SHAWE ROSENTHAL LLP

E-UPDATE

June 25, 2019

RECENT DEVELOPMENTS

Supreme Court Upholds Deference to Agency Interpretation of Regulations

In a case with widespread impact across all legal areas, including labor and employment, the U.S. Supreme Court upheld the *Auer* doctrine, under which courts give deference to an agency's reasonable reading of its own ambiguous regulations.

Background of the Case. In *Kisor v. Wilkie*, a Vietnam war vet first sought disability benefits in 1982, but was denied. He moved to reopen his claim in 2006. This time, he was granted benefits, but only from the date of his motion to reopen. The Board of Veterans' Appeals affirmed the retroactivity decision based on its interpretation of a regulation governing such claims. On appeal, the decision was affirmed by a federal court applying the *Auer* doctrine. The vet appealed, asking the Supreme Court to overturn the doctrine in its entirety.

The Court's Decision. The Supreme Court declined to overturn the *Auer* doctrine, observing that it is "rooted in a presumption ... that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities." In so holding, the Supreme Court articulated a number of principles that apply to the use of the *Auer* doctrine.

First, *Auer* deference is not afforded until a court has exhausted all the "traditional tools" of construction and still found the regulation to be ambiguous. These tools include the text, structure, history and purpose of a regulation. Then, if genuine ambiguity remains, "the agency's reading must fall within the bounds of reasonable interpretation." (Internal quotations omitted).

Next, the "court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." Of relevance to this determination are certain "markers" for assessing when *Auer* deference is appropriate.

- The agency's interpretation must be an authoritative or official position, and not some *ad hoc* statement.
- The agency's interpretation must implicate its substantive expertise, within its ordinary duties and not within the scope of another agency's authority.
- The agency's interpretation must reflect "fair and considered judgment." This is more than a merely "convenient litigating position" or a "*post hoc* rationalization[n]" of the agency's past actions. It also cannot be a new interpretation that creates "unfair surprise" to the parties – such as when an agency's new interpretation conflicts with a prior one.

In this specific case, however, the Supreme Court remanded the case back to the federal circuit court for two reasons. First, the federal circuit court failed to apply the traditional tools of construction

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before declaring the regulation to be ambiguous. Then it further assumed that *Auer* deference applies in the event of genuine ambiguity, rather than assessing whether the interpretation is of the type that Congress wanted to receive deference.

Lessons Learned. This case is significant in that it reinforces the fact that deference may continue to be given to an agency's interpretation of its own ambiguous regulations. Of particular importance, it also sets forth the steps by which a court should analyze whether *Auer* deference should be accorded to an agency's regulation.

Federal Hate Crimes Act May Apply to Workplace Misconduct

In a case of first impression throughout the U.S., the U.S. Court of Appeals for the Fourth Circuit (which covers Maryland, Virginia, West Virginia, and the Carolinas) held that the Federal Hate Crimes Prevention Act of 2009 may apply to violent crime that interferes with ongoing economic or commercial activity in the workplace.

Background of the Case. In *U.S. v. Hill*, an employee repeatedly punched another employee in the face without provocation, admittedly because the victim was gay. The employee was then indicted under the Hate Crimes Act, which was enacted to strengthen federal efforts to combat crimes targeting victims based on certain protected characteristics. Because the Hate Crimes Act was enacted pursuant to Congress' authority to regulate commerce under the Commerce Clause of the Constitution, it prohibits conduct that, in relevant part, "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct."

The employee argued that the application of the Hate Crimes Act to his assault of a co-worker was unconstitutional. The federal district court found that the Hate Crimes Act exceeded Congress' Commerce Clause authority, because, as applied to a workplace assault, it did not regulate activity substantially affecting interstate commerce.

The Court's Ruling. The Fourth Circuit, however, disagreed with the district court, instead finding that Congress had the power to proscribe violent conduct interfering with or affecting commerce, even when such impact is minimal. In this particular case, by "interfering" with the co-worker's packing and shipping activities, which were undeniably economic, the employee's conduct "substantially affect[ed] interstate commerce."

Lessons Learned. This ruling offers an interesting and unusual means of addressing discrimination in the workplace, although it is an option that lies in the hands of the government and not the employer.

Another NLRB Advice Memo on Handbook Rules

The National Labor Relations Board released yet another batch of Advice Memoranda this month. Advice Memoranda contain the recommendations of the Office of General Counsel to the Board on specific issues. Two of the three memos were originally prepared years ago, one on arbitration agreements, which has been subject to further developments since that time (as we discussed in a recent blog post, "Arbitration Agreement May Not Restrict Access to NLRB Processes"), and the other on the limited interest area of project labor agreements in the mining industry. The third and

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most recent, however, offers further guidance on handbook rules – a topic of perpetual interest to employers, both union and non-union alike.

In *Coastal Industries, Inc. d/b/a Coastal Shower Doors*, the OGC applied the *Boeing* analysis to several handbook rules and policies. As the Board set forth in the 2017 case, *The Boeing Company* rules (which we discussed in detail in a December 2017 E-lert) are divided into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful. In the current memo, the OGC found the following rules to be lawful Category 1 rules:

- Conduct rules. The rules prohibited various types of behavior, including:
  - "Obtaining unauthorized confidential information pertaining to clients or employees." Because the rule addresses the accessing or obtaining of confidential information, it does not affect employees' rights under Section 7 to discuss their terms and conditions of employment.
  - "Rude, discourteous or unbusinesslike behavior; creating a disturbance on Company premises or creating discord with clients or fellow employees." The OGC found the first part of this rule to be a lawful civility policy, of the type that has previously been approved by the Board. Requiring criticism of fellow employees or supervisors to be civil does not affect the protected right to criticize. As for the second part of the rule, the OGC notes that disruptive behavior rules, such as those that prohibited roughhousing, fighting, dangerous activities, or other bad behavior, are typically lawful.
  - "Unbusiness-like conduct, on or off Company premises, which adversely affects the Company services, property, reputation or goodwill in the community, or interferes with work." The OGC found the rule to serve the employer's legitimate interest in maintaining discipline and productivity on-duty, as well as prohibiting offensive or inappropriate conduct off-duty, which is mostly unprotected.
  - "Disparaging, abusive, profane or offensive language" and "illegal activities." The OGC concluded that the rule is combination of lawful civility policies and on-duty misconduct policies.
- Solicitation rule. The rule stated that solicitation activities during non-working time must be "in good taste." The OGC found this to be a lawful place/time/method restriction, similar to the civility rule referenced above. It does not prohibit all such protected discussions, but simply those that are inappropriate or unacceptable.
- Electronic assets rule. The rule prohibited employees from using company "electronic assets" to access social media accounts. The OGC refused to extend the Board's ruling in *Purple Communications*, which permits employees to use company email systems to engage in protected communications during nonworking time, to any other electronic communications system. Thus the rule was deemed lawful.
- Social media rule, in part. The following provisions were found to be lawful:
  - A prohibition on postings "that reasonably could be viewed as disparaging to employees." The OGC found this to be a lawful civility rule, as the Board has found a distinction between what employees can say about their fellow employees (not protected) and about their employer (protected).

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- A requirement to self-identify as an employee when posting about the company. The OGC found that this served the legitimate interest of having only authorized individuals speak on behalf of the company.

The OGC found the following to be unlawful Category 2 rules:

- Confidentiality rule. The rule stated that "all information gathered by, retained or generated by the Company is confidential." The rule's definition of confidential information was found to be overbroad, as it could easily encompass information such as wages and working conditions, about which employees have a protected right to discuss. Even though the rule specifically stated that it was not intended to infringe upon Section 7 rights, the OGC found this provision insufficient to render the rule lawful as it did not indicate that employees have the right to discuss wages and working conditions.
- Social media rule, in part. The following provisions were found to be unlawful:
  - "Employees should refrain from posting derogatory information about the Company on [social media] sites and proceed with any grievances or complaints through the normal channels." The OGC found this to be overbroad, as criticism of the employer generally is a protected activity (although an employer may properly ban criticism of the employer's products or services). In addition, the requirement to pursue grievances through normal channels could chill employees' protected right to band together or seek the assistance of a union. Again, an NLRA disclaimer could not save this rule, given the clear violations of the Act.
  - A prohibition on posting any company phone number. The OGC found this unlawfully prevented employees from soliciting customers and/or the public to call the employer in support of protected activities. The OGC also noted that the company's phone number was publicly available on its own website.
- Cell phone rule. The rule prohibited personal cell phone use "during working hours." However, employees have a protected right to communicate, including through such devices, during non-working time. The use of the term "working hours" was too broad, as it encompasses both working time and non-working time.

Update on Minimum Wage Increases in the Mid-Atlantic Region

Although the federal minimum wage remains $7.25, many states and local jurisdictions have enacted increases in the minimum wage. A number of those increases are scheduled to take place on July 1, 2019, including the following throughout the Mid-Atlantic region:

- Montgomery County, Maryland: $13.00 per hour (from $12.25) for employers with more than 50 employees and $12.50 per hour (from ($12.00) for employers with 50 or fewer employees. The law also sets a tipped wage for tipped employees that, together with any tip credit, meets the minimum wage. Employers are responsible for making up any shortfall. The tipped wage remains at $4.00 per hour. Montgomery County employers must also post the newly updated Minimum Wage and Overtime Law – Montgomery County notice.

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- Prince George's County, Maryland: Although there is no increase beyond the current $11.50 per hour at this time, employers in the County must post the newly updated Minimum Wage and Overtime Law – Prince George's County notice.

- District of Columbia: $14.00 per hour (from $13.25). The tipped wage will increase to $4.45 per hour (from $3.89). The required minimum wage poster has not changed.

- New Jersey: $10.00 per hour. Agricultural, seasonal, and small (fewer than 6 employees) employers continue to be subject to the old rate of $8.85 per hour. The tipped wage rate will increase to $2.63 (from $2.10). There is also a newly updated minimum wage poster that should be displayed in the workplace.

TAKE NOTE

Obesity Alone Is Not A Disability. The U.S. Court of Appeals for the Seventh Circuit held that extreme obesity, without evidence of an underlying physiological condition, does not meet the definition of a physical impairment and therefore is not considered a disability under the Americans with Disabilities Act.

In *Richardson v. Chicago Transit Authority*, due to the employee's extreme obesity, he was deemed unsafe to work in his position as a bus driver. He was eventually terminated after a two-year leave. He then sued, alleging violations of the ADA.

The Seventh Circuit found that the driver was unprotected by the ADA because the implementing regulations state that obesity is an impairment only if it results from an underlying "physiological disorder or condition," which the employee failed to show. In so holding, the Seventh Circuit joined the Second, Sixth and Eighth Circuits. The Seventh Circuit rejected arguments from medical organizations that obesity is in and of itself a physiological disorder, noting that "The ADA is an antidiscrimination – not a public health – statute, and Congress's desires as it relates to the ADA do not necessarily align with those of the medical community."

The Seventh Circuit also rejected the employee's argument that he was perceived as disabled in violation of the ADA. While he was subjected to adverse employment actions because of the physical characteristic of his weight, there was no evidence that anyone perceived that his obesity was caused by a physiological disorder.

We note, however, that the EEOC takes a different approach, stating as follows in its Compliance Manual: "[B]eing overweight, in and of itself, is not generally an impairment… On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment. In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment." Thus, employers should be aware that the EEOC does not require an underlying physiological disorder in order for obesity to be considered an impairment and thereby the obese employee to be disabled.

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Work Restrictions Don't Necessarily Amount to a Disability. The U.S. Court of Appeals for the Sixth Circuit held that the fact an employee had work restrictions that prevented his transfer did not mean that he was disabled under the Americans with Disabilities Act.

In *Booth v. Nissan North America, Inc.*, an employee suffered an injury resulting in work restrictions, but those restrictions did not affect his ability to perform his job duties, which he continued to do for another decade. He then applied for a transfer, but those restrictions conflicted with the requirements of the new position and he was denied the transfer. In the meantime, his current job was restructured to add new duties that were also in conflict with his restrictions. The employee's doctor then reevaluated him and modified the restrictions such that he could perform all the duties. He then sued, alleging violations of the ADA.

The Sixth Circuit found that the denial of transfer claim was untimely, as he failed to file a charge of discrimination with the Equal Employment Opportunity Commission within 300 days of the denial decision. Although the employee noted that the denial had been reiterated within that 300-day period, the Sixth Circuit found that the 300-day period ran from the date of the final decision, and not any date of subsequent re-explanation of the decision.

In addition, the Sixth Circuit also disposed of the discrimination claim. If an employee claims that he is substantially limited in the major life activity of working, he must show that his impairment limits his ability to "perform a class of jobs or broad range of jobs." The Sixth Circuit held that "simply having a work restriction does not automatically render one disabled…nor does being unable to perform a discrete task or a specific job."

Employer Need Not Provide Notice and Opportunity for Post-Discharge Bargaining. The National Labor Relations Board held that an employer had no obligation to give the union notice and the opportunity to bargain before discharging employees under existing disciplinary standards after a union election but before the union was certified.

In *Oberthur Technologies of America Corp.*, the employees were discharged after the union won an election but before it was certified by the Board. Under the Board's precedent set forth in *Fresno Bee*, an employer does not violate the Act when it imposes discipline pursuant to pre-existing disciplinary policies, even if some discretion as to the application of the policies exists. The employer is required, however, to bargain post-discharge with the union upon the union's request. In this case, the union never requested such bargaining, and therefore the employer did not incur a duty to bargain and did not refuse to bargain in violation of the Act.

Third Party Agreement Incorporated into a Bargaining Proposal Must Be Provided to Union. The U.S. Circuit Court for the District of Columbia held that an employer must provide an unredacted copy of an agreement with a third party where such agreement was incorporated into the employer's bargaining proposal.

In *DirectSat USA LLC v. NLRB*, the employer was an installation contractor with DirectTV. An issue arose during collective bargaining negotiations concerning whether future work other than installation and service of satellite television services would constitute bargaining unit work. In a proposal, the employer stated that any new work arising during the term of the collective bargaining agreement would not constitute bargaining unit work unless it was "pursuant to its Home Service

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Provider agreement with DirectTV." The employer provided a heavily redacted copy of the agreement to the union, despite the union's repeated request for the entire unredacted agreement.

The D.C. Circuit ordered the employer to provide an unredacted copy of the agreement. Although the agreement was not presumptively relevant as it did not pertain directly to the bargaining unit employees, the D.C. Circuit found that it was relevant to the union's performance of its duties as the bargaining representative, as it was necessary for the union to evaluate the extent of the work covered by the proposal.

Fourth Circuit Suggests Transfer Is Not Required Reasonable Accommodation. In a brief and non-precedential opinion, the U.S. Court of Appeals for the Fourth Circuit ruled that an employer is "not required to find another job for an employee who is not qualified for the job he…was doing."

This position, which was set forth in *Stansbury v. City of Annapolis*, stands in stark contrast to that of the Equal Employment Opportunity Commission and the Maryland Court of Appeals, both of which have held that, under the Americans with Disabilities Act and analogous state law, respectively, if an employee is incapable of performing the essential job functions of the original job because of his disabilities, he is entitled to a transfer to an open position as a reasonable accommodation. This transfer, according to the EEOC and the Maryland court, would be on a non-competitive basis, as long as the employee is qualified for the new position, with or without a reasonable accommodation. Other federal circuits are split on the issue.

Although employers in the Fourth Circuit generally may view this as good news, those in Maryland will continue to be bound by the more stringent reasonable accommodation requirements under state law.

New York Vastly Expands Workplace Harassment and Discrimination Protections. In a flurry of activity, the New York state legislature has passed, and the Governor has indicated that he will sign, a number of new measures aimed at expanding protections against harassment and discrimination in the workplace, as follows:

- **Senate Bill 6577**. This bill amends the New York State Human Rights Law in a number of significant ways, including the following:
    - The law will now apply to all employers, regardless of size.
    - Prohibitions on harassment are specifically set forth in the law, rather than being implied.
    - In contrast to well-established federal law, harassment need not be "severe or pervasive" in order to serve as the basis of a legal claim. Rather, the employee need only show that he or she was subjected to "inferior terms, conditions or privileges of employment."
    - The *Faragher-Ellerth* defense, by which employers can avoid liability for co-worker harassment if they attempted to prevent and promptly correct any harassment and the employee unreasonably failed to take advantage of the preventive or corrective measures, is eliminated. Rather, liability is avoided only if "the harassing conduct does not rise above the level of what a reasonable victim of discrimination would consider petty slights or trivial inconveniences."

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    - Employees can now recover punitive damages and attorney's fees against private employers.
    - The time period for reporting claims of discrimination or harassment to the New York State Division of Human rights is extended from one year to three years.
    - Non-employees, such as contractors, vendors, consultants and other service providers, can sue the company for discrimination or harassment.
    - Non-disclosure provisions in settlement/separation agreements resolving discrimination or harassment claims are barred unless they are the "preference of the complainant." This requires that the provision be in plain English or the primary language of the complainant. In addition, the complainant must be given 21 days to consider the provision, and seven days in which to revoke any signed agreement containing such a provision.
- **Senate Bill 6549**. Employers will be prevented from requesting, either orally or in writing, or relying upon an applicant's wage or salary history in determining whether to offer employment or the salary for the position.
- **Senate Bill 5248**. The bill requires equal pay for "substantially similar work" and prohibits pay differentials based on age, race, creed, color, national origin, sexual orientation, gender identity and expression, military status, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status.
- **Senate Bill 6209**. Following in the footsteps of the New York City Council, the bill prohibits race discrimination based on natural hairstyles. The definition of "race" is amended to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles" (e.g. braids, locks, and twists).

NEWS AND EVENTS

Save the Date. We hope you will join us for our biennial client conference, which will be held on Friday, October 4, 2019 at Oriole Park at Camden Yards. More information will be forthcoming this summer.

Webinar - Shawe Rosenthal is pleased to offer our clients the opportunity to participate in a *free 60-minute* webinar: **"Mental Health in the Workplace: Identifying Issues and Accommodating Employees"** on Tuesday, July 11, 2019, at 11:00 a.m. EST. This webinar is being presented by the Employment Law Alliance, of which we are the Maryland member firm. The webcast will explore practical ways that human resource professionals can identify warning signs of mental illness and provide support and accommodations to employees within the boundaries of the law. Additionally, you will learn about possible challenges with employee health insurance as you seek to work with employees who are struggling with mental health issues. You can click here to register.

Honor. The Employment Law Alliance, a global alliance of firms practicing employment and labor law of which Shawe Rosenthal is the Maryland member, has been named to Chambers and Partners' " Employment: the Elite – Global-wide" list. The ELA is one of only two law firm networks in the world to receive this "Band 1" distinction. For many years, Shawe Rosenthal has also been named as a top "Band 1" firm for Maryland in Chambers USA, and seven partners are also recognized. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients.

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Victory. Gary L. Simpler and Chad M. Horton assisted a spirits company in winning a union election. The members of the voting unit rejected union representation by a vote of 27 to 19.

Presentation and Media. Lindsey A. White moderated a panel discussion, "Marijuana in the Workplace," at the Maryland State Bar Association's annual conference. The panel discussion was featured, with quotes from Lindsey, in a June 14, 2019 *Daily Record* article by Heather Cobun, "Marijuana decriminalization sparks confusion in MD workplaces."

Media. Fiona W. Ong was quoted in a June 11, 2019 article on businessinsurance.com by July Greenwald, "Ruling alerts employers to make EEOC, lawsuit comparisons quickly."

Maryland Chamber Task Force. Lindsey A. White will be participating on a task force organized by the Maryland Chamber of Commerce to discuss the challenges of hiring ex-offenders and to help guide legislation moving forward. Other participants include the Jobs Opportunity Task Force, Johns Hopkins University, the Maryland Chamber of Commerce, MedStar Health, NAACP, Vehicles for Change, Senator Cory McCray (D) and Delegate Christopher Adams (R).

TOP TIP: Make Sure to Define Your FMLA Year

As employers with 50 or more employees know, the Family and Medical Leave Act provides eligible employees with 12 weeks of leave in a 12-month period. The FMLA permits the employer to define the 12-month period. But what a recent case highlights is that if the employer does not do so, the employee is entitled to the 12-month period that is the most favorable to him or her.

Under the FMLA, the employer may choose among the following 12-month options:

- A calendar year
- Any fixed 12-month period, like a fiscal year
- A 12-month period measured forward from the first date of leave
- A "rolling" 12-month period looking backward from the first day of leave

The Department of Labor has created a fact sheet that sets out these options, with examples of how they work. Of the four, the rolling backward measurement is the one that most employers choose, as it prevents the "stacking" of leave available under other methods (e.g. under the calendar year method, the employee may take the last 12 weeks of the year off and then the first 12 weeks of the next year, which is a new FMLA 12-month period, for a total of 24 consecutive weeks). Notably, as the DOL fact sheet states: "If an employer fails to select one of the 12-month period methods discussed above, the employer must use the 12-month period method that is the most beneficial to the employee."

In *Stahl v. Susque View Home Nursing and Rehabilitation Center*, the employee took more than 12 weeks of leave in the latter half of 2017. She then sought an extension of leave through mid-January of 2018, but her request was denied. She was then terminated when she did not return on December 30. It appears that there was some confusion about what 12-month period should apply, and the federal district court "inferred" that the calendar year was being used by the nursing home. Under that method, the employee was entitled to a new 12-week bank of FMLA leave on January 1, 2018, and therefore she should have been granted the requested leave.

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So employers should ensure that their FMLA policies define which 12-month period applies. If an employer has not yet chosen a method of calculating the 12-month period, or if it wishes to change the period being used, it must give 60-days' notice of the new 12-month period – and during that 60 days, the employee will be entitled to the "most beneficial" calculation!

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Penalizing the Employer for the EEOC's Mistake? by Fiona W. Ong, June 25, 2019.
- Arbitration Agreement May Not Restrict Access to NLRB Processes by Chad M. Horton, June 19, 2019 (Selected as "noteworthy" by the Employment Law Daily).
- NLRB Limits Union Access Rights by Chad M. Horton, June 18, 2019.
- Hey – New Dads Need Leave Too! by Fiona W. Ong, June 12, 2019 (Selected as "noteworthy" by the Employment Law Daily).
- U.S. Supreme Court Finds Charge-Filing Requirement to be Procedural, Not Jurisdictional by Fiona W. Ong, June 3, 2019.

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