

10-15-2013

Christopher v. Smithkline Beecham Corporation: A Tough Pill to Swallow for Pharmaceutical Sales Representatives?

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Hsuan Li, *Christopher v. Smithkline Beecham Corporation: A Tough Pill to Swallow for Pharmaceutical Sales Representatives?*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2013)

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Christopher v. SmithKline Beecham Corporation: A Tough Pill to Swallow for Pharmaceutical Sales Representatives?

By Hsuan Li*

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I. INTRODUCTION

Legal observers predict that in President Obama's second term, the Department of Labor (DOL) will tackle more cases concerning employee misclassification and overtime errors.¹ What are the practical effects of such rulings on long-established employment practices? This note attempts to examine this question in a particular area of employment law, namely the defining of exemptions under the Fair Labor Standards Act of 1938 (FLSA). *Christopher v. SmithKline Beecham Corp.*,² decided by the Supreme Court in the 2011–2012 session, settled a simple question that divided the Second and Ninth Circuits and vexed those in the pharmaceutical industry.³ Should companies like GlaxoSmithKline

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¹ See Jonathan R. Nadler & Joel S. Barras, *If Obama Wins, Corporate America Should Brace for Crackdown on Use of Independent Contractors*, FORBES (Oct. 2, 2012, 2:29 PM), <http://www.forbes.com/sites/beltway/2012/10/02/if-obama-wins-corporate-america-should-brace-for-crackdown-on-use-of-independent-contractors> (“[T]he [DOL] has made clear that it intends to effect sweeping changes. Chief among them is a novel provision that could require companies to prepare a written ‘classification analysis’ for every worker [T]his requirement also could apply to employees who fall under one of the FLSA’s many exemptions covering categories such as professional, administrative, commissioned sales employees, and others.”); Pat Didomenico, *Obama’s Second Term: What Does It Mean for Employers and HR?*, *The HR Soapbox*, BUS. MGMT. DAILY (Nov. 15, 2012, 4:50 PM), <http://www.businessmanagementdaily.com/33846/obamas-second-term-what-does-it-mean-for-employers-and-hr>; DeWayne Pope, *Obama’s Second Term: What Does It Mean for Employers and the Workplace?* BIRMINGHAM BUS. L. BLOG (Nov. 8, 2012), <http://redmountainlawblog.com/2012/11/08/obamas-second-term-what-does-it-mean-for-employers-and-the-workplace>.

In fact, the DOL’s Office of the Solicitor is encouraging plaintiffs to file “white collar” exemption cases through implementation of its Overtime Security Amicus Program. See *Overtime Security Amicus Program*, DEP’T OF LABOR, <http://www.dol.gov/sol/541amicus.htm> (last visited Feb. 7, 2013).

² *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

³ A simple misclassification ruling may have significant consequences for industries. For instance, in this misclassification of employees as independent contractors, employers may have to pay billions of dollars more in payroll taxes, Social Security and Medicare taxes, and workers’ compensation taxes each year. Nadler & Barras, *supra* note 1. Similarly, a reclassification of PSRs as nonexempt

Beecham (Glaxo) pay their pharmaceutical sales representatives (PSRs) overtime compensation under the mandate of FLSA, or are these PSRs excluded from protection under the “outside salesman” exemption? The Court held 5–4 that PSRs are considered outside salesmen exempt from FLSA overtime rules, and the DOL’s most recent interpretation of the relevant statute was not entitled to controlling deference.⁴ This ruling may be a tough pill to swallow for pharmaceutical sales representatives across the nation, as *Christopher* affirmed that they could not use FLSA to claim their overtime wages.

Or it may not be. After all, PSRs were never compensated for overtime in the past. The ruling merely validates and preserves that long-standing employment practice within the pharmaceutical sector. But a closer look at the ruling reveals greater implications that go beyond the prescription drug industry. The massive quantitative effect that the decision has made upon the rights and interests of those in the pharmaceutical industry may spill into a wide range of industries and affect many types of employees, including mortgage loan officers.⁵ It is clear that the impact of this law is significant and worth careful consideration because of its widespread impact on not only the estimated 92,000 PSRs nationwide, but also the tens of thousands of employees from diverse industries who lie within the scope of or at the periphery of FLSA.

Another key feature of this opinion is that it provides an informative example of the Court’s position in relationship to governmental agencies of the executive branch within the realm of administrative law. At the heart of the decision are the conflicting

from FLSA could cost the industry billions of dollars in revenue to pay these employees overtime.

⁴ *Christopher*, 132 S. Ct. at 2164–65.

⁵ Daniel Fisher, *Supreme Court Rejects Labor Dept. View on Sales-Rep Overtime*, FORBES (Jun. 18, 2012, 11:24 AM), <http://www.forbes.com/sites/danielfisher/2012/06/18/supreme-court-rejects-labor-dept-view-on-sales-rep-overtime> (“[T]oday’s decision should help overturn the decision of a federal court in Washington D.C. that approved of the Labor Dept.’s 2010 switch in policy toward counting mortgage loan officers as non-exempt. The ruling could potentially affect 250,000 employees and cost the financial industry billions of dollars in back pay.”); *see also* *Wong v. HSBC Mortg. Corp. (USA)*, No. C-07-2446 MMC, 2009 WL 151014 (N.D. Cal. Jan. 21, 2009) (denying motion for class certification of mortgage loan officers claiming they were not exempt under both FLSA and the state “outside sales” exemption).

interpretations of what FLSA's outside salesman exemption and relevant regulations cover. On one side, the pharmaceutical companies sought to exclude PSRs from qualifying for overtime pay under FLSA by defining their work as "making sales," and categorizing them as outside salesmen.⁶ On the other side, the DOL and the Obama administration argued that FLSA was designed to protect workers from exploitation and excessive hours, and thus PSRs should not qualify for the outside salesman exemption.⁷ Under the Court's authority in the province of administrative law, the Court gave the ultimate interpretation of the exemption in the context of PSRs. Parts II and III of this note will explain the case in depth and show how both sides were able to make these conflicting arguments, both of which were rooted in administrative law and FLSA history and practice. Part III will go into particular detail on how this interesting interaction resulted in a decision that penalized the DOL for its failure to "police" the long-standing pharmaceutical industry practice of placing PSRs within the outside salesman exemption,⁸ and how it saved the pharmaceutical industry from spending perhaps additional millions of dollars annually⁹—plainly demonstrating what is at stake in the battles between the agencies and the courts in the administrative law arena.

In Part IV, this note will examine how the Court came to its decision. The role of the DOL and other executive agencies may be summarized under two themes: "(1) the agency is charged with the detail of regulation and (2) the agency is expected to develop

⁶ See *infra* Part II.C.

⁷ *Id.*

⁸ See *Christopher*, 132 S. Ct. at 2168.

⁹ See generally *IMS Health Inc. v. Mills*, 616 F.3d 7, 14 (1st Cir. 2010), *vacated*, *IMS Health, Inc. v. Schneider*, 131 S. Ct. 3091 (2011), and *abrogated by Sorel v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) ("[P]harmaceutical manufacturers . . . spend billions of dollars a year to have some 90,000 pharmaceutical sales representatives make weekly or monthly one-on-one visits to prescribers nationwide"). The global industry is estimated to make total sales of \$820 billion each year. Steven I. Locke, *The Fair Labor Standards Act Exemptions and the Pharmaceuticals Industry: Are Sales Representatives Entitled to Overtime?*, 13 BARRY L. REV. 1, 1 (2009). As many as 100,000 pharmaceutical sales representatives visit physicians nationwide and distribute between \$4 billion and \$14 billion dollars in promotional spending. *Id.*

expertise in a particular area of regulation.”¹⁰ For governmental agencies such as the DOL, this means they are charged with the interpretation of the laws passed by Congress and with promulgating additional rules and regulations where Congress has granted them authority to do so.¹¹ This article examines the interpretation dimension as well as the latter rulemaking aspect and its interplay with judicial review. *Christopher* presented a situation where Congress deferred the interpretation of the relevant laws (FLSA) to the controlling agency, the DOL. Yet the Court rejected the DOL’s interpretation of FLSA. In other words, the agency’s reading of its own regulations was rejected.

Finally, Part V of this note will analyze the impact of the ruling in view of the existing laws of individual states. Who is impacted and how widespread is that impact? What is the significance of the ruling? This note goes deeper to investigate whether these predictions are likely to be realized in view of the existing rules in individual states. Have PSRs effectively lost all hope in obtaining overtime compensation in every state? This is a question that shows the interesting coexistence of and interplay between federal and state administrative law. Part V will discuss particular states, and provide a general idea of how PSRs who wish to obtain overtime compensation will fare under state law in the aftermath of *Christopher*. In Part VI, I will briefly conclude and offer predictions on where the industry and the PSRs will go from here.

II. BACKGROUND

A. *Pre-FLSA: The Undefined “White-Collar” Exemption*

29 U.S.C. § 213(a)(1) explicitly excludes “any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman” from FLSA

¹⁰ WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 6 (6th ed. 2012).

¹¹ See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (explaining that pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), gaps and ambiguities in statutes are construed as Congress’s “implied delegation of authority” to agencies).

protections.¹² These are known as the “white-collar” exemptions.¹³ These FLSA exemptions trace their lineage down from a line of antecedents that included the pre-Depression wage and hour legislation that applied only to “laborers, workmen, and mechanics,”¹⁴ and the National Industrial Recovery Act (NIRA),¹⁵ which saw the first express proposal for an executive, administrative, and supervisory exemption.¹⁶ While a class line was drawn to distinguish upper-level workers, it was unclear which jobs were

¹² 29 U.S.C. § 213(a)(1) (2012).

¹³ *Yuen v. U.S. Asia Commercial Dev. Corp.*, 974 F. Supp. 515, 519 (E.D. Va. 1997).

¹⁴ Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2223 (1998). Professor Malamud offers many possible reasons for why white-collar workers were not covered by the pre-New Deal worker protection laws. The main reason was that the legislation was health-oriented, and white-collar workers did not work in conditions that were “as injurious to health as those of industrial workers.” *Id.* at 2223–24. Further, white-collar workers were not unionized, as the unskilled industrial workers were. *Id.* at 2224. Finally, Professor Malamud posits that perhaps the white-collar workers did not welcome these regulations because they were interested in—and had an opportunity for—professional advancement; not only did they need the long working hours, they also needed to maintain their social status, and siding with the bosses rather than the manual workers would be more in the interest of the white-collar workers. *Id.*

¹⁵ Enacted on June 16, 1933, the purpose of NIRA was “work-spreading,” because President Franklin D. Roosevelt’s administration viewed raising wages and shortening work hours as a means of mitigating the nation’s unemployment dilemma. *Id.* at 2253 n.156; see also Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, DEP’T OF LABOR, <http://www.dol.gov/oasam/programs/history/flsa1938.htm#2> (last visited Feb. 5, 2013) (explaining that while the bill was in Congress, proponents argued that “unnecessarily long hours . . . wear out part of the working population while they keep the rest from having work to do.” They were confident that shortening hours would create millions of new jobs for the unskilled.) Like its successor FLSA, NIRA provided maximum hours and minimum wage regulations. Unlike FLSA, however, NIRA did not “specify the permissible wages and hours of labor,” but only required that all industries form their own codes of fair competition and comply with the agreed hours and wages regulations. Malamud, *supra* note 14, at 2253–54. NIRA was found unconstitutional in 1935. See *infra* note 22.

¹⁶ Malamud, *supra* note 14, at 2236. By the end of the two years that NIRA was able to guide the formation of worker-friendly industry codes, there was a “measure of consistency in excluding certain upper-level employees” from overtime and minimum wage provisions, but there was no articulation or agreement on where the lines should be drawn between protected and non-protected employees. *Id.* at 2281–82.

considered “white-collar” and which were not.¹⁷ The proper boundaries of the exemptions were a subject of debate to those in the industry and even to those within the government administration who formulated the proposed regulations.¹⁸ Yet the term was never clearly defined.¹⁹ President Roosevelt promised the public that he would protect the “white-collar class as well as the men in overalls,”²⁰ but he never clarified the scope of the classification either.²¹ While NIRA was shot down within two years of its promulgation—when the Supreme Court of the United States declared NIRA unconstitutional on “Black Monday,” May 27, 1935²²—the vaguely-defined white-collar exemption survived and expanded its exclusions to include the category of outside salesman.²³

¹⁷ As Professor Malamud points out, sociologists have identified that the difficulty in distinguishing classes lies in the phenomenon of the “twilight belt in which some members of the two groups overlap and merge.” *Malamud, supra* note 14, at 2227. This was true in studies that dichotomized a community into a “working class” and a “business class.” *Id.* The distinction has become even fuzzier with the creation of a “new middle class” that included “[c]ivil servants, clerks, and clerical workers.” *Id.* at 2228.

¹⁸ The first director of NIRA’s Division of Research and Planning, Alexander Sachs, expressly exempted executive, administrative, and supervisory positions from his pre-NIRA memorandum concerning his proposed wage and hour guidelines for NIRA. *Id.* at 2236.

¹⁹ Sachs’s memorandum did not specify where he drew the class lines, it “simply [took] the need for an exemption and the location of the boundary line between regulated and exempt workers for granted.” *Id.* at 2237. *See generally id.* at 2212 (discussing the blurring of class lines and the failure to define the white-collar class).

²⁰ *Id.* at 2254; *see also* Grossman, *supra* note 15.

²¹ Alba Edwards, long-term director of the Census Bureau, actually *excluded* “manager, officials, and professional persons” from his definition of the white-collar classification. Malamud, *supra* note 14, at 2254 (internal quotations omitted).

²² In *Schechter Corp. v. United States*, 295 U.S. 495 (1935), slaughterhouse operators tested the constitutionality of NIRA by challenging the “Live Poultry Code” promulgated under section 3 of the Act. *Id.* at 521. The code sought to regulate the live poultry industry in and around New York City. *Id.* at 523. The Court unanimously found that the code resulted from an unconstitutional “delegation of legislative power.” *Id.* at 542, 551. This ruling invalidated not only the live poultry provisions, but also the progressive labor standards of NIRA completely. Grossman, *supra* note 15.

Despite the major setback of the Schechter decision, the progressive labor movement would sweep across the nation again starting on “White Monday,”

B. *FLSA's "Outside Employee Exemption"*

After President Roosevelt's reelection in 1936, which he saw as the public's support for the New Deal,²⁴ his administration took up the task of replacing NIRA with a new fair labor standards regulation that would protect workers from "substandard wages and oppressive working hours."²⁵ After a year-long battle in the House,²⁶ FLSA came to fruition on June 24, 1938, and became effective on October 24 of the same year. The new Act required employers to pay employees at least the federal minimum wage and to compensate employees one and one-half times their regular wage for hours worked in excess of forty hours per week.²⁷ However, as was true for NIRA, Congress did not intend to protect all employees under this statute. Under § 213(a)(1), the statute exempted white-collar employees, which include certain executive, administrative, professional, and outside sales employees.²⁸ The Roosevelt administration hoped to alleviate the crisis of widespread unemployment by implementing this measure.²⁹ While legislative history on the exemptions is scarce, the Wage and Hour Division of the DOL suggests that Congress excluded these classes based on the premise that these workers earned much higher salaries than blue collar minimum wage workers and "enjoy[ed] other compensatory

March 29, 1937. Grossman, *supra* note 15. On this date, the Supreme Court upheld the Washington minimum wage law in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (the Court ruled in favor of a hotel chambermaid, allowing her to recover the difference between the state minimum wage and the wages paid to her). Roosevelt had been reelected by a landslide in 1936, which he understood as a validation of his New Deal policies, and he pressured the Court into ruling for the employee by an ultimatum that threatened to diminish the authority of the Court by adding six justices to the bench. Grossman, *supra* note 15.

²³ See 29 U.S.C. § 213(a)(1) (2012).

²⁴ He won by a landslide, winning by a count of 523 electoral votes to 8. Grossman, *supra* note 15.

²⁵ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012) (quoting *Barrentine v. Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981)); see also 29 U.S.C. § 202(a).

²⁶ For an interesting discussion of Roosevelt's fair standards campaign in the halls of Congress, see Grossman, *supra* note 15.

²⁷ See 29 U.S.C. § 207(a).

²⁸ § 213(a)(1).

²⁹ See *supra* note 15 and accompanying text.

privileges” and “better opportunities for advancement,” rendering wage protection unnecessary.³⁰ Further, these workers enjoyed a relatively low degree of employer supervision, and the work they performed was “difficult to standardize to any time frame,” making it difficult to implement the overtime provisions.³¹

The outside salesman exemption appeared in the categories of exclusions and expressly authorized the Secretary of Labor to promulgate rules “from time to time” and granted it the power to “define and delimit the specific terms of [the] exemptions through notice-and-comment rulemaking.”³² Ultimately, this task was designated to the DOL’s newly created Wage and Hour Division.³³ The Division promulgated specific rules for the outside salesman exemption in 29 C.F.R. § 541.500, as follows:³⁴

- (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 duty³⁵ is:

³⁰ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,122–24 (Apr. 24, 2004) (to be codified at 29 C.F.R. pt. 541) [hereinafter Final Rule].

³¹ *Id.* For reasoning that mirrors the Wage and Hour Division’s language, see *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 398 (9th Cir. 2011), *aff’d*, 132 S. Ct. 2156 (2012) (quoting *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207–08 (10th Cir. 1941) (“There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer’s place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day.”)).

³² Final Rule, *supra* note 30, at 22124; 29 U.S.C. § 213(a)(1).

³³ Malamud, *supra* note 14, at 2289.

³⁴ 29 C.F.R. § 541.500 (2013). Although the regulations were reissued in 1938, 1940, 1949, and finally in 2004, the “current regulations are nearly identical in substance to the regulations issued in the years immediately following the FLSA’s enactment.” *Christopher*, 132 S. Ct. at 2162.

³⁵ “‘Primary duty’ means the principal, main, major, or most important duty that the employee performs.” 29 C.F.R. § 541.700(a). The Wage and Hour Division’s 2004 Final Rule reaffirmed its “primary duty” test as the means to determine whether an employee was to be classified as an outside salesman. Final Rule, *supra* note 30, at 22,128. The Final Rule was supported by the Wage and

- (i) making sales within the meaning of section 3(k) of the Act,³⁶ 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 employer's place or places of business in performing such primary duty.

Section 541.500 is the general regulation, while § 541.501(b) attempts to clarify what § 541.500(a)(1)(i) means by “sales within the meaning of section (k) of the Act.” Unfortunately, the regulation merely restates the statutory definition of sale, with slight clarification denoted by the word “include”:

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.³⁷

The final relevant DOL regulation is § 541.503, which defines what type of “promotion work” is exempt and what is not. This is a question that is also integral to the issue of whether an employee is an outside salesman because under the predominant “primary duty”

Hour Division, with the reasoning that the test “is relatively simple, understandable and eliminates much of the confusion and uncertainty that are present under the existing rule” (referring to the twenty percent tolerance test, which disqualified a worker who spent more than twenty percent of his or her work hours on nonexempt duties, from the exemption). *Id.* at 22,161. The primary duties test avoided the difficult problem of keeping track of the work hours of the outside sales employee, which was consistent with the rationale behind the establishment of the white-collar exemptions. *Id.* at 22,128.

³⁶ At the center of the dispute in *Christopher* was the scope of the word “sale” as defined by FLSA: “‘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); *see also Christopher*, 132 S. Ct. at 2162.

³⁷ 29 C.F.R. § 541.501(b) (emphasis added).

test, if one of the employee's primary duties is nonexempt promotional work, then he cannot be considered an outside salesman. On the flip side, if the work is exempt, he must be considered an outside salesman for FLSA purposes. The text of § 541.503 reads as follows:

“Promotion 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.”³⁸

C. *Do Pharmaceutical Sales Representatives Actually Make “Sales?”*

The PSR is not a salesperson in the traditional sense, but shares many of the characteristics of a traditional salesperson. Conventionally known in the pharmaceutical industry as “detail men” or “detailers,” PSRs provide information to physicians with the goal of selling pharmaceutical products produced by the drug manufacturers they represent.³⁹ Although the law prohibits PSRs from making actual sales,⁴⁰ their job is to induce physicians to prescribe their products to patients, who will ultimately consummate the final sale of the products in a pharmacy.⁴¹ The success of a PSR

³⁸ *Id.* § 541.503(a). The regulation goes on to give some examples of what promotional work may be. For instance, a “company representative . . . 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.” *Id.* § 541.503(c). These duties are “not exempt work unless they are incidental to and in conjunction with the employee's own outside sales.” *Id.* Because arranging merchandise and replenishing stock do not consummate a sale that a person himself makes, the work cannot be considered exempt as outside sales work. *Id.*

³⁹ *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 387 (9th Cir. 2011).

⁴⁰ *Christopher v. SmithKlein Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075, at *3–5 (D. Ariz. Nov. 20, 2009), *aff'd sub nom.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

⁴¹ “While it is not possible to directly link a PSR's marketing activities to a particular patient filling a prescription, the incentive compensation is based, in part,

undoubtedly depends on their marketing abilities; they undergo extensive training in sales techniques provided by the drug manufacturer, and they penetrate clinics and hospitals fully armed with company sales materials and sample products to distribute to physicians.⁴² However, whether the primary duties of a PSR could actually be defined as “sales” has been disputed by PSRs and their employers.

If PSRs in fact make sales, then their employers can legally classify them as exempt outside salesmen who are not entitled to overtime compensation under FLSA.⁴³ Unfortunately, when drafting FLSA, Congress did not abide by the schoolhouse rule to refrain from circular definitions. Instead, the statute defines “sale” as “include[ing] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”⁴⁴ The Secretary’s definitions do not bring clarity to this issue either. As the district court in *Christopher* pointed out, “The regulations only marginally expound upon the statutory definition” and do not meaningfully offer any insight on whether the primary duties of a PSR include “making sales.”⁴⁵ Specifically, 29 C.F.R. § 541.501(b) provides that sale in §

on the number of prescriptions written by physicians in a PSR’s assigned geographic area.” *Id.* at *3 (internal citation omitted).

⁴² Glaxo trains PSRs on different methods to use to complete a call:

When Plaintiffs were hired, they received training in Glaxo’s “Assertive Selling Always Professional (ASAP)” model. They were also trained to follow Glaxo’s “Winning Practices” program. ASAP and Winning Practices are similarly structured and emphasize that a PSR should: (1) analyze and understand what is happening in an assigned region; (2) work with the team to drive results; (3) master professional knowledge to understand clinical management of patients; (4) prepare for calls; (5) “Sell Through Customer–Focused Dialogue”; (6) obtain the strongest commitment possible from a healthcare professional at the end of the call; and (7) provide added value to the customer relationship.

Christopher, 635 F.3d at 386–87.

⁴³ *Christopher v. SmithKlein Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2010 WL 396300 at *1 (D. Ariz. Feb. 1, 2010), *aff’d sub nom.*, 635 F.3d 383 (9th Cir. 2011), *aff’d*, 132 S. Ct. 2156 (2012) (Cases involving these issues and PSRs “turn[] on the definition of ‘sale’ under FLSA.”).

⁴⁴ 29 U.S.C. § 203(k) (2012).

⁴⁵ *Christopher*, 2010 WL 396300, at *1. Additionally, the court added: “Plaintiffs’ reference to regulations that define ‘promotion work’ and ‘primary

203(k) “include[s] the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.”⁴⁶ Pharmaceutical companies argue that courts should apply a broad meaning of sales and find that the promotional work that PSRs do to help consummate a future sale constitutes exempt sales work.⁴⁷ The DOL and the PSRs, on the other hand, believe the court should adopt a strict construction that limits sale to an actual transaction in some sense.⁴⁸ In other words, they believe PSRs should personally receive orders that yield from their promotional efforts to be considered making sales.

This was the very issue that split the Second and Ninth Circuits and led the Supreme Court to grant certiorari in *Christopher*.⁴⁹ The Second Circuit grappled with the question in *In re Novartis Wage & Hour Litigation*.⁵⁰ *In re Novartis* was a class action brought by 2,500 PSRs who were employed by the drug manufacturer Novartis in California and New York.⁵¹ They alleged that they were entitled to overtime pay under FLSA and state law.⁵² The DOL filed an amicus brief supporting the plaintiff-PSRs, arguing that, “the fact that the Reps do not actually ‘make sales’ conclusively demonstrates that the position is not that of an outside salesperson consistent with the Department’s legislative rules.”⁵³ The court ruled

duty’ do not serve to define or delimit the definition of ‘sale,’ and therefore do not advance their position.” *Id.* (internal citations omitted).

⁴⁶ 29 C.F.R. § 541.501(b) (2013).

⁴⁷ See Brief for Respondent, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (No. 11-204), 2012 WL 957501 at *27–28.

⁴⁸ Bryan D. Sullivan, Note, *Reconciling the Terms and Spirit of the Law: Pharmaceutical Sales Representatives and the FLSA Outside-Sales Exemption*, 96 IOWA L. REV. 1429, 1437–44 (2011).

⁴⁹ 132 S. Ct. at 2165 (“We grant certiorari to resolve this split.”). A Third Circuit case, *Smith v. Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010), was ultimately decided on the “administrative employee” exemption rather than the “outside salesman” exemption. The court found that PSRs were excluded under the former exemption. *Id.* at 286.

⁵⁰ *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *abrogated* by *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

⁵¹ *In re Novartis*, 611 F.3d at 144.

⁵² *Id.*

⁵³ Brief for Sec’y of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010) (No. 09-0437), 2009 WL 3405861.

that PSRs did not fall within FLSA's outside salesman exemption because the requirement should be "narrowly construed against the employers . . . and their application limited to those establishments 'plainly and unmistakably within their terms and spirit.'"⁵⁴ The court referred to two sources: first, 29 C.F.R. § 541.501(b), in which the Secretary of Labor defined § 3(k) of the Act (which defines sales) to require the "transfer of title";⁵⁵ and second, the DOL's definition of sale promulgated in the 2004 Final Rule, requiring a sale to at least include "a commitment to buy."⁵⁶ The court reasoned that the type of "commitment" the PSRs obtain from physicians does not constitute a commitment to buy or prescribe; the promises they obtain are too uncertain and remote to satisfy the "transfer of title" requirement.⁵⁷

The Ninth Circuit came to the opposite conclusion in *Christopher v. SmithKline Beecham Corp.*, the predecessor to the Supreme Court case in discussion.⁵⁸ The Secretary of Labor once again filed an amicus brief in support of the petitioner-PSRs. The DOL's brief pointed out that the primary duty of the PSRs is "at most obtain[ing] from physicians a non-binding commitment to prescribe GSK drugs to their patients when appropriate," and argued that the work should be characterized as nonexempt promotion work.⁵⁹ Promotion work can be exempt or nonexempt, according to the definition stated under 29 C.F.R. § 541.503(a). Using the language of the statute, the DOL explained that the type of promotional work that PSRs do "is incidental to sales made, or to be made, by someone else," and thus qualifies as nonexempt work under the rules.⁶⁰ The

⁵⁴ *In re Novartis*, 611 F.3d at 150 (emphasis added).

⁵⁵ *Id.* at 151.

⁵⁶ *Id.* at 154; *see also* Final Rule, *supra* note 30.

⁵⁷ *In re Novartis*, 611 F.3d at 154. The court declined to expand the concept of sales to include what Novartis called promotional activities, remarking that the pharmaceuticals industry should "direct its efforts to Congress, not the courts." *Id.* at 155.

⁵⁸ *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

⁵⁹ Brief for the Sec'y of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012) (No. 15257), 2010 WL 5854250, at *9-10.

⁶⁰ *Id.* at *10. The brief also quoted 29 C.F.R. § 541.503(b): "In other words, 'Promotion activities directed toward consummation of the employee's own

court held that the Secretary of Labor’s interpretation of FLSA’s definition of sale was not entitled to deference and that the PSRs fell within scope of the outside salesman exemption to FLSA’s overtime requirement.⁶¹ First, the court wrote that the Secretary’s definition, forwarded in the amicus brief, failed to clarify sale, but instead “parroted” the existing statutory language that purported to define sales.⁶² Such an adoption would undermine “the Administrative Procedures Act and notice-and-comment rulemaking.”⁶³ Thus, the court refused to apply *Auer* deference to the DOL’s definition.⁶⁴ Even if *Auer* applied, the court wrote, “[T]he Secretary’s position is both plainly erroneous and inconsistent with her own regulations and practices” and should not be given controlling deference.⁶⁵ Determining whether this is a fair statement is as convoluted a process as the history of the dispute itself. On one hand, the DOL has resisted—for fifty-five years—to extend the definition of sales to promotion work that is not done for the purpose of consummating the employee’s own sales.⁶⁶ This was done in spite of pressure from

sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.” *Id.*

⁶¹ *Christopher*, 635 F.3d at 392, 401.

⁶² *Id.* at 394–95. As in *Gonzales v. Oregon*, 546 U.S. 243 (2006), because the agency merely “parroted” the statute rather than employing its expertise to clarify the ambiguous statute, the Court denied the agency *Auer* deference. *Christopher*, 635 F.3d at 395.

⁶³ *Christopher*, 635 F.3d at 395; *see also* 29 U.S.C. § 213(a)(1) (2012) (expressly giving the Secretary the authority to define and delimit the exemptions through “notice-and-comment rulemaking”).

⁶⁴ “Were we to accept the Secretary’s offer, and give controlling deference even where there exists no meaningful regulatory language to interpret, we would unduly expand *Auer*’s applicability to interpretations of statutes expressed for the first time in case-by-case *amicus* filings.” *Christopher*, 635 F.3d at 395; *see supra* note 105–106 and accompanying text.

⁶⁵ *Id.* at 395. It is unclear how the Secretary’s position is “inconsistent with her own regulations and practices,” for it is noted that for fifty-five years, in spite of input from commenters such as the United States Chamber of Commerce, the DOL has refused to extend the definition of sales to promotional work that is not done for the purpose of consummating the employee’s own sales. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (No. 11-204), 2012 WL 379584 [hereinafter Brief for the United States].

⁶⁶ *See* Brief for the United States, *supra* note 65, at 3.

commenters such as the U.S. Chamber of Commerce.⁶⁷ On the other hand, the Ninth Circuit in *Christopher* pointed out that the DOL “did not challenge the conventional wisdom that detailing is the functional equivalent of selling pharmaceutical products,” until it spoke on behalf of the Petitioners in *In re Novartis*.⁶⁸ In fact, in the DOL’s Dictionary of Occupation Titles, the definition for pharmaceutical detailers reads: “Promotes use of and sells ethical drugs and other pharmaceutical products to physicians Promotes and sells other drugs and medicines manufactured by company. May sell and take order for pharmaceutical supply items from persons contacted.”⁶⁹

In sum, the Ninth Circuit thought applying the DOL’s present interpretation of making sales would create an unjust result for Glaxo, which had reasonably relied on the seventy-some years of DOL acquiescence and industry assumption that PSRs were exempt employees.⁷⁰ Whether this reasoning would carry the day was to be decided by the Supreme Court of the United States on June 18, 2012.

III. FACTS

SmithKline Beecham Corporation d/b/a GlaxoSmithKline (Glaxo) is a pharmaceutical company that develops, markets, and sells pharmaceutical products worldwide.⁷¹ It follows the industry practice of dispensing its products to patients through a physician’s prescription, the only channel available by federal regulations.⁷²

The petitioners were pharmaceutical sales representatives, Michael Christopher and Frank Buchanan,⁷³ who were employed by

⁶⁷ *Id.*

⁶⁸ *Christopher*, 635 F.3d at 399.

⁶⁹ DEP’T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES § 262.157-010 (4th ed. 1991).

⁷⁰ *Christopher*, 635 F.3d at 400.

⁷¹ See *About Us, What We Do*, GLAXOSMITHKLINE, <http://www.gsk.com/about-us/what-we-do.html> (last modified Aug. 6, 2013).

⁷² *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2163 (2012).

⁷³ The petitioners originally sought to bring a class action at the district court level, but were denied certification by the U.S. District Court for the District of Arizona. *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075, at *5 (D. Ariz. Nov. 20, 2009).

Glaxo for approximately four years beginning in 2003.⁷⁴ Christopher and Buchanan were primarily “responsible for marketing and promoting [Glaxo’s] products to physicians” within their assigned territories, and with encouraging those physicians to prescribe Glaxo’s products to their patients.⁷⁵ As was the situation with all the PSRs under Glaxo’s employment, Christopher and Buchanan were provided “with detailed reports on physicians, including their prescribing habits, their market share, and volume of prescriptions filled.”⁷⁶ This detailed information was geared towards helping the PSRs develop a strategic sales plan that focused on targeting “the top 250 physicians in their territory who prescribe for a particular disease state.”⁷⁷ As the majority stated in *Christopher*, their “primary objective was to obtain a nonbinding commitment from the physician to prescribe those drugs in appropriate cases, and the training that petitioners received underscored the importance of that objective.”⁷⁸

The petitioners were essentially salesmen, hired for their sales experience, and trained to close each sales call by obtaining the maximum commitment possible from the physician.⁷⁹ They received more than one month of training from Glaxo, which taught them about Glaxo products and instructed them on how to sell under the “Assertive Selling Always Professional (ASAP)” model and “Winning Practices” program.⁸⁰ They worked away from the office, spending about “[forty] hours each week in the field calling on physicians,” and an additional ten to twenty hours per week performing miscellaneous tasks, including “attending events, reviewing product information, and returning phone calls.”⁸¹ They worked with minimal supervision and did not punch a clock or report their hours.⁸² On average each year Christopher earned over \$72,000

⁷⁴ *Christopher*, 132 S. Ct. at 2164.

⁷⁵ *Christopher*, 2009 WL 4051075 at *1. Glaxo “at one time maintained as many as 9,000 PSRs to promote their products.” *Id.*

⁷⁶ *Id.* at *2.

⁷⁷ *Id.*

⁷⁸ *Christopher*, 132 S. Ct. at 2164.

⁷⁹ *Id.* at 2172–73.

⁸⁰ *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 386 (9th Cir. 2011); see *supra* note 42 and accompanying text.

⁸¹ *Christopher*, 132 S. Ct. at 2164.

⁸² *Id.*

and Buchanan over \$76,000, before taxes.⁸³ Both sums accounted for each employee's base salary and incentive pay, the latter of which "was based on the sales volume or market share of their assigned drugs in their assigned sales territories."⁸⁴ The incentive pay was uncapped; Christopher's incentive pay accounted for over thirty percent of his gross pay annually, and Buchanan's exceeded twenty-five percent.⁸⁵

However, neither was paid overtime compensation.⁸⁶ Christopher and Buchanan filed suit in the U.S. District Court for the District of Arizona, alleging that Glaxo violated FLSA by failing to pay them time-and-a-half wages when they worked more than forty hours per week.⁸⁷ Glaxo moved for summary judgment based on the § 213(a)(1) "outside salesman" exemption and the district court granted summary judgment to the pharmaceutical company.⁸⁸

The petitioners appealed the summary judgment and the Ninth Circuit affirmed the district court's ruling, agreeing that the DOL's interpretation was not entitled to controlling deference and that the PSRs were exempt employees.⁸⁹ The Supreme Court granted certiorari on November 28, 2011.⁹⁰

IV. ANALYSIS OF OPINION

A. *Justice Alito's Majority Opinion*

Justice Alito delivered the opinion of the Court, with Justice Breyer filing a dissenting opinion in which Justices Ginsburg, Sotomayor, and Kagan joined. Justice Alito began his discussion by stating that the goal of the Court was to decide whether PSRs fit into the term "outside salesman" as defined by the DOL.⁹¹ The Court

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 2159.

⁹⁰ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 760 (mem.), *granting cert.* to 635 F.3d 383 (9th Cir. 2011).

⁹¹ *Christopher*, 132 S. Ct. at 2161.

introduced FLSA's outside salesman exemption and explained that FLSA was passed with the purpose of "protect[ing] all covered workers from substandard wages and oppressive working hours."⁹² Establishing that Congress had not yet defined the term outside salesman, the Court proceeded to describe the instances of DOL's exercise of its power to "defin[e] and delimit[t]" the term.⁹³

The DOL promulgated the regulations in 1938, 1940, 1949, and in 2004,⁹⁴ but "[t]he current regulations [were] nearly identical in substance to the regulations issued in the years immediately following FLSA's enactment," Justice Alito noted.⁹⁵ The Court identified three DOL regulations that were relevant to the determination of the case,⁹⁶ but deemed them inconclusive and thus concluded that additional guidance from the DOL's Wage and Hour Division reports made in connection with the 1940, 1949, and 2004 regulation issuances would be helpful to determine the scope of the exemption.⁹⁷

Justice Alito then proceeded to provide a factual overview of the case. He focused on the pharmaceutical company's position of having to limit its sales activities to "detailing"—providing information to physicians about company products to influence the products they prescribed to their patients in appropriate cases—the medical practitioners who were ultimately the people "who possess the authority to prescribe the drugs."⁹⁸ He further noted that detailing had been in practice since "at least the 1950s" and that "the industry ha[d] employed more than 90,000 detailers nationwide" in recent years.⁹⁹ He also underlined the petitioners' lack of supervision—they "were not required to punch a clock or report their hours, and they

⁹² *Id.* at 2162 (alteration in original). Directly or not, this emphasizes that outside salesmen are not considered workers suffering from "substandard wages and oppressive working hours." *Id.*

⁹³ *Id.* (alteration in original).

⁹⁴ The DOL followed notice-and-comment procedures in its 2004 reissuance. *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 2162; see *infra* Part II.B for a closer look at the three regulations.

⁹⁷ *Christopher*, 132 S. Ct. at 2163.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2163–64.

were subject to only minimal supervision”—and described the efforts of the petitioners as “well compensated.”¹⁰⁰

The opinion went on to detail the procedural history of the case. Justice Alito highlighted certain points that framed the rest of the Court’s two-part inquiry of (1) whether the DOL’s interpretation of the regulations relevant to the outside salesman exemption should be applied, and (2) whether PSRs fit into the outside salesman exemption as defined by the DOL or the Court, if the latter found the DOL’s interpretation objectionable within the context of the law.¹⁰¹ The opinion first squarely noted that the DOL’s recent interpretation of the regulations was “announced in an uninvited *amicus* brief” filed in the Second Circuit.¹⁰² Then it summarized a couple of key concerns that led the Ninth Circuit to find in favor of the respondent drug manufacturer. First, the DOL had previously interpreted “making a sale” to require that the salesman “in some sense” sell, but the DOL had now, without warning, tightened its interpretation in light of *In re Novartis Wage & Hour Litigation, Christopher*, and other similar cases.¹⁰³ Second, the DOL had for over seventy years “acquiesced” in the drug industry’s practice of claiming PSRs as exempt.¹⁰⁴

1. Did *Auer* Deference Apply?

When courts review agency interpretation of statutes, judges reach for *Auer v. Robbins* as an analytical tool.¹⁰⁵ Under *Auer*, if an

¹⁰⁰ *Id.* at 2164.

¹⁰¹ *Id.* at 2165, 2170.

¹⁰² *Id.* at 2165. The “uninvited *amicus* brief” was filed in reaction to *In re Novartis*. The argument was rejected and the motion denied by the district court. See *supra* notes 48–55 and accompanying text.

¹⁰³ Final Rule, *supra* note 30. While the DOL described “a sale” as a “consummated transaction directly involving the employee for whom the exemption is sought” in the *amicus* briefs filed in the Second and Ninth Circuits, the Secretary now clarifies that a sale requires the employee to transfer title of the property at issue. *Christopher*, 132 S. Ct. at 2166 (citing Brief for the United States, *supra* note 65, at 12–13).

¹⁰⁴ *Christopher*, 132 S. Ct. at 2165.

¹⁰⁵ 519 U.S. 452 (1997). In *Auer*, police sergeants sued the St. Louis Board of Police Commissioners under FLSA for overtime wage benefits. *Id.* at 454. The Court held that the Secretary of Labor reasonably interpreted the “bona fide executive, administrative, or professional” regulation as denying exempt status

agency interprets its own ambiguous regulation, the court will accord substantial deference to that agency definition.¹⁰⁶ Even where an interpretation initially appears in a legal brief, such as where the DOL's interpretation of "making a sale" was advanced in its amicus brief to the Second Circuit, the interpretation may still be entitled to judicial deference.¹⁰⁷ The watchword is *may*, as courts do not have to defer to agency interpretations if they are "plainly erroneous or inconsistent with the regulation,"¹⁰⁸ or if the court makes the judgment that the agency did not fairly consider the matter under interpretation.¹⁰⁹

Diving into the initial question of whether the Court should defer to the DOL's interpretation, the Court took the position that the DOL "changed course" after the Court granted certiorari in *Christopher*,¹¹⁰ and in doing so, "seriously undermine[d] the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"¹¹¹ Justice Alito's reasoning is perhaps first and foremost outcome-oriented, as he stated that finding PSRs within the exemption would cause "unfair surprise" to the pharmaceutical industry, which has treated detailers/PSRs as outside salesmen for over seventy years.¹¹² There was no "adequacy of notice" to the companies by way of statutes or regulations, nor was there ever any enforcement action that signaled

to employees such as police sergeants. *Id.* at 458. Justice Scalia, on behalf of the unanimous Court, wrote: "A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." *Id.* at 463.

¹⁰⁶ *Christopher*, 132 S. Ct. at 2166.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (quoting *Auer*, 519 U.S. at 461).

¹⁰⁹ *Id.*; see also Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito, Chevron, Auer, and Cheney in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1 (2007), for a discussion of whether *Auer* has eroded under recent decisions, especially in the aftermath of *Gonzales*. Here in *Christopher*, the Court again refused to accord judicial deference to agency interpretations; this could perhaps be viewed as an additional strike by the Roberts Court against *Auer*.

¹¹⁰ *Christopher*, 132 S. Ct. at 2166.

¹¹¹ *Id.* at 2167 (citing *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)) (alteration in original).

¹¹² *Id.*

to the industry that it was misclassifying its 90,000 detailers/PSRs of recent years and of all others in decades past.¹¹³ The opinion stated: “[W]hile 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.”¹¹⁴

Reinforcing the opinion’s legal reasoning in deciding not to afford *Auer* deference, Justice Alito stressed—a few years after *Auer*—the standard for deference that the Court set out in *United States v. Mead Corp.*¹¹⁵: deference to the Department will be given only to the extent of thoroughness and validity that the agency demonstrates through its pronouncements.¹¹⁶ If the reasons cited are not persuasive, then no deference is warranted.¹¹⁷ Here, not only did the Secretary fail to solicit public comment before advancing the interpretation, the reasoning that the DOL used to support its interpretation was not on solid footing.¹¹⁸ In fact, Justice Alito wrote, the DOL changed its interpretation following the Second Circuit’s rejection of it.¹¹⁹ Such a decision process was “untenable” and not a hallmark of the thorough consideration that as required for *Auer* deference, as qualified by *Mead*.¹²⁰ Perhaps most damaging to the DOL’s interpretation, wrote Justice Alito, was that the new interpretation was “flatly inconsistent with the FLSA.”¹²¹ That is the case because the new interpretation required the passing of title in a sale, but the statute at issue included “consignment for sale” as part

¹¹³ *Id.*

¹¹⁴ *Id.* at 2168 (alteration in original) (quoting *Yi v. Sterling Collision Ctrs. Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007)).

¹¹⁵ 533 U.S. 218 (2001).

¹¹⁶ *Christopher*, 132 S. Ct. at 2168–69. Sometimes *Mead* is cited to indicate that formal notice-and-comment procedures are a measure of whether an agency was thorough in its consideration of a given interpretation, but *Mead* emphasizes that taking an informal process “does not alone” bar judicial deference. *Mead Corp.*, 533 U.S. at 219.

¹¹⁷ *Christopher*, 132 S. Ct. at 2168–69.

¹¹⁸ *Id.* at 2169.

¹¹⁹ *Id.*; see also *supra* text accompanying note 103.

¹²⁰ See *Christopher*, 132 S. Ct. at 2169.

¹²¹ *Id.*

of the sale definition.”¹²² The DOL’s “argu[ment] that a ‘consignment for sale’ may *eventually* result in the transfer of title” actually worked against the result that it sought to effect—the analogy could be extended to the present situation as well—for a physician’s nonbinding commitment may also eventually result in the transfer of title.¹²³

The DOL’s readings of regulations that were used to support its interpretations were deemed defective as well, as the Court pointed out that the DOL intentionally read the sales regulation under 29 C.F.R. § 541.501(b)¹²⁴ to *necessarily* include the transfer of title, when the regulation did not actually require it.¹²⁵ Furthermore, the DOL’s interpretation of promotional work was also forced and not really relevant or persuasive in determining the meaning of sales, because the regulation itself does not purport to distinguish between promotion work and sales, only between exempt and nonexempt promotion work.¹²⁶

In its entirety, the opinion finds the DOL’s interpretation unpersuasive and refuses to apply *Auer* deference.

2. The Court’s Interpretation of “Sales”

Because Justice Alito refused to accord *Auer* deference to the DOL’s interpretation, he employed the traditional tools of interpretation and looked to the statute and regulations for clues. The Court first examined the language of 29 U.S.C. § 213(a)(1), which excludes from protection, anyone “employed . . . *in the capacity* of [an] outside salesman.”¹²⁷ The Court found support for the proposition that perhaps FLSA’s notion of a salesman was not so rigid as to exclude anyone who does not fit the standard sense of the word: “The statute’s emphasis on the ‘capacity’ of the employee counsels in favor of a functional, rather than a formal, inquiry, one

¹²² *Id.*; see also 29 U.S.C. § 203(k) (2012). “A ‘consignment for sale’ does not involve the transfer of title.” *Christopher*, 132 S. Ct. at 2169.

¹²³ *Christopher*, 132 S. Ct. at 2169.

¹²⁴ See 29 C.F.R. § 541.501(b) (2013).

¹²⁵ *Christopher*, 132 S. Ct. at 2169.

¹²⁶ *Id.* at 2170; see also 29 C.F.R. § 541.501(b).

¹²⁷ *Christopher*, 132 S. Ct. at 2170 (quoting 29 U.S.C. § 213(a)(1)) (emphasis added).

that views an employee's responsibilities in the context of the particular industry in which the employee works."¹²⁸

The DOL's interpretation also "makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive."¹²⁹ 29 C.F.R. § 541.501 clarifies that "sales" are activities that involve the transfer of title, but it also parrots the statute in emphasizing that the scope actually "*includes any sale, exchange, . . . or other disposition.*"¹³⁰ Congress's language (and the DOL's reiteration of it) is significant because of the use of "include" and "any" as modifiers to sale, which means that Congress intended to include transactions that are not considered sales in a technical sense.¹³¹ If there is any doubt as to this expansive reading, the statute and regulation even contain a broad catchall phrase of "or other disposition."¹³² Thus, given the realities of the pharmaceutical industry, it would be "obscure and [would] defeat the intent and purpose of Congress" to exclude detailers from this definition.¹³³

Obtaining a nonbinding commitment from a physician to prescribe one of respondent's drugs is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells. This kind of arrangement, in the unique regulatory environment within which pharmaceutical companies must operate, comfortably falls within the catchall category of "other disposition."¹³⁴

With this working definition, the Court applied a "functional" and comparative analysis to the situation laid out in *Christopher* and drew the conclusion that PSRs "bear all of the external indicia of salesmen."¹³⁵ Not only were Christopher and Buchanan hired for their sales experience, they were trained to obtain the maximum

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ 29 C.F.R. § 541.501(b) (emphasis added).

¹³¹ *Christopher*, 132 S. Ct. at 2171.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 2172.

¹³⁵ *Id.*

commitment possible from physicians, with the end goal of “convinc[ing] physicians . . . to prescribe the drug in appropriate cases.”¹³⁶ Moreover, their duties were nearly identical to exempt employees who, instead of selling over-the-counter drugs, “sell physician-administered drugs, . . . [which can be] ordered by the physician directly.”¹³⁷

Finally, the Court justified its holding as consistent with the rationale for excluding certain employees from FLSA protections. Christopher and Buchanan each made more than \$70,000 per year on average, as is common for all detailers in the industry, which would make them somewhat an anomaly in the category of FLSA-protected employees, who are typically minimum wage earners.¹³⁸ Including them in the nonexempt class would also be contrary to FLSA’s goal of simplifying compliance with the statute by exempting employees who perform work that is “difficult to standardize to any time frame.”¹³⁹ Indeed, employers could not easily keep track of when PSRs like Christopher and Buchanan were performing their work in their respective assigned sales territories, or even how much time it took for them to accomplish their duties in the field.¹⁴⁰

B. *Justice Breyer’s Dissent*

Justice Breyer wrote the dissenting opinion. He agreed with the Court that *Auer* deference should not be applied. However, despite using the same method of interpretation as the Court, he arrived at a different conclusion—namely, that PSRs should not be treated as exempt employees.¹⁴¹ At the heart of his dissent was the conviction that detailers do not really sell at all; that the “nonbinding commitments” that they obtain are not only flimsy assurances,¹⁴² but

¹³⁶ *Id.* at 2174.

¹³⁷ *Id.* at 2173.

¹³⁸ *See id.*; *see also* Final Rule, *supra* note 30, at 22,124.

¹³⁹ *Christopher*, 132 S. Ct. at 2173.

¹⁴⁰ *Id.* at 2173; *see supra* Part III.

¹⁴¹ *Christopher*, 132 S. Ct. at 2179 (Breyer, J., dissenting).

¹⁴² What is a “nonbinding commitment” anyways, Justice Breyer asks rhetorically, and jeeringly juxtaposes the phrase with a series of colloquial oxymorons—a “definite maybe,” an “impossible solution,” or a “theoretical experience”—to make his point. *Id.* at 2176–77. The majority is probably still more correct in their view that a “nonbinding commitment” is more concrete than

“more naturally characterized as involving ‘promotional activities designed to stimulate sales made by someone else’”—i.e. nonexempt promotion work as defined by 29 C.F.R. § 541.503.¹⁴³ The dissent reasoned that because both the drug manufacturers and the physicians acknowledged that physicians do not prescribe the specific drugs simply because the detailers inform them about it, the “promises” they obtain cannot be true promises to prescribe and thus can only be characterized as nonexempt promotion work performed for the purpose of helping the company obtain an order from the pharmacy later on.¹⁴⁴ The dissent acknowledged that the main characteristics of a PSR’s job description mirror those occupations that are generally exempted from FLSA,¹⁴⁵ but nonetheless categorically rejected keeping PSRs within the exemption for reasons that do not fully contemplate the key purposes of FLSA and its exemptions,¹⁴⁶ which are to protect non-salary workers and to exempt those who enjoy greater independence and limited supervision by their employers.¹⁴⁷

V. IMPACT

This section explores how the *Christopher* ruling may affect the number of PSR misclassification cases in individual states.

the dissent believes and more comparable to a sale than not. After all, PSRs calculate their commission earnings based on these commitments; if these promises to prescribe were not so concrete, would sophisticated pharmaceutical companies be willing to award their employees for extracting them?

Clearly the work of detailers lies in the gray area between “selling” and “not selling.” Perhaps like almost everything else in this world, it is a political question that is colored by each individual’s social and political philosophy and answered accordingly. That the majority and dissenters are divided along political lines seem to suggest that this suggestion might be true — i.e., the liberals took a more employee/PSR-favoring interpretation, and the conservative justices held steadfastly for the big pharmaceutical employers.

¹⁴³ *Id.* at 2177; see also 29 C.F.R. § 541.503 (2013).

¹⁴⁴ *Christopher*, 132 S. Ct. at 2177–79.

¹⁴⁵ The PSRs earn relatively high pay rather than minimum wage, work uncertain hours and frequently beyond regular work hours, and exercise a high degree of independence and freedom from supervision. *Id.* at 2179. These are all characteristics of the general FLSA exemptions for executive, administrative, and outside sales employees, and therefore they fall within the statutory provisions. *Id.*

¹⁴⁶ See *Id.* at 2179–80.

¹⁴⁷ See *supra* text accompanying note 31 (discussing why some types of workers are exempt under the wage and hour laws).

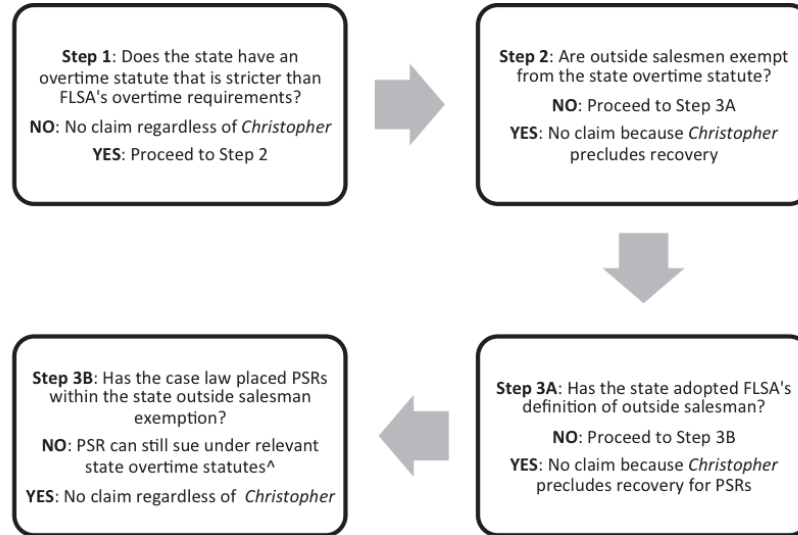
Christopher held that PSRs are considered outside sales employees under FLSA and are thus not protected by FLSA's overtime compensation requirements.¹⁴⁸ This does not necessarily mean that *state* overtime laws that include outside sales employees within its protections are preempted.¹⁴⁹ Nor does this ruling preempt case law that defines PSRs as nonexempt employees under *state* overtime laws. This leaves the possibility that PSRs may still sue pharmaceutical manufacturers on this issue based on applicable state law in states that recognize PSRs as nonexempt employees. On the other hand, it is likely that most states adopt FLSA's standards even for their own state overtime wages. In those states, *Christopher* is the final word that precludes further litigation on the subject of overtime compensation for PSRs. Finally, for states that do not have overtime requirements or states that have never considered PSRs as nonexempt to begin with, *Christopher* has no impact on the number of overtime cases involving PSRs. Regardless, the effects may impact the rights and duties of employees in other industries.¹⁵⁰

¹⁴⁸ *Christopher*, 132 S. Ct. at 2156 (majority opinion).

¹⁴⁹ State laws that are stricter than federal law are not preempted by FLSA. Congress expressly provides in § 218 that the codified provisions of FLSA will not excuse noncompliance "with any Federal or State law or municipal ordinance" that establishes a higher minimum wage or lower maximum workweek established by FLSA. 29 U.S.C. § 218 (2012); see also Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J. L. & PUB. POL'Y 83, 114 (2009) ("State minimum wage laws preceded federal legislation by a quarter century" and Congress expressly provided for "non-preemption of more protective state enactments."); Final Rule, *supra* note 30 at 22123 ("FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced . . . and the Act does not preclude employers from entering into collective bargaining agreements providing wages higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium.").

¹⁵⁰ For instance, see *infra* Part IV.A for a discussion of *Ramirez v. Yosemite Water Co.*, 978 P.2d 2 (Cal. 1999), in which a bottled water route salesman sued under the California labor statute for recovery of his overtime wages.

WHETHER A PSR CAN BRING SUIT AGAINST A FORMER PHARMACEUTICAL EMPLOYER IN THE AFTERMATH OF *CHRISTOPHER*:



^Unless otherwise precluded under the “administrative employee exemption”

Moving beyond a theoretical discussion, this note will now examine the factual effects of *Christopher* through the examination of a handful of states with historically strong labor laws and protections. Although pharmaceutical companies are chiefly located in only a handful of states,¹⁵¹ they are open to liability in every state they send their detailers into.¹⁵² The following is a state-by-state review of a handful of states with large pharmaceutical manufacturer presence, to give the reader an idea of whether *Christopher* directly

¹⁵¹ Out of 1,008 pharmaceutical company headquarters, the states with the most pharmaceutical companies include California (133), New Jersey (99), New York (81), Texas (46), Florida (46), Illinois (41), Massachusetts (43), and Pennsylvania (33). Together, these states account for over half the pharmaceutical companies registered in the United States. *Pharmaceutical Company Directory*, MEDILEXICON, <http://www.medilexicon.com/pharmaceuticalcompanies.php> (last visited Feb. 8, 2013).

¹⁵² See *Int'l Shoe Co. v. Office of Unemp't Comp. & Placement*, 326 U.S. 310, 316, 318 (1945) (“Minimum contacts . . . because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.”).

impacted the right of PSRs in particular states to obtain overtime compensation.¹⁵³

A. California

California has perhaps the most comprehensive set of labor and employment laws in the nation as promulgated under the California Labor Code.¹⁵⁴ The Code provides state overtime protection,¹⁵⁵ but section 1171 of the Code expressly excludes “any individual employed as an outside salesman.”¹⁵⁶ No reported case has expressly determined whether pharmaceutical salesmen are in this exempt category. California’s key “overtime salesman” classification case is *Ramirez v. Yosemite Water Co.*, in which the California Supreme Court was asked to determine whether a bottled water route salesman was entitled to recover overtime wages under California law.¹⁵⁷ The California Supreme Court ultimately remanded the case for further proceedings to determine whether the bottled water employee was primarily selling a product or rendering a service.¹⁵⁸ The reasoning in this case is key as guidance for future cases regarding the classification of “outsides salesmen.” First, the court made the distinction between California’s standard (as defined by the State’s Industrial Welfare Commission, or IWC) and the federal standard (as defined by the Wage and Hour Division of the DOL).¹⁵⁹ The former “takes a *purely* quantitative approach, focusing exclusively on whether the individual works more than half the

¹⁵³ As there is no readily available public data on the number of PSRs working within particular states, this article will discuss states with greater pharmaceutical manufacturer presence. The premise is that these are more heavily-populated states with more medical offices and a greater need for PSRs. Secondly, because of the companies’ proximity, they probably have greater influence over the promulgation of labor laws in their respective home states.

¹⁵⁴ See OGLETREE DEAKINS, CALIFORNIA WAGE AND HOUR PRACTICE GROUP, *available* at <http://www.ogletreedeakins.com/sites/default/files/uploads/practice-areas/cawageandhourbrochurecurrent.pdf> (last visited Oct. 20, 2013).

¹⁵⁵ CAL. LAB. CODE § 510 (West 2011).

¹⁵⁶ CAL. LAB. CODE § 1171.

¹⁵⁷ *Ramirez v. Yosemite Water Co.*, 978 P.2d 2 (Cal. 1999).

¹⁵⁸ *See id.* at 14.

¹⁵⁹ *See id.* at 7–13.

working time . . . selling . . . or obtaining orders or contracts.”¹⁶⁰ FLSA takes a more qualitative approach, requiring the court to analyze whether the employee’s primary duties are “the making of sales or the taking of orders.”¹⁶¹ Second, unlike the federal regulations, California also does not differentiate between exempt and nonexempt promotion work.¹⁶² The court noted that, “By choosing not to track the language of the federal exemption and instead adopting its own distinct definition of ‘outside salespersons,’ the IWC evidently intended to depart from federal law and to provide, at least in some cases, greater protection for employees.”¹⁶³

Overall, pharmaceutical detailers have a fair shot in bringing suit against employers for recovery of overtime wages in California. Because California has not yet decided that pharmaceutical salesman are “outside salesmen” exempt from the protections of the state’s overtime statute, and because the state supreme court uses the progressive method of making the determination with a quantitative approach, it is still possible for pharmaceutical salesmen to challenge their employers in court, especially if they can show that over fifty percent of their time is *not* spent on making sales or taking orders. True, the PSRs in this state will still run into the difficulty, as the petitioners in *Christopher* faced, of convincing the courts that providing information about pharmaceutical products to physicians is not the virtual equivalent of “making sales,” but it is an argument that is still available for California PSRs to make.

B. *New Jersey*

The State of New Jersey provides an example of state labor law moving towards uniformity with FLSA. It has a state overtime statute that excludes certain classes of employees, including those employed in an “outside sales capacity.”¹⁶⁴ Prior to 2012, the state’s

¹⁶⁰ *Id.* at 10 (alteration in original) (emphasis added) (quoting Wage Order No.7-80, which was superseded by CAL. CODE REGS. tit. 8, § 11070 (1998) but retains the same definition of “outside salesperson”) (internal quotation marks omitted).

¹⁶¹ *Id.* at 9 (quoting 29 C.F.R. § 541.505(a) (1998)) (internal quotation marks omitted).

¹⁶² *Id.* at 10.

¹⁶³ *Id.* at 11.

¹⁶⁴ N.J. ADMIN. CODE § 12:56-7.1 (2013).

approach to determining whether an employee was an “outside sales person” exempt from the state overtime statute¹⁶⁵ was a two-part test that required the court to go through both a qualitative and quantitative inquiry to determine whether an employee is considered an “outside sales person.”¹⁶⁶ The qualitative part of the test mirrored FLSA’s “primary duty” analysis,¹⁶⁷ while the quantitative portion was an independent basis much like California’s.¹⁶⁸ In *New Jersey Department of Labor v. Pepsi-Cola Co.*,¹⁶⁹ Pepsi-Cola Company alleged that its employees qualified for the “outside sales persons” exemption “because they had sales responsibilities, objectives, and training, and were paid in part on commission.”¹⁷⁰ The court

¹⁶⁵ *Id.*

¹⁶⁶ N.J. Dep’t of Labor v. Pepsi-Cola Co., No. A-918-00T5, 2002 WL 187400, *4–*5 (N.J. Super. Ct. App. Div. Jan. 31, 2002) (quoting N.J. ADMIN. CODE § 12:56-7.4). The statute stated:

(a) “Outside sales person” means any employee:

1. Who is employed for the purpose of and who is customarily and regularly engaged away from his or her employer's place or places of business in:

i. Making sales; 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. Whose hours of work of a nature other than that described in (a)1 above do not exceed 20 percent of hours worked in the workweek; provided, that work performed incidental to and in conjunction with the outside sales person's own personal sales or solicitations, including incidental deliveries and collection, shall be regarded as exempt work

Id.

¹⁶⁷ *See id.*

¹⁶⁸ *See supra* text accompany note 160.

¹⁶⁹ No. A-918-00T5, 2002 WL 187400 (N.J. Super. Ct. App. Div. Jan. 31, 2002).

¹⁷⁰ *Id.* at *5. Naturally, this is the typical argument that employers would like to make, and neglecting to do so would result in a significant loss of corporate profit. In *Pepsi*, New Jersey’s Office of Wage and Hour Compliance determined that Pepsi-Cola Co. owed its customer representatives and bulk customer representatives \$1,885,098.68 in overtime wages, not to mention a fine of \$188,509.87 in administrative fees relating to the violation. *Id.* at *2. How many cans and bottles of Pepsi will the company need to sell to recoup such a loss?

completed an exhaustive analysis of the duties of the company's customer representatives and bulk customer representatives (once united in a single category as "Route Salesmen") and determined that: (1) although it was true that plaintiffs were part of the "Driving Force" marketing program,¹⁷¹ and (2) commission earned was based on the territory's sales growth performance,¹⁷² they were not exempt "outside sales persons."¹⁷³ These facts were akin to Christopher and Buchanan's participation in the "Winning Practices" program, and their ability to earn commission based on the performance of their respective sales territories,¹⁷⁴ which meant that PSRs would probably pass the qualitative part of the test. Thus, if PSRs were able to persuade the court that they did not spend more than twenty percent of their work hours engaging in promotional activities that qualify as "making sales," they would likely have passed the quantitative part of New Jersey's test as well.

However, in 2011, the New Jersey Department of Labor proposed striking its quantitative limitation on the performance of non-exempt work to achieve uniformity with FLSA.¹⁷⁵ Pursuant to a notice-and-comment procedure,¹⁷⁶ Section 12:56-7.4 of the New Jersey Administrative Code was repealed and New Jersey no longer has a quantitative analysis for defining what encompasses "outside sales." It is uncertain whether *Pepsi-Cola, Co.* will still be helpful to PSRs seeking overtime compensation as the qualitative portion of the case analysis has not been impacted by the repeal of § 12:56-7.4. Nonetheless, the state's adoption of FLSA's approach to defining "outside sales" suggests that New Jersey courts may be compelled to apply the quantitative analysis more closely to *Christopher* in the future.

¹⁷¹ *Id.* at *6. The program focused on expanding sales through infiltration of large supermarket chains. *Id.*

¹⁷² *Id.* at *8.

¹⁷³ *Id.* at *1.

¹⁷⁴ *See supra* Part III.

¹⁷⁵ Suzanne K. Brown, *New Jersey State Department of Labor Proposes Repeal of Existing Overtime Exemption Rules and Adoption of Federal Overtime Exemption Regulations*, WAGE & HOUR DEFENSE BLOG (Apr. 8, 2011), <http://www.wagehourblog.com/2011/04/articles/state-wage-and-hour-laws/new-jersey-state-department-of-labor-proposes-repeal-of-existing-overtime-exemption-rules-and-adoption-of-federal-overtime-exemption-regulations>.

¹⁷⁶ *Id.*

C. *New York*

New York has a state overtime statute that expressly excludes “outside salesmen” from its protection.¹⁷⁷ There is no reported case law that probes the issue of whether a detailer is an “outside salesman,” nor does the statute contain language that explains what standard of measurement might be used to determine whether an employee is an outside salesman.¹⁷⁸ PSRs appear to have an open playing field here.

D. *Massachusetts*

Massachusetts’s overtime statute contains a provision that excludes “any employee [working] . . . as an outside salesman.”¹⁷⁹ There is no specific definition given for “outside salesman.” However, the state’s relevant regulatory code states that the general exclusions of “*bona fide* executive, or administrative or professional person . . . have the same meaning” as FLSA’s terms, and such an application is supported by case law.¹⁸⁰ Although no case law has discussed whether PSRs are defined as “outside salesmen,”¹⁸¹ given the inclination of the Massachusetts courts to adopt federal standards

¹⁷⁷ See N.Y. LAB. LAW § 652 (McKinney 2010) (minimum and overtime wage requirements); *Id.* § 651 (definitions that designate the types of employees that are not included).

¹⁷⁸ Typically, the only time “outside salesmen” are mentioned is in connection with workers’ compensation cases, in which the court only has to determine whether the salesperson was within “the course of his employment” when he was injured. See *Post v. Tenn. Prods. & Chem. Corp.*, 200 N.E.2d 213, 213 (N.Y. 1964) (estate of chemical salesman suing for worker’s compensation); *Freudenfeld v. Louis Stein & Co.*, 2 N.E.2d 688, 688 (N.Y. 1936) (internal quotation marks omitted) (estate of fur manufacturer’s outside salesman suing for worker’s compensation). This does not help with the PSR analysis.

¹⁷⁹ MASS. GEN. LAWS ANN. ch. 151, § 1A (West) (effective Nov. 26, 2003).

¹⁸⁰ 455 MASS. CODE REGS. 2.02(3) (2013); see *Cash v. Cycle Craft Co.*, 482 F. Supp. 2d 133, 140 (D. Mass. 2007), *aff’d*, 508 F.3d 680 (1st Cir. 2007) (“The Massachusetts statute governing overtime pay is nearly identical to the FLSA.”).

¹⁸¹ In fact, no reported case discusses what factors are part of the analysis to find an employee an “outside employee.”

for the interpretation of state minimum wage and overtime statutes, it is likely that the findings in *Christopher* will apply in this state, even if Massachusetts's PSRs bring suit against their employers under section 1A of chapter 151 of the General Laws of Massachusetts.

E. *Texas and Florida*

Because Texas and Florida do not have state overtime statutes, the only possible option for employees seeking recovery of overtime wages is FLSA. *Christopher* establishes the binding precedent that pharmaceutical salesmen are exempt under FLSA, thus it is unlikely that such a case will ever be brought before any court—unless the facts vary significantly (this is unlikely as, overall, detailers in the industry have been engaging in the same types of duties for the past seven decades).

F. *Illinois*

Illinois's overtime statute comes with an extensive description of excluded employees, which includes employees who serve in a "bona fide executive, administrative or professional capacity," as defined by FLSA.¹⁸² Notably, "outside salesmen" are excluded separately from the "white-collar" exemptions, and are defined as "an employee regularly engaged in making sales or obtaining orders or contracts for services where a major portion of such duties are performed away from his employer's place of business."¹⁸³ As with the federal law, this is also a qualitative standard.¹⁸⁴ The state's appellate court applied such a standard in *DeWig v. Landshire, Inc.*, a case in which the court was charged with determining whether a "route salesman"—who delivered his employer's "sandwiches and delicatessen foods to convenience stores, schools and other outlets" in Sandwich, Illinois—was an

¹⁸² 820 ILL. COMP. STAT. ANN. 105/4 (West 2004).

¹⁸³ 820 ILL. COMP. STAT. ANN. 105/3 (West) (effective Jan. 1, 2009).

¹⁸⁴ In fact, even the dissent in *DeWig v. Landshire, Inc.*, 666 N.E.2d 1204, 1208 (Ill. App. Ct. 1996) (Breslin, J., dissenting) (citation omitted), acknowledged that "the state definition of outside salesman should be read in a manner consistent with the federal definition."

“outside salesman.”¹⁸⁵ As in *Christopher*, the essential determination was whether the employee’s employment activities required him to “regularly engage[] in making sales.”¹⁸⁶ The court rejected the plaintiff’s argument that the Illinois General Assembly’s intended for a liberal construction of the text, stating that the statute was clear and “unless otherwise defined, words used in the statute are to be given their plain, ordinary meaning.”¹⁸⁷ For PSRs in Illinois hoping to be exempt from the statute, *DeWig* makes it clear that at least *some* jurisdictions in Illinois are required to strictly construe the meaning of “making sales” and are not to consider factors such as “commission potential or employer control” in applying the statute.¹⁸⁸ There is no further guidance as there are no reported cases of PSRs suing for overtime compensation.

G. Pennsylvania

Pennsylvania provides overtime protections for employees but expressly excludes those who are employed “in the capacity of outside salesm[e]n.”¹⁸⁹ There are no reported cases involving PSRs suing for overtime compensation. There is one reported case in which the appellate-level Commonwealth Court of Pennsylvania¹⁹⁰ demonstrated how the overtime exemptions are applied in the

¹⁸⁵ See *DeWig*, 666 N.E.2d at 1205 (making the mixed factual and legal finding that the “route salesman” included selling among his primary duties and thus qualified for the “outside salesman” exemption).

¹⁸⁶ *Id.* at 1206 (internal quotation marks omitted).

¹⁸⁷ *Id.* (citing *Granite City Div. of Nat’l Steel Co. v. Ill. Pollution Control Bd.*, 613 N.E.2d 719, 733 (Ill. 1993)).

¹⁸⁸ *Id.* This decision was made in Third District of Illinois Appellate Court. “A decision of the appellate court . . . [is] not binding on other appellate districts” in the state of Illinois. *State Farm Fire & Cas. Co. v. Yapejian*, 605 N.E.2d 539, 542 (Ill. 1992).

¹⁸⁹ 43 PA. CONS. STAT. ANN. § 333.105(a)(5) (West) (effective Oct. 3, 2012) (the exemptions); 43 PA. CONS. STAT. ANN. § 333.104 (West) (effective July 5, 2012) (the overtime statute).

¹⁹⁰ The Commonwealth Court “is unique to Pennsylvania . . . [and] one of Pennsylvania’s two statewide intermediate appellate courts.” *Learn*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/learn> (last updated Sept. 2013). The court is differentiated from the state’s appellate-level “superior court,” and is “primarily responsible for matters involving state and local governments and regulatory agencies.” *Id.*

state,¹⁹¹ but it offers very little guidance in the way of how PSRs would fare in Pennsylvania's courts. Nonetheless, the case serves as a fine example for comparison between state and federal administrative law.

In *Bayada Nurses, Inc. v. Department of Labor & Industry*, the court laid out the rules of agency interpretation for the state.¹⁹² The court stated that “the FLSA does not . . . pre-empt state regulation of wages and overtime if the state's standards are more beneficial to workers.”¹⁹³ Moreover, the Minimum Wage Act of Pennsylvania “grant[ed] the Department [of Labor and Industry] broad powers” to protect employees,¹⁹⁴ and delegated to Pennsylvania's Secretary of Labor the authority to “promulgate regulations relative to overtime” under section 333.104(c).¹⁹⁵ “When . . . construed liberally, [the statute] confers in the Department either legislative or interpretative rulemaking power.”¹⁹⁶ Finally, the agency's “interpretation is entitled to great deference and is to be given controlling weight” unless found “clearly erroneous.”¹⁹⁷ This mirrors its federal counterpart's grant of authority to the Secretary of Labor to enforce and interpret FLSA as the agency sees fit.

The opinion also examined the differences between “rules adopted under administrative agencies' legislative rulemaking power

¹⁹¹ See *Bayada Nurses, Inc. v. Commonwealth*, 958 A.2d 1050 (Pa. Commw. Ct. 2008), *aff'd*, 8 A.3d 866 (Pa. 2010) (upholding the state Secretary of Labor's “domestic services” regulation as valid).

¹⁹² *Id.* at 1059.

¹⁹³ *Id.* (alteration in original) (quoting *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 388 (E.D.N.Y. 2002)) (internal quotation marks omitted). Congress exercised its Commerce Power in legislating FLSA and pursuant to that power, made FLSA valid in all states. Lisa M. Milani, *The Applicability of the Fair Labor Standards Act to Volunteer Workers at Nonprofit Organizations*, 43 WASH. & LEE L. REV. 233, 233 n.1 (1986), available at <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2849&context=wlulr>. The statute explicitly allows for stricter state laws to survive conflict preemption as to provide greater protections for employees.

¹⁹⁴ *Bayada Nurses, Inc.*, 958 A.2d at 1057.

¹⁹⁵ *Id.* at 1056; 43 PA. CONS. STAT. ANN. § 333.104(c) (West) (effective July 5, 2012).

¹⁹⁶ *Bayada Nurses, Inc.*, 958 A.2d at 1057.

¹⁹⁷ *Id.* at 1057–58 (citing *Riverwalk Casino, L.P. v. Pa. Gaming Control Bd.*, 926 A.2d 926 (2007)).

and their interpretative rulemaking power. The former, known as substantive rules or regulations, result from legislative power granted by the legislature”¹⁹⁸ Substantive rules are presumed to be reasonable and have the force of law, as long as they are “reasonable” and constitutional.¹⁹⁹ Interpretive rules and regulations construe statutes and are deferred to as long as they are “reasonable” and do not expand upon the underlying statute’s terms and purpose.²⁰⁰ While this does not directly help an analysis of whether PSRs may or may not be exempt, it is interesting to see how administrative laws at the state and federal levels mirror one another, and how each give substantial deference to the respective administrative agencies that are charged with enforcing the law. With this knowledge, PSRs (and other exempt employees) are able to seek greater protections at the state level if they are able to garner support from the state legislature or the state’s equivalent to the DOL, which are charged with enforcing and interpreting the statutes. Thanks to Congress’s express language in the FLSA, they can do this with the assurance that federal law will not override any expanded protections.

While placing the spotlight on eight important states in the pharmaceutical industry provides but a limited sample, the sample effectively represents the current outlook throughout the United States, as demonstrated by my research of the overtime statutes in the fifty states.²⁰¹ The research shows that at least fifteen states have expressly adopted the FLSA’s exemptions as their state law exemptions or have written provisions that are as exclusive in scope as the FLSA.²⁰² There are some states that appear to favor employers more, such as the nineteen or so states that do not have overtime statutes, which means that, in those states, employees have only the FLSA or contractual agreements as a recourse for obtaining overtime wages.²⁰³ There are about nineteen or more states that are like California, New York, or Pennsylvania, which do have overtime

¹⁹⁸ *Id.* at 1056–57.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1057.

²⁰¹ *See infra* Appendix.

²⁰² *See id.*

²⁰³ *See id.*

statutes but also exclude “outside salesmen.”²⁰⁴ In those states, PSRs will need to fight the same court battles as Christopher and Buchanan did, with the exception of citing a state statute rather than the FLSA as their legal authority. This is also true for PSRs working in states like Alabama and North Carolina, where the state legislatures have provided overtime statutes but no exclusions.²⁰⁵ It is difficult to say whether *Christopher* has impacted the opportunities for success in the former category of states. As their exemptions are coextensive to, or adopted from, the FLSA, it is perhaps quite persuasive for employers to argue that PSRs should be considered exempt under the state statute because they were found exempt under the federal standard. On the other hand, judging from the fairly equal divisions in jurisdictions, it is clear that federal law and policy do not necessarily dictate what goes on within state legislative and administrative chambers. In a great number of cases, it will be up to the courts to decide whether or not *Christopher* is persuasive in interpreting state law.

However, there is one category where it is safe to say that the PSRs—whose territories are located in the nineteen states that never had overtime statutes to begin with—are negatively impacted by *Christopher*. Whereas PSRs in these states could once argue under the FLSA (as the plaintiff in *In re Novartis* did successfully), they are now excluded by the precedent that *Christopher* has established. Perhaps PSRs have effectively lost all hope in obtaining overtime compensation in these states.

VI. CONCLUSION

This note has discussed how the Supreme Court arrived at its decision in *Christopher v. SmithKline Beecham Corp.* It was a decision that the Court made through careful consideration of whether the DOL’s interpretation of a statute the DOL was charged with enforcing and defining was entitled to deference; whether the seventy-decade-long practices of the pharmaceutical industry would be justified by a change in the law; and, finally, whether the FLSA’s purposes would best be served by its decision. Whether one agrees with the outcome or not, the law was carried out according to the

²⁰⁴ See *id.*

²⁰⁵ See *id.*

administrative law promulgation and review procedures that the federal system of checks and balances operate upon.

What is in store for PSRs in the future given the Court's decision in *Christopher*? As this note suggests, many PSRs across the nation will still have the opportunity to at least argue their cases under their respective state laws. Perhaps they will succeed based upon the same reasoning that Christopher, Buchanan, and the DOL used before the U.S. Supreme Court. Maybe a sympathetic court analyzing a similar set of facts under state law will reach a different outcome. Or perhaps the facts of these new plaintiff-PSRs will differ according to the varying nature of their duties. This is certainly possible as technology is constantly improving and changing the face of industry. Perhaps the work of detailers will evolve with technology and social practices. Would a PSR still be considered an "outside employee" under the FLSA if he or she telecommunicates with physicians—from a permanent desk at the pharmaceutical employer's office—and sends free samples, gifts, and other "promotional goods" through the Internet? Probably not. In the short term, what is more likely to happen is that pharmaceutical companies will come up with creative ways of changing the work descriptions for PSRs around the nation, fitting them squarely into other exemptions or unambiguously within the "outside sales employee" exemption.

APPENDIX

State	State overtime statute	State provision exempting "outside salesman"
AL	None	None
AK	Yes	ALASKA STAT. ANN. § 23.10.055(9)(B)(3) (West 2013)—coextensive
AZ	Yes	None
AR	Yes	ARK. CODE ANN. § 11-4-211(D) (West 2007)—coextensive
CA	Yes	CAL. LAB. CODE § 1171 (West 2001)
CO	Yes	None
CT	Yes	CONN. GEN. STAT. ANN. § 31-58 (West 2013)—coextensive
DE	No	None
DC	Yes	D.C. CODE § 32-1004 (West 2012)—coextensive
FL	No	None
GA	No	None
HI	Yes	HAW. CODE R. § 12-21-6 (West 2013)
ID	Yes	IDAHO CODE ANN. § 44-1504(3) (West 2013)—coextensive
IL	Yes	820 ILL. COMP. STAT. ANN. 105/3 (West 2009)—coextensive
IN	Yes	IND. CODE ANN. § 22-2-2-3 (West 2013)
IA	No	None
KS	Yes	KAN. STAT. ANN. § 44-1202(e)(3) (West 2013)—coextensive
KY	Yes	KY. REV. STAT. ANN. § 337.285 (West 2009)—coextensive, adopts FLSA
LA	No	None
ME	Yes	None
MD	Yes	Coextensive—but must pay overtime if over sixty hours
MA	Yes	Coextensive
MI	Yes	None
MN	Yes	None
MS	Yes	None

MO	Yes	Coextensive
MT	Yes	Coextensive
NE	Yes	Coextensive, adopts FLSA
NV	Yes	NEV. REV. STAT. ANN. § 608.250 (West 2011)— outside salespersons whose earnings are based on commissions
NH	No	None
NJ	Yes	Coextensive
NM	Yes	None
NY	Yes	N.Y. LAB. LAW § 651 (McKinney 2010)
NC	Yes	None
ND	Yes	N.D. ADMIN. CODE 46-02-07-02 (2013), but work unrelated to outside sales may not be over 20% of hours
OH	Yes	Coextensive
OK	Yes	Coextensive, adopts FLSA
OR	Yes	OR. REV. STAT. ANN. § 653.020 (West 2013)— coextensive
PA	Yes	43 PA. CONS. STAT. § 333.105 (West 2012) —as defined by the Secretary
RI	Yes	None
SC	Yes	Coextensive, adopts FLSA
SD	Yes	None
TN	No	None
TX	No	None
UT	No	None
VT	Yes	VT. STAT. ANN. tit. 21, § 383 (West 2013)— outside employee is excluded from “employee” definition
VA	No	None
WA	No	None
WV	Yes	None
WI	Yes	WIS. ADMIN. CODE DWD § 274.04 (2013)— outside sales are employees spend 80% time away from employer
WY	No	None