Legal Update Article

U.S. Supreme Court Hears Oral Argument on Agency-Deference Doctrine

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March 28, 2019

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Should courts defer to agency interpretations of their own regulations so long as the interpretations are reasonable, even if a court believes another reasonable reading of a regulation is the better reading? In *Auer v. Robbins,* 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945), the U.S. Supreme Court said yes. However, the Court heard oral argument on March 27 on whether those cases should be overturned. *Kisor v. Wilkie,* No. 18-15. If the Court overturns *Auer* and *Seminole Rock,* the decision will have a significant impact on many employment cases involving interpretations of agency regulations, particularly those issued by the Department of Labor. The case is definitely one to watch and the decision will affect nearly every federal agency.

The substantive dispute in the case does not address any employment-related regulation, but instead involves whether the Department of Veterans Affairs properly denied medical benefits to a Vietnam War veteran. The U.S. Court of Appeals for the Federal Circuit, following *Auer,* deferred to the Department's interpretation of its own regulations and upheld the denial. The Supreme Court agreed to hear argument as to whether such agency deference should continue.

Critics of *"Auer* deference" argue it encourages agencies to issue vague regulations, use sub-regulatory interpretations of those regulations to make law to avoid the requirements of the Administrative Procedure Act (APA), and then demand that courts defer to the agency's interpretation. Abandoning the *Auer* deference doctrine would be a significant step in curbing the growth of the so-called administrative state. The Court's conservative majority might have the votes to do so. Prior to agreeing to review this case, the late-Justice Antonin Scalia (who authored *Auer)* and Chief Justice John Roberts, along with Justices Samuel Alito, Neil Gorsuch, and Clarence Thomas, have all signaled that *Auer* deference should be revisited, revised, or overturned. With Justice Brett Kavanaugh on the Court, the votes may exist now to overrule *Auer.*

Conversely, proponents of *Auer* deference argue it recognizes that agencies have special expertise that courts simply do not possess. They stress that if any agency has issued an interpretation of its own regulation that is reasonable, courts should not second-guess that interpretation. Because the agency is tasked with setting a national standard, having a uniform national standard established by the agency (as opposed to a hodgepodge of district court decisions with differing interpretations) benefits the regulated community.

During the March 27 oral argument, the Justices wrestled with whether *Auer* should be scrapped altogether or modified to limit its application. Moreover, neither the petitioner nor the respondent in the case is arguing that the *Auer* deference doctrine should be retained in its current form; rather, while the petitioner (the veteran) asserted that the doctrine should be eliminated altogether, the respondent (the government) argued that the doctrine should be modified to limit its application.

The Court's decision is expected by the end of the term in June.

Jackson Lewis will continue to monitor this case and the Supreme Court's subsequent decision. If you have any questions about this or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.

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