No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER, *et al.*,
Petitioners,

v.

SMITHKLINE BEECHAM, CORP., D/B/A
GLAXOSMITHKLINE,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL
CENTER
1201 F Street, N.W.
Suite 200
Washington, D.C. 20004

KEVIN M. KRAHAM
Counsel of Record
TAMMY D. MCCUTCHEN
S. LIBBY HENNINGER
LITTLER MENDELSON, P.C.
1150 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 423-2404
KKraham@littler.com

LISA A. SCHRETER
LITTLER MENDELSON, P.C.
3344 Peachtree Road, N.E.
Suite 1500
Atlanta, GA 30326

Counsel for Amicus Curiae

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Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 69 Fed. Reg. 22122 (Apr. 23, 2004) 12, 14, 17, 18, 28

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Proposed Rule, 68 Fed. Reg. 15560 (March 31, 2003) 12

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DOL Opinion Letter, May 19, 1945, 2 Lab. L. Rep. (CCH) P 33,093 27

DOL published *amicus curiae* briefs, available at http://www.dol.gov/sol/media/briefs/main.htm 26

Harold Stein, *Report and Recommendations of the Presiding Officer on Proposed Revisions of Regulations, Part 541* (Oct. 10, 1940)...4, 9, 10, 14, 15

Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541,* Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949)................10, 11, 12, 13, 14

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BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS*[1]

The National Federation of Independent Business (NFIB) is the nation's leading small business

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[1] No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both parties have consented to the filing of this brief.

association, representing members in Washington, D.C., and all 50 state capitals including all states encompassed by the Second and Ninth Judicial Circuits. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

NFIB represents over 300,000 member businesses nationwide, and its membership spans the spectrum of business operations. While NFIB members range from sole proprietor enterprises to firms with hundreds of employees, the typical NFIB member has ten employees and reports gross annual sales of approximately $500,000 per year and is covered by the Fair Labor Standards Act.

Without ready access to a team of expert attorneys, NFIB member businesses have enormous difficulty complying with existing and codified regulations. Small businesses with fewer than 20 employees already spend $10,585 per employee to comply with a vast array of federal regulations. Crain and Crain, *The Impact of Regulatory Costs on Small Firms* (September 2010) (report developed under contract

with the U.S Small Business Administration).[2] The Code of Federal Regulations includes over 165,000 pages of regulations. Williams and Adams, *Regulatory Overload* (February 08, 2012).[3] NFIB estimates that 845 new regulations currently under consideration will affect small business. *NFIB Small Business for Sensible Regulation Project, Quick Facts.*[4]

If federal agencies, such as the U.S. Department of Labor (DOL), are permitted to announce substantive changes to codified regulations through unsolicited *amicus* briefs – without prior notice or sufficient publication of the new requirements – compliance becomes practically impossible. Additionally, many of NFIB's members employ individuals in outside sales positions, and thus, they will be impacted by DOL's decision to graft a new substantive requirement – the actual transfer of title to goods – into the regulatory definition of "sales". Because DOL's changed regulation will apply retroactively, NFIB member businesses could face substantial back wage liability. Thus, the questions presented in this case are of great importance to NFIB and its member businesses.

SUMMARY OF ARGUMENT

DOL's *amicus* does not merely "interpret" the regulations defining and delimiting the outside sales exemption. Rather, DOL is attempting to materially change those regulations by announcing that the

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[2] Available at http://www.sba.gov/advocacy/7540/49291 (last visited on March 22, 2012).

[3] Available at http://mercatus.org/publication/regulatory-overload-0 (last visited on March 22, 2012).

[4] Available at http://www.sensibleregulations.org/resources/facts-and-figures (last visited on March 22, 2012).

outside sales exemption applies only to employees who actually and personally transfer title of goods. Comparison of the actual regulation defining the phrase "making sales", and DOL's various paraphrasing of the regulatory language compels the conclusion that DOL is regulating through *amicus*. The regulation provides that sales "includes" the transfer of title. DOL's *amicus* brief claims that sales "requires the transfer of title." DOL asserts – without explanation, authority or argument – that making sales "means transferring title to property," and the exemption applies "only if" the employee "transfers title to those goods to the buyer." DOL's proposed regulatory change is contradicted by FLSA statutory language, the legislative history of the FLSA, DOL's own regulations, and over 70 years of regulatory history.

Petitioners cannot prevail unless DOL's proposed regulatory change is accepted. Except for the technical transfer of title to property, which other laws prevent Petitioners from performing, the pharmaceutical sales representative (PSR) job has every traditional indicia of outside sales as articulated by DOL in 1940, *see* Report and Recommendations of the Presiding Officer (Harold Stein) on Proposed Revisions of Regulations, Part 541 at 53 (Oct. 10, 1940) ("Stein Report"), and the Tenth Circuit's 1941 decision in *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941).

Because DOL's *amicus* brief attempts to change the regulatory requirements for exemption, not merely interpret existing regulatory language, DOL is not entitled to deference. Moreover, deference should not be given to DOL's position because it is entirely contrary to the statute, its own regulations, and the

legislative and regulatory history. To afford deference to DOL in this matter would have immediate and devastating impacts on businesses – particularly small businesses – as it would result in retroactive liability and unfair surprise. Accordingly, the Ninth Circuit's holding below should be affirmed.

ARGUMENT

I. DOL'S LITIGATION POSITION REPRESENTS A MATERIAL CHANGE TO THE REGULATORY REQUIREMENTS FOR EXEMPTION AS AN OUTSIDE SALES EMPLOYEE

A. Transfer of Title Is Not Required for the Outside Sales Exemption

DOL's *amicus* brief attempts to graft a new, substantive requirement onto the regulations defining the outside sales exemption: An actual transfer of title to goods. This new regulatory requirement cannot be found either in the Fair Labor Standards Act or the Labor Department's codified regulations defining and delimiting the outside sales exemption.

Congress enacted the FLSA's minimum wage and overtime standards to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The FLSA was intended to protect low-wage workers – not all workers. *See e.g.*, S. Rep. 75-884 at 3 (1937) (FLSA intended to improve the standard of living for "those who are now under-nourished, poorly clad, and ill-housed."); S. Rep. 81-640, at 1-2 (1949) (FLSA intended to "promote economic justice and security for the lowest paid of our wage earners."). While the FLSA was enacted to

protect American workers from "substandard labor conditions," *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669-70 (1946), achieving the "goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of protection". *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir. 1997). In fact, Congress recognized that many workers are not in need of the FLSA's protections by enacting over 50 partial and complete exemptions to the minimum wage and overtime requirements of the FLSA. *See* Appendix A for a listing of FLSA exemptions.[5]

Relevant here is the exemption for employees employed "in the capacity of outside salesmen." 29 U.S.C. § 213(a)(1). Section 3(k) of the FLSA defines the terms "sale" and "sell":

> "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). The outside sales exemption is not further defined in the FLSA, which instead provides that the exemption is to be "defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the [Admin-

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[5] We join with *amicus curiae* Chamber of Commerce of the United States in questioning the oft-repeated canon that FLSA exemptions must be construed narrowly against the employers seeking to assert them, with application limited to employees plainly and unmistakably exempt. The enactment of over 50 different FLSA exemptions seems inconsistent with the notion that Congress intended the FLSA to protect virtually every employee. Since universal coverage was not Congress' intent, there is no basis for creating a presumption against exemption beyond the employer's normal burden of proof.

istrative Procedures Act]." 29 U.S.C. § 213(a)(1).[6] DOL has exercised this authority, most recently in 2004 after APA notice and comment rulemaking, by issuing the regulations found at 29 C.F.R. Part 541, Subpart F.

DOL's regulations, 29 C.F.R. § 541.500(a)(1), provide that the outside sales exemption applies to any employee whose "primary duty" is "making sales within the meaning of section 3(k) of the Act."[7] In discussing the meaning of "sales," DOL's regulations do little more than restate the language of Section 3(k):

> 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.*

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

DOL's *amicus* brief repeatedly paraphrases 541.501(b), rather than quoting this section – changing key language in the process:

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[6] When quoting this statutory language in its brief, U.S. Br. 9, DOL ends the quotation without ellipsis after the word "Secretary," thus deleting the essential requirement that the Secretary define and delimit the outside sales exemption through APA notice and comment rulemaking – not through *amicus* briefs.

[7] The regulations also require exempt outside sales employees to "customarily and regularly" be "engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a)(2). There is no dispute that the Petitioners meet this requirement.

> The regulations continue to provide that an outside salesman must be primarily engaged in making sales or obtaining service orders, 29 C.F.R. 541.500(a)(1)(i)-(ii); that making sales of goods *requires* the transfer of title to those goods, 29 C.F.R. 541.501(b); and that promotional work is not exempt unless it is directed toward consummation of the employee's own sales, 29 C.F.R. 541.503.

U.S. Br. 4 (emphasis added). Elsewhere, DOL asserts that making sales "*means* transferring title to property," *id.* at 10 (emphasis added); the exemption does not apply unless the employee "*actually transfers title* to the property," *id.* at 12-13 (emphases added); an employee sells goods "*only if* he transfers title to those goods to the buyer," *id.* at 14 (emphasis added); and the outside sales exemption applies "only to employees who consummate their own sales, *i.e., employees who transfer title to goods*," *id.* at 18 (emphasis added). *See also id.* at 25 ("selling" goods "means transferring title to property").

DOL changes the word "includes" in section 541.501(b) into a requirement that an exempt outside sales employee must actually and personally transfer title of goods. This is a substantive regulatory change. The word "includes" is illustrative – a transfer of title is sufficient to evidence that a sale has occurred, but not necessary. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 (U.S. 2010) (the word "include" in a statute "is meant to be illustrative rather than exhaustive.").

DOL's new regulatory requirement finds no support in the language of the FLSA. Section 3(k) of the Act does not state that a "sale" occurs "only if" there is a transfer of title: "'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). Rather, several of the commercial transactions in this list do not require a transfer of title: In a "consignment for title," the seller sends goods to a selling agent, but retains title to the property until the goods are sold. Whether and when title passes under a "contract to sell" is determined under the terms of the contract. Title to goods being shipped may not transfer until the shipment arrives at the intended destination. Because these transactions do not necessarily require transfer of title, DOL cannot rely on the *ejusdem generis* canon to establish that the phrase "other disposition" requires transfer of title.

DOL's reliance on the regulatory history of Part 541 is also futile. DOL has issued regulations defining and delimiting the outside sales exemptions on four occasions – 1938, 1940, 1949 and 2004. The original 1938 regulations were short, and contained no language regarding transfer of title:

> The term "employee employed . . . in the capacity of outside salesman" in section 13(a)(1) of the act shall mean any employee who customarily and regularly performs his work away from this employer's place of or places of business, who is customarily and regularly engaged in making sales as defined in section 3(k) of the act and who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer. For the purposes of this definition, recurrent routine deliveries, whether or not prior orders are placed by purchasers, and collections, shall not be considered sales.

See Stein Report at 53.

DOL mentions transfer of title for the first time in the 1940 Stein Report: "Generally speaking, the Division has interpreted section 3(k) of the act to include the transfer of title to tangible property and in certain cases, of tangible and valuable evidences of intangible property." *Id.* at 45. However, this mention is followed by a discussion of sales transactions which do not require transfer of title – "selling of time on the radio, the solicitation of advertising for newspapers or other periodicals and the solicitation of freight for railroads and other transportation agencies." *Id.* DOL concluded that "in a practical sense, these people are salesmen in that their activities are of the same nature as those of persons making sales within the meaning of section 3(k)." *Id.* To ensure such sales employees were not artificially excluded from the exemption, DOL decided "to add a further clause which will specifically include within the exemption persons engaged in selling activities of this type." *Id.*

Thus, in 1940, DOL specifically stated that the sales exemption applies to employees who do not actually transfer title of property if the "nature" of their activities is making sales "in a practical sense." DOL refused to limit application of the exemption to employees who actually transfer title.

The 1949 report on the "white collar" exemptions also includes no indication that the outside sales exemption requires the employee to actually transfer title of property. Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("Weiss Report"). Rather, DOL stated: "In borderline cases the test is whether the

person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Id.* at 83. The outside sales exemption then applies, if the employee obtains a commitment to buy as opposed to a "binding" commitment. The phase "obtaining a commitment to buy" in the Weiss Report, modifies the phrase "his own sales", thus implying some lesser requirement than an actual transfer of title. In fact, in 1949, DOL rejected such a rigid rule by stating: "With such variations in the methods of selling and promoting sales each case must be decided upon its facts." *Id.*

Although a bit outdated, DOL's example of a manufacturing representative who sells a product owned by another company – the "jobber" – is a clear indication that, in 1948, DOL did not interpret the outside sales regulation as requiring transfer of title:

> One situation involves a manufacturer's representative who visits the retailer for the purpose of obtaining orders for his employer's product, but transmits any order he obtains to the local jobber to be filled. Since this representative sells a specific commodity which is the property of the jobber rather than his employer the question has been raised whether he may be said to be engaged in making "sales" within the meaning of section 3(k) of the act. Applying the test recommended above, it is clear that the employee is performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer. The sale in this instance has been "consummated" in the sense that the salesman has obtained a commitment from the customer."

Id. In this example, the manufacturing representative could not have transferred title to the property because the property was not owned by his employer. Yet, DOL concluded that the manufacturer's representative was an exempt outside sales employee.

The outside sales regulations went unchanged from 1949 to 2004. As required under the Administrative Procedures Act, DOL proposed revisions to the Part 541 "white collar" overtime exemptions in 2003 and requested comments from the public. DOL reviewed the 75,280 comments submitted, and published final regulations in 2004. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Proposed Rule, 68 Fed. Reg. 15560 (March 31, 2003) (signed by Wage & Hour Administrator T. McCutchen) ("2003 Proposed Rule"); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 69 Fed. Reg. 22122 (Apr. 23, 2004) (signed by Wage & Hour Administrator T. McCutchen) ("2004 Final Rule").

DOL contends that the 2004 Final Rule "did not make any relevant substantive changes." U.S. Br. 4. DOL is wrong. The 2004 Final Rule did make a substantive change to 29 C.F.R. § 541.503, the very regulation upon which DOL now relies so heavily in this case – a change designed to ensure that an employee's failure to complete technical requirements for completing a sale under commercial law (such as transferring title) does not preclude application of the outside sales exemption.

The 2004 Final Rule incorporated an example from the 1948 Weiss Report, but with some important differences. The 1948 Weiss Report contained the

following example of an employee who does not make a sale:

> Still another type of situation involves the representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, *consults with the manager as to the requirement of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chain-store company which later ships the quantity requested*. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Since the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale, (the store manager often has no authority to buy) this work must be counted as nonexempt.

Weiss Report at 84 (emphasis added).

In 2004, DOL revised this 1949 example by eliminating the language: "consults with the manager as to the requirement of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chain-store company which later ships the quantity requested." *See* 29 C.F.R. § 541.503(c). The final regulation, therefore, provides as follows:

> Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory

> runs low, *but does not obtain a commitment for additional purchases*. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

Id (emphasis added). The Preamble to the 2004 Final Rule states that these changes to 29 C.F.R. § 541.503(c) were made "to address commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales". 69 Fed. Reg. at 22162.

In other words, the language was deleted in 2004 because, in DOL's opinion published in the Federal Register after the notice and comment rulemaking, an employee who obtains a commitment to buy by filling out a requisition for a quantity of goods, and leaving the requisition with the store manager to be transmitted later, meets the requirements for the outside sales exemption – despite the absence of a title transfer. "Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button. The changes to proposed section 541.503(c) are intended to avoid such a result." *Id.* at 22163.

Thus, DOL in 2004 rejected the overly technical "interpretation" advanced by DOL today in its *amicus* brief. Rather, DOL restated that the outside sales exemption applies if "the employee, in some sense, has made sales":

> Nonetheless, the Department agrees that technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales. Employees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale.

Id. (citing Stein Report at 46; Weiss Report at 83).

B. Application of the Outside Sales Exemption Should Turn on the Nature of the Employee's Work

DOL's addition of a new "title transfer" requirement for the outside sales exemption is unsupported by the FLSA's definition of "sales", the Part 541 regulations, and a regulatory history dating back to 1940.

However, failure to apply such a rigid standard does not leave us without a basis for determining application of the exemption. DOL itself provided the regulated public with an easily applicable analysis in 1940, when it stated:

> In border-line cases, a determination can be made in the light of facts that will illustrate the actual nature of the employee's work. Among factors to be considered are: the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; description of occupation in union contracts; comparison of duties of employees in question and of other employees engaged as (a) truck drivers and (b) salesman; possession of salesman's or solicitor's license when such a license is required by law or ordi-

> nance; and presence or absence of customary or contractual prearrangements concerning amount to be delivered.

Stein Report at 51-52.

In 1941, the Tenth Circuit articulated similar factors when discussing the reasons for excluding outside sale employees from the FLSA's protections:

> The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great extent, works individually. 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.

Jewel Tea Co., 118 F.2d at 207-08.

Combining the principles set forth by DOL and the Tenth Circuit (and putting those standards in more modern language) whether an employee qualifies for the outside sales exemption should depend on the nature of the job as a whole, with the following factors indicating that the employee has a primary duty of "sales":

1. The employer considers the sales experience of applicants when hiring;

2. The employer's job description indicates selling as an important job duty;

3. The employee receives training on sales skills and techniques;

4. The employee attends sales meetings and conferences;

5. The employee performs daily tasks independently and is not closely supervised;

6. The employee controls his own work hours;

7. The employee visits potential customers to seek commitments to purchase, whether binding or non-binding;

8. The employee's job performance is evaluated based on sales techniques and results;

9. The employer credits the employee with the sale, as evidenced by the employee earning commissions, bonuses or other compensation based on his own sales efforts; and

10. The employee earns well above the minimum wage.

Of course, none of these factors should be dispositive. Instead, as with all the "white collar" exemptions, application of the outside sales exemption must be determined in light of all facts and circumstances.

Applying these factors to determine application of the exemption is consistent with the purpose of the FLSA and the outside sales exemption. As stated above, the purpose of the FLSA is to "promote economic justice and security for the lowest paid of our wage earners." S. Rep. 81-640, at 1-2 (1949). Enacting over 50 exemptions from the FLSA's protections, Congress has recognized that many workers are not in need of the FLSA's protections – including "white collar" workers. As the legislative history of the FLSA indicates, the white-collar exemptions to the FLSA "were premised on the belief that the workers exempted typically earned salaries

well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." Preamble to the 2004 Final Rule, 69 Fed. Reg. at 22123-24.

Further, exempt employees – such as outside sales employees – perform work that is difficult to standardize to a specific time frame and cannot be easily spread to other workers after 40 hours of work have been performed in a workweek. *See id.* Like other "white collar" workers, outside sales employees who meet most of the factors suggested above do not need the FLSA's protections because they have greater control over their work hours and, in lieu of overtime, working longer hours generally is rewarded by the ability to earn commissions or other incentive compensation tied to sales.

There is no danger that application of these suggested factors could result in an outside sales exemption for "every employee of a manufacturing company" because "every such employee presumably contributes in some fashion to sales of the company's products." U.S. Br. 33. The factors articulated by DOL in 1940 and the Tenth Circuit in 1941 require far more than merely "facilitating sales" and would not lead to exemption for "every employee whose actions *facilitate* sales." *Id.*

Respondent's brief establishes that the pharmaceutical sales representative (PSR) position meets all of the suggested factors, and that analysis need not be repeated here. In short, PSRs are hired and trained to sell; control their own work hours; are not closely supervised; obtain commitments from doctors

to prescribe Respondent's pharmaceuticals; are evaluated and receive bonus compensation based on sales in their assigned geographic territories; and are compensated well in excess of minimum wage – up to $100,000 per year. PSRs are not vulnerable low-wage workers in need of the FLSA's protections.[8]

II. DOL'S NEW "TRANSFER OF TITLE" REQUIREMENT IS OWED NO DEFERENCE BECAUSE IT IS CONTRARY TO THE FLSA AND DOL'S OWN REGULATIONS

The Ninth Circuit strongly disagreed with the Second Circuit on the issue of whether to give deference to DOL's new "transfer of title" requirement. Reversing the Ninth Circuit on this issue would cause havoc among small businesses.

Plaintiffs' attorneys began filing putative collective actions alleging the PSRs were improperly denied overtime pay in late 2006 and early 2007. *See, e.g., Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008); *Barnick v. Wyeth*, 522 F.

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[8] DOL makes too much of the distinction between "promotion" and "sales" work. Promotion work related to an employer's own outside sales is exempt work. 29 C.F.R. § 541.503(a) ("Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work."). Whether promotion work is "incidental to and in conjunction with" Petitioner's sales depends on the meaning of the phrase "making sales." Thus, it is unnecessary for the Court to muck through the weeds of distinguishing "sales" from "promotion". The entire repetitive discussion of this issue in DOL's *amicus* brief is a red herring. Application of the exemption in this case turns on a single issue: Does a "sale", as defined under Section 3(k) of the FLSA, require an employee to actually and personally transfer title to property?

Supp. 2d 1257 (C.D. Cal. 2007). Initially, most district courts found that PSRs qualified for the outside sales exemption. *See, e.g., Delgado v. Ortho-McNeil, Inc.*, No. 07 Civ. 263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009); *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. 07 Civ. 00127, 2009 WL 3326632, at *6 (C.D. Cal. Feb. 6, 2009); *Baum v. Astrazeneca LP*, 605 F. Supp. 2d 669, 685-86 (W.D. Pa. 2009) (under analogous state law); *Menes v. Roche Labs., Inc.*, No. 07 Civ. 01444, 2008 WL 6600518, at *2 (C.D. Cal. Jan. 7, 2008) (same); *D'Este v. Bayer Corp.*, No. 07 Civ. 3206, 2007 WL 6913682, at *4 (C.D. Cal. Oct. 9, 2007) (same).

Prior to these decisions, DOL had never determined that PSRs were non-exempt and had never stated that the outside sales exemption requires actual transfer of title to property – despite the entire pharmaceutical industry classifying PSRs as exempt outside sales. *See Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007) (while it is "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing," the "more plausible hypothesis is that the . . . industry has been left alone" because it was in compliance).

The Ninth Circuit refused to grant deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to DOL's new "transfer of title" rule – first raised in an unsolicited *amicus* brief submitted in *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). *See Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 394 (9th Cir. 2011). Specifically, the court held that the position of the DOL did not warrant *Auer* deference because the DOL regulation defining "making sales"

essentially "parroted" the statutory language. *Id.* at 395. This is the correct conclusion as it places proper limits on an agency's attempts to informally issue interpretations of statutory language. Allowing otherwise would improperly circumvent the requisite formal rulemaking procedures.

A. *Auer* Deference Is Not Afforded Where An Agency Merely "Parrots" Statutory Language

As discussed above, DOL's new "transfer of title" requirement represents a material departure from its outside sales regulations, and is unsupported by the language of section 3(k) of the act, the outside sales regulations and 70 years of regulatory history. Deference is entirely unwarranted in this circumstance:

> We have never applied [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question. . . . Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate.

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-13 (1988).

The facts underlying the holding in *Auer* are instructive and present a meaningful distinction to DOL's current efforts to revise its regulations. In *Auer*, the Court requested an *amicus* brief from DOL to address the appropriate scope of the salary basis test. The salary basis test for the executive, administrative and professional exemptions under

section 13(a)(1) of the FLSA was adopted by DOL in its initial 1938 regulations. The Court reasoned that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations", DOL's interpretation of it "is controlling unless 'plainly erroneous or inconsistent with the regulation'". *Auer*, 519 U.S. at 461.[9] However, such deference is warranted only when the agency interprets its own ambiguous regulations. *See id.*

Here, DOL's position is not aimed at interpreting an ambiguous regulation. Any ambiguity instead lies in the statutory language, which is merely reiterated by DOL's implementing regulations. To permit DOL to now announce new regulations through unsolicited court filings improperly bypasses formal rulemaking procedures and is inconsistent with *Auer*.

Auer was not intended to supplant the public regulatory process, as the Court made clear in *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006). As here, the regulation subject to agency interpretation in *Gonzales* did little more than restate the terms of the statute itself. *Id.* at 257. In holding that *Auer* deference should not be given where the regulatory language merely "parrots" the statute, the Court noted that an agency "does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a

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[9] After notice and comment rulemaking in 2004, DOL revised its salary basis test regulation to specifically reject the litigation position it had taken in *Auer* that a "significant likelihood" of an improper salary deductions precluded exemption, stating: "Moreover, nothing in *Auer* prohibits the Department from making changes to the salary basis regulations after appropriate notice and comment rulemaking." 2004 Final Rule, 69 Fed. Reg. at 22180.

regulation, it has elected merely to paraphrase the statutory language." *Id.* To allow otherwise would permit regulation with no public oversight or input. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 587-588 (U.S. 2000). Accordingly, the Ninth Circuit's sound and well-reasoned analysis regarding the appropriate scope of *Auer* deference should be affirmed.

B. The Distinction Between An Agency's Interpretation of Regulatory Language and Statutory Language Is Critical To Avoid Subverting Formal Rulemaking Requirements

The Second Circuit's rubber-stamping of DOL's new "transfer of title" requirement illustrates the express need for guidance on the limitations on *Auer* deference. Relying solely on DOL's interpretation, the Second Circuit turned an entire industry on its head, subjecting it to vast potential liability and casting doubt on the exempt status of over 90,000 employees. Given the enormity of these possible ramifications, DOL's attempt to regulate outside of the constraints of the Administrative Procedures Act deserves careful scrutiny. While deference to an agency's interpretations may be appropriate in some circumstances, clear bounds need to be set to ensure that critical regulatory changes are not permitted to occur absent notice-and-comment procedures.

Courts should be required to affirmatively determine whether an agency's interpretation proffered through informal means is truly that – an "interpretation" of existing regulations – or an attempt to sidestep formal processes. As noted by the Ninth

Circuit, because DOL's regulations did not otherwise set forth a particular test for "sale", "the Secretary [of Labor] has used her appearance as *amicus* to draft a new interpretation of the FLSA's language." *SmithKline Beecham Corp*., 635 F.3d at 395. This attempt to bypass rulemaking and notice procedures appropriately troubled the court.

Put simply, efforts by agencies to informally interpret *statutory* language – thereby creating new regulatory requirements – should not be allowed. *See N. Cal. River Watch v. Wilcox*, 620 F.3d 1075, 1088 (9th Cir. 2010) (declining to extend *Auer* deference where the amicus brief submitted by the agency purported to interpret statutory, not regulatory, language). This is particularly true when an agency's new position will have a detrimental sweeping effect across any entire industry. *See Doe v. Mutual of Omaha Insurance Co*., 179 F.3d 557, 561, 563 (7th Cir. 1999) (an agency's attempts to advance "radically expansive" and "far-reaching" interpretations of its regulations which impacts an entire industry should not be permitted and courts are "justif[ied] . . . in requiring the Department to invite deference by a more deliberative, public, and systematic procedure than the filing of an amicus brief.").

APA procedures guarantee that the regulated community is put on notice of proposed new regulations and changes to existing regulations. Equally important, the regulated community is given the opportunity to provide the agency with the benefit of its hands-on knowledge regarding how the regulatory changes will impact them. *See* 5 U.S.C. § 551, *et seq.* Any burden imposed by the APA process is off-set by ensuring that the public is not surprised and unprepared by new regulatory requirements.

By unilaterally imposing its new "transfer of title" requirement through *amicus* briefing, DOL gave the public neither notice nor the chance to comment. Moreover, by evading the formal APA rulemaking procedures, DOL also failed to assess the potential negative impact its new interpretation of "sales" may have on small business, as conducting such an analysis is required as part of the APA notice procedures under the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq*.

If the Secretary of Labor wishes to revise the scope of 29 C.F.R. § 541.501(b), she can issue a notice of proposed rulemaking – just as she has done many times, including her recent proposed regulations to eliminate the FLSA exemption for most home care workers. However, on the issue here, she has not done so. DOL should not be permitted to push new regulatory requirements through the back door of an *amicus* brief.

III. ALLOWING AGENCIES TO REGULATE THROUGH *AMICUS* WILL HAVE A DEVISTATING IMPACT ON SMALL BUSINESSES

The Second Circuit's adoption of DOL's position failed to take into consideration the damaging ramifications associated with permitting an agency to issue regulations through *amicus* filings. Businesses today – particularly small businesses – already face significant hurdles complying with regulatory requirements. Permitting agencies such as DOL to announce new policies through obscure methods, such as *amicus* filings, would have a devastating impact on industries.

The Administrative Procedure Act notice and comment rulemaking process gives businesses notice of changes to regulations which may impact whether employees may be classified as non-exempt from FLSA overtime requirements in the future. It does not create back wage liability retroactively for a position an entire industry was previously treating as exempt. The most damaging aspect of announcing new regulations through court filings is the massive retroactive liability that can be created. In deferring to DOL's new and rigid definition of what constitutes "sales", the Second Circuit opened the flood gate of litigation, subjecting one industry to potentially billions of dollars of liability.

DOL's new "transfer of title" requirement is not limited in application to the pharmaceutical industry, but instead impacts every business which employs individuals in outside sales positions. Employers with outside sales employees – assuming they are aware of DOL's various *amicus* briefs on this issue – are faced with the daunting task of immediate restructuring of their businesses. Moreover, companies are rendered virtually defenseless to claims for overtime – subjecting them to possible payment equivalent of up to *six year*s of overtime payments for each employee.[10] Should this Court decline to affirm the Ninth Circuit's holding, and instead grant deference to DOL's litigation position, we can expect untold amounts of litigation and surprise liability to follow.

[10] Damages under the FLSA include recovery of unpaid wages for two years – three years for willful violations – and an equal amount of liquated damages. *See* 29 U.S.C. § 216(b).

A. Small Businesses Face Enormous Difficulties Even Learning About DOL's New "Transfer of Title" Requirement

Most small businesses do not have in-house legal counsel or human resource professionals. Thus, requiring such businesses to take notice of new positions set forth by the DOL through its participation as *amicus curiae* is unduly burdensome.

DOL publishes some, but clearly not all, of its court briefs on an obscure page on its internet site, sending out an email regarding the posting to a listserv. But for small businesses, without human resources professionals or employment lawyers on call who have signed up for the listserv (or regularly visit http://www.dol.gov/sol/media/briefs/main.htm), these methods of publication of new regulatory requirements are woefully insufficient to put small business owners on notice of the changes.

Most regulated businesses wish to comply with the FLSA. However, if an agency does not provide fair and reasonable notice of requirements, small businesses will face vast difficulties with compliance. This is exactly the opposite effect Congress intended when requiring that regulations under the FLSA be made pursuant to APA procedures. *Cf. Singh v. City of New York*, 524 F.3d 361, 369-70 (2d Cir. 2008) (noting that the "wide-ranging impact" on businesses was a relevant factor in rejecting plaintiffs' proffered interpretation of the Portal-to-Portal Act, where such interpretation would "suddenly impos[e] upon businesses across the country a liability to compensate employees" that no court had imposed in 60 years).

B. Regulation By Amicus Brief Creates Unfair Surprise and Upsets Long-Standing Expectations

Since the FLSA was enacted over 70 years ago, pharmaceutical sales representatives have always been treated as exempt from overtime requirements by the Department of Labor and the majority of reviewing courts.[11] By informally announcing its new "transfer of title" requirement in 2009, DOL imposed retroactive liability, without giving employers any time to reclassify sales representatives going forward before facing liability. In stark contrast, DOL gave the regulated community four months to examine its pay practices and make any necessary changes before the 2004 Final Rules came into effect. 2004 Final Rule, 69 Fed. Reg. at 22122 (Final Rule published on April 23, 2004, but were not effective until August 23, 2004).

DOL's *amicus* brief here results in exactly the "unfair surprise" raised by the Court in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) as a concern to the deference owed to informal agency

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[11] DOL and courts have reached this conclusion not only relying on the outside sales exemption, but also on other exemptions – such as the administrative and highly-compensated employee exemptions – not at issue in the underlying case. For example, in 1945 DOL issued an opinion letter opining that "medical detailists" employed by a pharmaceutical company, whose work was "aimed at increasing the use of [the company's] product in hospitals and through physician recommendations", qualified for the administrative exemption under the FLSA. DOL Opinion Letter, May 19, 1945, 2 Lab. L. Rep. (CCH) P 33,093. This opinion has never been repudiated and, until issuing its *amicus* brief to the Second Circuit in 2009, DOL has never disagreed that sales representatives in the pharmaceutical industry are exempt employees.

interpretations. *Id.* at 170 (the Court held that deference to such agency interpretations would be appropriate only "as long as interpretative changes create no unfair surprise"). While the Court held deference was owed to DOL's interpretation in *Coke* because it was announced in a notice-and-comment rulemaking procedure, it raised the issue of affording deference if such notice is not made. *See id* at 170-71; *see also Caruso v. Blockbuster-Sony Music Entm't Ctr*., 193 F.3d 730, 737 (3d Cir. 1999) ("An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning") (citation omitted).

Here, not only has DOL declined to issue proposed rulemaking with regards to its new "transfer of title" requirement, but it wholly failed to give *any* prior indication of this change. In particular, DOL has never brought an enforcement action concerning PSRs, and has never issued an opinion letter challenging the pharmaceutical industry's treatment of these employees.[12] DOL had ample opportunity to revise its interpretation of what constitutes a "sale"

[12] Opinion letters issued by the Wage & Hour Administrator give employers at least some time to adjust to a newly announced policy — as DOL has an internal policy never to issue an Opinion Letter to parties to pending litigation. Much to the frustration of employers around the country, in 2010, DOL announced that it would no longer be issuing opinion letters responding to questions individually raised by employers. Instead, DOL stated its intention to issue "Administrator's Interpretations" that address general legal requirements (DOL has issued only three AIs). In short, DOL will not tell an employer whether a job is properly classified as exempt *before* a lawsuit is filed, but will file *amicus* briefs after litigation begins, creating retroactive liability for employers.

in 2004 when it revisited the white collar exemptions. It chose not to do so – instead reinforcing the long-held position that an outside sales employee is one who "in some sense" makes a sale.

The pharmaceutical industry, at the very least, was surprised by DOL's new regulatory requirement – especially Novartis, which recently paid $99 million to 7,000 PSRs in order to resolve the Second Circuit case.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Suite 200
Washington, D.C. 20004

KEVIN M. KRAHAM
Counsel of Record
TAMMY D. MCCUTCHEN
S. LIBBY HENNINGER
LITTLER MENDELSON, P.C.
1150 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 423-2404
KKraham@littler.com

LISA A. SCHRETER
LITTLER MENDELSON, P.C.
3344 Peachtree Road, N.E.
Suite 1500
Atlanta, GA 30326

Counsel for Amicus Curiae

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APPENDIX

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FLSA Exemptions

1. 29 U.S.C. § 203(e)(3) (individuals employed in agriculture by their parents).
2. 29 U.S.C. § 203(e)(4) (individuals who volunteer to perform services for public agencies).
3. 29 U.S.C. § 203(m) (partial exemption for tipped employees).
4. 29 U.S.C. § 206(g) (partial exemption for employees under age 20 during their first 90 days of employment)
5. 29 U.S.C. § 207(i) (commissioned employees in retail and service establishments);
6. 29 U.S.C. § 207(j) (partial exemption for employees of establishments engaged in care of sick, aged or mentally ill).
7. 29 U.S.C. § 207(k) (partial exemption for fire protection and law enforcement employees).
8. 29 U.S.C. § 207(m) (partial exemption for employees stripping, grading, handling, stemming, re-drying, packing or storing tobacco).
9. 29 U.S.C. § 207(n) (partial exemption for rail, trolley and bus drivers engaged in charter activities).
10. 29 U.S.C. § 207(q) (partial exemption for employees receiving remedial education).
11. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide executive capacity).

12. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide administrative capacity).

13. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide professional capacity).

14. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide outside sales capacity).

15. 29 U.S.C. § 213(a)(3) (minimum wage and overtime exemption for employees of seasonable amusement or recreational establishments).

16. 29 U.S.C. § 213(a)(5) (minimum wage and overtime exemption for employees catching, harvesting, cultivating or farming fish, shellfish, crustacia, sponges, seaweeds, or other aquatic forms of animal and vegetable life).

17. 29 U.S.C. § 213(a)(6) (minimum wage and overtime exemption for certain employees of small farms).

18. 29 U.S.C. § 213(a)(8) (minimum wage and overtime exemption for employees of small newspapers).

19. 29 U.S.C. § 213(a)(10) (minimum wage and overtime exemption for switchboard operators for small telephone companies).

20. 29 U.S.C. § 213(a)(12) (minimum wage and overtime exemption for seaman on non-American vessels).

21. 29 U.S.C. § 213(a)(15) (minimum wage and overtime exemption for casual babysitters).

22. 29 U.S.C. § 213(a)(15) (minimum wage and overtime exemption for domestic service employees who provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves).
23. 29 U.S.C. § 213(a)(16) (minimum wage and overtime exemption for certain federal criminal investigators).
24. 29 U.S.C. § 213(a)(17) (minimum wage and overtime exemption for certain computer employees).
25. 29 U.S.C. § 213(b)(1) (overtime exemption for employees subject to the Motor Carrier Act).
26. 29 U.S.C. § 213(b)(2) (overtime exemption for employees of employers engaged in the operation of a rail carrier).
27. 29 U.S.C. § 213(b)(3) (overtime exemption for employees of carriers subject to the Railway Labor Act).
28. 29 U.S.C. § 213(b)(5) (overtime exemption for outside buyers of poultry, eggs, cream or milk).
29. 29 U.S.C. § 213(b)(6) (overtime exemption for seaman).
30. 29 U.S.C. § 213(b)(9) (overtime exemption for certain employees of small town radio and television stations).
31. 29 U.S.C. § 213(b)(10)(A) (overtime exemption for salesmen, partsmen and mechanics primarily engaged in selling or servicing automobiles, trucks or farm implements).
32. 29 U.S.C. § 213(b)(10)(B) (overtime exemption for trailer, boat and aircraft salesmen).

33. 29 U.S.C. § 213(b)(11) (overtime exemption for certain drivers and drivers' helpers making local deliveries and paid by the trip).
34. 29 U.S.C. § 213(b)(12) (overtime exemption for agricultural employees).
35. 29 U.S.C. § 213(b)(12) (overtime exemption for employees engaged in maintenance of ditches, canals, reservoirs or waterways used for storing water and which are operated on a non-profit or a sharecrop basis).
36. 29 U.S.C. § 213(b)(13) (overtime exemption for agricultural employees who work at livestock auctions during weekends).
37. 29 U.S.C. § 213(b)(14) (overtime exemption for small country grain elevators).
38. 29 U.S.C. § 213(b)(15) (overtime exemption for employees engaged in the processing of maple sap into sugar or syrup).
39. 29 U.S.C. § 213(b)(16) (overtime exemption for certain employees engaged in the transportation of fruits or vegetables).
40. 29 U.S.C. § 213(b)(17) (overtime exemption for taxicab drivers).
41. 29 U.S.C. § 213(b)(20) (overtime exemption for small fire and law enforcement agencies).
42. 29 U.S.C. § 213(b)(21) (overtime exemption for domestic service employees who reside in the household).
43. 29 U.S.C. § 213(b)(24) (overtime exemption for house-parents of nonprofit educational institutions).

44. 29 U.S.C. § 213(b)(27) (overtime exemption for employees of motion picture theaters).
45. 29 U.S.C. § 213(b)(28) (overtime exemption for certain forestry employees).
46. 29 U.S.C. § 213(b)(29) (overtime exemption for certain employees of amusement or recreational establishments located in a national park, national forest or on National Wildlife Refuge System land).
47. 29 U.S.C. § 213(b)(30) (overtime exemption for certain federal criminal investigators).
48. 29 U.S.C. § 213(d) (minimum wage and overtime exemption for newspaper delivery).
49. 29 U.S.C. § 214 (partial exemption for learners, apprentices and messengers, students, and disabled employees).
50. 29 U.S.C. § 214 (partial exemption for students working in retail or service establishments).
51. 29 U.S.C. § 214 (partial exemption for disabled employees whose productive capacity is impaired by age, injury, or physical or mental deficiency).