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FLSA Litigation Tracker
Litigator Q&A

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FLSA Litigation

In an August 2012 interview, David Borgen, who represents employees and labor organizations at Goldstein Demchak Baller Borgen & Dardarian in Oakland, Calif., discusses the U.S. Supreme Court's June ruling in *Christopher v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline* that pharmaceutical sales representatives were ineligible for overtime pay under the Fair Labor Standards Act's ''outside salesman'' exemption. He also comments on the decision's implications for FLSA litigants and litigators.

David Borgen Discusses Supreme Court's *Christopher v. GlaxoSmithKline* Ruling, Implications for FLSA Litigation

David Borgen
(interviewed by Lawrence E. Dubé)

BLOOMBERG BNA: How long have you been practicing labor and employment law? How did you get started in the field?

David Borgen (Borgen@gdblegal.com) is a partner in Goldstein Demchak Baller Borgen & Dardarian in Oakland, Calif. Since 1990, his practice has been limited to class actions brought on behalf of workers. He is senior editor of Bloomberg BNA's The Fair Labor Standards Act (Second Edition) and the Wage and Hour Laws: A State by State Survey (Second Edition) treatises.

Borgen: I have been practicing labor and employment law for over 31 years. My first job in the field was organizing legal services attorneys and staff into a national union of legal services workers while I was in law school. After graduation, I was a staff attorney for the Communications Workers of America for about a decade.

BLOOMBERG BNA: And how long have you been with Goldstein Demchak Baller Borgen & Dardarian? Can you tell us something about the firm and its practice?

Borgen: I joined the firm in 1990 when the firm was litigating ''mini-trials'' in the Stage II proceedings of the landmark *Kraszewski v. State Farm General Insurance Co.* , a gender discrimination class action under Title VII of the 1964 Civil Rights Act in the U.S. District Court for the Northern District of California, which eventually settled for $250 million.

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The law firm focuses on complex public interest class action litigation in the areas of wage/hour, employment discrimination, and disability rights. The firm has been in Oakland, California since 1972 and currently has 12 attorneys.

BLOOMBERG BNA: How much of your practice is now representing clients in wage and hour law?

Borgen: When I first came to the firm, all of my time was spent on Title VII class actions. We started our wage/hour practice in 1997, and within a year, it swallowed up 100 percent of my professional work time. More recently, I have been assisting with the firm's gender discrimination class actions against the Chicago Fire Department and a disability rights class action for better wheelchair access on Los Angeles sidewalks.

BLOOMBERG BNA: What drew you to wage and hour litigation?

Borgen: Wage and hour litigation allows us to recover wages that should have been paid to workers under the minimum wage and overtime statutes that were enacted many years ago for the protection of all workers (not just unionized workers or women and minorities) . The issues usually involve claims for basic fairness in the workplace and in the labor market.

When we first got started in this area, we really liked the ''lenient'' standard applicable to FLSA collective actions under Section 216(b) of the act, which was much more worker-friendly than the ''rigorous analysis'' required for class actions brought under Rule 23 of the Federal Rules of Civil Procedure. For me, it provided an opportunity to diversify our firm's practice which had, until then, been almost exclusively limited to Title VII class action litigation. We were able to adapt what we knew about large scale class actions and Age Discrimination in Employment Act actions to the field of wage/hour laws.

BLOOMBERG BNA: What kinds of cases have you been handling in the past few years?

Borgen: Our wage/hour cases include both state law class actions in California and FLSA collective actions filed around the country. We continue to prosecute misclassification/exemption cases, compensable time cases, tip pooling cases, and cases seeking reimbursement of business expenses (under state law). We also continue to represent workers who have been unlawfully characterized as ''volunteers'' by large profitable corporations.

BLOOMBERG BNA: With a practice like that, we can assume you followed *Christopher v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline*, 132 S. Ct. 2156, 19 WH Cases2d 257 (2012), the FLSA case that the Supreme Court decided June 18?

Borgen: Yes, we were all following the case and had studied the oral argument before the Supreme Court. We had been tracking all the various pharma-rep cases around the country, including the previous case where the Supreme Court had not granted certiorari, *In re Novartis Wage & Hour Litigation*, 611 F.3d 141, 16 WH Cases2d 481 (2d Cir. 2010) (subsequently settled for $99 million—before *Christopher* was decided).

BLOOMBERG BNA: Can you review for us what the *Christopher* case was about, and how it reached the Supreme Court?

Borgen: Up until *Christopher*, the exempt or nonexempt status of pharmaceutical representatives was a wide open question. For decades, the drug industry marketed its wares through the use of detailers or pharma-reps who were tasked with visiting doctors' offices to introduce doctors to the companies' drugs and to encourage them to prescribe specific drugs for their patients.

The goal of these ''sales calls'' was to obtain a nonbinding commitment from the doctors to prescribe the companies' drugs. The doctors did not buy or sell the drugs. The medicines were obtained by patients who filled prescriptions at pharmacies. The activities and sales pitches of the detailers were highly regulated by federal law. The pharma-reps were well compensated, in part by incentive pay programs linked to the sales volume of specific drugs in given territories.

From the plaintiffs' point of view, none of the existing FLSA exemptions appeared to apply to this scenario. No sales as commonly understood were consummated in this context and the regulatory scheme appeared to deprive the employees of the independent discretion necessary for the administrative exemption.

The Labor Department agreed with contentions of pharma-reps in a series of amicus briefs to the courts of appeal considering cases that arose from district courts around the country. There were a number of significant cases, but the primary split was between the Ninth Circuit, which held in *Christopher* that the FLSA's outside sales exemption barred pharma-reps' overtime claims (635 F.3d 383, 17 WH Cases 2d 353 (9th Cir. 2011), and the Second Circuit, which gave deference in *Novartis* to DOL views expressed in an amicus brief, finding (before the case settled) that the employees were not FLSA-exempt administrative employees or outside sales employees.

BLOOMBERG BNA: What did the Supreme Court decide in *Christopher*?

Borgen: Justice Samuel A. Alito, joined by Chief Justice John G. Roberts and Justices Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas, held that the FLSA outside sales exemption applies to pharmacy sales representatives.

The critical issue was whether the activity that these pharmacy reps engaged in was sales or marketing. This was complicated by the fact that drug sales are heavily regulated and the reps (or detailers) could at best get each medical doctor to make a nonbinding commitment to prescribe the drugs manufactured by their employers. The doctors did not buy the drugs or sell them to their patients. Patients obtained the drugs at a pharmacy after obtaining a prescription.

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The court's majority rejected the argument that a sale required a transfer of title and held that in the context of this particular industry the commitment obtained by a pharma-rep was tantamount to a sale.

In ruling on this case, all nine Justices rejected the contrary position advocated in briefs filed by the Department of Labor. The Court declined to give any deference to DOL's position, rejecting the employees' argument that the high court's decision in *Auer v. Robbins*, 519 U.S. 452, 3 WH Cases 2d 1249 (1997), supported such deference, and criticizing DOL for attempting to regulate by amicus brief. In what may have wide ranging impact outside the labor/employment context, the Supreme Court suggested that only regulations issued through the notice and comment process would be entitled to any significant deference.

BLOOMBERG BNA: And what did the dissent say?

Borgen: Justice Stephen G. Breyer wrote the dissent, and he was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

Interestingly, the dissent—like the majority—rejected giving any deference to the DOL briefs, criticizing the DOL for changing its interpretations during the course of the litigation and appeals. However, the Breyer dissent rejected stretching the definition of ''sale'' beyond its normal meaning to include the nebulous concept of ''obtaining a non-binding commitment.'' The dissenters would have ruled that the work performed by the pharma-reps was more in the nature of nonexempt promotional work rather than exempt outside sales work.

BLOOMBERG BNA: Justice Alito wrote that the language of the statute ''counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works.'' What did you take from that comment?

Borgen: As is often the case these days, the conservative majority ignored the long standing rule that the remedial protections of the FLSA must be liberally interpreted to protect workers. Traditionally this has meant that exemptions were to be narrowly construed so that only workers who fell plainly and unmistakably within the exemptions would be included. Here, the majority turned the rule on its head and construed the exemption so as to broaden its meaning to its farthest limits in order to protect the employers from having to pay overtime. Simply stated, the majority opinion in *Christopher* is a radical reinterpretation of the FLSA.

BLOOMBERG BNA: And what about the majority's discussion of the DOL amicus briefs?

Borgen: It is unfortunate that the Supreme Court decided not to give the traditional *Auer* deference to the DOL's amicus brief like the Second Circuit did in the *Novartis* case. It would appear to be a retreat from *Auer* deference, and reflects the more skeptical approach to deference seen in *United States v. Mead Corp.*, 533 U.S. 218, 69 USLW 4488 (2001), and previously in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

BLOOMBERG BNA: Solicitor of Labor Patricia Smith has said that DOL intends to continue filing amicus briefs in FLSA cases where the government is not a party. Do you have any comment on that?

Borgen: DOL should continue to inform the appeals courts of its opinions about the meaning of the FLSA. Certainly, DOL will be cautious in making sure its opinions reflect sound consideration of the act and prior opinions. What the majority at the Supreme Court seems to be saying to the DOL is, ''Don't regulate by amicus briefing.'' The court is telling DOL to formulate its interpretations of the FLSA by means of the notice and comment regulatory process.

BLOOMBERG BNA: What about the majority's comments that DOL caught the pharmaceuticals industry by ''surprise''? Do you think that's accurate? Relevant?

Borgen: The Alito majority seems concerned that somehow a contrary ruling would have been unfair to the enormously profitable pharmaceutical industry given that the DOL had not sought, in the past, to recover overtime compensation for the pharma-reps. However, this logic is terribly dangerous in the context of FLSA enforcement. DOL has a very limited budget and the agency is often constrained by Republican administrations that are hostile to workers' rights. It is no surprise that entire industries are often left to violate the wage/hour laws and regulations and it is only later, due to a regime change in Washington or action by an alert private bar, that industries are brought to justice for wage theft occurring daily under the very noses of under-resourced or undermotivated state and federal regulators.

BLOOMBERG BNA: Are there any other industries or issues you're aware of that might be vulnerable to the same challenge—that DOL has moved the bar on employers without formal rulemaking or some form of advance notice?

Borgen: DOL has been cautious under President Obama not to do that. In practice, what we've seen is that the DOL will alert ''stakeholders'' when changes are afoot so that they get lots of informal input before setting the regulatory and/or enforcement agendas.

BLOOMBERG BNA: Justice Alito wrote in the majority opinion that the pharmaceutical reps who averaged more than $70,000 per year and put in 10-20 hours per week outside ''normal business'' hours were ''hardly the kind of employees that the FLSA was intended to protect.''

Where do you think that comment came from, and where do you think it might lead?

Borgen: You know, in the highly controversial rewriting of what we refer to as the ''541 regs'' or the ''white collar regulations'' in 2004, DOL created an entirely new exemption for ''highly compensated'' employees, setting the level for this exemption at $100,000 a year. Clearly, the $70,000 that Justice Alito refers to is well below this bar and I don't know how that can, in the current regulatory scheme, be considered as outside the scope of the FLSA's protections.

BLOOMBERG BNA: The justices also agreed in June to hear *Genesis Health Care Corp. v. Symczyk*, U.S., No. 11-1059, *cert. granted* 6/25/12.

This involves a Third Circuit decision that a district court could consider a registered nurse's FLSA claims against Genesis Health Care Corp. even though Genesis offered to fully settle her wage claim when Symczyk had not yet filed for conditional certification of an FLSA Section 16(b) collective action.

Can you tell us what the issues will be, and what the practical significance of this case is?

Borgen: I think *Genesis* could be a very significant case, depending of course on the Supreme Court's eventual ruling. It seems to me that the Third Circuit's holding—that the Rule 23 relation-back rule should apply to collective actions so as to permit a case to proceed even where the named plaintiff's claim is mooted by a Rule 68 offer—should be affirmed. This would be consistent with *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 29 WH Cases 937 (1989), and the remedial purposes of Section 216(b), the FLSA, the ADEA, etc. If the Third Circuit is reversed, it would leave collective actions open to all sorts of gaming, where defendants would seek to decapitate the litigation and plaintiffs' counsel would have to have hold back multiple opt-ins ready to file before a motion to dismiss could be brought.

BLOOMBERG BNA: Does *Christopher* give you any comfort or concern—or a clue—about what the current Supreme Court might do in *Symczyk*?

Borgen: I am not in a rush to predict new potential problems. As the federal courts tilt toward employers, employee advocates like myself are continuing to assess the damage to workers' rights already wrought by *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 112 FEP Cases 769 (2011), and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 79 USLW 4279 (2011).

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