Legal Update Article

U.S. Supreme Court Upholds Agency-Deference Under *Auer*, But Weakened Doctrine Emerges

By Jeffrey W. Brecher

June 28, 2019

Meet the Authors

Jeffrey W. Brecher

(Jeff)
Principal and Office Litigation Manager
(631) 247-4652
Jeffrey.Brecher@jacksonlewis.com

Related Services

Employment Litigation
Wage and Hour

By the thinnest of margins, a majority of the U.S. Supreme Court has declined to overrule the so-called *Auer* (or *Seminole Rock)* deference doctrine, under which courts defer to an agency's reasonable interpretation of its own ambiguous regulation. ***Kisor v. Wilkie***, No. 18-15, 2019 U.S. LEXIS 4397 (June 26, 2019).

Auer Deference Doctrine

The doctrine first gained a foothold 20 years ago in *Auer v. Robbins,* 519 U.S. 452 (1997), although its roots can be traced back several decades earlier to *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945).

Generally, under *Auer,* a court should defer to an agency's interpretation of its own ambiguous regulation, so long as that interpretation is reasonable, even if the court believes another reasonable reading of the regulation is the better reading.

The *Auer* doctrine has had a steady stream of critics who argue, among other things, that the doctrine violates separation of powers, as it permits an agency to implement a regulation itself (determining what the law means) and then demand that courts defer to its interpretation.

Some also argue that the doctrine encourages agencies to issue vague regulations, and then use sub-regulatory guidance, not subject to the notice-and-comment requirements of the Administrative Procedure Act (APA), to expand upon those regulations. The *Auer* doctrine has long been derided by those opposed to the growing size and role that federal agencies now play – the so-called administrative state.

Supreme Court Decision

With a swing vote from Chief Justice John Roberts, the *Auer* doctrine survives, although not unscathed and perhaps only a shadow of its former self, resulting in what Justice Neil Gorsuch described as a doctrine "maimed and enfeebled — in truth, zombified."

The Court, in further defining the doctrine's application, has significantly limited it to the point where the Chief Justice noted in his separate concurrence that the "distance" between the majority view (permitting deference in some circumstances) and that of Gorsuch, who would have overruled *Auer* in its entirety, is "not as great as would initially appear."

Significantly, Roberts did not join the full majority opinion, authored by Justice Elena Kagan and joined by Justices Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor. While the majority upheld the *Auer* doctrine on its merits, Roberts instead refused to abandon the doctrine only because of stare decisis.

Gorsuch's opinion, which would have overruled *Auer,* was joined in whole or in part by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh.

As for the facts of the *Kisor* case itself, which involved whether a Vietnam Veteran was properly denied benefits, and which turned on an interpretation of a regulation issued by the Department of Veterans Affairs, all of the Justices concurred that it required remand for further consideration by the U.S. Court of Appeals for the Federal Circuit in light of the further guidance provided by the Court regarding the application of the *Auer* doctrine.

Writing for the majority, Kagan stated that the *Auer* doctrine retains an important role in construing agency regulations, explaining at length its underpinnings: a presumption that Congress would want the agency to play the primary role in resolving regulatory ambiguities. The bulk of the majority opinion, however, is then spent explaining the limitations of the doctrine, resulting in Kagan explaining that the doctrine is "potent in its place but cabined in its scope."

For the doctrine to apply at all, there first must be *genuine* ambiguity in the regulation, an analysis that requires a court to "exhaust all the traditional tools of construction" — the "text, structure, history, and purpose of a regulation, in all of the ways it would if it had no agency to fall back on." In other words, reviewing courts cannot simply "wave the ambiguity flag" and conclude that ambiguity exists only because both sides present reasonable views or because the analysis is a complicated one. This clarification alone may significantly limit the doctrine's application. A reviewing court will have to establish its inability, after using all the tools of statutory construction, to resolve the issue and, instead, conclude a genuine issue of ambiguity exists. Emphasizing this point, Kagan stated, "when we use that term [genuinely ambiguous], we mean it." Call that *Auer* step one.

Even if genuine ambiguity remains, the court then must find the agency's reading to be reasonable — that is, the interpretation offered by the agency must fall within the "zone of ambiguity" the court has identified after attempting, and failing, to resolve that ambiguity. Call this *Auer* step two.

Even then, *Auer* deference may not be appropriate. *Auer* step three requires the reviewing court to "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight," *i.e.,* consider further exceptions to the doctrine's applicability.

While the Supreme Court stated that there is no "exhaustive test" to determine whether an exception should be made, it identified some "markers" that may determine whether deference to the agency's interpretation is appropriate:

1. Whether the interpretation states an official agency position rather than, for example, statements during the speech of a mid-level official, informal memorandum, or comments during a telephone call;
2. Whether the interpretation implicates the agency's substantive expertise, particularly in comparison to the court that is examining the interpretation; and
3. Whether the "agency's reading of a rule … reflect[s] fair and considered judgment," as opposed to "a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack" or "a new interpretation, whether or not introduced in litigation, that creates unfair surprise to regulated parties."

By requiring this extensive analysis before affording an agency interpretation deference, Kagan concluded that the *Auer* deference doctrine is "not quite so tame as some might hope, but not nearly so menacing as they might fear."

***

Bottom line: the *Auer* doctrine survives, but may barely limp on.

If you have any questions about this decision or any other legal issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.