chopping block: Deference to agency interpretations that the agency has specifically said are *not* authoritative

With respect to the requirement that the interpretation represent an agency's "authoritative. . . position," the majority cited with approval ***Exelon Generation Co. v. Local 15, Int'l Brotherhood of Elec. Workers, AFL-CIO***, in which the U.S. Court of Appeals for the **Seventh Circuit** "declin[ed] deference when the agency had itself 'disclaimed the use of the regulatory guides as authoritative'."

Exelon involved **guidance issued by the Nuclear Regulatory Commission**. The guidance specifically stated that "guides are not substitutes for regulations and compliance with them is not required," and that the "NRC staff does not expect any existing licensee to use or commit to using the guidance in this regulatory guide." Moreover, the NRC regulations said, "Except as specifically authorized by the Commission in writing, no interpretations of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized as binding upon the Commission."

Under *Kisor*, any agency guidance that disclaims authoritative use is *ipso facto* ineligible for *Auer* deference, although it arguably might be subject to *Skidmore* deference. This includes a number of agency interpretations in the employment law arena:

- **The *Field Operations Handbook* of the U.S. Department of Labor.** The Foreword says that it "is not used as a device for establishing interpretative policy."

- **DOL Fact Sheets.** Most contain the proviso that "This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations." See, for example, **DOL Fact Sheet 17R**.

- **The *Federal Contract Compliance Manual* of the Office of Federal Contract Compliance**

Programs. The OFCCP's web page where the Manual is found states that the Manual "does not establish substantive agency policy. Therefore, if there is an inconsistency between material in the [Manual] and other OFCCP policies and its implementing regulations, the latter are controlling."

- ***The Casehandling Manual* of the National Labor Relations Board.** Its Introduction states that it "is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board."

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