

# One Minute Memo<sup>®</sup>



## Supreme Court Rejects DOL's Interpretation and Finds Pharmaceutical Sales Representatives Qualify for the Outside Sales Exemption

This morning, a divided Supreme Court issued a 5-4 decision written by Justice Alito upholding decades of industry practice and finding that the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives (PSRs). The Court decided unanimously that the Department of Labor's (DOL) *amicus curiae* briefs in which it first articulated its position that the outside sales exemption should not apply to PSRs should not be provided any "especially favorable weight."

The critical question in *Christopher v. SmithKline* was whether the PSRs had a primary duty of "making sales," which is required for application of the outside sales exemption. Federal law prohibits the sale of any prescription drug without the authorization of a licensed physician and PSRs cannot consummate a sale of their employers' products to end-users. Rather, the PSRs only encourage physicians to prescribe those products. Rejecting the DOL's argument that "sales" requires a transfer of title, Justice Alito's opinion, with which Justices Roberts, Scalia, Kennedy and Thomas joined, found that the statute requires a "functional, rather than a formal, inquiry [] that views an employee's responsibilities in the context of the particular industry in which the employee works." The Court then concluded that PSRs' work is "tantamount to a sale" in the pharmaceutical industry.

Justice Breyer's dissent, with which Justices Ginsburg, Sotomayor and Kagan agreed, did not challenge the majority's decision with respect to the level of deference to be applied to the DOL's *amicus* brief, but instead focused on the non-binding nature of the commitments obtained by PSRs, arguing that obtaining such a "definitely maybe" is more akin to "promotional activities" than true sales work.

Obviously, the impact of the Court's decision will be felt most immediately in the pharmaceutical industry. Dozens of pending cases around the country will likely be dismissed based on this decision. Dozens more nascent lawsuits likely will never be filed, and the tens of thousands of employees who are currently working as PSRs will continue to be treated as exempt, at least under federal law and in states that follow the FLSA's outside sales exemption. But the Court's decision in the *Christopher* case potentially permits employers in all industries to classify a wider variety of employees as outside sales, even if the employee does not directly effect a transfer of title. Moreover, due to the Court's decision on deference, the *Christopher* case is likely to reverberate throughout many other industries.

The Court's decision on deference should be understood as a blow to the DOL's aggressive *amicus curiae* program. The Court decided that deference was not warranted because the interpretation would "impose potentially massive liability . . . for conduct that occurred well before the interpretation was announced," resulting in "unfair surprise." The Court observed that the pharmaceutical industry had "little reason to suspect that its longstanding practice of treating detailers as exempt" might violate the FLSA prior to the start of the DOL's *amicus* program in 2009 because the DOL's position was not clear from the statute or regulations and "the DOL never initiated any enforcement actions or otherwise suggested that it thought the industry was acting unlawfully." The Court went on to state that DOL's interpretation was also unpersuasive, pointing to the fact that the DOL had advanced different definitions of the term "sales" before the Ninth Circuit and the Supreme Court and that the DOL's position was "flatly inconsistent" with the definition of "sales" in the statute.

## Seyfarth Shaw — One Minute Memo

In light of the Court's decision on the deference issue, other DOL *amicus* briefs addressing other issues may come under increased scrutiny. Through its "regulation by *amicus*" program, DOL has influenced pending litigation related to tip pooling, the deductibility of certain expenses, whether certain activities are "interstate commerce" sufficient to establish FLSA coverage, the outside sales exemption, the administrative exemption, the propriety of "hybrid" FLSA/state law class actions, commissioned employees, donning and doffing, *de minimis* time, the continuous workday principle, the tip credit's applicability to certain employees and/or side work, the use of representative testimony in class/collective actions, willfulness, and the good faith defense. Many areas of FLSA law have been impacted, and the Supreme Court's decision in *Christopher* should cause courts to reconsider a wide variety of issues, particularly where DOL has articulated a new or changed position in an *amicus* brief.

Seyfarth will be hosting a webinar on Wednesday at 2:30 EST to address the decision's impact on employers. To register for the webinar please [click here](#).

By: *Richard Alfred*, Chair of the Wage & Hour Litigation Practice Group, *Alex Passantino*, Leader of the Wage & Hour Audit & Assessment Practice and *Jessica Schauer*, Managing Associate.

If you would like further information, please contact your Seyfarth attorney, Richard Alfred at [ralfred@seyfarth.com](mailto:ralfred@seyfarth.com), Alex Passantino at [apassantino@seyfarth.com](mailto:apassantino@seyfarth.com) or Jessica Schauer at [jmschauer@seyfarth.com](mailto:jmschauer@seyfarth.com).



[www.seyfarth.com](http://www.seyfarth.com)

Attorney Advertising. This One Minute Memo is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.) © 2012 Seyfarth Shaw LLP. All rights reserved.

**Breadth. Depth. Results.**