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In *Christopher v. Smithkline Beecham Corp.* the Supreme Court handed employers—and pharmaceutical manufacturers in particular—a victory holding that (1) pharmaceutical sales representatives (PSRs) properly fall under the FLSA's "outside sales" exemption, and (2) the Department of Labor had essentially acquiesced to decades of industry practice classifying PSRs as exempt. The industry has come under fire in recent years by a barrage of lawsuits alleging that pharmaceutical sales representatives were misclassified as exempt from the Fair Labor Standards Act's ("FLSA") overtime provisions.

The *Christopher* decision is significant for two reasons. First, it provided the Supreme Court's first-ever guidance on the FLSA's "outside sales" exemption, providing employers with needed flexibility by recognizing that "sales" may be performed in ways that are unique to a particular industry. Second, the Court signaled that it would not defer to an agency's re-interpretation of a regulation if doing so would result in an "unfair surprise" to industry members that had followed a different—but reasonable—interpretation for decades, without challenge by the agency.

The outside sales exemption

To qualify for the FLSA's outside sales exemption, an employee's primary duty must be making sales (which includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition), or obtaining orders or contracts for services for which a consideration will be paid by the client or customer, and the employee must be customarily and regularly engaged away from the employer's place of business. Important to qualifying for the exemption, but not at issue in the *Christopher* case, the exempt classification of "outside sales" is distinguished from nonexempt "inside sales" by the requirement that the employee must be customarily and regularly engaged away from the employer's place of business. Telephone sales, regardless of the location from which the call is made or received, are not "outside" sales.

The Christopher decision

The Supreme Court found that PSRs are employed "in the capacity of" outside sales. The Court rejected the formalistic analysis urged by the United States Department of Labor ("DOL")—distinguishing between sales and promotions—because PSRs exhibit "all of the external indicia" of sales. They are hired based on their sales experience, and they are trained to close sales by obtaining the greatest possible verbal commitment from doctors to prescribe the medications they are selling. In addition, PSRs work away from the office with minimal supervision, and their success in increasing prescriptions is rewarded by incentive compensation. Finally, PSRs earn salaries well above the minimum wage, their jobs are not conducive to clocking in and out at the start or end of a shift, and they enjoy other benefits setting them apart from nonexempt workers. These factors make PSRs "hardly the kind of employees the FLSA was intended to protect."

The case resolves a split among the circuit courts of appeals. The Second Circuit Court of Appeals had ruled that PSRs did not engage in "outside sales" because they did not "lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it." *In re Novartis Wage and Hour Litig.,* 611 F.3d 141 (2d Cir. 2010). In contrast, the Ninth Circuit Court of Appeals held in *Christopher* that PSRs engaged in outside sales, setting the stage for the Supreme Court's review.

Before deciding whether PSRs performed "outside sales" under the FLSA, the Court addressed whether the DOL's interpretation of its own FLSA regulations was owed controlling deference. The DOL took the position that "[a]n employee does not make a 'sale' for purposes of the outside sales exemption unless he actually transfers title to the property at issue."

The Supreme Court rejected the DOL's interpretation, and also found that it was not worthy of deference. The Court found the DOL's position more restrictive than the text of the FLSA and its regulations. The FLSA's statutory text does not require the transfer of title in order to engage in sales, and includes a catch-all phrase ("or other disposition") that presumably anticipates "industry-by-industry variations in methods of selling

commodities." This flexibility is critical to the pharmaceutical industry, where sales representatives are prohibited by law from transferring title to the medications. Nor do the FLSA's regulations require a transfer of title. The regulations merely state that "sales" include—but do not necessarily require—a transfer of title to tangible property. This inclusiveness, the Court held, "in no way limits the broad statutory definition of 'sale.'"

The Court was also concerned with the timing of the DOL's interpretation. The DOL had held since 1940, in a report and recommendation by the Wage and Hour Division, that the outside sales exemption was available to someone who "in some sense make[s] a sale." The Court noted that the DOL did not advance its more restrictive interpretation of the outside sales exemption until 2009, having never objected to decades of industry practice to the contrary. Granting deference to the DOL's recent interpretation would give rise to "massive liability" for conduct that occurred well in advance of the DOL's announced position. Given the DOL's failure to challenge the industry's classification of PSRs as exempt for several decades, the Court found that the DOL had essentially acquiesced to the classification.

Practical considerations

The *Christopher* decision is a victory for employers and pharmaceutical manufacturers in particular. It provides a flexible interpretation of what it means to "sell" under the FLSA, and limits the DOL's ability to enact last-minute interpretations of longstanding regulations in a way that would upend employers' longstanding practices and understanding of the law. Employers should take this opportunity to re-examine the classification of employees who could be considered exempt, outside salespeople, as well as the exemption status of other employees, generally.

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