

Earlier this year the Supreme Court issued *Kisor v. Wilkie*, upholding but dramatically narrowing *Auer* deference. The *Auer* doctrine instructs that courts must defer to an agency's construction of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." While purporting to affirm *Auer* deference, the *Kisor* majority held that a court should only defer to an agency's interpretation if there is a genuine ambiguity, the regulatory guidance comes from the appropriate source, and the rationale for the regulation is not litigation driven. The *Kisor* Court also instructed that interpretive issues that fall into a "judge's bailiwick" are not entitled to deference. *Auer* deference, in other words, is no longer very deferential.

Indeed, in a concurrence Chief Justice Roberts explained that after *Kisor*, "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 Gorsuch also concurred, but he criticized the majority's refusal to outright overrule *Auer*. Judge Gorsuch explained that the *Kisor* majority's revised *Auer* guideposts would leave the doctrine "zombified." He predicted that *Kisor* would "force litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve."

A look at two initial decisions applying *Kisor* reflect the Court's tension. Namely, while courts more closely scrutinize agencies' interpretations of their own regulations, *Auer* deference remains intact. And—as Justice Gorsuch predicted—this revised deference regime appears to sometimes require litigants (and their lawyers) to jump through additional hoops.

Court Rejects DOL's "Reinterpretation" of Longstanding "Dual Jobs" Regulation

A federal judge in the Pennsylvania Eastern District Court recently applied *Kisor* in the context of a class action lawsuit brought by servers who worked at P.F. Chang's China Bistro. The servers argued that the restaurant misclassified them as tipped-wage employees (\$2.13/hour) because their "dual jobs" performing tipped and not-tipped work entitled them to full minimum wage (\$7.25/hour). Under decades-old regulatory guidance interpreting the Dual Jobs regulation, the servers could state a claim because they had worked more than 20% of the time in non-tipped jobs.

The restaurant countered, however, that recent Department of Labor ("DOL") guidance "reinterpreting" the Dual Jobs regulation defeated the servers' claims. The court rejected the restaurant's argument, concluding that the DOL's revised interpretation of the Dual Jobs regulation should not receive *Auer* deference. Rebutting the restaurant, the Court explained that the DOL's revised interpretation "contradicts itself" and contradicts "the text of the Dual Jobs regulation" and thus was "unreasonable." Applying another lesson from *Kisor*, the court also explained that the revised regulation did not reflect the DOL's "fair and considered judgment" because the DOL changed course without any articulated reason or explanation. The court repeated *Kisor*'s instruction that "an agency's change in policy position will rarely warrant *Auer* deference."

The Court's reasoning aligns with Chief Justice Roberts' prediction that cases where "deference is warranted" will "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." Indeed, in this case, the Court did not find the DOL's interpretation convincing at all and so the court rejected it. The servers' claims survived.

Opponents of *Auer* deference should applaud the Court's refusal to defer to the DOL's changed guidance. The decision reflects a modest step towards checking the power of the administrative state. In pragmatic terms, that modest step means greater safeguards for regulated individuals and entities—including notice and public participation in the rulemaking and legislative process.

Court Affirms Deference to SEC's Interpretation of "Suspicious Activity" Regulation

In a case from the Southern District of New York applying *Kisor*, the SEC successfully received *Auer* deference for its interpretation of "Rule 17a-8." That regulation requires broker-dealers to file suspicious activity reports for any number of "transactions" that may involve "illegal activity." The broker-dealer argued that the SEC's interpretation of its own Suspicious Activity regulation was "unreasonable" because it impermissibly expanded the regulation as written. In an opinion issued before *Kisor*, the court rejected that argument, repeating the then-settled rule that an agency's interpretation of its own regulation should receive deference unless it is "plainly erroneous or inconsistent with the regulation." Applying that deference, the court reasoned that the SEC's broad interpretation of the Suspicious Activity regulation as advanced in its formal adjudication over the years was "reasonable."

After *Kisor*, the broker-dealer asked the court to reconsider its earlier deference. Despite its deferential earlier opinion, the court declined to reverse its decision upholding the SEC's interpretation. The court repeated *Kisor's* holding that "*Auer* deference retains an important role in construing agency regulations," and thus concluded that because *Kisor* affirmed *Auer*, it would not reverse its earlier opinion. Most notably, the court's analysis denying the motion to reconsider emphasized that its earlier decision rested "principally" on the regulation's plain text, and thus its earlier opinion squared with *Kisor*.

The Court's decision deferring to the agency's interpretation of the regulation arguably does not square with the *Kisor* majority's requirement that a regulation be "genuinely ambiguous" to receive deference. On the other hand, the Court's holding pays fidelity to the actual holding in *Kisor*: that *Auer* deference remains intact.

What Does this Mean for Agency Deference?

These early opinions applying *Kisor* provide several important takeaways. Most importantly, courts no longer follow the bright-line rule that controlled agency interpretation after the Court's early decision in *Seminole Rock*. It is not the law that a court must defer to an agency regulatory interpretation unless it is "plainly erroneous or inconsistent with the regulation." Though the bright-line rule is gone, courts apply the framework that replaced it selectively—inviting room for advocates to frame issues and emphasize favorable facts.

A litigant hoping to capitalize on *Kisor* should pay careful attention to the majority's reasoning without forgetting the actual holding. In practice, that means that *Kisor's* guideposts remain just that—*limits* on *Auer* deference but not reason to assume *Auer* is irrelevant. As the Southern District of New York's decision makes clear, *Auer* deference remains controlling law. And *Kisor's* guidepost will not always mean the doctrine is completely "maimed and enfeebled," as Justice Gorsuch predicted.

It follows that a careful litigant will frame any arguments about *Auer* deference by thoughtfully emphasizing the majority's reasoning. In particular, a litigant should focus on testing the agency's authority to interpret a particular regulation *at all*. Justice Kagan, writing for the majority, instructed that a court may not "wave the ambiguity flag" unless it exhausts "traditional tools" of construction. The cases discussed above punctuate the need for a litigant hoping to avoid the agency-friendly *Auer* deference standard to make the sometimes "taxing inquiry" of resolving a regulation's unambiguous meaning.

Assuming some ambiguity exists, a litigant may then avoid *Auer* deference by establishing that the agency's regulation is not "reasonable." *Kisor* emphasized that an agency's interpretation may not be reasonable: "That is a requirement an agency can fail." And, even then, an agency's reasonable interpretation might not receive "controlling weight" because the interpretation does not reflect the agency's "authoritative" interpretation or it does not "implicate" the agency's "substantive expertise." Finally, the agency cannot advance a *post hoc* interpretation—as illustrated by the DOJ's attempt to rewrite regulations in the context of the lawsuit by servers suing for their unpaid wages.

Auer deference remains a significant tool for an agency to receive leeway in saying what its own rules mean. But it often does not apply. Regulated businesses and individuals should carefully understand *Kisor's* important limits, but also appreciate that *Auer* deference is not yet extinct.

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