Minnesota Department of Employment & Economic Development

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Small Business Notes

In this issue:

U.S. Supreme Court to Address Legal Precedent on Deference Due by Courts to a Regulatory Agency's Interpretation of Its Own Ambiguous Regulations

The U.S. Supreme Court's decisions in *Auer v. Robbins,* 519 U.S. 452 (1997), and *Bowles v. Seminole Rock and Sand Co.,* 325 U.S. 410 (1945) require courts to defer to an administrative agency's reasonable interpretation of its own ambiguous regulation.

On December 10, 2018, the U.S. Supreme Court granted *certiorari* in *James L. Kisor v. Peter O'Rourke, Acting Secretary of Veterans Affairs* (Docket No. 18-15) involving two differing interpretations of the word "relevant" in the context of award of retroactive veterans benefits for which "relevant" evidence of service had to be provided. The Veterans Administration denied Kisor, a Marine veteran, retroactive disability benefits, and when the Court of Appeals for Veterans Claims affirmed that decision noting that the documents presented by Kisor to demonstrate his disability were not relevant, Kisor took an appeals to the U.S. Court of Appeals for the Federal Circuit. That court concluded that both Kisor and the Veterans Administration had offered reasonable constructions of the term "relevant" as used in the Veterans Administration regulations. The Circuit Court then applied the *Auer* deference explaining that "…an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted."

The questions for consideration by the Supreme Court are whether *Auer* (and with it *Seminole Rock*) should be overruled or, if it is retained, whether interpretations should first be subject to some substantive canons of construction.

The issues go beyond the facts of the *Kisor* case. In its *amicus* brief in support of petitioner Kisor the Chamber of Commerce of the United States noted that "Given the breadth of government regulations, virtually every Chamber member has at least some portions of its business regulated by federal agencies" and that *Auer* deference harms the business community "by encouraging agencies to adopt vague regulations that they can later interpret however they see fit."

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Regulatory uncertainty, the Chamber's brief continued, as well as the costs associated of hiring lawyers and lobbyists to "determine the fairest reading of vague regulations" or to "seek guidance from the agency."

Likewise, and significantly, nineteen states submitted an *amicus* brief in support Kisor arguing that *Bowles v. Seminole Rock and Sand* should be overruled with *Auer* because its deference obligation imposes four hardships distinctively on the states:

- It expands the federal government's power to preempt state law;
- It undermines states' political protections that appear in the U.S. Constitution;
- It upsets the balance of federal-state power by decreasing state's political checks on federal power through operation of the federal Administrative Procedure Act;
- It permits agencies retroactively to change conditions controlling states' receipt of federal funds under Spending Clause legislation.

As of January 5, 2019, no date had yet been set for oral argument.

U.S. Department of Labor (DOL) Opinion Letter: Rate of Pay is An "Actual Fact" Not An Arbitrary Choice When Computing An Employee's Overtime Pay

On December 21, 2018, the Wage and Hour Division of the DOL provided an opinion letter (FLSA 2018-28) to a business that had requested an opinion on Fair Labor Standards Act (FLSA) compliance of its compensation plan which paid employees an average hourly rate of pay that could vary from work week to workweek. The request addressed compliance on minimum wage and overtime pay calculations.

The business provides home health aide services to its clients in their homes. In the course of service delivery some employees travel to more than one client during the course of a workday. The business noted that to calculate weekly pay for an employee it multiplies the employee's contact time with clients by the employee's hourly rate of pay. The business then divides that number by the employee's total hours worked—a number including both client contact time and travel time. The business guarantees that the result meets both federal and state minimum wage requirements.

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In its request the business stated that a "typical standard rate of pay is $10 per hour with a client including travel time" and if any employees works over 40 hours (including total paid hours and travel time) in any work week "they are paid time and a half for all time over 40 hours at a rate of $10."

The DOL's opinion stated that such a compensation arrangement met FLSA minimum wage requirements: "Although an employee's average hourly pay rate may vary from workweek to workweek, the employer always ensures that the average hourly rate of pay exceeds the FLSA's minimum wage requirement for all hours worked"

The DOL's opinion stated, however, that the business' compensation plan "may not comply with the FLSA's overtime requirements" explaining that "If the employer always assumes a regular rate of pay of $10 per hour when calculating overtime due, then the employer will not pay all overtime due to employees whose actual regular rate of pay exceeds $10 per hour…Neither an employer nor an employee may arbitrarily choose the regular rate of pay; it is an 'actual fact' based on 'mathematical computation." The opinion went on to note that the plan does meet the FLSA overtime requirements for employees whose actual regular rates of pay are less than $10 per hour since an employer is free to pay overtime in an amount greater than the statutorily required amount.

Some Emerging Technologies May Soon Be Subject to Export Control Regulations

The U.S. Department of Commerce Bureau of Industry and Security is presently reviewing comments received to its Advanced Notice of Proposed Rulemaking (ANPR) that would, in the interest of national security, impose export licensing control on certain new "emerging technologies" that currently can be exported to most countries without a license. (The original ANPR was published on November 19, 2018 with an extension for comments to January 10, 2019.)

Such proposed rules would have a substantial affect not only on finished product export but also on foreign investment in, or acquisition of, U.S. manufacturers of those products as well as joint ventures by U.S. firms with foreign firms.

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Since many small businesses are involved in the development of new technologies as both manufacturers of finished products and as developers and manufacturers of upstream components, it is worth noting the technologies which the Bureau has identified as being possibly added to the Commerce control List and therefore requiring an export license.

- Biotechnology, to include nanobiology, synthetic biology, genetic engineering, neurotechnology.
- Artificial intelligence and machine learning technologies.
- Position, Navigation, Timing technology
- Microprocessor technology.
- Memory centric logic technology for advanced computing.
- Data analytics technology.
- Quantum information and sensing technology.
- Logistics technology to include distribution based logistics systems.
- Additive manufacturing (for example 3D printing).
- Robotics and robot control systems.
- Brain-computer interfaces.
- Hypersonic flight technologies including control and protection systems.
- Advanced materials technology, functional textiles.
- Advanced surveillance technologies including facial and voice recognition systems.

There is no date for the publication of a final rule. Many of the comments received stressed the need for better definitions, understanding of the context of such technologies, including what is available now in foreign countries, and avoiding unintended consequences of research and development limitation.

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Some Federal Contractors May Lose Small Business Status Under New Law if U.S. Small Business Administration (SBA) Delays Rulemaking

On December 17, 2018, the President signed the "Small Business Runway Extension Act of 2018" (P.L. 115-324) which extends from three years to five years the time for determining if a contractor continues to qualify as a small business under SBA's revenue based size standards. Since the revenue threshold for small business status is made on the basis of the average revenue over the computation period, increasing the period from three years to five could have the effect of lowering the average revenue amount for businesses which had lower revenues in years for and five.

The new law itself is silent on the mechanism for SBA implementation leading many small businesses to believe that, absent SBA rules or guidance to the contrary, the new law and its standards were immediately effective. But on December 21, 2018, the SBA did issue an Information Notice stating that the Runway Extension Act "…is not presently effective and is not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process."

Since federal rulemaking can be a lengthy process, contractors in the bidding processes should still use the current three year averaging of revenue.

EMPLOYMENT AND ECONOMIC DEVELOPMENT

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