CLIENT ALERT

Supreme Court Reaffirms that Deference Is Due to Agency Regulatory Interpretations—Sometimes

Jul.01.2019

When the Supreme Court granted certiorari in *Kisor v. Wilkie,* many observers thought the Court was poised to overturn the longstanding *Auer* deference doctrine, under which courts defer to an agency's reasonable interpretation of its own regulations. But on June 27, 2019, in what was probably the most eagerly anticipated administrative law decision of the past term, the Court declined to do so. In a victory of sorts for the actual petitioner, if not advocates deeply skeptical of *Auer*'s legal underpinnings, the Court remanded Mr. Kisor's challenge to the Department of Veterans Affairs' denial of disability benefits, directing the lower court to reconsider whether its original application of *Auer* deference was appropriate. The Court, however, left the *Auer* doctrine itself intact—albeit with limitations that seem likely to narrow the doctrine's scope and application. How much the the doctrine has been narrowed probably depends on whom you ask: some say a lot; some say maybe not much.

Inasmuch as *Auer* has not been discarded outright, one thing is certain: for businesses regulated by the federal government, the regulating agencies may continue to invoke *Auer* to defend their regulatory actions, and parties will continue to litigate whether deference should apply. And while the limitations on the *Auer* doctrine articulated by the majority may give regulated parties better fodder for arguments against deference, only time will tell what the lower courts will make of *Kisor*, and whether over time we will still be referring to *Auer* deference, or to some less potent "*Kisor*" deference.

The Majority's Renewed Commitment to Limited Application of *Auer*

Justice Kagan wrote the majority opinion, emphasizing the importance of *stare decisis* and the federal courts' history, dating back to the end of the nineteenth century, of deferring to agencies' interpretations of their own regulations, at least when those regulations are ambiguous. Importantly, however, the majority identified a number of limits on the application of *Auer*. First and foremost, the Court held, courts should not afford *Auer* deference unless, after exhausting "all the traditional tools of statutory construction," they conclude that the regulation is "*genuinely* ambiguous." If a clear meaning can be discerned through examination of context, consistency with the statute, prior actions of the agency, or other traditional factors, there is no room to defer to the agency's new interpretation. Second, a court must make an independent inquiry into whether the "character and context" of the agency decision entitle it to weight. This includes considering whether the agency interpretation is "authoritative" or an "official position," as opposed to an ad hoc statement. Justice Kagan also noted the agency's interpretation must be based on its expertise, and must reflect the agency's "fair and considered judgment," not a new or changed position.

Many of these limitations had already been articulated in one form or another in prior cases; Justice Kagan characterized this part of her opinion as "tak[ing] the opportunity to restate, and somewhat expand on, those principles . . . to clear up some mixed messages we have sent." To be sure, though, even if those limitations do not break new ground, their collection and reemphasis in this decision may result in an overall narrowing of the application of the *Auer* deference doctrine. Through the Court's opinion in *Kisor*, the courts have been, in essence, admonished to think twice and harder before they defer to an agency's reading of its previously promulgated regulations, and no doubt many will henceforth do so.

Interestingly, although the headlining issue on which the Court granted certiorari was not decided in Mr. Kisor's favor, he nonetheless achieved a result that may on remand—in combination with the newly formulated *Auer* doctrine—ultimately give him the result he seeks: his veterans benefits. That is because the majority concluded that a remand of Mr. Kisor's benefits claim was necessary because the Federal Circuit failed to deploy all the traditional tools of statutory construction to determine whether the regulation was truly ambiguous before deferring to the VA's new interpretation, and did not assess whether the VA's interpretation is entitled to deference in light of the additional considerations discussed (such as whether the agency's reading is authoritative and considered). So Mr. Kisor gets another day in court and another shot at his VA benefits. Mr. Kisor's sympathizers, if not *Auer*'s most ardent detractors, might take heart that a win, is a win, is a win.

Notable Aspects of the Concurring Opinions

Justice Roberts wrote a separate opinion concurring in both the result (remand to the lower court for reconsideration of whether *Auer* applies here) and some of the majority's reasoning—including, most critically, its conclusion that *Auer* deference remains in play, albeit subject to important limitations. Roberts did not endorse the parts of the majority opinion discussing the long history of *Auer*-type deference and instead focused on stare decisis. He also made a point of noting that the decision does not touch upon the question of whether courts should defer to agencies' interpretation of *statutes—i.e.*, the *Chevron* deference doctrine. This might suggest that Roberts could go a different direction on that important question.

Justice Gorsuch wrote a lengthy but punchy opinion that concurred in the remand, but strongly disagreed regarding the validity of *Auer* deference. Gorsuch opened: "It should have been easy for the Court to say goodbye to *Auer* . . . . Yet today a bare majority flinches, and *Auer* lives on." He castigated the Chief Justice for forcing "litigants and lower courts to jump through needless and perplexing new hoops . . . . All to what end? So that we may pretend to abide by stare decisis?" Gorsuch characterized the doctrine that emerged from the decision as "maimed and enfeebled—in truth, zombified." He went on to explain why he believes *Auer* is at odds with history, the Constitution, and the APA.

In yet another concurrence, Justice Kavanaugh, joined by Justice Alito, stated that he agrees with Gorsuch's conclusion that the *Auer* deference doctrine should be "retired." In what was perhaps a small dig at the Chief Justice by way of an allusion to Roberts' comment at his 2005 confirmation hearing that his job as a judge "is to call balls and strikes," Justice Kavanaugh stated: "Umpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules." Justice Kavanaugh also opined, however, that, as a practical matter, it should not make much of a difference if *Auer* is formally overturned because if, as the majority instructs, courts employ all the traditional tools of regulatory construction before deciding there is ambiguity, regulations will rarely be found to be ambiguous. If Kavanaugh is correct to think that *Auer*, as limited by *Kisor*, is little different from no *Auer*, that could raise some interesting questions about the application of regulations that seemed clear when promulgated to factual situations that were never anticipated. Agencies that historically have been able to persuade courts to defer to their interpretations may find themselves being told by the courts to promulgate new rules through notice-and-comment rulemaking, rather than given leeway to expand on vague regulatory text.

In this regard, Chief Justice Roberts may not be wrong in observing that there is not as much daylight as one might think between the majority and concurring opinions. Justice Kagan summarized the "upshot" of *Kisor* as: "When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. But . . . it often doesn't." The fight going forward will center—as it long has—on when deference to agency interpretations of regulations is warranted. The question is whether, in *Kisor*, the Court has given challengers new or more powerful weapons to bring to that fight.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas A. Lorenzen
Partner – Washington, D.C.
Phone: +1 202.624.2789
Email: tlorenzen@crowell.com

Daniel W. Wolff
Partner – Washington, D.C.
Phone: +1 202.624.2621
Email: dwolff@crowell.com

Amanda Shafer Berman
Counsel – Washington, D.C.
Phone: 202.688.3451
Email: aberman@crowell.com