

Christopher Vs. Smithkline Beecham Corp.

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Appeal No. : 11-204

Appellant : Christopher

Respondent : Smithkline Beecham Corp.

Judgement :

Christopher v. SmithKline Beecham Corp.

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SUPREME COURT OF THE UNITED STATES

SYLLABUS

CHRISTOPHER et al. v. SMITHKLINE BEECHAM CORP., dba
GLAXOSMITHKLINE

certiorari to the united states court of appeals for the ninth circuit

The Fair Labor Standards Act (FLSA) requires employers to pay employees overtime wages, see 29 U. S. C. 207(a), but this requirement does not apply with respect to workers employed in the capacity of outside salesman, 213(a)(1). Congress did not elaborate on the meaning of outside salesman, but it delegated authority to the Department of Labor (DOL) to issue regulations to define the term. Three of the DOLs regulations are relevant to this case. First, 29 CFR 541.500 defines outside salesman to mean any employee . . . [w]hose primary duty is . . . making sales within the meaning of [29 U. S. C. 203(k)]. 541.500(a)(1)-(2). Section 203(k), in turn, states that [s]ale or sell includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. Second, 541.501 clarifies that [s]ales within the meaning of [203(k)] include the transfer of title to tangible property. 541.501(b). Third, 541.503 provides that promotion work that is performed incidental to and in conjunction with an employees own outside sales or solicitations is exempt work, whereas promotion work that is incidental to sales made, or to be made, by someone else is not. 541.503(a). The DOL provided additional guidance in connection with its promulgation of these regulations, stressing that an employee is an outside salesman when the employee in some sense, has made sales. 69 Fed. Reg. 22162.

The prescription drug industry is subject to extensive federal regulation, including the requirement that prescription drugs be dispensed only upon a physicians prescription. In light of this requirement, pharmaceutical companies have long focused their direct marketing efforts on physicians. Pharmaceutical companies promote their products to physicians through a process called detailing, whereby employees known as detailers or pharmaceutical sales representatives try to persuade physicians to write prescriptions for the products in appropriate cases.

Petitioners were employed by respondent as pharmaceutical sales representatives for roughly four years, and during that time their primary objective was to obtain a nonbinding commitment from physicians to prescribe respondents products in appropriate cases. Each week, petitioners spent about 40 hours in the

field calling on physicians during normal business hours and an additional 10 to 20 hours attending events and performing other miscellaneous tasks. Petitioners were not required to punch a clock or report their hours, and they were subject to only minimal supervision. Petitioners were well compensated for their efforts, and their gross pay included both a base salary and incentive pay. The amount of incentive pay was determined based on the performance of petitioners assigned portfolio of drugs in their assigned sales territories. It is undisputed that petitioners were not paid time-and-a-half wages when they worked more than 40 hours per week.

Petitioners filed suit, alleging that respondent violated the FLSA by failing to compensate them for overtime. Respondent moved for summary judgment, arguing that petitioners were employed in the capacity of outside salesman, 213(a)(1), and therefore were exempt from the FLSAs overtime compensation requirement. The District Court agreed and granted summary judgment to respondent. Petitioners filed a motion to alter or amend the judgment, contending that the District Court had erred in failing to accord controlling deference to the DOLs interpretation of the pertinent regulations, which the DOL had announced in an amicus brief filed in a similar action. The District Court rejected this argument and denied the motion. The Ninth Circuit, agreeing that the DOLs interpretation was not entitled to controlling deference, affirmed.

Held: Petitioners qualify as outside salesmen under the most reasonable interpretation of the DOLs regulations. Pp. 8-25.

(a) The DOL filed amicus briefs in the Second Circuit and the Ninth Circuit in which it took the 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. Brief for Secretary of Labor as Amicus Curiae in *In re Novartis Wage and Hour Litigation*, No. 09-0437 (CA2), p. 11. The DOL changed course after the Court granted certiorari in this case, however, and now maintains that [a]n employee does not make a sale . . . unless he actually transfers title to the property at issue. Brief for United States as Amicus Curiae 12-13. The DOLs current interpretation of its regulations is not entitled to deference under *Auer v.*

Robbins, 519 U. S. 452. 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, see, *id.*, at 461-462, this general rule does not apply in all cases. Deference is inappropriate, for example, when the agency's interpretation is plainly erroneous or inconsistent with the regulation, *id.*, at 461, or when there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter, *id.*, at 462. There are strong reasons for withholding Auer deference in this case. Petitioners invoke the DOL's interpretation to impose potentially massive liability on respondent for conduct that occurred well before the interpretation was announced. To defer to the DOL's interpretation would result in precisely the kind of unfair surprise against which this Court has long warned. See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U. S. 158-171. Until 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. The statute and regulations do not provide clear notice. Even more important, despite the industry's decades-long practice, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully. The only plausible explanation for the DOL's inaction is acquiescence. Whatever the general merits of Auer deference, it is unwarranted here. The DOL's interpretation should instead be given a measure of deference proportional to its power to persuade. See *United States v. Mead Corp.*, 533 U. S. 218. Pp. 8-14.

(b) The DOL's current interpretation—that a sale demands a transfer of title—is quite unpersuasive. It plainly lacks the hallmarks of thorough consideration. Because the DOL first announced its view that pharmaceutical sales representatives are not outside salesmen in a series of amicus briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the DOL's internal decisionmaking process proved to be untenable. The interpretation is also flatly inconsistent with the FLSA. The statute defines sale to mean, *inter alia*, a consignment for sale, and a consignment for sale does not involve the transfer of title. The DOL relies heavily on 29 CFR 541.501, which provides that [s]ales . . . include the transfer of title to tangible property, 541.501(b), but it is apparent that this regulation does not mean that a sale must

include a transfer of title, only that transactions involving a transfer of title are included within the term sale. The DOLs explanation that obtaining a non-binding commitment to prescribe a drug constitutes promotion, and not sales, Reply Brief for Petitioners 17, is also unconvincing. Since promotion work that is performed incidental to an employees own sales is exempt, the DOLs conclusion that detailers perform only nonexempt promotion work is only as strong as the reasoning underlying its conclusion that those employees do not make sales. Pp. 14-16.

(c) Because the DOLs interpretation is neither entitled to Auer deference nor persuasive in its own right, traditional tools of interpretation must be employed to determine whether petitioners are exempt outside salesmen. Pp. 16-24.

(1) The FLSA does not furnish a clear answer to this question, but it provides at least one interpretive clue by exempting anyone employed . . . in the capacity of [an] outside salesman. 29 U. S. C. 213(a)(1). The statutes emphasis on capacity counsels in favor of a functional, rather than a formal, inquiry, one that views an employees responsibilities in the context of the particular industry in which the employee works. The DOLs regulations provide additional guidance. Section 541.500 defines an outside salesman as an employee whose primary duty is making sales and adopts the statutory definition of sale. This statutory definition contains at least three important textual clues. First, the definition is introduced with the verb includes, which indicates that the examples enumerated in the text are illustrative, not exhaustive. See *Burgess v. United States*, 553 U. S. 124, n. 3. Second, the list of transactions included in the statutory definition is modified by any, which, in the context of 203(k), is best read to mean one or some indiscriminately of whatever kind, *United States v. Gonzales*, 520 U. S. 1. Third, the definition includes the broad catchall phrase other disposition. Under the rule of *eiusdem generis*, the catchall phrase is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity. Nothing in the remaining regulations requires a narrower construction. Pp. 16-20.

(2) Given this interpretation of other disposition, it follows that petitioners made sales under the FLSA and thus are exempt outside salesmen within the meaning of the DOLs regulations. Petitioners obtain nonbinding commitments from physicians to prescribe respondents drugs. This kind of arrangement, in the unique regulatory environment within which pharmaceutical companies operate, comfortably falls within the catchall category of other disposition. That petitioners bear all of the external indicia of salesmen provides further support for this conclusion. And this holding also comports with the apparent purpose of the FLSAs exemption. The exemption is premised on the belief that exempt employees normally earn salaries well above the minimum wage and perform a kind of work that is difficult to standardize to a particular time frame and that cannot easily be spread to other workers. Petitioners-each of whom earned an average of more than \$70,000 per year and spent 10 to 20 hours outside normal business hours each week performing work related to his assigned portfolio of drugs in his assigned sales territory-are hardly the kind of employees that the FLSA was intended to protect. Pp. 20-22.

(3) Petitioners remaining arguments are also unavailing. Pp. 22-24.

635 F. 3d 383, affirmed.

Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.

Christopher v. SmithKline Beecham Corp. - 11-204 (2012)

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SUPREME COURT OF THE UNITED STATES

No. 11-204

MICHAEL SHANE CHRISTOPHER, et al., PETITIONERS v. SMITHKLINE
BEECHAM CORPORATION dba GLAXOSMITHKLINE

on writ of certiorari to the united states court of appeals for the ninth circuit

[June 18, 2012]

Justice Alito delivered the opinion of the Court.

The Fair Labor Standards Act (FLSA) imposes minimum wage and maximum hours requirements on employers, see 29 U. S. C. 206-207 (2006 ed. and Supp. IV), but those requirements do not apply to workers employed in the capacity of outside salesman, 213(a)(1). This case requires us to decide whether the term outside salesman, as defined by Department of Labor (DOL or Department) regulations, encompasses pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employers prescription drugs in appropriate cases. We conclude that these employees qualify as outside salesmen.

I

A

Congress enacted the FLSA in 1938 with the goal of protect[ing] all covered workers from substandard wages and oppressive working hours. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 739 (1981); see also 29 U. S. C. 202(a). Among other requirements, the FLSA obligates employers to compensate employees for hours in excess of 40 per week at a rate of 1 times the employees regular wages. See 207(a). The overtime compensation requirement,

however, does not apply with respect to all employees. See 213. As relevant here, the statute exempts workers employed . . . in the capacity of outside salesman. 213(a)(1).[[1](#)]

Congress did not define the term outside salesman, but it delegated authority to the DOL to issue regulations from time to time to defin[e] and delimi[t] the term. Ibid. The DOL promulgated such regulations in 1938, 1940, and 1949. In 2004, following notice-and-comment procedures, the DOL reissued the regulations with minor amendments. See 69 Fed. Reg. 22122 (2004). The current regulations are nearly identical in substance to the regulations issued in the years immediately following the FLSAs enactment. See 29 CFR 541.500-541.504 (2011).

Three of the DOLs regulations are directly relevant to this case: 541.500, 541.501, and 541.503. We refer to these three regulations as the general regulation, the sales regulation, and the promotion-work regulation, respectively.

The general regulation sets out the definition of the statutory term employee employed in the capacity of outside salesman. It defines the term to mean any employee . . . [w]hose primary duty is . . . making sales within the meaning of [29 U. S. C. 203(k)][[2](#)] and [w]ho is customarily and regularly engaged away from the employers place or places of business in performing such primary duty.[[3](#)] 541.500(a)(1)-(2). The referenced statutory provision, 29 U. S. C. 203(k), states that [s]ale or sell includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. Thus, under the general regulation, an outside salesman is any employee whose primary duty is making any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

The sales regulation restates the statutory definition of sale discussed above and clarifies that [s]ales within the meaning of [29 U. S. C. 203(k)] include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. 29 CFR 541.501(b).

Finally, the promotion-work regulation identifies [p]romotion work as one type of activity often performed by persons who make sales, which may or may not be

exempt outside sales work, depending upon the circumstances under which it is performed. 541.503(a). Promotion work that is performed incidental to and in conjunction with an employees own outside sales or solicitations is exempt work, whereas promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. Ibid.

Additional guidance concerning the scope of the outside salesman exemption can be gleaned from reports issued in connection with the DOLs promulgation of regulations in 1940 and 1949, and from the preamble to the 2004 regulations. See Dept. of Labor, Wage and Hour Division, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition (1940) (hereinafter 1940 Report); Dept. of Labor, Wage and Hour Division, Report and Recommendations on Proposed Revisions of Regulations, Part 541 (1949) (hereinafter 1949 Report); 69 Fed. Reg. 22160-22163 (hereinafter Preamble). Although the DOL has rejected proposals to eliminate or dilute the requirement that outside salesmen make their own sales, the Department has stressed that this requirement is met whenever an employee in some sense make[s] a sale. 1940 Report 46; see also Preamble 22162 (reiterating that the exemption applies only to an employee who in some sense, has made sales). And the DOL has made it clear that [e]xempt status should not depend on technicalities, such as whether it is the sales employee or the customer who types the order into a computer system and hits the return button, Preamble 22163, or whether the order is filled by [a] jobber rather than directly by [the employees] own employer, 1949 Report 83.

B

Respondent SmithKline Beecham Corporation is in the business of developing, manufacturing, and selling prescription drugs. The prescription drug industry is subject to extensive federal regulation, including the now-familiar requirement that prescription drugs be dispensed only upon a physicians prescription.[[4](#)] In light of this requirement, pharmaceutical companies have long focused their direct marketing efforts, not on the retail pharmacies that dispense prescription drugs, but rather on the medi- cal practitioners who possess the authority to prescribe the drugs in the first place. Pharmaceutical companies promote their prescription

drugs to physicians through a process called detailing, whereby employees known as detailers or pharmaceutical sales representatives provide information to physicians about the companys products in hopes of persuading them to write prescriptions for the products in appropriate cases. See *Sorrell v. IMS Health Inc.*, 564 U. S. ___, ___ (2011) (slip op., at 1-2) (describing the process of detailing). The position of detailer has existed in the pharmaceutical industry in substantially its current form since at least the 1950s, and in recent years the industry has employed more than 90,000 detailers nationwide. See 635 F. 3d 383, 387, and n. 5, 396 (CA9 2011).

Respondent hired petitioners Michael Christopher and Frank Buchanan as pharmaceutical sales representatives in 2003. During the roughly four years when petitioners were employed in that capacity,[[5](#)] they were responsible for calling on physicians in an assigned sales territory to discuss the features, benefits, and risks of an assigned portfolio of respondents prescription drugs. Petitioners primary objective was to obtain a nonbinding commitment[[6](#)] from the physician to prescribe those drugs in appropriate cases, and the training that petitioners received underscored the importance of that objective.

Petitioners spent about 40 hours each week in the field calling on physicians. These visits occurred during normal business hours, from about 8:30 a.m. to 5 p.m. Outside of normal business hours, petitioners spent an additional 10 to 20 hours each week attending events, reviewing product information, returning phone calls, responding to e-mails, and performing other miscellaneous tasks. Petitioners were not required to punch a clock or report their hours, and they were subject to only minimal supervision.

Petitioners were well compensated for their efforts. On average, Christophers annual gross pay was just over \$72,000, and Buchanans was just over \$76,000.[[7](#)] Petitioners gross pay included both a base salary and incentive pay. The amount of petitioners incentive pay was based on the sales volume or market share of their assigned drugs in their assigned sales territories,[[8](#)] and this amount was uncapped. Christophers incentive pay exceeded 30 percent of his gross pay during each of his years of employment; Buchanans exceeded 25

percent. It is undisputed that respondent did not pay petitioners time-and-a-half wages when they worked in excess of 40 hours per week.

C

Petitioners brought this action in the United States District Court for the District of Arizona under 29 U. S. C. 216(b). Petitioners alleged that respondent violated the FLSA by failing to compensate them for overtime, and they sought both backpay and liquidated damages as relief. Respondent moved for summary judgment, arguing that petitioners were employed . . . in the capacity of outside salesman, 213(a)(1), and therefore were exempt from the FLSAs overtime compensation requirement.[[9](#)] The District Court agreed and granted summary judgment to respondent. See App. to Pet. for Cert. 37a-47a.

After the District Court issued its order, petitioners filed a motion to alter or amend the judgment, contending that the District Court had erred in failing to accord controlling deference to the DOLs interpretation of the pertinent regulations. That interpretation had been announced in an uninvited amicus brief filed by the DOL in a similar action then pending in the Second Circuit. See Brief for Secretary of Labor as Amicus Curiae in *In re Novartis Wage and Hour Litigation*, No. 09-0437 (hereinafter *Secretarys Novartis Brief*). The District Court rejected this argument and denied the motion. See App. to Pet. for Cert. 48a-52a.

The Court of Appeals for the Ninth Circuit affirmed. See 635 F. 3d 383. The Court of Appeals agreed that the DOLs interpretation[[10](#)] was not entitled to controlling deference. See *id.*, at 393-395. It held that, because the commitment that petitioners obtained from physicians was the maximum possible under the rules applicable to the pharmaceutical industry, petitioners made sales within the meaning of the regulations. See *id.*, at 395-397. The court found it significant, moreover, that the DOL had previously interpreted the regulations as requiring only that an employee in some sense make a sale, see *id.*, at 395-396 (emphasis deleted), and had acquiesce[d] in the sales practices of the drug industry for over seventy years, *id.*, at 399.

The Ninth Circuit's decision conflicts with the Second Circuit's decision in *In re Novartis Wage and Hour Litigation*, 611 F. 3d 141, 153-155 (2010) (holding that the DOL's interpretation is entitled to controlling deference). We granted certiorari to resolve this split, 565 U. S. ____ (2011), and we now affirm the judgment of the Ninth Circuit.

II

We must determine whether pharmaceutical detailers are outside salesmen as the DOL has defined that term in its regulations. The parties agree that the regulations themselves were validly promulgated and are therefore entitled to deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). But the parties disagree sharply about whether the DOL's interpretation of the regulations is owed deference under *Auer v. Robbins*, 519 U. S. 452 (1997). It is to that question that we now turn.

A

The DOL first announced its view that pharmaceutical detailers are not exempt outside salesmen in an amicus brief filed in the Second Circuit in 2009, and the Department has subsequently filed similar amicus briefs in other cases, including the case now before us.[[11](#)] While the DOL's ultimate conclusion that detailers are not exempt has remained unchanged since 2009, the same cannot be said of its reasoning. In both the Second Circuit and the Ninth Circuit, the DOL took the 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. Secretary's Novartis Brief 11; see also Brief for Secretary of Labor as Amicus Curiae in No. 10-15257 (CA9), p. 12. Perhaps because of the nebulous nature of this consummated transaction test,[[12](#)] the Department changed course after we granted certiorari in this case. The Department now takes the position that [a]n employee does not make a sale for purposes of the outside salesman exemption unless he actually transfers title to the property at issue. Brief for United States as Amicus Curiae 12-13 (hereinafter U. S. Brief).[[13](#)] Petitioners and the DOL assert that this new interpretation of the regulations is entitled to controlling deference. See Brief for Petitioners 31-42; U. S. Brief 30-34.[

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, see *Chase Bank USA, N. A. v. McCoy*, 562 U. S. ___, ___ (2011) (slip op., at 12); *Auer*, 519 U. S., at 461-462, this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency's interpretation is plainly erroneous or inconsistent with the regulation. *Id.*, at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U. S. 332, 359 (1989)). And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question. *Auer*, supra, at 462; see also, e.g., *Chase Bank*, supra, at ___ (slip op., at 14). This might occur when the agency's interpretation conflicts with a prior interpretation, see, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U. S. 504, 515 (1994), or when it appears that the interpretation is nothing more than a convenient litigating position, *Bowen v. Georgetown Univ. Hospital*, 488 U. S. 204, 213 (1988), or a post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack, *Auer*, supra, at 462 (quoting *Bowen*, supra, at 212; alteration in original).

In this case, there are strong reasons for withholding the deference that Auer generally requires. Petitioners invoke the DOL's interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced. To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires. *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F. 2d 154, 156 (CA DC 1986) (Scalia, J.).[[15](#)] Indeed, it would result in precisely the kind of unfair surprise against which our cases have long warned. See *Long Island Care at Home, Ltd. v. Coke*, 551 U. S. 158-171 (2007) (deferring to new interpretation that create[d] no unfair surprise because agency had proceeded through notice-and-comment rulemaking); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 158 (1991) (identifying adequacy of notice to regulated parties as one factor relevant to the

reasonableness of the agency's interpretation); *NLRB v. Bell Aerospace Co.*, 416 U. S. 267, 295 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding where doing so would impose new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements or in a case involving fines or damages).

This case well illustrates the point. Until 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. The statute and regulations certainly do not provide clear notice of this. The general regulation adopts the broad statutory definition of sale, and that definition, in turn, employs the broad catchall phrase other disposition. See 29 CFR 541.500(a)(1). This catchall phrase could reasonably be construed to encompass a nonbinding commitment from a physician to prescribe a particular drug, and nothing in the statutory or regulatory text or the DOL's prior guidance plainly requires a contrary reading. See Preamble 22162 (explaining that an employee must in some sense make a sale); 1940 Report 46 (same).

Even more important, despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully.[[16](#)] We acknowledge that an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred. See, e.g., *Heckler v. Chaney*, 470 U. S. 821, 831 (1985) (noting that an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise). But where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute. As the Seventh Circuit has noted, while it may be possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing, the more plausible hypothesis is that the Department did not think the industry's practice was unlawful. *Yi v. Sterling Collision Centers, Inc.*, 480 F. 3d 505, 510-511 (2007). There are now approximately 90,000 pharmaceutical sales representatives; the nature of their

work has not materially changed for decades and is well known; these employees are well paid; and like quintessential outside salesmen, they do not punch a clock and often work more than 40 hours per week. Other than acquiescence, no explanation for the DOLs inaction is plausible.

Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages,[[17](#)] but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrat[ing] the notice and predictability purposes of rulemaking. *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U. S. ___, ___ (2011) (Scalia, J., concurring) (slip op., at 3); see also Stephenson & Pogoriler, *Seminole Rocks Domain*, 79 Geo. Wash. L. Rev. 1449, 1461-1462 (2011); Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 655-668 (1996). It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it 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.

Accordingly, whatever the general merits of Auer deference, it is unwarranted here. We instead accord the Department's interpretation a measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. *United States v. Mead Corp.*, 533 U. S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944)).

B

We find the DOL's interpretation of its regulations quite unpersuasive. The interpretation to which we are now asked to defer—that a sale demands a transfer of title—plainly lacks the hallmarks of thorough consideration. Because the DOL first announced its view that pharmaceutical sales representatives do not qualify as outside salesmen in a series of amicus briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the Department's

internal decisionmaking process proved to be untenable. After arguing successfully in the Second Circuit and then unsuccessfully in the Ninth Circuit that a sale for present purposes simply requires a consummated transaction, the DOL advanced a different interpretation in this Court. Here, the DOL's brief states unequivocally that [a]n employee does not make a sale for purposes of the outside salesman exemption unless he actually transfers title to the property at issue. U. S. Brief 12-13.

This new interpretation is flatly inconsistent with the FLSA, which defines sale to mean, *inter alia*, a consignment for sale. A consignment for sale does not involve the transfer of title. See, e.g., *Sturm v. Boker*, 150 U. S. 312, 330 (1893) (The agency to sell and return the proceeds, or the specific goods if not sold . . . does not involve a change of title); *Hawkland*, *Consignment Selling Under the Uniform Commercial Code*, 67 Com. L. J. 146, 147 (1962) (explaining that [a] consignment of goods for sale does not pass the title at any time, nor does it contemplate that it should be passed (quoting *Rio Grande Oil Co. v. Miller Rubber Co. of N. Y.*, 31 Ariz. 84, 87, 250 P. 564, 565 (1926))).

The DOL cannot salvage its interpretation by arguing that a consignment for sale may eventually result in the transfer of title (from the consignor to the ultimate purchaser if the consignee in fact sells the good). Much the same may be said about a physician's nonbinding commitment to prescribe a particular product in an appropriate case. In that situation, too, agreement may eventually result in the transfer of title (from the manufacturer to a pharmacy and ultimately to the patient for whom the drug is prescribed).

In support of its new interpretation, the DOL relies heavily on its sales regulation, which states in part that [s]ales [for present purposes] include the transfer of title to tangible property, 29 CFR 541.501(b) (emphasis added). This regulation, however, provides little support for the DOL's position. The DOL reads the sales regulation to mean that a sale necessarily includes the transfer of title, but that is not what the regulation says. And it seems clear that that is not what the regulation means. The sentence just subsequent to the one on which the DOL relies, echoing the terms of the FLSA, makes clear that a consignment for sale

qualifies as a sale. Since a consignment for sale does not involve a transfer of title, it is apparent that the sales regulation does not mean that a sale must include a transfer of title, only that transactions involving a transfer of title are included within the term sale.

Petitioners invite us to look past the DOLs determination that a sale must involve the transfer of title and instead defer to the Departments explanation that obtaining a non-binding commitment to prescribe a drug constitutes promotion, and not sales. Reply Brief for Petitioners 17. The problem with the DOLs interpretation of the promotion-work regulation, however, is that it depends almost entirely on the DOLs flawed transfer-of-title interpretation. The promotion-work regulation does not distinguish between promotion work and sales; rather, it distinguishes between exempt promotion work and nonexempt promotion work. Since promotion work that is performed incidental to an employees own sales is exempt, the DOLs conclusion that pharmaceutical detailers perform only nonexempt promotion work is only as strong as the reasoning underlying its conclusion that those employees do not make sales. For the reasons already discussed, we find this reasoning wholly unpersuasive.

In light of our conclusion that the DOLs interpretation is neither entitled to Auer deference nor persuasive in its own right, we must employ traditional tools of interpretation to determine whether petitioners are exempt outside salesmen.

C

1

We begin with the text of the FLSA. Although the provision that establishes the overtime salesman exemption does not furnish a clear answer to the question before us, it provides at least one interpretive clue: It exempts anyone employed . . . in the capacity of [an] outside salesman. 29 U. S. C. 213(a)(1) (emphasis added). Capacity, used in this sense, means [o]utward condition or circumstances; relation; character; position. Websters New International Dictionary 396 (2d ed. 1934); see also 2 Oxford English Dictionary 89 (def. 9) (1933) (Position, condition, character, relation). The statutes emphasis on the capacity of the employee

counsels in favor of a functional, rather than a formal, inquiry, one that views an employees responsibilities in the context of the particular industry in which the employee works.

The DOLs regulations provide additional guidance. The general regulation defines an outside salesman as an employee whose primary duty is making sales, and it adopts the statutory definition of sale. 29 CFR 541.500(a)(1)(i). This definition contains at least three important textual clues. First, the definition is introduced with the verb includes instead of means. This word choice is significant because it makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive. See *Burgess v. United States*, 553 U. S. 124, n. 3 (2008) (explaining that [a] term whose statutory definition declares what it includes is more susceptible to extension of meaning . . . than where . . . the definition declares what a term means (alteration in original; some internal quotation marks omitted)). Indeed, Congress used the narrower word means in other provisions of the FLSA when it wanted to cabin a definition to a specific list of enumerated items. See, e.g., 29 U. S. C. 203(a) (Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons (emphasis added)).

Second, the list of transactions included in the statutory definition of sale is modified by the word any. We have recognized that the modifier any can mean different things depending upon the setting, *Nixon v. Missouri Municipal League*, 541 U. S. 125, 132 (2004), but in the context of 29 U. S. C. 203(k), it is best read to mean one or some indiscriminately of whatever kind, *United States v. Gonzales*, 520 U. S. 1, 5 (1997) (quoting *Websters Third New International Dictionary* 97 (1976)). That is so because Congress defined sale to include both the unmodified word sale and transactions that might not be considered sales in a technical sense, including exchanges and consignments for sale.[[18](#)]

Third, Congress also included a broad catchall phrase: other disposition. Neither the statute nor the regulations define disposition, but dictionary definitions of the term range from relinquishment or alienation to arrangement. See *Websters New International Dictionary* 644 (def. 1(b)) (1927) ([t]he getting rid, or making

over, of anything; relinquishment or alienation); *ibid.* (def. 1(a)) ([t]he ordering, regulating, or administering of anything); 3 Oxford English Dictionary, *supra*, at 493 (def. 4) ([t]he action of disposing of, putting away, getting rid of, making over, etc.); *ibid.* (def. 1) ([t]he action of setting in order, or condition of being set in order; arrangement, order). We agree with the DOL that the rule of *eiusdem generis* should guide our interpretation of the catchall phrase, since it follows a list of specific items.[[19](#)] But the limit the DOL posits, one that would confine the phrase to dispositions involving contract[s] for the exchange of goods or services in return for value, see U. S. Brief 20, is much too narrow, as is petitioners view that a sale requires a firm agreement or firm commitment to buy, see Tr. of Oral Arg. 64, 66. These interpretations would defeat Congress intent to define sale in a broad manner and render the general statutory language meaningless. See *United States v. Alpers*, 338 U. S. 680, 682 (1950) (instructing that rule of *eiusdem generis* cannot be employed to obscure and defeat the intent and purpose of Congress or render general words meaningless). Indeed, we are hard pressed to think of any contract for the exchange of goods or services in return for value or any firm agreement to buy that would not also fall within one of the specifically enumerated categories.[[20](#)]

The specific list of transactions that precedes the phrase other disposition seems to us to represent an attempt to accommodate industry-by-industry variations in methods of selling commodities. Consequently, we think that the catchall phrase other disposition is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity.

Nothing in the remaining regulations requires a narrower construction.[[21](#)] As discussed above, the sales regulation instructs that sales within the meaning of 29 U. S. C. 203(k) include the transfer of title to tangible property, 29 CFR 541.501(b) (emphasis added), but this regulation in no way limits the broad statutory definition of sale. And although the promotion-work regulation distinguishes between promotion work that is incidental to an employees own sales and work that is incidental to sales made by someone else, see 541.503(a), this distinction tells us nothing about the meaning of sale.[[22](#)]

Given our interpretation of other disposition, it follows that petitioners made sales for purposes of the FLSA and therefore are exempt outside salesmen within the meaning of the DOLs regulations. Obtaining a nonbinding commitment from a physician to prescribe one of respondents drugs is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells.[[23](#)] This kind of arrangement, in the unique regulatory environment within which pharmaceutical companies must operate, comfortably falls within the catch- all category of other disposition.

That petitioners bear all of the external indicia of salesmen provides further support for our conclusion. Petitioners were hired for their sales experience. They were trained to close each sales call by obtaining the maximum commitment possible from the physician. They worked away from the office, with minimal supervision, and they were rewarded for their efforts with incentive compensation. It would be anomalous to require respondent to compensate petitioners for overtime, while at the same time exempting employees who function identically to petitioners in every respect except that they sell physician-administered drugs, such as vaccines and other inject- able pharmaceuticals, that are ordered by the physician directly rather than purchased by the end user at a pharmacy with a prescription from the physician.

Our holding also comports with the apparent purpose of the FLSAs exemption for outside salesmen. The exemption is premised on the belief that exempt employees typically earned salaries well above the minimum wage and enjoyed other benefits that se[t] them apart from the nonexempt workers entitled to overtime pay. Preamble 22124. It was also thought that exempt employees performed a kind of work that was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSAs time-and-a-half overtime premium. Ibid. Petitioners-each of whom earned an average of more than \$70,000 per year and spent between 10 and 20 hours outside normal business hours each week

performing work related to his assigned portfolio of drugs in his assigned sales territory-are hardly the kind of employees that the FLSA was intended to protect. And it would be challenging, to say the least, for pharmaceutical companies to compensate detailers for overtime going forward without significantly changing the nature of that position. See, e.g., Brief for Ph RMA as Amicus Curiae 14-20 (explaining that key aspects of [detailers] jobs as they are currently structured are fundamentally incompatible with treating [detailers] as hourly employees).

3

The remaining arguments advanced by petitioners and the dissent are unavailing. Petitioners contend that detailers are more naturally classified as nonexempt promotional employees who merely stimulate sales made by others than as exempt outside salesmen. They point out that respondents prescription drugs are not actually sold until distributors and retail pharmacies order the drugs from other employees. See Reply Brief for Petitioners 7. Those employees,[[24](#)] they reason, are the true salesmen in the industry, not detailers. This formalistic argument is inconsistent with the realistic approach that the outside salesman exemption is meant to reflect.

Petitioners theory seems to be that an employee is properly classified as a nonexempt promotional employee whenever there is another employee who actually makes the sale in a technical sense. But, taken to its extreme, petitioners theory would require that we treat as a nonexempt promotional employee a manufacturers representative who takes an order from a retailer but then transfers the order to a jobbers employee to be filled, or a car salesman who receives a commitment to buy but then asks his or her assistant to enter the order into the computer. This formalistic approach would be difficult to reconcile with the broad language of the regulations and the statutory definition of sale, and it is in significant tension with the DOLs past practice. See 1949 Report 83 (explaining that the manufacturers representative was clearly performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer); Preamble 22162 (noting that technological changes in how orders are taken and processed should not preclude the exemption for employees who in

some sense make the sales).

Petitioners additionally argue that detailers are the functional equivalent of employees who sell a concept, and they point to Wage and Hour Division opinion letters, as well as lower court decisions, deeming such employees nonexempt. See Brief for Petitioners 47-48. Two of these opinions, however, concerned employees who were more analogous to buyers than to sellers. See *Clements v. Serco, Inc.*, 530 F. 3d 1224, 1229-1230, n. 4 (CA10 2008) (explaining that, although military recruiters [i]n a loose sense were selling the Army's services, it was the Army that would pa[y] for the services of the recruits who enlist); Opinion Letter from Dept. of Labor, Wage and Hour Division (Aug. 19, 1994), 1994 WL 1004855 (explaining that selling the concept of organ donation is similar to that of outside buyers who in a very loose sense are sometimes described as selling their employers service to the person for whom they obtain their goods). And the other two opinions are likewise inapposite. One concerned employees who were not selling a good or service at all, see Opinion Letter from Dept. of Labor, Wage and Hour Division (May 22, 2006), 2006 WL 1698305 (concluding that employees who solicit charitable contributions are not exempt), and the other concerned employees who were incapable of selling any good or service because their employer had yet to extend an offer, see Opinion Letter from Dept. of Labor, Wage and Hour Division (Apr. 20, 1999), 1999 WL 1002391 (concluding that college recruiters are not exempt because they merely induce qualified customers to apply to the college, and the college in turn decides whether to make a contractual offer of its educational services to the applicant).

Finally, the dissent posits that the primary duty of a pharmaceutical detailer is not to obtain a promise to prescribe a particular drug, but rather to provid[e] information so that the doctor will keep the drug in mind with an eye toward using it when appropriate. *Post*, at 6. But the record in this case belies that contention. Petitioners end goal was not merely to make physicians aware of the medically appropriate uses of a particular drug. Rather, it was to convince physicians actually to prescribe the drug in appropriate cases. See App. to Pet. for Cert. 40a (finding that petitioners primary objective was convincing physicians to prescribe [respondents] products to their patients).

For these reasons, we conclude that petitioners qualify as outside salesmen under the most reasonable interpretation of the DOLs regulations. The judgment of the Court of Appeals is

Affirmed.

Notes

1 This provision also exempts workers employed in a bona fide executive, administrative, or professional capacity. .

2 The definition also includes any employee [w]hose primary duty is . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. 29 CFR 541.500(a)(1)(ii). That portion of the definition is not at issue in this case.

3 It is undisputed that petitioners were customarily and regularly engaged away from respondents place of business in performing their responsibilities.

4 Congress imposed this requirement in 1951 when it amended the Federal Food, Drug, and Cosmetic Act (FDCA) to provide that drugs that are not safe for use except under the supervision of a practitioner may be dispensed only . . . upon a . . . prescription of a practitioner licensed by law to administer such drug. Durham-Humphrey Amendment of 1951, ch. 578, -649 (codified at). As originally enacted in 1938, the FDCA allowed manufacturers to designate certain drugs as prescription only, but it did not say which drugs were to be sold by prescription or that there were any drugs that could not be sold without a prescription. Temin, *The Origin of Compulsory Drug Prescriptions*, 22 J. Law & Econ. 91, 98 (1979). Prior to Congress enactment of the FDCA, a prescription was not needed to obtain any drug other than certain narcotics. See *id.*, at 97.

5 Respondent terminated Christophers employment in 2007, and Buchanan left voluntarily the same year to accept a similar position with another pharmaceutical company.

6 The parties agree that the commitment is nonbinding.

7 The median pay for pharmaceutical detailers nationwide exceeds \$90,000 per year. See Brief for Respondent 14.

8 The amount of incentive pay is not formally tied to the number of prescriptions written or commitments obtained, but because retail pharmacies are prohibited from dispensing prescription drugs without a physicians prescription, retail sales of respondents products necessarily reflect the number of prescriptions written.

9 Respondent also argued that petitioners were exempt administrative employees. The District Court and the Court of Appeals found it unnecessary to reach that argument, and the question is not before us.

10 The DOL filed an amicus brief in the Ninth Circuit advancing substantially the same interpretation it had advanced in its brief in the Second Circuit. See Brief for Secretary of Labor as Amicus Curiae in No. 10-15257.

11 The DOL invites interested parties to inform it of private cases involving the misclassification of employees in contravention of the new Part 541 rule so that it may file amicus briefs in appropriate cases to share with courts the Departments view of the proper application of the new Part 541 rule. See Dept. of Labor, Office of Solicitor, Overtime Security Amicus Program, <http://www.dol.gov/sol/541amicus.htm> (as visited June 15, 2012, and available in Clerk of Courts case file).

12 For example, it is unclear why a physicians nonbinding commitment to prescribe a drug in an appropriate case cannot qualify as a sale under this test. The broad term transaction easily encompasses such a commitment. See Websters Third New International Dictionary 2425 (2002) (hereinafter Websters Third) (defining transaction to mean a communicative action or activity involving two parties or two things reciprocally affecting or influencing each other). A consummated transaction is simply a transaction that has been fully completed. See *id.*, at 490 (defining consummate to mean to bring to completion). And a pharmaceutical sales representative who obtains such a commitment is directly involv[ed] in this transaction. Thus, once a pharmaceutical sales representative and a physician have fully completed their agreement, it may be said that they have entered into a consummated transaction.

13 When pressed to clarify its position at oral argument, the DOL suggested that a transfer of possession in contemplation of a transfer of title might also suffice. Tr. of Oral Arg. 17.

14 Neither petitioners nor the DOL asks us to accord controlling deference to the consummated transaction interpretation the Department advanced in its briefs in

the Second Circuit and Ninth Circuit, nor could we given that the Department has now abandoned that interpretation. See *Estate of Cowart v. Nicklos Drilling Co.*, (noting that it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself).

15 Accord, *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commn*, 681 F. 2d 1189, 1192 (CA9 1982) (recognizing that the application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited); *Kropp Forge Co. v. Secretary of Labor*, 657 F. 2d 119, 122 (CA7 1981) (refusing to impose sanctions where standard the regulated party allegedly violated d[id] not provide fair warning of what is required or prohibited); *Dravo Corp. v. Occupational Safety and Health Review Commn*, 613 F. 2d 1227, 1232-1233 (CA3 1980) (rejecting agencys expansive interpretation where agency did not state with ascertainable certainty what is meant by the standards [it] ha[d] promulgated (internal quotation marks omitted and emphasis deleted)); *Diamond Roofing Co. v. Occupational Safety and Health Review Commn*, 528 F. 2d 645, 649 (CA5 1976) (explaining that statutes and regulations which allow monetary penalties against those who violate them must give an employer fair warning of the conduct [they] prohibi[t] or requir[e]); 1 R. Pierce, *Administrative Law Treatise* 6.11, p. 543 (5th ed. 2010) (observing that [i]n penalty cases, courts will not accord substantial deference to an agencys interpretation ofan ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule).

16 It appears that the DOL only once directly opined on the exempt status of detailers prior to 2009. In 1945, the Wage and Hour Division issued an opinion letter tentatively concluding that medical detailists who performed work . . . aimed at increasing the use of [their employers] product in hospitals and through physicians recommendations qualified as administrative employees. Opinion Letter from Dept. of Labor, Wage and Hour Division (May 19, 1945), 1 CCH Labor Law Service, Federal Wage-Hour Guide 33,093. But that letter did not address the outside salesman exemption.

17 For instance, it makes the job of a reviewing court much easier, and since it usually produces affirmance of the agencys view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and

predictability to the administrative process. *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U. S. ___, ___ (2011) (Scalia, J., concurring) (slip op., at 3).

[18](#) Given that the FLSA provides its own definition of sale that is more expansive than the terms ordinary meaning, the DOLs reliance on dictionary definitions of the word sale is misplaced. See, e.g., *Burgess v. United States*, (noting that [w]hen a statute includes an explicit definition, we must follow that definition (internal quotation marks omitted)).

[19](#) The canon of *ejusdem generis* limits general terms [that] follow specific ones to matters similar to those specified. *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U. S. ___, ___ (2011) (slip op., at 16) (alteration in original; internal quotation marks omitted).

[20](#) The dissents approach suffers from the same flaw. The dissent contends that, in order to make a sale, an employee must at least obtain a firm commitment to buy. *Post*, at 10 (opinion of Breyer, J.). But when an employee who has extended an offer to sell obtains a firm commitment to buy, that transaction amounts to a contract to sell. Given that a contract to sell already falls within the statutory definition of sale, the dissents interpretation would strip the catchall phrase of independent meaning.

[21](#) In the past, we have stated that exemptions to the FLSA must be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit. *Arnold v. Ben Kanowsky, Inc.*, . Petitioners and the DOL contend that *Arnold* requires us to construe the outside salesman exemption narrowly, but *Arnold* is inapposite where, as here, we are interpreting a general definition that applies throughout the FLSA.

[22](#) The dissents view that pharmaceutical detailers are more naturally characterized as nonexempt promotional employees than as exempt outside salesmen relies heavily on the DOLs explanation in its 1940 Re-port that sales promotion men are not salesmen. See *post*, at 7; see also 1940 Report 46. There, the Department described a sales promotion man as an employee who merely pav[es] the way for salesmen and who frequently deals with retailers who are not customers of his own employer but of his employers customer and is interested in sales by the retailer, not to the retailer. 1940 Report 46. The dissent asserts that detailers are analogous to sales promotion men because they deal with

individuals, namely doctors, who are not customers of their own employer and are primarily interested in sales authorized by the doctor, not to the doctor. Post, at 7. But this comparison is inapt. The equivalent of a sales promotion man in the pharmaceutical industry would be an employee who promotes a manufacturers products to the retail pharmacies that sell the products after purchasing them from a wholesaler or distributor. Detailers, by contrast, obtain nonbinding commitments from the gatekeepers who must prescribe the product if any sale is to take place at all.

[23](#) Our point is not, as the dissent suggests, that any employee who does the most that he or she is able to do in a particular position to ensure the eventual sale of a product should qualify as an exempt outside salesman. See post, at 9 (noting that the most a California firms marketing employee may be able to do to secure orders from New York customers is to post an advertisement on the Internet). Rather, our point is that, when an entire industry is constrained by law or regulation from selling its products in the ordinary manner, an employee who functions in all relevant respects as an outside salesman should not be excluded from that category based on technicalities.

[24](#) According to one of respondents amici, most pharmaceutical companies have systems in place to maintain the inventories of wholesalers and retailers of prescription drugs (consisting mainly of periodic restocking pursuant to a general contract), [and] these systems are largely ministerial and require only a few employees to administer them. Brief for Ph RMA as Amicus Curiae 24; see also *ibid.* (explaining that one of its members employs more than 2,000 pharmaceutical sales representatives but fewer than ten employees who are responsible for processing orders from retailers and wholesalers, a ratio that is typical of how the industry is structured).

Christopher v. SmithKline Beecham Corp. - 11-204 (2012)

SUPREME COURT OF THE UNITED STATES

MICHAEL SHANE CHRISTOPHER, et al., PETITIONERS v. SMITHKLINE
BEECHAM CORPORATION dba GLAXOSMITHKLINE

on writ of certiorari to the united states court of appeals for the ninth circuit

[June 18, 2012]

Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, dissenting.

The Fair Labor Standards Act (FLSA) exempts from federal maximum hour and minimum wage requirements any employee employed . . . in the capacity of outside salesman. 29 U. S. C. 213(a)(1). The question is whether drug company detailers fall within the scope of the term outside salesman. In my view, they do not.

I

The Court describes the essential aspects of the detailers job as follows: First, the detailer provide[s] information to physicians about the companys products in hopes of persuading them to write prescriptions for the products in appropriate cases. Ante, at 5. Second, the detailers call[] on physicians in an assigned sales territory to discuss the features, benefits, and risks of an assigned portfolio of respondents prescription drugs, and they seek a nonbinding commitment from the physician to prescribe those drugs in appropriate cases Ibid. (footnote omitted). Third, the detailers compensation includes an incentive element based on the sales volume or market share of their assigned drugs in their assigned sales territories. Ante, at 6. The Court adds that the detailers work with only minimal supervision and beyond normal business hours attending events, reviewing product information, returning phone calls, responding to e-mails, and performing other miscellaneous tasks. Ante, at 6.

As summarized, I agree with the Courts description of the job. In light of important, near-contemporaneous differences in the Justice Departments views as to the meaning of relevant Labor Department regulations, see ante, at 8-9, I also agree that we should not give the Solicitor Generals current interpretive view any especially favorable weight. Ante, at 14. Thus, I am willing to assume, with the Court, that we should determine whether the statutory term covers the detailers job as here described through our independent examination of the statutes language and the related Labor Department regulations. But, I conclude on that basis that a detailer is not an outside salesman.

II

The FLSA does not itself define the term outside salesman. Rather, it exempts from wage and hour requirements any employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary). 29 U. S. C. 213(a)(1) (emphasis added). Thus, we must look to relevant Labor Department regulations to answer the question. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984); see also *Long Island Care at Home, Ltd. v. Coke*, 551 U. S. 158, 165 (2007) (explaining that the FLSA explicitly leaves gaps to be filled by regulations).

There are three relevant regulations. The first is entitled General rule for outside sales employees, 29 CFR 541.500 (2011); the second is entitled Making sales or obtaining orders, 541.501; and the third is entitled Promotion work, 541.503. The relevant language of the first two regulations is similar. The first says that the term employee employed in the capacity of outside salesman . . . shall mean any employee . . . [w]hose pri-mary duty is: (i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders or contracts for services or for the use of facilities 541.500(a)(1). The second regulation tells us that the first regulation requires that the employee be engaged in . . . (1) Making sales within the meaning of section 3(k) of the Act, or (2) Obtaining orders or contracts for services or for the use of facilities. 541.501(a).

The second part of these quoted passages is irrelevant here, for it concerns matters not at issue, namely orders or contracts for services or for the use of facilities. The remaining parts of the two regulations are similarly irrelevant. See Appendix, *infra*. Thus, the relevant portions of the first two regulations say simply that the employees primary duty must be making sales within the meaning of section 3(k) of the Act. And 3(k) of the Act says that the word Sale or sell includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. 29 U. S. C. 203(k).

Unless we give the words of the statute and regulations some special meaning, a detailers primary duty is not that of making sales or the equivalent. A detailer might convince a doctor to prescribe a drug for a particular kind of patient. If the doctor encounters such a patient, he might prescribe the drug. The doctors client, the patient, might take the prescription to a pharmacist and ask the pharmacist to fill the prescription. If so, the pharmacist might sell the manufacturers drug to the patient, or might substitute a generic version. But it is the pharmacist, not the detailer, who will have sold the drug.

To put the same fairly obvious point in the language of the regulations and of 3(k) of the FLSA, see 29 U. S. C. 203(k), the detailer does not sell anything to the doctor. See Blacks Law Dictionary 1454 (9th ed. 2009) (defining sale as [t]he transfer of property or title for a price). Nor does he, during the course of that visit or immedi-ately thereafter, exchange the manufacturers product for money or for anything else. He enters into no contract to sell on behalf of anyone. He consigns nothing for sale. He ships nothing for sale. He does not dispose of any product at all.

What the detailer does is inform the doctor about the nature of the manufacturers drugs and explain their uses, their virtues, their drawbacks, and their limitations. The detailer may well try to convince the doctor to prescribe the manufacturers drugs for patients. And if the detailer is successful, the doctor will make a nonbinding commitment to write prescriptions using one or more of those drugs where appropriate. If followed, that nonbinding commitment is, at most, a nonbinding promise to consider advising a patient to use a drug where medical

indications so indicate (if the doctor encounters such a patient), and to write a prescription that will likely (but may not) lead that person to order that drug under its brand name from the pharmacy. (I say may not because 30% of patients in a 2-year period have not filled a prescription given to them by a doctor. See USA Today, Kaiser Family Foundation, Harvard School of Public Health, The Public on Prescription Drugs and Pharmaceutical Companies 3 (2008), available at <http://www.kff.org/kaiserpolls/upload/7748.pdf> (all Internet materials as visited June 13, 2012, and available in Clerk of Courts case file). And when patients do fill prescriptions, 75% are filled with generic drugs. See Dept. of Health and Human Services, Office of Science & Data Policy, Expanding the Use of Generic Drugs 2 (2010).)

Where in this process does the detailer sell the product? At most he obtains from the doctor a nonbinding commitment to advise his patient to take the drug (or perhaps a generic equivalent) as well as to write any necessary prescription. I put to the side the fact that neither the Court nor the record explains exactly what a nonbinding commitment is. Like a definite maybe, an impos-sible solution, or a theoretical experience, a nonbinding commitment seems to claim more than it can deliver. Regardless, other than in colloquial speech, to obtain a commitment to advise a client to buy a product is not to obtain a commitment to sell that product, no matter how often the client takes the advice (or the patient does what the doctor recommends).

The third regulation, entitled Promotion work, lends support to this view. That is because the detailers work as described above is best viewed as promotion work. The regulation makes clear that promotion work falls within the statutory exemption only when the promotion work is actually performed incidental to and in conjunction with an employees own outside sales or solicitations. 29 CFR 541.503(a) (emphasis added). But it is not exempt if it is incidental to sales made, or to be made, by someone else. Ibid.

The detailers work, in my view, is more naturally characterized as involving [p]romotional activities designed to stimulate sales . . . made by someone else, 541.503, e.g., the pharmacist or the wholesaler, than as involving [p]romotional

activities designed to stimulate the detailers own sales.

Three other relevant documents support this reading. First, the Pharmaceutical Research and Manufacturers of America (Ph RMA), of which respondent is a member, publishes a Code on Interactions with Healthcare Professionals. See Ph RMA, Code on Interactions with Healthcare Professionals (Ph RMA Code) (rev. July 2008), available at http://www.phrma.org/sites/default/files/108/phrma_marketing_code_2008.pdf. The Ph RMA Code describes a detailers job in some depth. It consistently refers to detailers as delivering accurate, up-to-date information to healthcare professionals, *id.*, at 14, and it stresses the importance of a doctors treatment decision being based solely on each patients medical needs and the doctors medical knowledge and experience, *id.*, at 2. The Ph RMA Code also forbids the offering or providing of anything in a manner or on conditions that would interfere with the independence of a healthcare professionals prescribing practices. *Id.*, at 13. But the Ph RMA Code nowhere refers to detailers as if they were salesmen, rather than providers of information, nor does it refer to any kind of commitment.

To the contrary, the document makes clear that the pharmaceutical industry itself understands that it cannot be a detailers primary duty to obtain a nonbinding commitment, for, in respect to many doctors, such a commitment taken alone is unlikely to make a significant difference to their doctors use of a particular drug. When a particular drug, say Drug D, constitutes the best treatment for a particular patient, a knowledgeable doctor should (hence likely will) prescribe it irrespective of any nonbinding commitment to do so. Where some other drug, however, is likely to prove more beneficial for a particular patient, that doctor should not (hence likely will not) prescribe Drug D irrespective of any nonbinding commitment to the contrary.

At a minimum, the document explains why a detailer should not (hence likely does not) see himself as seeking primarily to obtain a promise to prescribe a particular drug, as opposed to providing information so that the doctor will keep the drug in mind with an eye toward using it when appropriate. And because the detailers primary duty is informational, as opposed to sales-oriented, he fails to

qualify as an outside salesman. See 541.500(a)(1)(i) (restricting the outside salesman exemption to employees [w]hose primary duty is . . . making sales (emphasis added)). A detailer operating in accord with the Ph RMA Code sells the product only in the way advertisers (particularly very low key advertisers) sell a product: by creating demand for the product, not by taking orders.

Second, a Labor Department Wage and Hour Division Report written in 1940 further describes the work of sales promotion men. See Dept. of Labor, Wage and Hour Division, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition (1940) (1940 Report). The 1940 Report says that such individuals pav[e] the way for sales by others. *Id.*, at 46. Frequently, they deal with [the] retailers who are not custom- ers of [their] own employer but of [their] employers customer. *Ibid.* And they are primarily interested in sales by the retailer, not to the retailer. *Ibid.* [T]hey do not make actual sales, and they are admittedly not outside salesmen. *Ibid.*

Like the sales promotion men, the detailers before us deal with individuals, namely doctors, who are not customers of their own employer. And the detailers are primarily interested in sales authorized by the doctor, not to the doctor. According to the 1940 Report, sales promotion men are not outside salesmen, primarily because they seek to bring about, not their own sales, but sales by others. Thus, the detailers in this case are not outside salesmen.

Third, a Wage and Hour Division Report written in 1949 notes that where work is promotional in nature it is sometimes difficult to determine whether it is incidental to the employees own sales work. See Dept. of Labor, Wage and Hour Division, Report and Recommendations on Proposed Revisions of Regulations, Part 541, p. 82 (1949) (1949 Report). It adds that in borderline cases

the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt. *Id.*, at 83 (emphasis added).

The 1949 Report also refers to a

company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock . . . , consults with the manager as to the requirements of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chain-store company which later ships the quantity re-quested. *Id.*, at 84.

It says this company representative is not an outside salesman because he

does not consummate the sale nor direct his efforts toward the consummation of a sale (the store manager often has no authority to buy). *Ibid.*

See also 29 CFR 541.503(c) (explaining that if an employee does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work)

A detailer does not take orders, he does not consummate a sale, and he does not direct his efforts towards the consummation of any eventual sale (by the pharmacist) any more than does the company's representative in the 1949 Reports example. The doctor whom the detailer visits, like the example's store manager, has no authority to buy.

Taken together, the statute, regulations, ethical codes, and Labor Department Reports indicate that the drug detailers do not promote their own sales, but rather sales made, or to be made, by someone else. Therefore, detailers are not outside salesmen.

III

The Court's different conclusion rests primarily upon its interpretation of the statutory words of other disposition as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity. *Ante*, at 19. Given the fact that the doctor buys nothing, the fact that the detailer sells nothing to the doctor, and the fact that any nonbinding commitment by the doctor must, of ethical necessity, be of secondary importance, there is nothing about the

detailers visit with the doctor that makes the visit (or what occurs during the visit) tantamount . . . to a paradigmatic sale. Ibid. See Part I, *supra*.

The Court adds that [o]btaining a nonbinding commitment from a physician to prescribe one of respondents drugs is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells. Ante, at 20. And that may be so. But there is no most they are able to do test. After all, the most a California firms marketing employee may be able to do to secure orders from New York customers is to post an advertisement on the Internet, but that fact does not help qualify the posting employee as a salesman. The Court adds that it means to apply this test only when the law precludes an entire industry . . . from selling its products in the ordinary manner. Ante, at 21, n. 23. But the law might preclude an industry from selling its products through an outside salesman without thereby leading the legal term outside salesman to apply to whatever is the next best thing. In any event, the Court would be wrong to assume, if it does assume, that there is in nearly every industry an outside salesman lurking somewhere (if only we can find him). An industry might, after all, sell its goods through wholesalers or retailers, while using its own outside employees to encourage sales only by providing third parties with critically important information.

The Court expresses concern lest a holding that detailers are not salesmen lead to holdings that the statute forbids treating as a salesman an employee who takes an order from a retailer but then transfers the order to a jobbers employee to be filled, ante, at 23, or a car salesman who receives a commitment to buy but then asks his or her assistant to enter the order into the computer, *ibid*. But there is no need for any such fear. Both these examples involve employees who are salesmen because they obtain a firm commitment to buy the product. See 1949 Report 83 (as to the first example, such an employee has obtained a commitment from the customer); 69 Fed. Reg. 22163 (2004) (as to the second example, explaining that [e]xempt status should not depend on . . . who types the order into a computer, but maintaining requirement that a salesman obtai[n] a commitment to buy from the person to whom he is selling). The problem facing the detailer is that he does not obtain any such commitment.

Finally, the Court points to the detailers relatively high pay, their uncertain hours, the location of their work, their independence, and the fact that they frequently work overtime, all as showing that detailers fall within the basic purposes of the statutory provision that creates exceptions from wage and hour requirements. Ante, at 5-6. The problem for the detailers, however, is that the statute seeks to achieve its general objectives by creating certain categories of exempt employees, one of which is the category of outside salesman. It places into that category only those who satisfy the definition of outside salesman as defined and delimited from time to time by regulations of the Secretary. 29 U. S. C. 213(a)(1) (emphasis added). And the detailers do not fall within that category as defined by those regulations.

For these reasons, with respect, I dissent.

Appendix

1. 29 CFR 541.500 (2011) provides:

General rule for outside sales employees.

(a) The term employee employed in the capacity of outside salesman in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employers place or places of business in performing such primary duty.

(b) The term primary duty is defined at 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employees own outside sales or solicitations, including incidental deliveries

and collections, shall be regarded as exempt outside sales work. Other work that furthers the employees sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employees sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

2. 29 CFR 541.501 (2011) provides:

Making sales or obtaining orders.

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that sale or sell includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Obtaining orders for the use of facilities includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word services extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

3. 29 CFR 541.503 (2011) provides:

Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.