


DECEMBER 18, 2018 | REGULATORY & GOVERNMENT OVERSIGHT

U.S. Supreme Court to Hear Legal Challenge to Auer Deference Standard

In 1997, the U.S. Supreme Court decided the case of *Auer v. Robbins*, establishing the standard for what has become known as Auer deference (or Seminole Rock Deference from *Bowles v. Seminole Rock and Sand Co.* (1945)). This decision and the standard it set is significant for employers because it gives substantial latitude to federal agencies, like the Department of Labor, to interpret their own ambiguous standards. Specifically, in *Auer*, the Supreme Court held that an Agency's, in this case the Department of Labor, interpretation of its own standards is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" In other words, if it's not clear what is required by the plain language of the standard, the Court will generally defer to the Agency's own reasonable interpretations of its regulations. 

However, the Supreme Court will now have the opportunity to reconsider Auer deference in the case of *Kisor v. Wilkie*. On December 10, 2018, the Court [agreed to review](#) Question 1 of the petition for certiorari, which specifically asks "[w]hether the Court should overrule *Auer* and *Seminole Rock*."

In the *Kisor* case, a Vietnam Veteran, James L. Kisor, challenged the Department of Veterans Affairs' ("the Department") interpretation of its regulation governing the standards for reconsideration of claims for disability benefits. The Board of Veterans' Appeals rejected Mr. Kisor's request for an earlier effective date for his retroactive benefits because he failed to provide documentation that met the Department's interpretation of "relevant" records to support his request. Relying on Auer deference, the U.S. Court of Appeals for the Federal Circuit found the meaning of the term "relevant" in the applicable regulation ambiguous and, although it determined both Mr. Kisor's and the Department's interpretations of the term reasonable, deferred to the Department's interpretation. As a result, it upheld the Department's decision to deny an earlier effective date for Mr. Kisor's disability benefits.

The Supreme Court has had prior chances to take up the issue of Auer deference, including one as recent as March 2018. In *Garco Construction, Inc. v. Speer*, a majority of the Court denied the petition for certiorari, but Justices Thomas and Gorsuch [dissented from that decision](#). In his dissent, Justice Thomas highlighted the main arguments against Auer deference, explaining that it passes the "interpretive judgment" of a judge to the agency and "undermines" the judiciary's check on the branches of government by "ceding the courts' authority to independently interpret and apply legal texts." He also stated that the current standard puts the authority to change the interpretation of a regulation in the hands of the same Agency that promulgated it. This dissent provides some insight into the arguments against maintaining the Auer deference standard that will likely be

made before the Court in *Kisor*, as well as the lens the Court itself may use in reconsidering the standard.

Based on the current make-up of the Supreme Court, there is a good chance it will use this opportunity to limit the current latitude given to an Agency's own interpretation of its regulations. With the confirmation of Brett Kavanaugh to the Court on October 6, 2018, the ideological majority became conservative with Justice Kavanaugh joining Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch. Some of the conservative members of the Supreme Court, such as Justice Thomas, have publicly criticized Auer deference in the past. In addition, the Court's newest member, Justice Kavanaugh, has shown some skepticism toward broad Agency authority and has expressed his belief that Auer deference would eventually be replaced.

The Supreme Court's decision on Auer deference in *Kisor v. Wilkie* could significantly alter the level of deference currently given Agencies in interpreting their own regulations, as well as how they are able to enforce those interpretations against the regulated community, including employers. We will be monitoring the outcome of this case and any change made to the current standard of deference given to Agency interpretations.