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Overregulation or Fair Interpretation: *Christopher v. SmithKline* and the Question of Judicial Deference in Department of Labor Rulemaking

INTRODUCTION

American jobs are remarkably different from what they were 30 years ago. Many of today's employees use technology that allows them to be constantly connected to their jobs, and many have jobs requiring them to work outside of the traditional scheme of clocking in and clocking out of work each day. While the American workplace has evolved in many ways since the passage of the primary federal statutes that protect American workers, many of those statutes and the regulations that implement them have made considerably less progress.¹ For example, the vast majority of American workers have enjoyed the protections of the Fair Labor Standards Act (FLSA)² since 1938. The FLSA guarantees two of the most important employment conditions for most workers – a minimum wage and overtime pay for any hours worked in excess of 40 hours each week.³ Even though the FLSA deals almost exclusively with these two very basic and widely accepted controls on the employment relationship, the law has become one of the most complex and hotly debated areas of employment litigation over the last several years because of uncertainty about the scope of the Act's coverage as it relates to modern workplaces.

Some of these uncertainties arise when employers seek to avoid their wage and hour obligations by fitting their employees into one of the hundreds of FLSA exemptions, which include jobs from commercial fishermen to computer professionals. However, many jobs simply cannot be fitted into these exemptions, the vast majority of which were enacted in response to the concerns of employers who operated under workplace dynamics that are markedly different from

¹ Robert D. Lipman et. al., *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 361 (1994).

² 29 U.S.C. § 201 *et seq.*

³ 29 U.S.C. §§ 206-207.

those that exist today.⁴ As a result, the FLSA has become a minefield of litigation for employers and a source of confusion for employers and employees alike. Unfortunately, the Department of Labor (DOL), the federal agency charged with interpreting and enforcing the FLSA, has struggled to adequately resolve many of these problems.

One of the major driving forces behind FLSA litigation of the last few years is the issue how much judicial deference the DOL should receive for its “opinion letters” – the DOL’s primary method of providing comprehensive guidance and compliance assistance to employers and employees covered by the FLSA. The opinion letter has been both a blessing and a curse for the DOL, which is largely a function of the fact that the opinion letter provides guidance on the meaning and interpretation of FLSA regulations on an individual, fact-dependent basis. A lack of broad, independent interpretive authority is just one of the many structural obstacles faced by the DOL, but it is an obstacle that appeared to be shrinking over the last few decades because of the high level of judicial deference granted to agency’s interpretations of their own regulations. In fact, the DOL began to use judicial deference as a tool to advance its regulatory interpretations through amicus briefs. However, this chapter in judicial deference may be at an end. From the definition of “changing clothes” at the beginning and end of every workday to the definition of an “outside salesman,” employers and courts alike have been waging a new war against the DOL and its use of opinion letters and amicus briefs to interpret key exemptions contained in the FLSA. The DOL has never before faced such an intense period of employer animosity and judicial antagonism toward the use of opinion letters to revise its prior interpretations of the FLSA, and in some cases, to completely overturn its prior positions.

⁴ See WILLIS J. NORDLUND, THE QUEST FOR A LIVING WAGE: THE HISTORY OF THE FEDERAL MINIMUM WAGE PROGRAM 45 (1997).

In a recent case decided by the U.S. Supreme Court, *Christopher v. SmithKline*,⁵ the United States Supreme Court had a chance to review a controversial opinion letter issued by the DOL concerning multiple pharmaceutical companies that had attempted to classify their sales representatives as “outside salesmen,” a category of workers excused from both the wage and hour requirements of the FLSA. The Court chose to give almost no deference to the DOL’s interpretation as articulated in its amicus brief, instead choosing to perform its own detailed analysis of the meaning of the term “outside salesman” and whether pharmaceutical marketing representatives fit within this narrow exemption. The Supreme Court concluded that the DOL’s interpretation did not deserve deference because of the “unfair surprise” such deference would create for the multiple pharmaceutical companies who had been treating their sales representatives as “outside salesmen” for years without any objection from the DOL.

In this article, I will illustrate some of the most challenging aspects of litigating FLSA exemption cases given the inability of FLSA regulations to keep up with the pace of change in American workplaces. I will use the facts of *SmithKline* as an example of the tactical and legal issues faced by wage and hour attorneys in exemption cases, and I will demonstrate how *SmithKline* itself has only added to the unpredictability of these cases. Section I will discuss the history of the FLSA, its major amendments, and recent rulemaking surrounding one of the most outdated FLSA exemptions – the in-home care worker exemption. Section II will describe the methods by which the DOL interprets the FLSA and issues guidance to employers, and it will trace the evolution of the various doctrines of judicial deference that apply to such interpretations. Section III will present the Court’s decision in *Christopher v. SmithKline*, viewed in the context of the Court’s apparent disdain for the Obama administration’s use of a DOL amicus program to announce and revise its interpretations of many FLSA provisions.

⁵ 132 S.Ct. 2156 (2012).

Section IV will discuss the recent debate surrounding employers' claims that the DOL has been "over" regulating the FLSA, particularly through its use of opinion letters and amicus briefs to interpret many of the FLSA's complicated provisions. The section will discuss the implications of *SmithKline* for other cases involving the proper classification of exempt workers, and it will also consider the impact of a larger political context involving presidential influence over the DOL's rulemaking and interpretive agenda. Section V will offer solutions attorneys who must litigate FLSA exemption cases without answers to some of the questions left open by *SmithKline*. As an alternative to piecemeal opinion letters and amicus briefs, this article will propose a DOL policy of notice and comment rulemaking and more formal guidance, including improved Administrator Interpretations, as the most appropriate method for ensuring that future DOL interpretations are entitled to deference.

I. A Brief History of the FLSA and Judicial Deference to DOL Interpretation

The FLSA is one of the most basic and enduring employment protections in American history. While the basic goal of the FLSA – giving all workers a livable wage – may seem quite simple and socially desirable, it took a grueling Congressional battle for the FLSA to become federal law.⁶ The FLSA is also a statute that has seen a number of Congressional amendments over the years that have both expanded and restricted its coverage in certain industries and its protections of certain categories of employees, and it is still changing today.

A. The Spirit and Purpose of the FLSA and its Early Exemptions

Congress enacted the FLSA in 1938 to address the substandard wages that President Roosevelt and his advisers believed had "sparked and prolonged the Depression."⁷ The text of the statute itself stated that the statute was intended to address "labor conditions detrimental to

⁶ NORDLUND, *supra* note 4, at 45-52.

⁷ Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 22 (2000).

the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”⁸ Given these concerns, Congress sought to use the FLSA as a tool to ensure fair competition in American markets as well as to permanently resolve the devastating effects of the Depression on the average American worker.⁹ The FLSA sets a uniform national floor for hourly wages, and it also requires that employees be paid time and a half for any hours they worked over forty each week.¹⁰ Throughout the Depression, employers who were strapped for cash simply chose to retain fewer employees while forcing their remaining employees to work longer hours.¹¹ “One of the most important purposes of the Fair Labor Standards Act was to reduce the large volume of unemployment by discouraging overtime, thereby providing an incentive for employers to hire additional workers.”¹²

While the wage and hour provisions worked in tandem for most employees covered by the FLSA, there were notable exemptions from one or both of the statute’s main protections. Among those groups of employees who were exempt from both the wage and hour provisions under the original 1938 statute were executive, administrative and professional employees, employees of local retailers, outside salesmen, seamen, most employees of commercial fishing companies, and all agricultural employees, among others.¹³ Some of these exemptions were a function of the Roosevelt administration’s goal of ensuring that the FLSA would not be the kind of “intrastate” regulation that was struck down in *Schechter Poultry v. United States*¹⁴ throughout

⁸ 29 U.S.C. § 202.

⁹ Harris, *supra* note 8, at 22.

¹⁰ 29 U.S.C. §§ 206-207

¹¹ NORDLUND, *supra* note 4, at 34.

¹² U.S. DEPARTMENT OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANNUAL REPORT (1940) at X.

¹³ NORDLUND, *supra* note 4, at 51.

¹⁴ 295 U.S. 495 (1935)(holding that the federal government may only regulate businesses that have a direct effect on interstate commerce and that states hold the right to regulate businesses that affect interstate commerce indirectly).

the 1930s.¹⁵ The president also had to manage the demands of southern congressmen who refused to vote for a minimum wage statute unless it incorporated exemptions that would protect the agriculturally-based southern economy that depended on the exploitation of black labor.¹⁶

Many of these exemptions were also the result of lobbying by both employers and labor unions alike who sought to control some of the unknowns about the effect the law would have on free enterprise and employee bargaining power.¹⁷ Employers themselves were mostly ambivalent to the FLSA, but their lobbying associations mounted a persistent opposition to the enactment of the statute. Organizations including the U.S. Chamber of Commerce, the National Industrial Conference Board, and the National Restaurant Association maintained “rigid opposition” to any federal minimum wage law.¹⁸ Many labor unions, including the American Federation of Labor (AFL) and the Committee on Industrial Organizations (CIO), were apprehensive about federal minimum wage legislation, not only because it impinged on the territory of the unions, but also because of the fear that the minimum wage floor would become a maximum wage.¹⁹ The final version of the FLSA, as signed by President Roosevelt, was a compromise among members of Congress, employers, the AFL and CIO, and President Roosevelt incorporating exemptions and other mechanisms designed to make the transition to a minimum wage, maximum hour regime as smooth as possible for all parts of the country.²⁰

B. Major Amendments to the FLSA

The FLSA was a landmark piece of employment legislation, but it was not without its flaws and ambiguities. The U.S. Supreme Court was left to resolve early issues of interpreting

¹⁵ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal* 65 TEX. L. REV. 1335, 1372 (1987).

¹⁶ Linder, *supra* note 6, at 1342-43.

¹⁷ NORDLUND, *supra* note 4, at 51.

¹⁸ *Id.* at 44.

¹⁹ *Id.* at 34-35; Harris, *supra* note 8, at 22.

²⁰ NORDLUND, *supra* note 4, at 51.

the FLSA. One of the Court’s early decisions, *Anderson v. Mt. Clemens Pottery, Co.*,²¹ illustrated to Congress that it could not leave too many of the FLSA’s gaps open to Supreme Court interpretation if it wanted to guarantee that employers would not be subject to massive waves of retroactive FLSA litigation.²² This led to the first major restriction of the FLSA’s coverage, the Portal-to-Portal Act of 1947.²³ Despite many of the initial problems with the enforcement and interpretation of the law, both the DOL and Congress recognized the need to bring more industries and employees under the protection of the FLSA, largely under the influence of lobbying by unions and employees.²⁴ However, this expansion of coverage was accompanied by a corresponding restriction in many other industries in which employers persuaded Congress the wage and hour provisions would put them out of business entirely.²⁵

1. The Portal to Portal Act

One of the FLSA’s major gaps is that it does not define “work” or “workweek.” As such, the Supreme Court had to develop its own definitions of these terms to assist in its early interpretation of the statute.²⁶ The Court’s first attempt at defining “work” came in 1944 in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*,²⁷ holding that time miners spent traveling down into the mine qualified as “work” under the FLSA.²⁸ The Court again defined “work” and “workweek” broadly in *Anderson* by holding that the “workweek” included “all time during which an employee is necessarily *required* to be on the employer’s premises, on duty or at

²¹ 328 U.S. 680 (1946)(holding that employers had to pay employees for all time they were required to be at the workplace, including time spent turning on lights and machines each morning.)

²² Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 71-72 (1991).

²³ 29 U.S.C. §§ 251–62 (2011).

²⁴ Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA’s Future*, 13 N.Y. CITY L. REV. 107, 124-25 (2009).

²⁵ Lipman et al., *supra* note 1, at 363-64.

²⁶ *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (“[W]e are not guided by any precise statutory definition of work or employment.”).

²⁷ 321 U.S. 590, 591–92 (1944).

²⁸ *Id.* at 499 (noting that the miners’ travel into the mines was a “fossorial activity bearing all the indicia of hard labor.”).

a prescribed workplace.”²⁹ The Court also held that preliminary activities done solely on the employer’s premises that are a “necessary prerequisite to productive work” also constitute work for purposes of the FLSA.³⁰ These preliminary activities could include tasks such as putting on aprons or overalls, turning on machines, and sharpening tools.³¹

In 1947, Congress enacted the Portal-to-Portal Act³² as a direct legislative response to the Supreme Court's decision in *Anderson* and subsequent cases applying its reasoning, which Congress viewed as interpreting the FLSA in a way that disregarded “long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities” that would “bring about the financial ruin of many employers.”³³ The Portal-to-Portal Act provides, among other things, that employers cannot be liable under the FLSA for not compensating employees for “preliminary” or “postliminary” activities done before or after the employee’s actual workday.³⁴

The Portal-to-Portal Act is a fascinating legislative response by Congress. Congress faced huge amounts of pressure from both private employers and the U.S. Treasury to effectively override the Supreme Court.³⁵ The Act was a clear signal to employers that Congress was willing to listen to their pleas about how and when the FLSA should apply to their workers, and it set a precedent for the extensive amendments that Congress would make to the FLSA over the next few decades in response to employer arguments about the damage the wage and hour requirements would have on a particular industry.

²⁹ *Id.* at 690–91(emphasis added).

³⁰ *Id.* at 693.

³¹ *Id.* at 692–93.

³² 29 U.S.C. §§ 251–62 (2011).

³³ *Id.* at § 251(a).

³⁴ *Id.* at § 254(a).

³⁵ Linder, *supra* note 23 at 132, 135.

2. The Removal and Addition of Industry-Specific Exemptions

Congress made its first substantive amendments to the FLSA in 1949, eleven years after the statute was passed.³⁶ The 1949 amendments attempted to clarify some of the more ambiguous portions of the statute in addition to both expanding and restricting coverage for specific industries.³⁷ The amendments extended coverage to workers in industries that were not previously subject to the FLSA's provisions, including airline employees and employees at fish and seafood canneries.³⁸ However, the amendments also restricted coverage for certain industries by creating exemptions for certain telegraph agencies, logging and forestry operations with fewer than twelve employees, taxi drivers, learners, apprentices.³⁹ Perhaps one of the most shocking exemptions, and one that stands in stark contrast to the principles of Americans with Disabilities Act, is an exemption for disabled workers.⁴⁰

Lobbyists from various industries have had success convincing Congress to exempt their employees from both the minimum wage and maximum hours provisions by arguing that the standard would drive up prices and damage the economic viability of American fisheries, logging operations, bulk petroleum distribution, and local news media, including newspapers and broadcast stations.⁴¹ There is little evidence to explain why Congress chose to create exemptions for these industries and not for others, outside of the individual persuasive power of lobbyists.⁴²

Many of the FLSA's original exemptions have been repealed by subsequent amendments, including those in 1966, which brought nursing homes, laundries, and the entire construction industry under the FLSA's coverage, and those in 1977, which eliminated the overtime

³⁶ NORDLUND, *supra* note 4, at 76.

³⁷ *Id.* Congress likely included this exemption with the thinking that employers would not hire disabled workers at the minimum wage rate.

³⁸ *Id.* at 76-77.

³⁹ *Id.* at 77.

⁴⁰ *Id.*

⁴¹ Lipman et al., *supra* note 1 at 363-64.

⁴² *Id.*

exemption for hotel, motel, and restaurant workers.⁴³ However, some of the exemptions that remain no longer serve the purposes for which they were enacted. To this day, not all agricultural workers are covered by the wage and hour provisions FLSA,⁴⁴ despite the fact that the vast majority of these workers are immigrants who work long hours for extremely low wages.⁴⁵ Some workers are covered by the FLSA's minimum wage requirement only, meaning their employers do not have to pay them for overtime.⁴⁶ These include airline employees,⁴⁷ movie theater employees,⁴⁸ "any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup,"⁴⁹ and "any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state."

These are just a few examples illustrating that most FLSA exemptions were not drafted in a way that captures the current realities of the modern American workplace and its demographics, which can lead to irrational outcomes when applied to today's workers.⁵⁰ In fact, FLSA exemptions are so complicated and confusing that Thompson Publishing Group produces a monthly newsletter to inform employees of their rights under the FLSA and alert them to the ways in which their employers might be misinterpreting the law.⁵¹ Thompson also produces a similar newsletter geared toward employers, in addition to numerous handbooks and guides that describe the intricacies and pitfalls of FLSA exemptions.⁵²

3. Change On the Horizon

⁴³ *History of Changes to the Minimum Wage Law*, U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, <http://www.dol.gov/whd/minwage/coverage.htm>.

⁴⁴ 29 U.S.C. § 213(a)(6).

⁴⁵ Lipman et al., *supra* note 1, at 360.

⁴⁶ *See* 29 U.S.C. § 213 (listing exemptions from §207, the maximum hour provision of the FLSA).

⁴⁷ 29 U.S.C. §213(b)(5).

⁴⁸ 29 U.S.C. § 213(b)(27).

⁴⁹ 29 U.S.C. § 213(b)(15).

⁵⁰ *Id.*

⁵¹ *See, e.g., Taking a Poll: How Much Do You Know About Voting Leave*, 18 No. 2 FLSA EMP. EXEMPTION HANDBOOK NEWSL. 1 (Oct. 2012).

⁵² *See, e.g., Schlomo Katz, To Clock or Not to Clock?*, 20 No. 3 EMPLOYER'S GUIDE FAIR LAB. STANDARDS ACT NEWSL. 1 (Oct. 2012).

While it is largely true that the FLSA and its exemptions have failed to keep up with the realities of the modern workplace, there appears to have been one recent success. In December 2011, President Barack Obama proposed a revision of the FLSA that would extend overtime coverage to home-care workers, many of whom take care of the elderly in their own homes.⁵³ The DOL conducted an extended comment period, and it is currently deciding on a final rule.⁵⁴ Home health care is the second-fastest-growing job category in the country with a work force of about 2.5 million, and two-thirds of home care workers would be affected by a rule extending overtime protection.⁵⁵ The proposed rule recognizes that women, immigrants and service workers are an extremely important component of the modern workforce, and it attempts to interpret the FLSA in such a way that will allow these workers to receive appropriate compensation for all of the hours they work.

This proposed rulemaking is a stark example of the ways in which the FLSA simply does not meet the needs of the modern workplace. While the DOL and the President recognize this fact, notice and comment rulemaking is a cumbersome tool⁵⁶ for the task of ensuring that the FLSA and its maze of exemptions are being applied in a way that considers both the intent of the exemptions and the practical effect that those exemptions have on today's employees. Unfortunately, the DOL does not have the resources to conduct this kind of notice and comment rulemaking for every situation in which the FLSA has gaps or ambiguous exemptions. As an alternative, the DOL relies on judicial deference to its own interpretations of the FLSA and its regulations, which it bases on its own knowledge and experience with the application of the law.

⁵³ Eileen Boris & Jennifer Klein, *Homecare Workers Aren't Just 'Companions,'* NY TIMES (July 1, 2012), <http://www.nytimes.com/2012/07/02/opinion/fairness-for-home-care-workers.html>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Notice and comment rulemaking is inherently time consuming, costing agencies money and other resources to draft notices of proposed rulemaking, review all submitting comments, and incorporate comments into final rules.

II. History of Deference to Agency Interpretation

The steady growth of the federal administrative state throughout the twentieth century introduced numerous legal issues for the federal courts, including the extent to which the courts should give deference to agency interpretations of both federal laws enacted by Congress and federal regulations promulgated by the agencies themselves.⁵⁷ The United States Supreme Court has grappled with the complex issue of agency deference on many occasions, and the evolution of its deference doctrines indicate a general trend toward a higher level of deference for agencies when they are interpreting both their enabling statutes and their own regulations.⁵⁸

A. Judicial Deference to Agency Interpretations of Statutes

In 1944, the Court established what today might be considered a fairly low baseline for judicial deference to agency interpretation of statutes in *Skidmore v. Swift & Co.*,⁵⁹ affording deference to an agency's interpretation according to the agency's "power to persuade."⁶⁰ Such persuasive power depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements."⁶¹ *Swift* employed the plaintiffs in *Skidmore* at one of its meatpacking plants and paid them a weekly salary.⁶² The employees worked during the day as well as several nights a week, when they were on call in the plant's "fire hall," from where they would monitor and respond to any fire alarms.⁶³ The

⁵⁷ Elbert Lin & Brendan J. Morrissey, *Agency Deference After Christopher v. SmithKline Beecham*, 25 No. 11 ADLAW BULLETIN 1 (Sept. 2012).

⁵⁸ *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)(holding that agency interpretations of ambiguous statutory provisions are entitled to significant deference), and *Auer v. Robbins*, 519 U.S. 452, 462 (1997)(extending mandatory deference absent a plainly erroneous agency interpretation of its own regulations to cases where the agency's interpretation is advanced for the first time "in a legal brief.").

⁵⁹ 323 U.S. 134 (1944).

⁶⁰ *Id.* at 140.

⁶¹ *Id.*

⁶² *Id.* at 135.

⁶³ *Id.*

employees were not compensated for this “on call” time.⁶⁴ To resolve the issue of whether the employees should be compensated for their “on call” time, the Court consulted an “interpretive bulletin” created by the DOL Administrator explaining the DOL’s position as to what activities may be counted as working time where an employee is “on call.”⁶⁵ The Court found that the Administrator’s bulletin was persuasive under the facts of the case, and it factored the bulletin into its decision that some “on call” time can be working time under the FLSA.⁶⁶ Courts relied on the *Skidmore* standard to evaluate agency interpretations of statutes for many years.⁶⁷

Forty years after its decision in *Skidmore*, the Court issued its decision in *Chevron U.S.A. v. Natural Resources Defense Council*.⁶⁸ The Court used *Chevron* to announce a dramatic increase in the amount of deference to be given to an agency’s statutory interpretation of an ambiguous statute.⁶⁹ *Chevron* dealt with the national air quality standards established by the Environmental Protection Agency (EPA) to interpret the amended Clean Air Act.⁷⁰ The Act required states to establish a permit program regulating “new or modified major stationary sources” of air pollution.⁷¹ The EPA issued a definition of “stationary source” that allowed states to treat all of the pollution-emitting devices within one plant “as though they were encased within a single ‘bubble.’”⁷² The EPA promulgated this definition using notice and comment rulemaking.⁷³ The Court concluded this was a reasonable construction of “stationary source.”⁷⁴

⁶⁴ *Id.*

⁶⁵ *Id.* at 138-39.

⁶⁶ *Id.* at 139-140 (1944)(concluding that the Administrator’s bulletin was “made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.”)

⁶⁷ Lin & Morrissey, *supra* note 57, at 2.

⁶⁸ 467 U.S. 837, 865 (1984).

⁶⁹ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 883 (2001).

⁷⁰ *Id.* at 839-40.

⁷¹ *Id.* at 840.

⁷² *Id.*

⁷³ *Id.* at 858-59.

⁷⁴ *Id.* at 840.

Chevron requires courts to give substantial deference to agency interpretations where the statute is ambiguous and the agency’s interpretation is a permissible construction of the ambiguity.⁷⁵ Prior to the Court’s decision in *Chevron*, courts were only required to give substantial deference where Congress had expressly delegated authority to an agency “to define a statutory term or prescribe a method of executing a statutory provision.”⁷⁶ However, “[u]nder *Chevron* . . . , if a statute is unambiguous the statute governs; if, however, Congress’ silence or ambiguity has ‘left a gap for the agency to fill,’ courts must defer to the agency’s interpretation so long as it is a ‘permissible construction of a statute.’”⁷⁷ In other words, a statute must be “ambiguous” or silent on the matter at issue in order for an agency’s interpretation of that statute to receive substantial deference.

The Court’s position on deference to statutory interpretations went through another, more confusing transformation in *United States v. Mead Corp.*⁷⁸ *Mead* addressed the question of whether a U.S. Customs Service ruling letter interpreting the Harmonized Tariff Schedule was entitled to *Chevron* deference.⁷⁹ The ruling letter classified spiral day planners “diaries” that are “bound” for tariff purposes, which was a change in the treatment of such planners.⁸⁰ The Court concluded that the ruling letter was not entitled to *Chevron* deference, because it did not possess the “force of law” created through rulemaking pursuant to a Congressional delegation of power to engage in such rulemaking.⁸¹ However, the Court noted that ruling letters could still be

⁷⁵ J. Lyn Entrikin Goering, *Tailoring Deference to Variety with A Wink and A Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 46 (2010).

⁷⁶ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 883 (2001).

⁷⁷ *Stinson v. United States*, 508 U.S. 36, 44 (1993).

⁷⁸ 533 U.S. 218 (2001).

⁷⁹ *Id.* at 221.

⁸⁰ *Id.* at 224-25.

⁸¹ *Id.* at 226-27 (noting that “[d]elegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”)

granted *Skidmore* deference based on their power to persuade.⁸² The Court expressly stated that some agency interpretations of statutory provisions, including interpretive rules, informal orders, and other pronouncements issued without extensive agency consideration and process are not entitled to *Chevron* deference.⁸³

The Court's decision in *Mead* makes many courts uncomfortable about the proper application of *Chevron*, leading many to apply lower-level *Skidmore* deference instead of *Chevron* deference where they are unsure whether an agency was appropriately acting under its authority to create binding interpretations.⁸⁴ This is known as "*Mead*-induced *Chevron* avoidance."⁸⁵ However, other courts apply the considerations introduced in *Mead* in a much different way – by granting *Chevron* deference to even those agency interpretations that were not promulgated through notice-and-comment rulemaking or adjudication so long as the interpretation "foster[s] fairness and deliberation" and "bespeaks the type of legislative activity that naturally binds more than the parties to the ruling."⁸⁶

Despite the practical judicial split created by *Mead*, the Court subsequently reaffirmed its approach of applying a very high level of deference to agency interpretations in cases where statutory language is truly ambiguous, even where the agency's interpretation conflicts with that of the court. In *National Cable & Telecommunications Association v. Brand X Internet Services*,

⁸² *Id.* at 221.

⁸³ *Id.* at 227, 235-38.

⁸⁴ Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1446 (2005), referencing *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp.*, 374 F.3d 362, 369 (5th Cir. 2004) (refusing to decide whether *Chevron* or *Skidmore* analysis applies to interpretation contained in Pension Benefit Guarantee Corporation's audit review order because the interpretation "may be upheld under the less deferential standard set forth in [Skidmore]") and *Pronsolino v. Nastro*, 291 F.3d 1123, 1133, 1134-35 (9th Cir. 2002) (refusing to decide whether *Chevron* or *Skidmore* analysis applies to interpretation contained in EPA "policy, regulations, and practice" because the interpretation is "one to which we owe substantial Skidmore deference, at the very least").

⁸⁵ Lisa Schultz Bressman, *supra* note 84, at 1446; *See, e.g., Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (finding that the Surface Transportation Board had appropriate authority to impose environmental conditions on its acquisitions of railroads, despite the fact that such conditions were not promulgated using full notice and comment procedures.)

⁸⁶ Bressman, *supra* note 84, at 1445-46, *citing Mead*, 533 U.S. at 230, 232.

the court reviewed the FCC’s interpretation of the term “telecommunications service,” as contained in the Communications Act of 1934 as amended by the Telecommunications Act of 1996.⁸⁷ The Court held that the FCC could properly exempt broadband cable modem companies from mandatory common-carrier regulations of the Telecommunications Act because the services of such companies do not meet its definition for “telecommunication service.”⁸⁸ The Court upheld the FCC’s interpretation of “telecommunication service” despite the fact that the Ninth Circuit had previously held that the definition could be read to include cable modem services.⁸⁹ In reaching this conclusion, the Court stated that “a court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”⁹⁰ The Court held “telecommunications service” to be an ambiguous term to which the court should grant *Chevron* deference.⁹¹ *Brand X* has been argued to support the contention that the Court was still embracing a broad approach to substantial deference for agency interpretations of statutes as of 2005.

B. Judicial Deference to Agency Interpretations of Regulations

The Court developed a separate deference doctrine for agency interpretations of agency regulations starting with its decision in *Bowles v. Seminole Rock & Sand Co.*⁹² In *Seminole Rock*, a manufacturer of crushed stone challenged a price regulation issued by the Administrator of the Office of Price Administration setting the maximum price for crushed stone 60 cents per ton.⁹³ This price was based on the Administrator’s interpretation of the phrase “highest price charged

⁸⁷ 545 U.S. 967, 982 (2005).

⁸⁸ *Id.* 968.

⁸⁹ *Id.*

⁹⁰ *Id.* at 982.

⁹¹ *Id.* at 980.

⁹² 325 U.S. 410 (1945).

⁹³ *Id.* at 412.

during March 1942,” which was the controlling level for a general price freeze applied to many products by the Administrator in 1942 and 1943 to prevent price inflation during World War II.⁹⁴ The Administrator interpreted this phrase as having three different meanings based on whether a particular seller made delivery of a sale of goods during March 1942.⁹⁵ Because Seminole Rock made a sale in March 1942 at the delivery price of 60 cents, the Administrator froze Seminole Rock’s prices at this amount pursuant to his interpretation. The Court upheld the Administrator’s interpretation of “highest price charged during March 1942,” and concluded that courts must give “controlling weight” to an agency’s interpretation of its own ambiguous regulation “unless it is plainly erroneous or inconsistent with the regulation.”⁹⁶

The Court expanded the scope of *Seminole Rock* deference in its decision in *Auer v. Robbins*.⁹⁷ In *Auer*, the Court evaluated whether the DOL Administrator properly found that police sergeants were not exempt under the “bona fide executive, administrative, or professional” exemption from the overtime pay requirements of the FLSA. DOL regulations interpreting the FLSA state that one requirement for exempt status is that an employee earn a specified minimum amount on a “salary basis” that is not subject to reduction on the basis of “quality or quantity” of work performed.⁹⁸ The DOL Administrator interpreted this provision as requiring that public employees not be subject to any kind of disciplinary reduction in their salaries, even if such reduction is rarely applied, because such reductions qualify as those made on the basis of “quality or quantity” of work performed.⁹⁹ The Court upheld this definition using *Chevron* deference, even though the interpretation of reductions based on the “quality or quantity” of

⁹⁴ *Id.* at 413-415.

⁹⁵ *Id.* at 414.

⁹⁶ Lin & Morrissey, *supra* note 57, at 3, *citing* 325 U.S. at 414.

⁹⁷ 519 U.S. 452 (1997).

⁹⁸ *Id.* at 455.

⁹⁹ *Id.* at 461.

work performed was issued in an amicus brief submitted at the request of the Court rather than promulgated using notice and comment rulemaking.¹⁰⁰ The Court, in a majority opinion drafted by Justice Scalia, held that *Seminole Rock* deference applies even when an Agency’s interpretation first emerges “in the form of a legal brief.”¹⁰¹ This effectively means that agencies can support private litigants whose cases depend on the outcome of a judicial decision on the meaning of an agency regulation.¹⁰² The Court also announced a limitation on deference in *Auer* – an agency may not receive *Seminole Rock* deference where its interpretation of a regulation is a “post hoc rationalization” that is intended “to defend past agency action against attack.”¹⁰³

Commentators have argued that the wave of increasing judicial deference that started with *Chevron* “crested” with the Court’s decision in *Auer*.¹⁰⁴ Many commentators have also argued that *Auer* deference affords “even greater deference to agency interpretations of their own ambiguous regulations than *Chevron* yields to interpretations of ambiguous statutes.”¹⁰⁵ Some scholars have also dubbed the doctrine “*Auer* super-deference” because it does not require an agency to resolve or analyze any underlying ambiguity in its own regulations before interpreting

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 462.

¹⁰² Lin & Morrisey, *supra* note 57, at 3.

¹⁰³ 519 U.S. at 462. I will use the term “*Auer* deference” to refer to the doctrine that the Court articulated in *Seminole Rock* and then expanded in *Auer*, as the Supreme Court uses this term to refer to this doctrine throughout its opinion in *Christopher v. SmithKline*.

¹⁰⁴ See, e.g., J. Lyn Entrikin Goering, *Tailoring Deference to Variety with A Wink and A Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 48 (2010);

¹⁰⁵ See generally John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 639-40 (1996)(questioning the constitutionality of *Seminole Rock* deference due to the high degree of deference it affords); See also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 551 (2003); See also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1103 (2008)(“Beyond *Chevron*, *Seminole Rock* recognizes the practical reality that an agency interpretation of its own (valid-under-the-statute) concept or complex web of regulations should be followed by judges unless there is a strong statutory reason to reject it.”); See also Goering, *supra* note 105, at 48.

such regulations, whereas *Chevron* requires that an agency first demonstrate that a statute is truly ambiguous before proceeding with its interpretation of the ambiguity.¹⁰⁶

C. The DOL's Interpretive Methods and "Amicus Program"

The uncertainties created by the FLSA are not lost on the DOL, which spends a great deal of time and resources attempting to provide guidance on the meaning of the FLSA and its accompanying regulations. The DOL issues what it calls "opinion letters" as its primary method of interpretive guidance.¹⁰⁷ Opinion letters are statements of interpretation made by the Administrator of the Wage and Hour Division (WHD), the department of the DOL that oversees the administration of the FLSA, requiring little to no procedure aside from posting the opinion letter for public viewing.¹⁰⁸ The WHD normally issues opinion letters in response to specific factual inquiries by employers or employees who are struggling to make sense of the FLSA.¹⁰⁹ However, the DOL's Office of the Solicitor also issues fact-specific amicus briefs in pending FLSA litigation.¹¹⁰ These amicus briefs serve the same interpretive function as opinion letters, particularly where the DOL announces its interpretation on an issue for the first time in an amicus brief. If the courts adopt the interpretation of a FLSA regulation as articulated in a DOL amicus brief, the DOL can effectively skirt notice and comment rulemaking procedures.¹¹¹ This has become an effective and common method over the past few years for the structurally-flawed DOL to advance litigation that might improve its regulations for the modern workplace.¹¹²

¹⁰⁶ Goering, *supra* note 105, at 50.

¹⁰⁷ Richard L. Alfred & Jessica M. Schauer, *Continuous Confusion: Defining the Workday in the Modern Economy*, 26 ABA J. LAB. & EMP. L. 363, 369 (2011).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *SOL Briefs*, U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, <http://www.dol.gov/sol/media/briefs/main.htm#.UNZy2s1aQU4>.

¹¹¹ Where a court adopts the interpretation of the DOL as espoused in its amicus brief, the DOL can simply point to the court's decision as lending legitimacy and binding effect to the interpretation.

¹¹² See *id.* (listing over 350 amicus briefs filed by the Office of the Solicitor since 2000, 171 of which were filed in the last three years).

The DOL has also recently begun issuing interpretive guidance that is intended to have a binding effect beyond that of the individualized, fact-intensive opinion letters – Administrator Interpretations.¹¹³ Each of these documents is intended as “a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. Guidance in this form will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees.”¹¹⁴ Administrator Interpretations require more procedure, in that the DOL explicitly states in each opinion that the legal analysis and interpretation contained in the document will be broadly applicable to all regulated employers.¹¹⁵ The issue of appropriate judicial deference only emerges where DOL opinion letters announce a widely applicable interpretation, as with Administrator Interpretations, or when a DOL interpretation could take on the force of law if adopted by a court. In the past, courts have afforded *Auer/Seminole Rock* deference to DOL interpretations of FLSA regulations.¹¹⁶

FLSA cases like *Christopher v. SmithKline* illustrate the way that the DOL has recently attempted to use litigation and amicus briefs to secure binding interpretations of its statutes and regulations without having to resort to notice and comment rulemaking, which is often a prolonged and contentious endeavor. The DOL developed the regular use of this tactic after the U.S. Supreme Court chose not to object to it in its decision in *Auer*, effectively opening the door for the DOL to create an “amicus program” through which it can solicit cases that will lead to a binding stamp of judicial approval for the agency’s interpretation of a statute or regulation at issue.¹¹⁷ *SmithKline* is an excellent example of the DOL’s attempt to use its amicus program to

¹¹³ Pamela J. Moore et al., *Recent Developments in Employment Law*, 46 TORT TRIAL & INS. PRAC. L.J. 317, 326 (2011).

¹¹⁴ *Rulings and Interpretations*, U.S. DEP’T OF LABOR – WAGE AND HOUR DIVISION, <http://www.dol.gov/whd/opinion/opinion.htm#.UNZ6Qc1aQU4>.

¹¹⁵ *See id.*

¹¹⁶ *See, e.g., Auer v. Robbins*, 519 U.S. 452 (1997).

¹¹⁷ Lin & Morrissey, *supra* note 57, at 3.

secure judicial deference for its interpretation of a statute where it does not appear that the DOL would be able to secure retroactive application of its interpretation by any other means.

III. *SmithKline* and the Debate on “Over-Regulation” under the FLSA

The FLSA and its accompanying regulations contain hundreds of exemptions, which has led to the classification of certain groups of employees on a case-by-case basis. One of the “hot topics” in FLSA litigation over the past few years has been the classification of pharmaceutical sales representatives (PSRs) as “outside salesmen,”¹¹⁸ which has been a FLSA-exempt category of workers since 1938.¹¹⁹ The U.S. Supreme Court granted certiorari, and it issued its decision in *Christopher v. SmithKline Beecham* on June 18, 2012.¹²⁰ The decision resolved a split between the Ninth and Second Circuits, with one holding that a defendant company had properly refused overtime pay for PSRs by virtue of the “outside salesman” exemption, and the other holding that the defendant company was liable for improperly classifying the PSRs as exempt.¹²¹ The Court held in *SmithKline* that PSRs were properly classified as exempt “outside salesmen.”¹²² The dissent, in finding no exemption, looked more to the original intent of the “outside salesman” exemption than to ways that it might be read to fit the realities of the PSR position.

A. *Christopher v. SmithKline*

1. Majority Opinion

Justice Samuel Alito drafted the majority opinion in *SmithKline*, securing the votes of Chief Justice John Roberts, Justice Antonin Scalia, Justice Anthony Kennedy, and Justice

¹¹⁸ 29 U.S.C. § 213(a)(1).

¹¹⁹ David Voreacos & Bob Van Voris, *Novartis Will Pay \$99 Million to Settle Overtime Lawsuit*, <http://www.bloomberg.com/news/2012-01-25/novartis-will-pay-99-million-to-settle-overtime-lawsuit.html>.

¹²⁰ 132 S. Ct. 2156 (2012).

¹²¹ See *In re Novartis Wage and Hour Litigation*, 611 F.3d 141, 143 (2d Cir. 2010)(holding that PSRs are not exempt from FLSA coverage under the “outside salesman” exemption or the administrative employee exemption) and *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 385 (9th Cir. 2011)(holding that PSRs are properly exempt from the FLSA under both the “outside salesman” and administrative employee exemptions).

¹²² 132 S. Ct. at 2174.

Clarence Thomas.¹²³ The two plaintiffs in the case, Michael Christopher and Frank Buchanan, had previously worked as pharmaceutical sales representatives for SmithKline.¹²⁴ PSRs at SmithKline were “responsible for calling on physicians in an assigned sales territory to discuss the features, benefits, and risks of an assigned portfolio of respondent’s prescription drugs.”¹²⁵ Their main marketing goal was to obtain a nonbinding commitment from each physician stating that he or she would prescribe SmithKline’s drugs to his or her patients.¹²⁶ Each PSR spent about 40 hours each week in the field calling on physicians during normal business hours in addition to spending about 10 to 20 hours each week “attending events, reviewing product information, returning phone calls, responding to e-mails, and performing other miscellaneous tasks.”¹²⁷ The Court stressed throughout the opinion that the plaintiffs were highly paid, with base salaries and incentive pay of over \$70,000 total.¹²⁸

The plaintiff employees argued that they had been improperly exempted from the overtime provisions of the FLSA. However, the Ninth Circuit held that SmithKline had properly applied the “outside salesman” exemption to their positions. The main disagreement between the PSRs and their former employer as articulated in the petition for certiorari was whether or not the DOL’s interpretations of its own ambiguous regulations defining “outside salesman” and “sales” in its amicus brief should be afforded *Auer* deference, which the Ninth Circuit had declined to apply.¹²⁹ The DOL’s regulations define “outside salesman” as an employee whose primary duty is “making sales” within the meaning adopted by the FLSA.¹³⁰ The FLSA states that a “sale” includes “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other

¹²³ *Id.* at 2161.

¹²⁴ *Id.* at 2164.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 2165.

¹³⁰ 29 C.F.R. § 541.500(a)(1)(i).

disposition.”¹³¹ Congress chose not to further define the term “outside salesman,” but it delegated authority to the DOL to issue regulations that would do so.¹³²

The majority affirmed the holding of the district court and the Ninth Circuit that PSRs are exempt under the FLSA because they are in fact “outside salesmen,” and it supported the Ninth Circuit’s decision not to extend *Auer* deference to the DOL’s interpretation of its own regulations defining “outside salesman” and “sales” for purposes of the exemption.¹³³ In reaching this holding, the Supreme Court emphasized the fact that the DOL had itself changed its interpretation of the regulations defining the “outside salesman” exemption during the course of its involvement with both *In re Novartis* and *SmithKline*.¹³⁴ DOL filed *amicus* briefs in both the Second Circuit and the Ninth Circuit expressing its view that “a ‘sale’ for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.”¹³⁵ The DOL shifted its position after the Court granted certiorari in *SmithKline*, favoring the interpretation that “[a]n employee does not make a ‘sale’ . . . unless he actually transfers title to the property at issue.”¹³⁶ Furthermore, the Supreme Court noted that the DOL submitted an unsolicited *amicus* brief in support of the plaintiff-employees.¹³⁷

Alito wrote that the DOL’s current interpretation of its regulations – the one it announced in its *amicus* brief for *SmithKline* at the Supreme Court level – is not entitled to *Auer*

¹³¹ 29 U.S.C. §203(k).

¹³² *SmithKline*, 132 S. Ct. at 2162 (noting that Congress “delegated authority to the DOL to issue regulations ‘from time to time’ to ‘defin[e] and delimit[t]’” the term “outside salesman.” 29 U.S.C. § 213(a)(1)).

¹³³ *Id.* at 2165.

¹³⁴ *Id.* at 2165-66.

¹³⁵ *Id.*, citing Brief for Secretary of Labor as *Amicus Curiae* in *In re Novartis Wage and Hour Litigation*, No. 09–0437 (2d Cir. 2010).

¹³⁶ *Id.* at 2166.

¹³⁷ *Id.*

deference.¹³⁸ He attacked the DOL’s approach to interpretation in this case, writing that although *Auer* ordinarily calls for deference to an agency’s interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, the Court does not have to follow this approach in all cases. One example of a case where deference is inappropriate is when the agency’s interpretation is “plainly erroneous or inconsistent with the regulation” or when there is reason to suspect that the interpretation “does not reflect the agency’s fair and considered judgment on the matter.”¹³⁹

Alito gave a searing assessment of the DOL’s approach to interpretation in this case, writing that “there are strong reasons for withholding” *Auer* deference in this case, primarily because allowing the PSRs to invoke the DOL’s newly articulated interpretation would “impose potentially massive liability” on SmithKline for a decision to withhold overtime that was made long before the DOL announced its new interpretation of the regulations defining “outside salesman.”¹⁴⁰ The majority felt that giving deference to the DOL’s interpretation would result in “precisely the kind of ‘unfair surprise’” that it has long sought to prohibit under deference doctrines.¹⁴¹ Alito also emphasized the fact that the pharmaceutical industry had been using the “outside salesman” exemption for several decades to classify its PSRs, and the court had never instituted any type of enforcement actions against the companies until 2009, making the DOL’s inaction equivalent to its acquiescence.¹⁴²

After determining that *Auer* deference was unwarranted, the majority found that the DOL’s new interpretation, requiring an actual transfer of title to create a “sale,” was utterly unpersuasive under *Skidmore* deference because it “plainly lacks the hallmarks of thorough

¹³⁸ *Id.* at 2168.

¹³⁹ *Id.* at 2166, quoting *Auer v. Robbins*, 519 U.S. 452 (1997).

¹⁴⁰ *Id.* at 2167.

¹⁴¹ *Id.* at 2167.

¹⁴² *Id.* at 2168.

consideration.”¹⁴³ Given this assessment, the majority went on to do its own detailed analysis of the meaning of “outside salesman” as defined by DOL regulations defining the exemption.¹⁴⁴

2. Dissenting Opinion

Justice Stephen Breyer drafted a dissenting opinion on which he was joined by Justice Sonia Sotomayor, Justice Ruth Bader Ginsburg, and Justice Elena Kagan. Notably, the dissent does not discuss the majority’s unwillingness to defer to the DOL’s interpretation of its own regulations.¹⁴⁵ Instead, the dissent embarks on its own application of the regulations interpreting “outside salesman” and “sales” as they relate to the FLSA exemption. The dissent ended up at the opposite end of the spectrum from the majority, finding that PSRs bear no resemblance to the door-to-door salesmen of the 1940s who were the original workers that Congress sought to exempt from the FLSA’s coverage.¹⁴⁶ As a result, the majority and the dissent present two entirely different, *sui generis* definitions of “outside salesman” for purposes of the FLSA. The stark disagreement between the majority and the minority on the interpretation of the “outside salesman” regulations provides no further assistance as to how the majority decision might affect other categories of FLSA exemptions and DOL opinion letters or amicus briefs interpreting them.

IV. Making Sense of *SmithKline* in Theory and Practice

A. Lingering Questions from *SmithKline* and Its Effect on Doctrines of Judicial Deference

Scholars and commentators seem to be divided into two differing viewpoints on the larger significance of the Supreme Court’s decision in *SmithKline*. The first view is that the

¹⁴³ *Id.* at 2169 (referencing the DOL’s use of an amicus brief to announce the interpretation rather than allowing an opportunity for comment and the DOL changing its initial interpretation as evidence that the interpretation lacked thorough consideration).

¹⁴⁴ *Id.* at 2170-74.

¹⁴⁵ Lin & Morrissey, *supra* note 57, at 4.

¹⁴⁶ *SmithKline*, 132 S. Ct. at 2178.

deference discussion in *SmithKline* is confined to the factual scenario of the case, in which the DOL used faulty guidance procedures in such a way that would impose mass liability on an important U.S. industry.¹⁴⁷ The second view is that the Court’s refusal to grant *Auer* deference in *SmithKline* is more broadly applicable to other regulatory interpretations and suggests that the Court may continue to cut back on *Auer* and other doctrines of judicial deference, even in the absence of notice problems or sudden shifts in agency interpretations.¹⁴⁸ Either way, *SmithKline* appears to have created far more problems than it solved for those facing or pursuing litigation.

1. The Outside Salesman Exemption – Can the DOL Override the U.S. Supreme Court?

One of the initial issues left unresolved by the *SmithKline* decision is whether or not the DOL can draft its own binding guidance that prospectively defines “outside salesman” in a way that contradicts the analysis of the Supreme Court. One possible outcome is that lower courts will view *SmithKline* as having little effect on *Auer* deference generally. If that is the case, the DOL could issue its own definition of “outside salesman” through rulemaking to which lower courts would most likely defer under *Brand X*, even if it is contrary to the definition announced by the Court.¹⁴⁹ However, *Brand X* stated that an agency interpretation of an ambiguous statute is entitled to deference even if it contradicts a federal court’s interpretation of that statute, but does not consider the issue of conflicting interpretations of agency regulations.¹⁵⁰ It is unclear whether the DOL will choose to interpret “outside salesman” directly from 29 U.S.C. § 213(a)(1), a federal statute, or whether it will opt to interpret 29 C.F.R. § 541.500, the DOL regulation providing definitions to assist in the interpretation of the “outside salesman”

¹⁴⁷ Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 411 (2012).

¹⁴⁸ Lin & Morrisey, *supra* note 57, at 6.

¹⁴⁹ Lin & Morrisey, *supra* note 57, at 5.

¹⁵⁰ Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 980 (2005)(noting that “[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.”)

exemption. Several circuit courts have held that *Brand X* deference should apply to conflicting interpretations of both ambiguous statutes and regulations.¹⁵¹ If courts apply the reasoning of *Brand X* to any subsequent DOL interpretations of “outside salesman,” the Court’s extensive analysis of the term will have been a *sui generis* pronouncement with little lasting value. However, no matter which interpretive route the DOL chooses, *SmithKline* clearly requires that the DOL give employers ample notice that it plans to apply and enforce its own definition of the “outside salesman,” either through notice and comment rulemaking or interpretive guidance with substantial notice procedures.

2. An Uncertain Future for Judicial Deference

One of the most unpredictable aspects of the *SmithKline* decision is whether it will have a broader effect on the larger body of judicial deference. In *Auer* and *Brand X*, the U.S. Supreme Court greatly expanded the universe of interpretive guidance to which it would give significant deference, signaling to the DOL and other agencies that the Court was willing to give more weight to agency interpretations created outside of notice and comment rulemaking. However, many commentators have suggested that the Court’s decisions in *Mead* and *SmithKline* indicate that the Court is moving away from the sweeping deference it embraced in the past, foreshadowing further restrictions of judicial deference to agency interpretation, particularly where the Court feels agencies are creating rules in ways that are unfair or unpredictable for those parties who are governed by such rules.¹⁵² Justice Scalia has articulated his opinion that *Auer* and *Brand X* may be invalid because they give unwarranted deference where Congress has

¹⁵¹ See *Levy v. Sterling Holding Co.*, 544 F.3d 493, 502 (3rd Cir. 2008); *In re Lovin*, 652 F.3d 1349, 1353-54 (Fed. Cir. 2011).

¹⁵² See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2159 (2012) (“To defer to the DOL’s interpretation would result in precisely the kind of “unfair surprise” against which this Court has long warned.”)

virtually no role or influence – in the promulgation and interpretation of agency regulations.¹⁵³

Scalia believes that upholding the *Auer* doctrine could lead agencies to create intentionally vague and ambiguous regulations “that they can later interpret as they see fit, thereby ‘frustrat[ing] the notice and predictability purposes of rulemaking.’”¹⁵⁴

However, the Court does not explicitly write that it believes the DOL has intentionally drafted its “outside salesman” guidance or regulations in an ambiguous way that would allow for changes to its interpretations “as it sees fit.” Instead, the Court specifically refers to *Auer* deference as a “general rule” that “ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief.”¹⁵⁵ It seems unlikely that the Court intended for *SmithKline* to affect the doctrine of *Auer* deference outside of the factual circumstances it faced in *SmithKline* given its renewed endorsement of the doctrine as a “general rule.” The Court seemed much more focused on reprimanding the DOL for abusing the Court’s holding in *Auer* that agencies are entitled to deference for interpretations articulated in amicus briefs.

The Court’s decision to openly rebuke the DOL in *SmithKline* for its use of amicus briefs as interpretive pronouncements seems to suggest that the Court may be reacting to some aspect of the DOL’s amicus briefs and their limited procedural requirements beyond the “unfair surprise” that the Court predicted would occur from a retroactive application of the DOL’s interpretation of “outside salesman.” Interestingly, the Court does not mention the fact that the DOL started an amicus brief program following the election of President Barack Obama in 2008. This program has become an important component of the DOL’s regulatory agenda, and the

¹⁵³ *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011).

¹⁵⁴ *SmithKline*, 132 S. Ct. at 2168, *quoting* *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2266 (2011)(Scalia, J. dissenting).

¹⁵⁵ *Id.* at 2166.

Court's decision seems to be a reaction to the DOL's conscious choice to use *Auer* deference in an attempt to secure binding judgments that adopt its interpretations.

3. Judicial Pushback to Presidential Administration

One of the potential explanations for the Court's discomfort with applying *Auer* deference to the DOL's interpretation of its "outside salesman" regulations is the increased visibility of the partisan influences that shape agency policy. It seems rather trivial for the U.S. Supreme Court to grant certiorari on the issue of how to properly define "outside salesman" for purposes of the FLSA, especially given the staggering amount of other contentious legal issues the Court chooses not to review each year. Defining particularized statutory terms such as this seems to be the sort of task that the Court should feel comfortable leaving to the expertise of the DOL. However, it appears the Court accepted *SmithKline* for review on this comparatively trivial issue in order to make a point to agencies regarding the propriety of hastily altering interpretive guidance to further a political policy agenda.

Some commentators have suggested that *SmithKline* is a direct reprimand to the Obama administration for failing to use adequate procedures to issue interpretive guidance designed to secure support from labor unions.¹⁵⁶ Other commentators have also pointed out that the disputed interpretation in *SmithKline* arose directly from the DOL's more aggressive approach to interpretive guidance following the transition into the Obama administration in 2008 and 2009.¹⁵⁷ While these opinions seem to come primarily from conservative, employer-friendly commentators, it is difficult to ignore the proliferation of amicus briefs filed by the DOL over the last three years. The DOL has filed 171 briefs during that time period, which constitutes more

¹⁵⁶ Daniel Fisher, *Supreme Court Rejects Labor Dep't View on Sales Rep. Overtime*, FORBES (June 18, 2012), <http://www.forbes.com/sites/danielfisher/2012/06/18/supreme-court-rejects-labor-dept-view-on-sales-rep-overtime/>.

¹⁵⁷ *Supreme Court Issues Long-Awaited Decision in Christopher v. SmithKline Beecham Corp.*, NAT'L. L. REV. (June 20, 2012), <http://www.natlawreview.com/article/supreme-court-issues-long-awaited-decision-christopher-v-smithkline-beecham-corp>.

than a third of the briefs filed since 2000. Additionally, the DOL has begun issuing guidance with a wider scope of applicability through its Administrator Interpretations. This method of issuing interpretive guidance breaks with the decades-old custom of issuing such guidance only in response to individual inquires as to the applicability of statutes and regulations. These actions are unprecedented steps for the DOL in terms of attempting to influence judicial review and secure binding effect for its “across-the-board” interpretations.

These steps may be the result of what Justice Elena Kagan and other legal scholars refer to as “presidential administration” – increased presidential use of executive branch agencies to advance important social and fiscal goals in an “expeditious and coherent” way without having to wade through a “bureaucracy that hums along on automatic pilot.”¹⁵⁸ Justice Kagan argued in her 2001 article, *Presidential Administration*, that former President Bill Clinton used agencies in a more powerful and effective way than any president before him.¹⁵⁹ Clinton was able to bypass a deadlocked partisan Congress by using agencies to advance many of his most important policy goals, including tightening environmental regulations on automobile manufacturers and reforming welfare.¹⁶⁰ In her article, Justice Kagan called for courts to embrace the expeditious and efficient aspects of presidential administration by granting increased deference to interpretations issued by executive agencies, thereby linking deference with presidential involvement in agency policy and promoting the president’s role in “neglected areas of regulation.”¹⁶¹ Justice Kagan noted that the *Chevron* deference rule had its “deepest roots” in the idea that agencies are instruments of the President, and they are “entitled to make policy choices,

¹⁵⁸ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339 (2001).

¹⁵⁹ *See id.* at 2296.

¹⁶⁰ *Id.* at 2301.

¹⁶¹ *Id.* at 2376–78.

within the gaps left by Congress, by virtue of his relationship to the public.”¹⁶² Furthermore, Justice Kagan argued that “a focus on presidential action would reverse in many cases the courts' current suspicion of change in regulatory policy.”¹⁶³

Conservative columnist John Fund has attacked the agenda of the DOL's Office of the Solicitor, which includes an increased emphasis on amicus briefs as a method of advancing agency interpretations, as a blatant use of presidential administration to bypass Republican input in Congress. Fund writes that “[b]ecause President Obama will now have a tough time getting his liberal agenda through a more Republican Congress, many Democrats are urging him to ram it through using the executive branch's unilateral power.” While Fund's critique exaggerates the use of presidential administration as a dangerous and unchecked practice, his observations about Obama's use of the DOL to advance his labor policies are accurate. President Obama's employee-centered policies are the driving force behind the DOL's current regulatory agenda, although the president's influence is not specifically mentioned.¹⁶⁴

Perhaps one of Obama's most visible uses of presidential administration through the regulatory authority of the DOL was a proposed rulemaking to extend FLSA coverage to home healthcare workers in 2011.¹⁶⁵ This proposed revision to the FLSA regulations came directly from President Obama himself, signaling that he views the DOL as an important tool in advancing his policy goal of improving the financial outlook for low wage workers. Many courts appear to be uncomfortable with the partisan nature of many of the policies that are advanced by presidential administration, as demonstrated by the judicial pushback against the

¹⁶² *Id.* at 2373.

¹⁶³ *Id.* at 2378.

¹⁶⁴ *Regulatory Agenda Narrative*, U.S. DEP'T OF LABOR, <http://www.dol.gov/regulations/2010RegNarrative.htm>.

¹⁶⁵ See Boris & Klein, *supra* note 54; see also *Notice of Proposed Rulemaking to Amend the Companionship and Live-In Worker Regulations*, U.S. DEP'T OF LABOR – WAGE AND HOUR DIVISION, <http://www.dol.gov/whd/flsa/companionNPRM.htm#.UNhs3s1aQU4>.

DOL's shifting stance on the meaning of section 203(o) of the FLSA, which exempts time employees spend "changing clothes" from compensable work time under the FLSA.¹⁶⁶ The Tenth Circuit held in *Salazar v. Butterball* that the donning and doffing of personal protective equipment (PPE) fell under the "changing clothes" exemption, despite a DOL Administrator Interpretation stating that donning and doffing PPE should not be exempt work.¹⁶⁷ In reaching this conclusion, the court chose not to grant deference to the DOL Administrator Interpretation under *Skidmore*, writing that the interpretation had no power to persuade because the DOL had previously interpreted the statute to include the donning and doffing of PPE under the "changing clothes" exemption.¹⁶⁸ A similar judicial distrust of shifting agency interpretations appears to have contributed to the Supreme Court's holding in *SmithKline*, but this may be a trend that attorneys can reverse through the strategic use of deference arguments.

B. Proposed Approaches for Attorneys Litigating FLSA Exemption Issues

In the absence of a full-scale overhaul of the FLSA itself, a solution advocated by some employment law scholars, the DOL must work within the confines of the FLSA as written as well as within the Administrative Procedure Act. The only way for the DOL to ensure that its interpretations will receive *Auer* or *Chevron* deference is to conduct notice and comment rulemaking or draft interpretive guidance with an ample amount of notice attached. However, the DOL simply does not have the resources to conduct notice and comment rulemaking on a regular basis. Given this reality, attorneys have an important role to play both in suggesting when the DOL should consider issuing guidance using additional procedures that mimic the notice and fairness requirements of formal rulemaking as well as in shaping the future of judicial deference.

¹⁶⁶ Amanda Walck, *Taking It All Off: Salazar v. Butterball and the Battle Over Fair Compensation Under the FLSA's "Changing Clothes" Provision*, 89 DENV. U. L. REV. 549, 574-75 (2012).

¹⁶⁷ 644 F.3d 1130, 1142-43 (2011).

¹⁶⁸ *Id.* at 1139.

1. Attorneys Should Continue to Rely on DOL Interpretations Issued with Procedural Fairness

Although it is not entirely clear whether lower courts will extend the reasoning of *SmithKline* to invalidate other DOL interpretations, whether issued through an opinion letters or amicus briefs, attorneys should continue to rely on those DOL interpretations that are not issued for the first time (or suddenly reversed) as a part of an ongoing lawsuit. As discussed above, the DOL made an unusual move when it chose to issue a different interpretation of the regulations governing the “outside salesman” during the litigation of *SmithKline* and *In re Novartis*. Contrary to the speculative observations of some commentators, it does not appear at this time that *SmithKline* will have a broader effect on the level of deference that lower courts will apply to DOL interpretations of their own regulations. *Auer* deference remains the “general rule,” and it should remain as such if parties continue to rely on DOL interpretations that “reflect the agency's fair and considered judgment on the matter in question.”

2. Attorneys Should Continue to Advocate for the Application of *Auer* and *Chevron* Deference to DOL Interpretations

Along the same lines, attorneys and employee advocacy organizations should continue to argue that *Auer* deference remains the “general rule” for agency interpretations of their own regulations. Attorneys may want to distinguish the facts of their cases from the aspects of the *SmithKline* that led the court to find that no deference was warranted, including the relevant timing of any DOL interpretation and any changes to the agency’s interpretation over time. Lower courts will be less likely to read *SmithKline* as limiting the ability of an agency like the DOL to issue interpretive guidance in the form of an amicus brief. *Chevron* is also still the general rule for agency interpretations of the statutes they enforce, and attorneys should continue

to advocate for *Chevron* deference, especially in cases where *Mead* suggests that a court may still find that the agency used adequate procedures that merit *Chevron* deference under *Mead*.

3. Attorneys Should Bring Issues Requiring Interpretive Guidance To the Attention of the DOL Administrator As Early In the Litigation Process as Possible

The DOL is an inherently flawed regulatory agency because it depends on the parties it regulates to bring possible violations and misinterpretations to its attention. Because of this flaw, attorneys must be especially vigilant regarding emerging issues in wage and hour law. For example, if an attorney is starting to see a number of employees at a nationally known company with the same complaint about being misclassified and not receiving overtime, that attorney needs to consult the DOL as soon as possible. If it turns out that the employer's classification decision hinges on its interpretation of an ambiguous FLSA provision or regulation, the DOL's assistance is likely essential to determining the correct classification. As *SmithKline* illustrates, the DOL's interpretation may hurt a case if the DOL is shifting its position on a particular issue. While neither of these circumstances is fatal to a case individually, the combination of the two created a perfect storm in *SmithKline*. Attorneys should attempt to avoid these situations by communicating with the DOL on a regular basis about new interpretive issues.

Another strategy for avoiding the perfect storm of shifting interpretations coupled with interpretations announced in amicus briefs is for attorneys to request opinion letters in contentious cases prior to soliciting an amicus brief from the DOL. Some courts may be more suspicious of an interpretation announced in an amicus brief post-*SmithKline*, which may make opinion letters a more appealing option for those courts. Furthermore, other *amici curiae* may be able to argue on behalf of the DOL's interpretation where it does not have the resources to do so, making an opinion letter a more versatile option for use during litigation. The DOL is

attempting to transition to a system of guidance based on Administrator Interpretations that are more broadly applicable, which may well emerge as the effective tool of interpretive guidance for the DOL with improved notice procedures.

CONCLUSION

The DOL's amicus program illustrates both the benefits and the potential downfalls created when an agency attempts to use amicus briefs as a method of securing binding authority for its interpretive guidance. Unfortunately for the DOL, its amicus program appears to be a problematic and unpredictable way for the agency to guide employers, employees, and attorneys through the regulatory jumble of the FLSA. The DOL is experimenting with its opinion letters, expanding their scope and transforming them into the kind of well-reasoned, widely disseminated interpretation the Supreme Court was searching for in *SmithKline*. Administrator Interpretations are the future of DOL regulatory guidance, and as such, the DOL needs to ensure that it issues such Interpretations using procedures that will hold up under an analysis of *Auer* deference. Barring any major overhaul of the way the DOL does business, attorneys must find a way to ensure that the DOL is adequately informed of situations where large numbers of workers may be affected by misclassification under FLSA exemptions. Attorneys must continue to advocate for substantial deference in situations where it is warranted, but also recognize when DOL involvement in an interpretation may do more harm than good. *SmithKline* has thrown a wrench into a line of cases suggesting that agencies can use amicus briefs to announce interpretive guidance regarding their own regulations, but it has not shut the door on strategic advocacy. The DOL and attorneys alike must continue to navigate the tangled exemptions of the FLSA, but hopefully *SmithKline* will serve as an important reminder that notice and procedure must accompany any attempt to interpret the FLSA in the modern workplace.