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SUPREME COURT REBUFFS LABOR DEPARTMENT

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Any reader of this article is probably well aware of one of the most commonly referenced federal statutes, namely, The Fair Labor Standards Act (29 U.S. Code §201, *et seq.*) (the "FLSA"). This statute deals essentially with setting forth minimum wage, the requirement of a customary 40 hour work week, and a time and a half pay provision for work in excess of the 40 hour time period. However, under FLSA Section 213, Congress has set forth a substantial number of exemptions to the maximum hour and overtime provisions, one of which is an "outside salesman." That term is not specifically defined in the statute and authority is given to the Secretary of Labor to promulgate appropriate regulations. However, FLSA Section 203(k) defines a "sale" to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." The Department of Labor had promulgated regulations indicating that an employee is an "outside salesman" when that employee "in some sense, has made sales."

The pharmaceutical industry maintains a sales format of using "pharmaceutical sales representatives," also referred to as "detailers," for purposes of contacting physicians to inform them about products in the hope that the physicians will ultimately prescribe particular medicines which the detailers represented. The detailers do not, as such, make any sales to retail drug stores, physicians or others, as only a physician is authorized to issue a prescription.

Against this background, the United States Supreme Court in *Christopher v. SmithKline Beecham Corp.* (decided June 18, 2012) examined the question of whether these pharmaceutical representatives were or were not "outside salesmen." Christopher and others had filed suit contending that they were not covered under the FLSA exemption as outside salesmen because they did not make any sales and, therefore, were entitled to the overtime provisions of the FLSA. Although the Supreme Court upheld both the District Court for the District of Arizona and the Ninth Circuit Court of Appeals' affirmance that the pharmaceutical representatives or "detailers" were, in fact, outside salesmen and, therefore, exempt from the overtime provisions of the FLSA, what makes this case particularly relevant, not just for the pharmaceutical industry, but for any person exposed to governmental regulations, is that during the course of the legal proceedings, the Department of Labor filed an *amicus* (friend of court) brief in both the Ninth Circuit and a companion case in the Second Circuit in which it espoused the view that a sale for purposes of the exemption required a consummated transaction directly involving the employee for whom the exemption is sought. After the Supreme Court had granted *certiorari*, however, the Department of Labor changed its position holding that "an employee does not make a 'sale' . . . unless he actually transfers title to the property at issue." Inasmuch as the detailers did not actually transfer title to

any medications, they were thus not outside sales persons and entitled to overtime compensation.

The Supreme Court acknowledged the general principle that an agency's interpretation of its own regulations, and particularly where the regulation might be ambiguous, is accorded deference. However, the Court emphasized that deference is inappropriate when the interpretation is "plainly erroneous or inconsistent with the regulation." This standard of inappropriateness or erroneous interpretation of a regulation raises a red flag for any entity seeking to contest not only a Department of Labor regulation but virtually any rule or regulation promulgated by any federal agency. The importance of the Court's decision regarding deference and interpretation of a federal agency regulation casts a broad brush which can be of substantial assistance in arguing the inapplicability of a particular administrative provision. Any party potentially being exposed to administrative action by virtue of a regulation is advised to closely examine the process by which the regulation was enacted, the reasonableness of its interpretation and whether the agency interpretation is appropriate or applicable to the fact situation in which the complainant is involved. *Christopher v. SmithKline Beecham Corp.* is thus a valuable tool that can assist an entity when confronted with a regulation which it considers erroneous, abusive or inappropriate.

The labor and employment attorneys at Weston Hurd LLP are available to address your questions or concerns regarding this important aspect of employment law.

Supreme Court Opinion:

[Christopher v. SmithKline Beecham Corp.](#)



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