

# **SIGNIFICANT LEGAL DEVELOPMENTS IN WAGE & HOUR LAW: DEFERENCE STANDARDS**

**David Borgen and Jennifer Liu<sup>1</sup>**  
**Goldstein, Demchak, Baller, Borgen & Dardarian**  
**300 Lakeside Drive**  
**Suite 1000**  
**Oakland, CA 94612**  
**(510) 763-9800**  
**[www.gdblegal.com](http://www.gdblegal.com)**

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This paper addresses deference to the interpretations of the U.S. Department of Labor (“DOL”) and the California Division of Labor Standards Enforcement (“DLSE”) in light of the U.S. Supreme Court’s recent decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007).

In *Coke*, the Supreme Court found a DOL regulation, which exempted domestic companionship services providers employed by third parties from the minimum wage and maximum hours requirements of the Fair Labor Standards Act (“FLSA”), to be valid and binding on the court. Evelyn Coke, a domestic worker hired by a third party employer, had challenged the third-party regulation, pointing out that it fell under a section entitled “Interpretations” and had not been promulgated under typical notice and comment procedures. Moreover, another regulation, located in a section entitled “General Regulations,” defined domestic companions as employees hired by the person in whose home they work, and would have excluded from the

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<sup>1</sup> Jennifer Liu is a 3L at Stanford Law School and was a Summer Associate at Goldstein, Demchak in 2007.

exemption workers like Coke hired by third party companies. Taken as a whole, Coke argued, the regulation did not appear to be binding.

The Second Circuit agreed with the plaintiff in rejecting the DOL's third party regulation. The Supreme Court reversed. Holding that Evelyn Coke and other home health care aides hired by third parties are exempt under the third-party regulation, the Supreme Court found the DOL's third-party regulation to be valid and binding under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). *Coke*, 127 S.Ct. at 2344. Even though the third-party regulation appeared to be contradicted by another regulation, the third-party regulation was more specific than the other regulation and therefore governed. *Id.* at 2348-49. That the regulation actually adopted had not been subject to notice and comment procedures, but was adopted after a contrary proposal had undergone notice and comment, did not detract from its validity because the adopted rule was a "logical outgrowth" of the proposed rule. *Id.* at 2351. The Court also deferred to the DOL's internally circulated "Advisory Memorandum." *Id.* at 2349. That the Court viewed the memorandum as binding, rather than merely persuasive, suggests that the DOL's interpretations of its own regulations—whether in memoranda, opinion letters, or legal briefs—may not permit extensive room for argument.

Part I of this paper reviews the major categories of deference that have been established by the U.S. Supreme Court. Part II surveys deference cases arising from the DOL's regulation of wages and hours under the Fair Labor Standards Act ("FLSA"). Part III surveys the deference landscape in California, a major battlefield state in the current wage/hour wars. We have attempted to analyze recent deference cases that will be useful to NELA lawyers who find themselves increasingly confronted by DOL positions that may be adverse to workers' rights.

As such we hope that this paper will be a useful guide to approaching deference issues in litigation in the current regulatory climate.

## **I. Standards of Deference: *Chevron*, *Auer*, and *Skidmore***

The traditional approach to analyzing deference standards is to categorize agency actions along two dimensions. First, is the action a rule or an order? Second, is the action formal or informal? Under the Administrative Procedures Act, 5 U.S.C. §§ 500 et seq., a “rule” is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4). An “order” is everything that is not a rule—“the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” 5 U.S.C. § 551(5). This paper is primarily concerned with rulemaking—those agency statements having some “future effect.” One exception to this scope is opinion letters—the DOL considers opinion letters to be rulings, which places them in the camp of orders. *In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1184 (10th Cir. 2005); 29 C.F.R. § 790.17(d).

Formal rulemaking is subject to the notice-and-comment procedures outlined in 5 U.S.C. § 553. Informal rulemaking, which includes “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” is exempt from these procedures under 5 U.S.C. § 553(b)(3)(A). The problem with the traditional formal-informal distinction, however, is that it is not always dispositive of what standard of deference a rule should receive. Not all regulations promulgated after notice-and-comment have been granted deference under *Chevron*, while some interpretations that did not undergo notice-and-comment have.

Accordingly, courts approach administrative interpretations not only by looking to the formal or informal character of a rule, but also by examining the authority under which the rule is made. Three different “levels” of deference can apply. These standards are not so much levels, at least not in the same sense as rational, intermediate, and strict levels of judicial review, but are rather rules that dictate whether the action should be accorded binding or persuasive weight. First, *Chevron* deference applies to agency actions which carry out an express or implied delegation by Congress to the agency to interpret an ambiguous statute through rules carrying the force of law. The *Chevron* standard is extremely deferential—an interpretation owed *Chevron* deference is binding unless it is unreasonable. Second, deference under *Auer v. Robbins*, 519 U.S. 452 (1997), applies to agency interpretations of its own ambiguous regulations. The *Auer* standard is analogous to *Chevron* and is also highly deferential—interpretations under *Auer* are binding unless they are plainly erroneous or inconsistent with the regulation. Third, if a regulation does not warrant deference under *Chevron* or *Auer*, deference under *Skidmore v. Swift*, 323 U.S. 134 (1944), applies. Under *Skidmore*, agency interpretations are not binding, but may receive varying amounts of weight according to their power to persuade.

#### **A. *Chevron* Deference**

When Congress has delegated legislative authority to an administrative agency to interpret an ambiguous statute through rules carrying the force of law, and when an action is taken as an exercise of that authority, the action is entitled to *Chevron* deference and is binding unless procedurally defective, substantively arbitrary or capricious, or manifestly contrary to the statute. *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

A series of questions guide the determination of whether or not *Chevron* applies. First, is the statute ambiguous on the issue? If not, and if the statute speaks to the issue being interpreted, the analysis ends there, and a court must give effect to the text or clear intent of the statute. *Chevron*, 467 at 843 n.9. If the statute does not speak to the issue, however, a second question must be asked—has Congress delegated legislative authority to the agency to fill the gaps it left in the statute? *Chevron* recognized that Congress may grant interpretive authority to an agency through express delegation, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.” *Mead*, 533 U.S. at 229 (quoting *Chevron*, 467 U.S. at 844). Implicit delegation can be “apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law,” whether Congress actually had an intent to leave the statute ambiguous or not. *Id.*

Third, was the rule promulgated through notice-and-comment rulemaking? The “overwhelming number” of cases in which rules have received *Chevron* deference have been cases of notice-and-comment rulemaking. *Id.* at 230. That said, however, notice-and-comment rulemaking is not decisive, as there have been cases in which courts applied *Chevron* even where formal notice-and-comment procedures were not followed. *Id.*; see also *Christensen v. Harris County*, 529 U.S. 576, 590-91 (2000) (Scalia, J., concurring) (listing cases in which Court has accorded *Chevron* deference to authoritative agency positions).

## **B. *Auer* Deference**

*Auer v. Robbins* involved a challenge to the DOL’s interpretation of its own regulation—the salary-basis test—in an amicus brief. 519 U.S. 452 (1997). The Court in *Auer* recognized that FLSA expressly grants the DOL legislative authority to “defin[e] and delimit[t]” the scope

of the executive, administrative, and professional employee exemption to the statute’s coverage. *Id.* at 456. Accordingly, it applied *Chevron* deference to the salary-basis test as a regulation setting the scope of the exemption. *Id.* at 457. The *Auer* plaintiffs had also challenged the DOL’s interpretation of the salary-basis regulation, which the agency had offered in its amicus brief. The Court rejected that challenge. “Because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.” *Id.* at 461 (internal quotation marks omitted). The Court further reasoned: “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.

To qualify for *Auer* deference, the interpretation must also be “the agency’s fair and considered judgment on the matter in question.” *Auer*, 519 U.S. at 462. It may not be a “‘post hoc rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack.” *Id.* (citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). The existence of other regulations, rulings, or administrative practices that are consistent with the interpretation weigh in favor of it meriting *Auer* deference. *See Bowen*, 488 U.S. at 212.

### **C. *Skidmore* Deference**

In *Christensen v. Harris County*, the Court held that “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.” 529 U.S. at 587. “*Auer* deference,” the Court further distinguished, “is warranted only when the language of the regulation is ambiguous.” *Id.* at 588. Instead, interpretations of an administrative agency that do not receive deference under *Chevron* or *Auer* are “entitled to

respect” under *Skidmore*, but only to the extent that those interpretations have “power to persuade.” *Id.* at 587 (quoting *Skidmore*, 323 U.S. 134, 140 (1944)).

Under *Skidmore*, the weight of an agency interpretation “depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. at 140.

#### **D. Does Auer survive Christensen?**

At least one prominent jurist has suggested that very little of *Auer* survives *Christensen*. *Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) (Posner, J.). The straight text of *Christensen* calls into question the authority of all informal interpretations—opinion letters, amicus briefs, and the like. If an interpretation lacks the force of law, perhaps it should not warrant *Chevron*-like deference, regardless of whether it interprets its own ambiguous regulation, an unambiguous regulation, or a statute. *Christensen* explicitly reaffirmed *Auer*, however, although it narrowed its scope to the interpretation of regulations whose language is ambiguous. *Christensen*, 529 U.S. at 588. *Gonzalez v. Oregon* may have narrowed *Auer* even further. 546 U.S. 243 (2006). That case distinguished an interpretation of a regulation of the Controlled Substances Act (“CSA”) from the interpretation of the regulation in *Auer* in that the CSA regulation did little more than parrot the terms of the statute itself. *Id.* at 915. *Auer*, on the other hand, involved regulations which “gave specificity to a statutory scheme the Secretary was charged with enforcing and reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act.” *Id.* Additionally, the Court noted the fact that the interpretation of the CSA regulation ran

counter to the intent of the agency at the time of the regulation's promulgation as another factor weighing against *Auer* deference. *Id.* at 916.

If any further doubt has existed about *Auer*'s continued vitality, however, *Coke* has laid those doubts to rest. In *Coke*, as discussed above, the Court accorded *Auer* deference to an "Advisory Memorandum" that had been circulated within the DOL and which interpreted the conflicting domestic companionship regulations at issue in that case. 127 S.Ct. at 2349. Although the memorandum had been written in response to the *Coke* litigation, the Court dismissed any *Bowen* concerns, finding that the interpretation was not merely a "*post hoc* rationalization" but rather "the agency's fair and considered judgment on the matter in question." *Id.* Because the memorandum was not plainly erroneous or inconsistent with the regulation (or at least, not inconsistent with the regulations as the Court chose to interpret them), it bound the Court to its interpretation. *Id.*

## **II. Deference to the U.S. Department of Labor**

### **A. Legislative Versus Interpretive Rules**

The standard of deference that should be applied to a regulation depends on whether the regulation is legislative or interpretive. Kearns' treatise on the FLSA remarks that "[t]he line between a rule that requires notice and comment and an interpretive rule that is exempt from this procedure has been characterized as 'fuzzy,' 'baffling,' and 'enshrouded in considerable smog.'" Kearns, FAIR LABOR STANDARDS ACT 62 (1999).

*Coke*, among other questions, addressed precisely this issue. *Coke* had challenged one of two regulations governing 29 U.S.C. § 213(a)(15), the domestic companionship exemption of FLSA. That regulation, 29 C.F.R. § 552.109(a), states that domestic companionship employees who are hired by third parties to work in clients' homes are covered by the exemption. A

different regulation, however, defined “domestic service employment” to be services provided by an employee in the “home of the person by whom he or she is employed.” 29 C.F.R. § 552.3. As an aide employed by a third party, Coke would not have been entitled to recover under the first regulation, but could under the second.

Arguing that the first regulation was an interpretive rule entitled only to *Skidmore* deference, Coke pointed to the title and location of the regulation in the context of the overall regulatory scheme. *Coke*, 127 S.Ct. at 2350. It was placed in a Subpart B, entitled “Interpretations,” that was to set forth statements of general policy and interpretations. *Id.* On the other hand, 29 C.F.R. § 552.3 was located in Subpart A, entitled “General Regulations,” which were to define and delimit the scope of the exemption. *Id.* The Court found these arguments unconvincing. Following the statutory interpretation canon that the specific governs the general, and finding that extending the exemption to employees of third-party employers better comported with Congress’s concern for maintaining low cost elder care, the Court granted *Chevron* deference to the first regulation. *Id.*

In another recent case, the Eleventh Circuit held that DOL regulations on non-compensable travel time under § 254(a) were not legislative rules, because FLSA did not delegate the agency the authority to define the scope of that provision. *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340, 1343 (11th Cir. 2007). Nonetheless, the court found one of the interpretive regulations to be persuasive and accorded it deference under *Skidmore*. *Id.* Under that interpretation, time spent by construction workers going through security screening to work onsite on an airport project was not compensable.

A recent district court in Pennsylvania also deferred, under *Skidmore*, to the agency’s regulations interpreting the FLSA, finding a securities broker to be an exempt employee and not

entitled to overtime pay. *Hein v. PNC Fin. Servs. Group, Inc.*, No. 06-2713, at \*11-12 (E.D. Pa. Jun. 20, 2007). The regulations at issue in *Hein* were the salary basis and primary duties regulations interpreting the administrative employee exemption. These regulations are legislative, however, and were promulgated after notice-and-comment. Although it reached the same result, the court seems to have erred in applying *Skidmore* and not *Chevron* deference.

*Downes v. J.P. Morgan Chase & Co.*, an Equal Pay Act claim brought by a computer worker, highlights one area of ambiguity in the scope of the DOL's legislative rulemaking authority. No. 03 Civ. 8991, 2007 WL 1468218, \*10, n.9 (S.D.N.Y. 2007). The executive, administrative, and professional exemption, codified at 29 U.S.C. § 213(a)(1), as well as the domestic companionship exemption at § 213(a)(15), explicitly grant the DOL the authority to define and delimit the scope of those exemptions. The computer worker exemption at 29 U.S.C. § 213(a)(17), however, does not contain similar language. The *Downes* court noted that the "[DOL] itself has acknowledged some ambiguity as to its rule-making authority with respect to § 213(a)(17)," given the contrast with § 213(a)(1). *Id.* at \*10 n.9. Nonetheless, as none of the parties had challenged the regulations interpreting § 213(a)(17) on that basis, the court deferred to them as binding under *Chevron*. *Id.*

## **B. Opinion letters**

At the federal level, much of the action in the interpretation of wage and hour laws takes place through opinion letters. In light of the obliterating effect several recent opinion letters may have on the statutory rights of entire categories of workers, understanding the weight that should be attached to these interpretations is of critical importance.

As a general rule, under *Christensen*, opinion letters lack the force of law and are entitled only to *Skidmore* deference. 529 U.S. at 587. The one exception to this rule is where an opinion

letter interprets the agency's own ambiguous regulation, in which case *Auer* deference applies. *Id.* at 588. As simple as this dichotomy might seem, however, it has been extraordinarily muddled in practice. *See, e.g., Pontius v. Delta Fin. Corp.*, No. 04-1737, at \*20 n.19 (W.D. Pa. Mar. 20, 2007) (“This Court’s review of the case law and commentary regarding of [sic] the degree of deference due a particular agency interpretation indicates that the jurisprudence is extensive, complicated and fraught with inconsistencies and disagreements.”).

Where opinion letters have interpreted the DOL’s regulations on the executive, administrative and professional exemption—i.e., the salary basis and primary duties tests—courts have often granted *Auer* deference to those interpretations.

In *In re Farmers Insurance Exchange*, 481 F.3d 1119 (9th Cir. 2007), insurance claims adjusters challenged a November 2002 opinion letter which construed the administrative exemption codified at § 213(a)(1) to exclude insurance claims adjusters generally. Finding that the November 2002 opinion letter interpreted the agency’s own regulations and that it was consistent with earlier opinion letters, the Ninth Circuit held it controlling under *Auer*. *Id.* at 1129.

In *re Wal-Mart Stores, Inc.*, 395 F.3d 1177 (10th Cir. 2005), pharmacists challenged the DOL’s interpretation in several opinion letters, which had ruled that employers could make prospective reductions in salaries to accommodate business needs without losing the professional exemption under §213(a)(1). The court held that opinion letters interpreting the salary-basis test were entitled to *Auer* deference as interpretations of the agency’s own ambiguous regulations, finding Wal-Mart entitled to the exemption.

A magistrate judge in Pennsylvania also extended *Auer* deference to an opinion letter. In *Pontius v. Delta Financial Corp.*, No. 04-1737, defendant cited a November 2006 opinion letter,

which found registered financial services representatives to be exempt, in support of its classification of mortgage analysts as exempt. Finding that the portion of the opinion letter addressing the salary-basis test clearly encompassed the compensation scheme of the mortgage analysts, the court granted *Auer* deference to that interpretation. *Id.* at 14-15. However, the court found that the portions of the opinion letter addressing the primary duties test were not analogous to the mortgage analysts, and refused to defer to these applications. *Id.* at 21-26.

The Eleventh Circuit, however, refused to grant *Auer* deference to a DOL opinion letter interpreting the primary duties test in an administrative exemption case involving insurance agents, and applied *Skidmore* instead. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004). Rejecting a 1998 letter which found state licensed insurance agents to be nonexempt employees, the court held the agents to be exempt, stating that opinion letters “should be considered and given due deference, but they are persuasive authority only—not binding.” *Id.* at 628 n.8. This decision, it should be noted, is out of step with most cases, which have applied *Auer* deference to the DOL’s interpretations of the salary basis and primary duties tests. *See supra.*

Under the less frequently litigated outside sales exemption, the deference standards which courts have applied to opinion letters interpreting the exemption have also been “fraught with inconsistencies.” Earlier this year, the DOL issued a pair of opinion letters expressing the view that salespersons who sell newly constructed homes in residential communities, and who work from model homes within the communities, are exempt outside salespersons because only the model home-sales office is considered the employer’s place of business, and not the homes being sold. Because such salespeople customarily and regularly leave the model home-sales office to meet with customers and to show new homes, they are exempt, even if they remain within the boundaries of the community. Opinion Letter, 2007-1, Wage and Hour Division, U.S. Dep’t of

Labor, 2007 DOLWH LEXIS 1 (Jan. 25, 2007); Opinion Letter, 2007-2, Wage and Hour Division, U.S. Dep't of Labor, 2007 DOLWH LEXIS 2 (Jan. 25, 2007). This interpretation followed the same position adopted in an older opinion letter, Opinion Letter, Wage and Hour Division, U.S. Dep't of Labor, 1964 DOLWH LEXIS 198 (Apr. 21, 1964), and in the DOL Field Operations Handbook. U.S. Dep't of Labor, § 22e06(c).

In *Billingslea v. Brayson Homes, Inc.*, 2006 U.S. Dist. LEXIS 11707 (N.D. Ga., Mar. 7, 2006), a decision pre-dating the two opinion letters, the court held that residential community salespersons were not exempt outside salespersons because it considered the entire residential community to be the employer's place of business. In reaching this conclusion, it refused to defer to the 1964 opinion letter under *Skidmore*, finding the letter's reasoning to be "conclusory." CITE. After the publication of the 2007 opinion letters, the employer filed a motion for relief from the judgment based on an intervening change in the law. *Billingslea v. Brayson Homes, Inc.*, No. 04-CV-00962, 2007 U.S. Dist. LEXIS 52566 (N.D. Ga. July 20, 2007). The court granted the employer's motion, deferring to the new opinion letters. *Id.* at \*10-11. It is not clear under which deference standard the court made its decision, as it cited both *Skidmore* and *Auer* in its discussion. *Id.* As an interpretation of the "away from the employer's place of business" regulation, which was ambiguous on the question of what constitutes "away," *Auer* deference was correct. However, even under *Skidmore*, the letters would have had significant power to persuade, given the extensive reasoning of the two letters and their consistency with both an older opinion letter and the Field Operations Handbook. In *Maddox v. KB Homes, Inc.*, No. 06-CV-05241, 2007 U.S. Dist. LEXIS 58743 (C.D. Cal. July 9, 2007), another recent case also involving residential community salespersons, the court similarly deferred to the opinion letters, although it relied upon *Skidmore* rather than *Auer*.

Outside the case law on the FLSA exemptions, courts have also confronted deference questions on FLSA's other regulations. In *Senger v. City of Aberdeen*, 466 F.3d 670, 674 (8th Cir. 2006), the court accorded *Auer* deference to the DOL's interpretation of an ambiguous regulation in an opinion letter and amicus brief. The interpretation of the regulation, which concerned 29 U.S.C. § 207(p)(3), construed it to entitle public employees to overtime pay for hours during which other employees voluntarily substituted for them. A dissenting opinion in that case would have denied deference to the regulation, which it viewed as inconsistent with the statute. *Id.* at 676 (Beam, J., dissenting).

The Seventh Circuit has declined to extend deference to DOL opinion letters in *Shie v. City of Aurora*, 432 F.3d 749 (7th Cir. 2005), a compensable time case in which several of the agency's opinion letters conflicted on the question of whether mandatory travel time to medical care outside of an employee's normal work hours would be compensable. The opinion letters cited by the employer interpreted the relevant regulation, 29 C.F.R. § 785.43, as only counting waiting time incurred during work hours as compensable time. *Id.* at 752-53. Opinion letters addressed other factual situations, however, found to the contrary. *Id.* at 753. The court relied upon *Christensen* to conclude that the opinion letters, as informal interpretations of the agency, lacked the force of law and did not warrant *Chevron* deference. *Id.* Citing the presence of conflicting opinion letters on the compensable time issue and the lack of case law supporting defendant's position that such time was not compensable, the court held that mandatory travel time during off-work hours was compensable. *Id.* at 753-54.

In *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd by IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), the Ninth Circuit refused to defer to the agency's position in an amicus brief and in a June 2002 opinion letter interpreting the term "clothes" as used in 29 U.S.C. § 203(o), a

statute, where the interpretation conflicted with the agency's previous position in two earlier opinion letters. Interpreting the same June 2002 opinion letter, on the same regulation, the Eleventh Circuit came to the opposite conclusion. *Anderson v. Cagle's, Inc.*, 2007 WL 1662662, \*8 (11th Cir. 2007). Acknowledging that inconsistent interpretations may be entitled to less deference, the court held that the 2002 opinion letter was nonetheless entitled to some deference and found it to contain more persuasive reasoning than the earlier letters. *Id.* While these courts arrived at different outcomes, both courts' choice to apply *Skidmore* deference appears correct.

### **C. Advisory memoranda; interpretive bulletins**

Other informal interpretations of the DOL, such as advisory memoranda and interpretive bulletins, are treated similarly as opinion letters. When they interpret the DOL's own ambiguous regulations, they receive *Auer* deference. Otherwise, they are subject to *Skidmore* and have weight only to the extent that they are persuasive.

In *Coke*, as noted above, the Supreme Court granted *Auer* deference to an internal advisory memorandum interpreting the scope of the domestic companionship exemption. 127 S.Ct. at 2349. The Court noted that the DOL's long history of struggling with whether to cover employees hired by third parties weighed *in favor* of deference, even though it had interpreted the regulations inconsistently in previous opinion letters. "[A]s long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." *Id.* To the contrary, the DOL's long history of struggling with the regulations showed that its present interpretation represented its "fair and considered judgment" on the issue. *Id.*

Interpretive bulletins, at least where they do not interpret an agency's own ambiguous regulations, receive *Skidmore* deference. In *U.S. Department of Labor v. North Carolina*

*Growers Association*, the DOL sued Christmas tree farmers for failure to pay overtime in violation of FLSA. 377 F.3d 345 (4th Cir. 2004). The DOL, in interpretive bulletins dating back to 1956, considered Christmas tree farming to fall outside of the FLSA exemption for agricultural workers. *Id.* at 353. The court recognized that the interpretive bulletins were entitled to deference under *Skidmore* and that the “lengthy history” of its interpretation weighed in its favor; nevertheless, it decided the issue to the contrary. *Id.* at 353-54.

#### **D. Manuals and handbooks**

In *Belt v. EmCare, Inc.*, 444 F.3d 403 (5th Cir. 2006), nurse practitioners and physician assistants sued a physician’s group for failing to pay them overtime as required by FLSA. At issue was whether or not plaintiffs were exempt as members of the “traditional practice” of medicine, which would bring them within the professional exemption from FLSA coverage, or whether they were non-exempt as members of a related profession—the governing regulatory scheme was ambiguous on the question. Under *Auer*, the court gave controlling weight to a DOL opinion letter, the Field Operations Handbook (“Handbook”), and the agency’s amicus brief, all of which stated that PA’s were to be non-exempt unless compensated on a salary basis. 444 F.3d at 415.

Where it has interpreted other regulations, the Sixth Circuit has held the Handbook to be entitled only to *Skidmore* deference. *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 554 (6th Cir. 1999) (holding that administrative pronouncements such as the Handbook and opinion letters are not binding but provide persuasive authority); *see also Fast v. Applebee’s International, Inc.*, 2007 WL 1309680, \*5 (W.D. Mo. 2007) (holding that portion of Handbook that attempted to clarify 29 C.F.R. § 531.56(e) was persuasive but not binding authority).

The Eleventh Circuit, in a case involving the commissioned work exemption at § 207(i), also held that the Handbook is entitled to *Skidmore* but not *Chevron* deference. *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251, 1255 (11th Cir. 2001) (noting that the Handbook lacks the force of law but is nonetheless persuasive).

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, the Supreme Court reiterated that manuals, such as the EEOC Compliance Manual, do not merit *Chevron* deference. 127 S.Ct. 2162, 2177 n.11 (2007). The EEOC’s interpretation of the statute of limitations in *Ledbetter*, the Court ruled, was based on the agency’s misreading of a previous Supreme Court case. *Id.* As opposed to agency interpretations of statutes and regulations, “[a]gencies have no special claim to deference in their interpretation of [judicial] decisions.” *Id.* The dissenters in *Ledbetter* would have accorded the Compliance Manual at least *Skidmore* deference, however, as representative of the agency’s “experience and informed judgment.” *Id.* at 2185 n.6 (Ginsburg, J., dissenting).

#### **E. Legal Briefs**

Consistent with *Auer*, other courts have recently held that the agency’s positions in legal briefs are entitled to significant deference, where the agency interprets its own ambiguous regulations.

In *Intracomm, Inc. v. Bajaj*, the Fourth Circuit requested that the Secretary of Labor file an amicus brief detailing her interpretation of the “combination exemption” regulation. 2007 WL 1933887, \*5 (4th Cir. 2007). *Bajaj* involved a computer software programmer who contested his classification as an exempt employee under the combination exemption, which defendants argued was an independent exemption that allowed them to classify him as exempt even though he did not meet the salary-basis test. The Secretary’s amicus brief rejected

defendants' interpretation, explaining that the combination exemption regulation provides an alternate way of meeting the primary duties test, and that it does not constitute a new and independent exemption replacing the usual exemption requirements. *Id.* at \*6. The court applied *Auer* deference to the brief, finding it to be an interpretation of an ambiguous regulation. *Id.* at \*5. The court also highlighted consistency as a plus factor in favor of deference, noting that the Secretary's interpretation was consistent with earlier longstanding opinion letters. *Id.* at \*8.

In *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2007 WL 1893362 (4th Cir. July 3, 2007), an ERISA case, the court discounted the DOL's interpretation advanced in an amicus brief. The court acknowledged that the DOL's position was entitled to *Auer* deference, but then went on to show that the interpretation had been inconsistently held and was contrary to the DOL's stated intent when it promulgated the regulation. *Id.* at \*5. Thus, it rejected the interpretation as "inconsistent with the regulation." *Id.* at 1. The case bears noting by practitioners—even when an undesirable interpretation is clearly entitled to *Auer* deference, a successful challenge might still be made in the application of the deference—i.e., by showing that it is "plainly erroneous or inconsistent with the regulation."

#### **F. Factsheets**

Plaintiffs in *Ramos v. Lee County School Board*, 2005 WL 2405832 (M.D. Fla. 2005), instructors in a Head Start program, brought a misclassification suit against the board to recover unpaid overtime. Concluding that the instructors fell within the professional exemption for teachers, the district court accorded *Skidmore* deference to a fact sheet published on the DOL website opining that those who engage in teaching inherently exercise the discretion and judgment required to fall within the exemption. *Id.* at \*4. While the court found that the fact sheet was not binding on the court and "on the low end" of the spectrum of authority, it

nonetheless found the fact sheet “entitled to some respect” as the agency’s construction of a statutory scheme entrusted to its administration. *Id.*

### **III. California**

California principles of deference to the actions of its administrative agencies differ somewhat from federal principles, particularly in the labor and employment sphere. One reason for California’s idiosyncrasy, at least in the labor and employment field, is the history of the state’s regulatory system. Unlike the federal system, which vests the DOL with both rulemaking and enforcement authority, California, until recently, divided rulemaking and enforcement responsibilities between two separate bodies. The Industrial Welfare Commission’s (“IWC”) primary function was rulemaking; it was empowered to formulate regulations, known as wage orders. *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 561 (1996) (“*Tidewater*”). The IWC was defunded by the California Legislature in 2004, but its wage orders remain in effect. *Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 434 n.2 (2006). The DLSE’s primary function was to enforce the state’s labor laws, including IWC wage orders. *Id.* at 561-62.

As in the federal context, the line between a regulation and an interpretation is far from clear. *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 6 n.3 (1998). “The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other. Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum.” *Id.* (citing *Western States Petroleum Ass’n v. Superior Court*, 9 Cal. 4th 559, 575-

76 (1995) (Mosk, J.) (internal quotations and citation omitted). The framework is similar to the federal construct: quasi-legislative regulations are entitled to *Chevron*-like deference; all other interpretations should be considered for their persuasive power as in *Skidmore* deference. California does not have a standard of deference analogous to *Auer*; this is likely due to the fact that the IWC and DLSE have historically divided rule-making and interpretive authority. The IWC does not generally interpret its own wage orders, and the DLSE does not generally promulgate regulations.

The practical result of this framework, as it is in federal cases, is that some interpretations are given “great weight and respect,” while others are given considerably less. The following sections review leading and recent cases in which California courts have applied deference standards to the various regulations and interpretations issued by the IWC and DLSE.

#### **A. IWC Wage Orders & “Quasi-Legislative” Regulations**

California also has its own Administrative Procedures Act (“APA”), under which “the exercise of any quasi-legislative power conferred by any statute” must be promulgated through notice-and-comment and other required procedures. Gov. Code §§ 11346 et seq. The IWC was exempt from the APA but, under the Labor Code, had to engage in similar notice-and-comment procedures in issuing its wage orders. *Tidewater*, 14 Cal. 4th at 569; Cal. Labor Code §§ 1176-88. Wage orders are entitled to significant deference: “Judicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission’s exercise of a considerable degree of policy-making judgment and discretion.” *Indus. Welfare Comm’n v. Superior Court*, 27 Cal. 3d 690, 702 (1980). Judicial review is limited to a determination of whether the order is arbitrary, lacking in evidentiary support, or procedurally defective. *Id.* The

authority of the IWC to issue wage orders, however, is limited by the scope of authority conferred upon it by the Legislature. *Bearden v. U.S. Borax, Inc.*, 139 Cal. App. 4th 429, 435-36 (2006).

In *California Labor Federation v. Industrial Welfare Commission*, 63 Cal. App. 4th 982 (1998), for example, the court upheld amendments made by the IWC to five industry wage orders, eliminating the eight-hour workday requirement in those industries. *Bearden*, however, invalidated an IWC wage order relieving employers from providing a second meal break to employees covered by a valid collective bargaining agreement. 139 Cal. App. 4th 429. In *Bearden*, the court distinguished *California Labor Federation* as an exercise of the agency's power to amend or rescind wage orders. *Id.* at 439-40. In *Bearden*, the wage order constituted a new exemption which was outside of the IWC's conferred authority to create. *Id.* at 440.

The DLSE is empowered to promulgate necessary "regulations and rules of practice and procedure," including quasi-legislative regulations. *Tidewater*, 14 Cal. 4th at 570-75. The DLSE may also interpret IWC wage orders in order to enforce them; these interpretations are not regulations and need not comply with the APA. *Aguilar v. Ass'n for Retarded Citizens*, 234 Cal. App. 3d 21, 27 (1991). The interpretations of the DLSE, like those of other administrative agencies, merit "great weight and respect," as the agency possesses expertise in its subject area. *IBM*, 26 Cal. 3d at 930 & 931 n.7; *Aguilar*, 234 Cal. App. 3d at 29. However, final responsibility for interpreting a statute or wage order rests with the judiciary, and a court must reject an interpretation if it is "clearly erroneous or unreasonable." *Aguilar*, 234 Cal. App. 3d at 29.

Where the DLSE has been found to promulgate regulations, the regulations have generally been found to be void for lack of compliance with the APA. *See, infra, Tidewater*, 14

Cal. 4th 557 (overruling two cases which had held DLSE policies to be interpretations, finding them to have been regulations subject to the APA); *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000); and *Church v. Jamison*, 143 Cal. App. 4th 1568 (2006).

### **B. Opinion and Advice Letters**

As a general rule, DLSE advice and opinion letters are entitled to weight according to their ability to persuade. *Tidewater*, 14 Cal. 4th at 571 (interpretations that are not regulations, such as advice letters, may be persuasive as precedents in similar subsequent cases); *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000) (finding persuasive two DLSE advice letters stating that a worker need only be subject to the control of the employer in order to be entitled to compensation). “Advisory opinions of this sort, ‘while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” *Bell v. Farmers Insurance Exchange*, 87 Cal. App. 4th 805 (2001) (finding persuasive two DLSE advice letters) (internal quotations omitted, citation omitted in original) (citing *Yamaha Corp. of America*, 19 Cal. 4th 1 (1998)).

In the recently decided *Murphy v. Kenneth Cole Productions, Inc.*, however, that general rule reached its limit. 40 Cal. 4th 1094 (2007). *Murphy* involved a former store manager at a Kenneth Cole retail store who brought a number of pay claims against his former employer, including a claim for missed meal and rest breaks. Reversing the trial court, the appellate court held that Murphy could not recover for the missed breaks, holding that the payments for the missed breaks were penalties and not wages, which subjected the claim to a one-year rather than a three-year statute of limitations. *Id.* at 1102.

The Supreme Court reversed. In coming to the conclusion that payments for missed meal and rest breaks are wages and not penalties, it criticized the inconsistent positions the DLSE had

taken on the issue. Between 2001 and 2004, the DLSE issued four opinion letters interpreting the extra hour of pay required by California law to be a wage, not a penalty. In December 2004, however, the DLSE did an-about face. After the issue became “highly politicized,” the DLSE withdrew the four opinion letters and, in their place, proposed new regulations and issued a precedent decision interpreting the payment as a penalty. While acknowledging that “the DLSE’s construction of a statute is entitled to consideration and respect,” the court noted “it is not binding and it is ultimately for the judiciary to interpret this statute.” *Id.* at 1105 n.7. “Additionally, when an agency’s construction ‘flatly contradicts’ its original interpretation, it is not entitled to ‘significant deference.’” *Id.* (citing *Henning v. Indus. Welfare Comm’n*, 46 Cal. 3d 1262, 1278 (1988)) (internal quotations omitted).

### **C. Precedent Decisions**

The DLSE website cites § 11425.60 of the Government Code as allowing the agency to “designat[e] as a ‘precedent decision’ any decision that contains a significant legal or policy determination of general application that is likely to recur. The authority of the [DLSE] to designate a decision as a precedent is not subject to judicial review and is not viewed as an underground regulation.” DLSE website, available at: <http://www.dir.ca.gov/dlse/DLSE-PrecedentialDecisions.htm>.

Post-*Murphy*, this statement appears to rest on shaky ground. *Corrales v. Bradstreet*, a case also involving missed meal and rest break claims, was pending appeal when the opinion in *Murphy* was issued. No. C051407, 2007 WL 1978025 (Cal. App. 3 Dist. July 10, 2007). As noted in the discussion of *Murphy*, *supra*, the DLSE had issued a precedent decision in *Hartwig v. Orchard Commercial, Inc.* holding that the extra hour of pay provided by § 226.7 was a penalty and not a wage, which the decision stated would be binding in future cases. *Id.* at \*3

(citing *Hartwig*, No. 12-56901RB (Cal. Dep’t of Indus. Relations, DLSE, May 11, 2005). The court issued an opinion in *Corrales*, despite *Murphy* having mooted the issue, to challenge head-on “the matter of DLSE invalidly designating precedent decisions in circumvention of APA rule-making requirements.” *Id.* at \*7. In the *Corrales* matter, the DLSE had cited to a 1997 memorandum, issued internally by a previous Labor Commissioner, purporting to adopt the APA for all proceedings of the DLSE. *Id.* at \*13. The APA allows an agency to designate a decision as precedential, but under the Government Code, the APA can only be adopted “by regulation, ordinance, or other appropriate action.” *Id.* The memorandum, of course, had not been subject to APA procedures, and the court found its claim of authority invalid under *Tidewater*. *Id.* at \*14. Under *Corrales*, then, the DLSE may not designate rulings as precedent decisions unless it formally follows the APA.

#### **D. DLSE Enforcement Policies and Interpretations Manual**

Unlike in the federal context, where the Field Operations Handbook has fairly consistently been given persuasive weight under *Skidmore*, the DLSE’s Enforcement Policies and Interpretations Manual (“Manual”) has not always enjoyed as much deference.

*Tidewater*, a seminal California administrative law case, considered how much weight it should accord to a written statement of policy in the DLSE’s Operations and Procedures Manual, issued in 1989, the predecessor version of the current Manual, issued in 1998. 14 Cal. 4th 557. The policy in question stated that IWC wage orders applied to seamen. *Id.* at 562. Finding that the policy was intended to apply generally and to predict how the agency would decide future cases, the court decided that the policy was a regulation and, because it did not undergo notice-and-comment, was void for failure to comply with the procedural requirements of the APA. *Id.*

at 574-76. Accordingly, the court gave no weight to the manual, even though it arrived at the same interpretation based on its analysis. *Id.* at 576-79.

*Tidewater* did not discount the manual in its entirety, however. “[I]f an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency’s prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations.” *Id.* at 571. Those interpretations, like advice letters, warrant deference to the extent they are persuasive. *Id.* Ironically, then, a policy which appears to have received more of the agency’s “fair and considered judgment” receive no weight at all, whereas policies that merely restate or summarize previous decisions are at least considered for their persuasive weight.

*Morillion v. Royal Packing Co.* similarly held that an interpretation contained in the Manual, which would have considered time spent by agricultural workers commuting on employer’s buses to be compensable time, was entitled to no deference. 22 Cal. 4th 575 (2000). Nonetheless, as in *Tidewater*, the court adopted the same result, finding the commute time to be compensable. *Id.* at 588.

A recent case, *Church v. Jamison*, addressed how much weight to give to an interpretation contained in the Manual, which applied a statute of limitations in reverse to limit the employer’s liability for vacation time to time vested within but not before the period. 143 Cal. App. 4th 1568 (2006) (including deference issues in portions certified for partial publication). Following *Tidewater* and *Morillon*, the court held that the Manual was entitled to no deference. *Id.* at 1579.

### **E. Legal Briefs**

In *Monzon v. Schaefer Ambulance Serv., Inc.*, 224 Cal. App. 3d 16 (1990), an overtime case brought by ambulance workers, the court considered whether an IWC wage order required employers to pay overtime for either the number of daily overtime hours or the number of weekly overtime hours, or if employers were required to pay the greater of the two. In an amicus brief and in a declaration attached to a motion for a new trial, the DLSE stated that its historic interpretation was to read the wage order in the alternative—that employers could pay the lesser of the two. *Id.* at 33. In a sense, the brief was similar to one submitted in *Auer* in that it purported to interpret the agency’s own policies. The court, however, did not find the DLSE’s position persuasive and rejected its proposed reading. *Id.*