1-1-2007

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Publication Information
Jay E. Grenig, Are Regulations Exempting Certain Home Health Care Attendants from Wage and Hour Laws Enforceable?, 34 Preview U.S. Sup. Ct. Cas. 382 (2007).

Case at a Glance

A Department of Labor regulation exempts from the minimum wage and overtime provisions of the Fair Labor Standards Act employees who perform household work related to the care of the elderly or infirm and who are employed by an employer or agency other than the family or household using their services. Evelyn Coke, a home health care attendant, has challenged those regulations, claiming they are inconsistent with the Fair Labor Standards Act.

Are Regulations Exempting Certain Home Health Care Attendants from Wage and Hour Laws Enforceable?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 382–386.

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ISSUE

Does a Department of Labor regulation exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act employees who care for the elderly or infirm and who are employed by an employer or agency other than the family or household using their services?

FACTS

Evelyn Coke filed an action in the U.S. District Court for the Southern District of New York under the Fair Labor Standards Act. She alleged that she had been employed by the defendants as a "home health care attendant" since 1997. Coke claimed that the defendants did not pay her minimum wage or overtime compensation, although she was working more than forty hours per week.

Coke acknowledged that the "companionship services" exemption to the FLSA, as interpreted and defined by a Department of Labor regulation (29 C.F.R. § 552.109(a)) applied to her employment. However, she contended that the regulation was unreasonable and impermissible in light of the FLSA's clear language and statutory purpose. The district court found the Department of Labor regulation was entitled to strong deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pointing to the explicit statutory grant of authority to the Department of Labor to define and delimit Section 213(a)(15) of the FLSA, the district court held that § 552.109(a) was a legitimate exercise of the Department of Labor's authority, and the court granted the defendant's motion for judgment on the pleadings. *Coke v. Long Island Care at Home, Ltd.*, 267 F.Supp.2d 332 (S.D.N.Y. 2003).

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the district court. The court of appeals reasoned that the FLSA is a remedial act, and its exemptions are to be narrowly construed. Pointing out that the Department of Labor had included

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ARGUMENT DATE:
APRIL 16, 2007
FROM: THE SECOND CIRCUIT

§ 552.109(a) under a part titled "Interpretations," the court refused to accord *Chevron* deference to § 552.109(a), deeming it to be an interpretive rather than a legislative regulation.

The court of appeals also declined to give deference to § 552.109(a) under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Concluding that persons employed by a third party were outside the category of domestic service employees and were protected by the FLSA Act before the 1974 amendments, the court of appeals said "[i]t is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered." The court of appeals also placed considerable weight on what it characterized as a "stark internal inconsistency" between § 552.3 (the regulation defining "domestic service employment") and § 552.109(a), finding that, under § 552.3, employees employed by third parties do not qualify for the exemption that § 552.109(a) grants them. The court of appeals pointed to the fact that the Department of Labor had proposed eliminating the exemption for third-party employees on several occasions, deeming the Department of Labor's position "hardly ... a model of consistency." The court questioned both the Department of Labor's reasoning and procedural regularity in adopting § 552.109(a). The court of appeals concluded the Department of Labor regulation applying the "companionship services" exemption to services rendered by persons employed by third parties, as opposed to the family of the recipient of care, was unenforceable.

The Supreme Court granted the defendants' petition for review. It noted that the Department of Labor had recently issued a memorandum asserting that it had intended § 552.109(a) "to be an exercise of its expressly delegated authority." In the memorandum, the Department Labor had asserted that, by reading § 552.3 and § 552.101(a) as requiring that domestic service employment be performed in private homes but as not addressing the issue of third-party employment, regulations are fully harmonized and rendered internally consistent. The memorandum went on to state:

> Consequently the Department reads sections 552.3 and 552.101(a) as not addressing the issue of third party employment. Read in that context, I find no inconsistency between sections 552.3 and 552.109(a). All prior statements by the Department to the contrary, including the Department's January 19, 2001 NPRM, see 66 Fed. Reg. at 5485, are hereby repudiated and withdrawn.

The Supreme Court vacated the judgment and remanded the case to the Second Circuit for further consideration in light of the Department of Labor's memorandum.

On remand, the Second Circuit again determined that the regulation applying the "companionship services" was unenforceable. It also concluded that the arguments presented in the Department of Labor memorandum were unpersuasive. The court of appeals continued to rely on the purported incompatibility between § 552.109(a) and § 552.3 and concluded § 552.109(a) was unenforceable. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48 (2d Cir. 2006).

The defendants again petitioned the Supreme Court to review the Second Circuit's decision. The Supreme Court granted certiorari on January 5, 2007.

Case Analysis

This case presents the narrow, but important, question of what deference should be given to Department of Labor regulations concerning the Fair Labor Standards Act. The FLSA, enacted by Congress in 1938, requires employers to pay most workers a specified minimum wage and overtime compensation for hours worked in excess of forty per week. See 29 U.S.C. § 201 et seq.

Before 1974, home care aides were generally covered by minimum wage and overtime laws if they were employed by agencies. Aides hired directly by families were not covered. In 1974, Congress amended the FLSA to broaden its coverage to include employees performing "domestic services"—including household workers such as maids and cooks. The 1974 legislation carved out exceptions for employees engaged in "babysitting services" and "companionship services." 29 U.S.C. § 213(a)(15).

Soon after the 1974 amendments, the Department of Labor promulgated a series of regulations more clearly delineating who are subject to the exemption. One of the regulations, 29 C.F.R. § 552.6, includes within the exemption: (1) those who perform household work related to the care of the elderly or infirm, and (2) those who also perform housework incidental to their "companionship services" as long as the housework accounts for less than twenty percent of the weekly hours worked. A second regulation (29 C.F.R. § 552.109(a)) applies the exemption to employees engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services. Only § 552.109(a) is at issue in the proceeding before the Supreme Court.

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Although the Department of Labor called § 552.109(a) an "interpretation," it was promulgated following the statutory notice and comment procedures for legislative regulations. However, the rule the Department of Labor adopted after comments were received was the opposite of the rule proposed in the original notice.

In early 2001, the Clinton administration in its next-to-last day in office proposed amendments to the "companionship services" exemption regulations. According to a statement by the Department of Labor, it proposed to amend the regulations to revise the definition of "companionship services" to "more closely mirror Congressional intent." The Department of Labor explained that in 1974 it was Congress's intent "to cover all workers who performed domestic services as a vocation, excluding casual babysitters and providers of companionship services who were not regular bread winners or responsible for their [own] families support." In 2002, the Bush administration scrapped the proposed amendments.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), provides that an administrative agency charged with implementing a federal statute has authority to make rules to fill any gap left, implicitly or explicitly. According to *Chevron,* when Congress has delegated rulemaking authority to an administrative agency, a federal court must recognize that Congress intended any statutory ambiguity to be "resolved, first and foremost, by the [administrative] agency." A federal court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrative agency. The courts also recognize that a long-standing contemporaneous construction of a statute by the administering agency is entitled to great weight. See *Leary v. United States,* 395 U.S. 6 (1969). To apply *Chevron,* a court must determine "whether the statute unambiguously forbids the [a]gency's interpretation, and, if not, whether the interpretation, for other reasons exceeds the bounds of the permissible." *Barnhart v. Walton,* 535 U.S. 212 (2002).

However, not all administrative agency actions merit *Chevron* deference. Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the administrative agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.,* 533 U.S. 218 (2001). According to *Mead,* interpretations contained in policy statements, agency manuals, and enforcement guidelines may merit some deference even though the interpretation is not entitled to *Chevron* deference.

Long Island Care asserts there is no real dispute that Congress delegated authority to the Department of Labor to make regulations "carrying the force of law." According to Long Island Care, in establishing an exemption for workers who provide "companionship services (29 U.S.C. § 213(a)(15)), Congress expressly declared that the terms of the exemption provision should be "defined and delimited by regulations of the Secretary [of Labor]." Long Island Care also notes that Congress set forth a general grant of rule-making power, saying the Secretary of Labor was authorized to prescribe necessary rules, regulations, and orders with respect to amendments to the FLSA.

Disagreeing with Long Island Care, Coke asks the Court to affirm the Second Circuit without deciding whether the third-party regulation is entitled to *Chevron* deference because it says § 552.10(a) is contrary to the language of the FLSA "companionship exemption" (29 U.S.C. § 213(a)(15), contrary to congressional intent, and contrary to another Department of Labor regulation (29 C.F.R. § 552.3). She claims the Second Circuit's construction of the regulation as not stripping employees of third-party business firms of the FLSA's minimum wage and overtime protections is the only one that gives meaning to all the words in the statutory exemption, is consistent with congressional intent, and is consistent with the Department of Labor's own definition in § 552.3 of the term "domestic service employment."

Coke argues the Department of Labor expressly and intentionally did not adopt the regulation pursuant to its delegated authority to adopt rules "carrying the force of law." She points out that the Department of Labor stated in its regulations (29 C.F.R. § 552.2(c)), as well as in the notice of proposed rule making, that the third-party regulation was not among those that "defined and delimited" the statutory terms but rather was a "statement of policy and interpretation." Coke asserts that the Department of Labor's attempt retroactively to reclassify the regulation should be accorded little weight in relation to the express, contemporaneous classification and is unpersuasive.

Skidmore v. Swift & Co., 323 U.S. 134 (2001), provides a more limited level of deference to be used where an interpretive regulation clarifies ambiguous terms found in a statute or explains how a provision operates. While interpretive regulations may sometimes function as prece-

dents, they are not entitled to *Chevron* deference as a class. Interpretive regulations are nonetheless afforded "considerable weight" and will be upheld if they implement the congressional mandate in a reasonable manner. *Skidmore* provides for deference based upon a regulation's "power to persuade" given the agency's claim to expertise under the statute.

Because it believes the regulation was not adopted pursuant to the Department of Labor's authority to adopt rules "carrying the force of law," and because it is an interpretive regulation, Coke asserts the deference due is that under *Skidmore*. Coke says that, under *Skidmore,* the Second Circuit properly declined to follow the regulation because the regulation is inconsistent with the statutory exemption's text, congressional intent, the Department of Labor's own definition of "domestic service employment," the regulation governing babysitters, and the Supreme Court's mandate that the Department of Labor narrowly construe the FLSA's exemptions.

Long Island Care contends there is nothing in the 1974 amendments to the FLSA requiring that "employed in domestic service" indicates an intention to exempt only workers employed by the homeowner. Long Island Care emphasizes that 29 U.S.C. § 206(f), the provision covering employees in domestic service, speaks of workers "employed in domestic service *in a household,*" not of workers employed "by the household." (Italics in original) Long Island Care also notes that the overtime provision in 29 U.S.C. § 207(l) refers only to employment "in" a household.

Coke says the language of 29 U.S.C. § 215(a)(13) exempting employees "employed in domestic service employment to provide companionship" encompasses only companions employed directly by private household employers. It is Coke's position that the 1974 amendments extended the FLSA to all employees "employed in domestic service," but exempted only employees "employed in domestic service *employment*" to provide babysitting or companionship services. (Italics in original) Coke asserts there is a material distinction between the terms "domestic service" and "domestic service employment." She says the former term is broader, encompassing domestic work performed in a household irrespective of the identity of the employer while the latter term is narrower, additionally requiring an employment relationship between the domestic employee and the private household. Coke claims the third-party regulation ignores the significance of the word "employment" as distinct from the word "service," rendering the word "employment" superfluous.

According to Long Island Care, the rule-making history demonstrates that the Department of Labor promulgated the third-party employer regulation after full notice-and-comment rule making—a procedure required only for rules of a legislative nature. Long Island Care also relies on the Department of Labor's statement in the 2005 memorandum claiming that the Department intended the regulation to be binding at the time of promulgation and has always treated it that way.

With respect to the contention that there is an irreconcilable conflict between § 552.109(a) and § 552.3 of the regulations, Long Island Care argues that the Department of Labor's explanation as to why there is not a conflict should be given deference. According to Long Island Care, the very existence of a conflict between two regulations indicates some kind of ambiguity, and the Department of Labor has provided a reasonable way of resolving the ambiguity.

Declaring that the third-party employer regulation has governed whether companions are entitled to minimum wages and overtime pay for more than 30 years, Long Island Care says that, when the Department of Labor proposed eliminating the third-party employer exemption several years ago, it withdrew the proposal, after notice and comment, because of a concern about potential adverse effects. Long Island Care says those potential effects remain today, and if contrary policy arguments have any basis, it is Congress and the Department of Labor that should address them.

Coke argues that the court should not accord deference to a regulation that the Department of Labor itself calls "interpretations." According to Coke, *Mead* requires the courts to apply a lesser degree of deference to § 552.109(a) as an interpretive rather than a legislative regulation. Coke argues that under *Skidmore*'s less deferential standard § 552.109(a) is unenforceable. She contends the regulation is inconsistent with Congress's likely purpose in enacting the 1974 amendments, inconsistent with other regulations, and inconsistent with other agency positions over time.

Recognizing that several Senate and House reports describe the "generally accepted meaning" of "domestic service" as referring to work "in or about a private home of the person by whom [the worker] is employed," Long Island Care claims those references to not reveal a plain, or even likely, intent to limit the 1974 amendment to homeowner-employed workers.

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Long Island Care notes that the House and Senate Reports also treat the term "domestic service employees" as essentially synonymous with the term "private household workers"—a term that includes employees of third parties—indicating that members of Congress using the terms were thinking about the place of work and not about the employer.

Coke argues that the legislative context in which Congress adopted the companionship exemption also illuminates its meaning, confirming congressional intent to exempt only companions employed directly by private households. She points out that for over a decade prior to the 1974 amendments, the FLSA covered companions and other domestics employed by third-party firms qualifying as enterprises engaged in commerce. Coke indicates that throughout congressional discussions of the amendments the committees and individual members of Congress repeatedly stated that they intended to expand the FLSA's coverage of domestics; nowhere, according to Coke, did Congress express any intent to contract existing language.

According to Coke, the only concerns expressed in Congress about the extension of the act's coverage of domestics related exclusively to domestics employed directly by private households. In response to these expressed concerns for private-household employers, Coke states that Congress created a limited set of special provisions applicable only to employees employed by households, including the companionship exemption, as it had earlier done in the Social Security Act. Addressing the House and Senate Reports, Coke says that they explained that household employers could be accommodated through the companionship exemption (and the paired exemption of babysitters) because Congress did not expect provision of companionship or babysitting to be a regular source of support for companions employed by households.

SIGNIFICANCE

Applying the *Chevron* deference test, in *Johnston v. Volunteers of America,* 13 F.3d 559 (10th Cir. 2000), cert. denied, 531 U.S. 1072, 121 S.Ct. 763, 148 L.Ed.2d 665 (2001), the Tenth Circuit has found the companionship services exemption to be valid on its face. However, the Tenth Circuit held that employees who were not directly employed by clients were not exempt from overtime requirements pursuant to companion services exemption when the care was provided in residences that had been selected by the employer and found not to be private homes. Also applying *Chevron,* the Ninth Circuit has ruled that attendants performing "companionship services" in clients' private homes are excluded by the companionship services exemption from minimum wage coverage. *McCune v. Oregon Sr. Services Div.,* 894 F.2d 1107 (9th Cir. 1990). This case provides the Supreme Court with the opportunity to clarify when the *Chevron* deference test should be applied.

This controversy reflects the tension between the goal of providing workers with living wages and the goal of providing necessary and affordable services at an affordable cost. Some suggest that a victory for the respondent will result in higher wages, inducing more workers to provide companionship services. Others suggest that a ruling in favor of the respondent will make companionship services less affordable. They claim that the need to restrain costs in the case of third-party employees has only become more acute as agencies provide an increasing amount of needed care.

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Continuing Care Leadership Coalition, Inc., Home Care Ass'n of New York, Inc., Home Care Council of New York City, Inc., and New York State Ass'n of Health Care Providers (Peter G. Bergmann (212) 504-6000)

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National Private Duty Ass'n (Trenten P. Bausch (402) 964-5000)

United States (Paul D. Clement, Solicitor General (202) 514-2217)

In Support of Respondent Evelyn Coke

AARP and The Older Women's League (Stacy Canan (202) 434-2060)

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