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WLF URGES HIGH COURT TO RECOGNIZE LIMITS ON AGENCY DEFERENCE

(Christopher v. SmithKline Beecham Corp.)

U.S. Supreme Court, No. 11-204

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to affirm an appeals court's decision to accord no deference to the Department of Labor's recent "reinterpretation" of the Fair Labor Standards Act's (FLSA) "outside sales" exemption. That interpretation, which the Secretary of Labor first announced in a 2009 *amicus* brief, would require the nation's more than 90,000 pharmaceutical sales representatives to be reclassified overnight as overtime-eligible employees under the FLSA. But that novel interpretation abruptly contradicts the Department's own regulatory and interpretative guidance to the contrary for more than seventy years.

In a brief filed in *Christopher v. SmithKline Beecham*, WLF emphasized that deferring to regulatory agencies who freely change their interpretations of regulations and statutes without the formal protections of notice-and-comment rulemaking would significantly undercut the predictability that has long been a hallmark of our common law system.

WLF filed its brief on its own behalf and on behalf of its clients, the Allied Educational Foundation and the Cato Institute.

"The law simply does not permit a federal agency to regulate by *amicus* brief," said WLF Senior Litigation Counsel Cory Andrews after filing WLF's brief. "If administrative agencies come to believe that formal rulemaking procedures are too cumbersome or inconvenient to follow, and are instead permitted to disrupt settled expectations under the pretense of "reinterpreting" existing regulations, an important safeguard for our representative system of government will be lost," Andrews said.

The case raises important issues about the limits of agency deference and the need to maintain appropriate checks on unpredictable and disruptive agency actions. At issue is whether pharmaceutical sales representatives are exempt from the overtime pay requirements of the FLSA. In answering that question, the appeals court accorded no deference to the Department of Labor's newly announced interpretation of "sales" within the meaning of the FLSA. Under the new narrow definition, an employee is deemed to engage in "sales" only when he or she actually "transfers title" in the consummation of a

sale. Because pharmaceutical sales representatives do not sell pharmaceuticals directly to patients, who are the end users, they cannot possibly satisfy the Department's strict definition.

In its brief, WLF argued that nothing in the regulatory history suggests that the Department of Labor had based its longstanding regulations on an idiosyncratic definition of the word "sales." Nor could WLF identify anything in the Secretary's *amicus* filings to suggest that the Department suddenly changed its policy because, after a careful examination of the language and history of the FLSA's outside sales exemption and the regulations implementing it, the Department suddenly discovered that its previous interpretations woefully misrepresented Congressional intent. Rather, WLF argued, the Secretary's new view of the outside sales exemption appears at best to be an after-the-fact effort to justify the Department's new litigating position and policy preference.

WLF's brief also cautioned against the enormous upheaval that the Department's new interpretation of "outside sales" would have on legitimate reliance interests in the pharmaceutical industry—among employers *and* employees alike. Such concern, WLF argued, is especially warranted here, where an agency's contradictory interpretation creates an unfair surprise for the affected stakeholders who had come to rely on that agency's earlier acquiescence for well over half a century.

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

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