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HIGH COURT RECOGNIZES LIMITS ON AGENCY DEFERENCE

(*Christopher v. SmithKline Beecham Corp.*)
U.S. Supreme Court, No. 11-204

The U.S. Supreme Court today refused to accord binding deference to the Department of Labor's recent "reinterpretation" of the Fair Labor Standards Act's (FLSA) "outside sales" exemption. That interpretation, which the Secretary of Labor first announced in a 2009 *amicus* brief, would have required the nation's more than 90,000 pharmaceutical sales representatives to be reclassified overnight as overtime-eligible employees under the FLSA.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case arguing that the Department of Labor's novel interpretation contradicted the Department's own regulatory and interpretative guidance to the contrary for more than seventy years.

"Today's decision is a victory for common sense and basic fairness," said WLF Senior Litigation Counsel Cory Andrews after reading the Court's opinion. "Administrative agencies cannot be permitted to disrupt settled expectations under the pretense of 'reinterpreting' existing regulations, or else an important safeguard for our representative system of government will be lost," Andrews said.

In a 5-4 opinion in *Christopher v. SmithKline Beecham*, the Supreme Court held that binding deference is inappropriate where an agency's new interpretation is inconsistent with the applicable statute and implementing regulation, and where the agency has long acquiesced to the regulated industry's decades-long practice. "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once an agency announces them," Justice Samuel Alito wrote on behalf of the Court's majority. "[I]t is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference," he concluded.

The case raised important issues about the limits of agency deference and the need to maintain appropriate checks on unpredictable and disruptive agency actions. At issue was whether pharmaceutical sales representatives are exempt from the overtime pay requirements of the FLSA. In answering that question, the appeals court below accorded no deference to the Department of Labor's newly announced interpretation of "sales" within the meaning of the FLSA. Under that new narrow definition, an employee is deemed to engage in "sales" only when he or she actually "transfers title" in the consummation of a sale. Because pharmaceutical sales representatives do not sell pharmaceuticals directly to patients, who are the end users, they cannot possibly satisfy the Department's strict definition.

In its brief, WLF argued that the Secretary of Labor's new view of the outside sales exemption appeared at best to be an after-the-fact effort to justify the Department's new litigating position and policy preference. WLF's brief also cautioned against the enormous upheaval that the Department's new interpretation of "outside sales" would have on legitimate reliance interests in the pharmaceutical industry—among employers *and* employees alike. Such concern, WLF argued, is especially warranted where, as here, an agency's contradictory interpretation creates an unfair surprise for the affected stakeholders who had come to rely on that agency's earlier acquiescence for well over half a century.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending economic liberty, free enterprise, and a limited and accountable government.

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For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.