03-7666

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EVELYN COKE, individually and on behalf of others similarly situated,
Plaintiff-Appellant,
v.
LONG ISLAND CARE AT HOME, LTD. and MARYANN OSBORNE,
Defendants-Appellees.

On Appeal from the United States District Court for
the Eastern District of New York

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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In *Long Island Care at Home, Ltd. v. Coke*, 126 S. Ct. 1189 (2006), the Supreme Court vacated this Court's decision in *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2004), and remanded the case for further consideration in light of the Department of Labor's ("Department" or "DOL") Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005) ("Advisory Memorandum" or "Memorandum"). *Coke*, 126 S. Ct. 1189 (Jan. 23, 2006). This Court has directed the parties to submit supplemental briefs addressing: (1) any new arguments or issues raised in the Department's Advisory Memorandum, and (2) how the Memorandum affects the court's analysis of the case if it does not present any new arguments or issues.

As explained below, the Advisory Memorandum provides compelling new arguments for this Court to reconsider its invalidation of 29 C.F.R. 552.109(a), a DOL regulation that construes the companionship exemption in the Fair Labor Standards Act ("FLSA" or "Act") to apply to companions employed by third parties. In particular, the Memorandum explains why section 552.109(a) is a legislative rule entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), rather than an interpretive rule entitled to less deference, as this Court concluded. The Memorandum further provides a far more comprehensive recounting of the history of the statute and regulation than has previously been presented to this Court, demonstrating that the regulation is consistent with both congressional intent and other DOL regulations. Finally, the Memorandum dispels this Court's apparent misimpression that the Department has not thoroughly considered the issue of third party employment.

A. The Department Intended to Use its Expressly Delegated Rulemaking Authority When it Promulgated 29 C.F.R. 552.109(a).

There is no dispute in this case that Congress delegated authority to the Department to issue certain legislative rules, including rules to define and delimit the scope of the FLSA's companionship exemption. *See* 29 U.S.C. 213(a)(15) (exemption applies to "any employee employed in domestic service employment to provide companionship services . . . as such terms are defined and delimited by regulations of the Secretary [of Labor]"); *Coke*, 376 F.3d at 123. There is also no dispute that a regulation promulgated pursuant to that authority is entitled to *Chevron* deference, i.e., if it "'fills a gap or defines a term in a reasonable way in light of the Legislature's design, [a Court] give[s] that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding.'" *Id.* at 126 (citation omitted).

The sole issue in dispute, therefore, is whether the Department's rule on third party domestic service employment, 29 C.F.R. 552.109(a), is a valid exercise of the authority delegated to the Secretary to issue legislative rules. This Court previously concluded that the Department did not intend section 552.109(a) to be a legislative rule because "DOL expressly states in 29 C.F.R. § 552.2(c) that '[t]he definitions required by [29 U.S.C. 213(a)(15)] are contained in §§ 552.3, 552.4, 552.5 and 552.6.'" *Coke*, 376 F.3d at 131. The Department's Advisory Memorandum explains that, in promulgating 29 C.F.R. Part 552.109(a) through notice-and-comment rulemaking, the Department did, in fact, rely on its expressly delegated authority to "define[] and delimit[]" the terms of the FLSA's companionship services exemption, 29 U.S.C. 213(a)(15), as well as on its additional general authority "to prescribe necessary rules, regulations, and orders" under the 1974 FLSA amendments that enacted the exemption, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (1974). *See* Advisory Memorandum No. 2005-1, *supra*, at 1 (discussing Department's statement of authority, 40 Fed. Reg. 7404 (Feb. 20, 1975), when it promulgated the

Part 552 regulations). The Department's general authority to prescribe necessary rules, regulations, and orders was not considered by this Court in its original decision. It is, however, precisely the kind of authority that the Supreme Court has held warrants *Chevron* deference. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2698-99 (2005) (FCC's Declaratory Ruling, issued under similar grant of rulemaking authority, is entitled to *Chevron* deference).

The Memorandum authoritatively establishes that the Department has always considered, and continues to treat, section 552.109(a) as a legislative rule entitled to *Chevron* deference. It explains that the regulations expressly state that the Department relied on both its authority under section 13(a)(15) and the delegation of rulemaking authority in the 1974 FLSA amendments when it promulgated all the rules contained in 29 C.F.R. Part 552, including section 552.109(a). *See* 29 C.F.R. Part 552 ("Authority"); *see also* 29 C.F.R. 552.2(a) (Part 552 "provides necessary rules for the application of the Act to domestic service employment"). It also points out that the Department used a notice-and-comment rulemaking procedure to develop and issue section 552.109(a). *See* 39 Fed. Reg. 35,382 (Oct. 1, 1974); 40 Fed. Reg. 7404. Reviewing the Department's contemporaneous explanation of section 552.109(a), the Memorandum finds that "at the time the final rule [enacting section 552.109(a)] was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations -- something that could be true only of a legislative rule." Advisory Memorandum, at 7.

In light of the Memorandum's explanations, this Court cannot adhere to its conclusion that the Department intended for section 552.109(a) to be an interpretive rather than a legislative rule. This Court previously heavily relied on the fact that the regulation was placed "under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations'" in concluding that the regulation was interpretive only. *Coke*, 376 F.3d at 131. The Department's placement of regulations in an "Interpretations" subpart, however, says nothing about the level of deference they must be accorded. *See Auer v. Robbins*, 519 U.S. 452, 456-58 (1997) (according *Chevron* deference to a Department of Labor regulation, listed in an "Interpretations" subpart, promulgated under the Secretary's authority to "define[] and delimit[]" the FLSA's exemption in 29 U.S.C. 213(a)(1) for employees employed in an executive, administrative, or professional capacity). Where, as here, the Department expressly relied on its legislative rulemaking authority and used notice-and-comment rulemaking procedures, the regulation is entitled to *Chevron* deference regardless of its placement in a subpart that was labeled "Interpretations." *See Brand X*, 125 S. Ct. at 2698-99 (FCC's Declaratory Ruling, issued after rulemaking proceeding, entitled to *Chevron* deference because Congress gave the Commission authority to promulgate binding legal rules and the Declaratory Ruling was issued in the exercise of that authority); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (*Chevron* deference applies where Congress authorized the agency to make rules carrying the force of law, and the agency promulgated rules pursuant to that authority).[1]

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[1] It is hard to imagine a clearer "invocation" of an agency's statutory authority to promulgate legally-binding rules than the notice-and-comment rulemaking the Department undertook in promulgating section 552.109(a). *See Mead*, 533 U.S. at 230 (notice-and-comment procedures are an important indicator that a rule is entitled to *Chevron* deference); *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 59 (2d Cir. 2004) (under *Mead*, "formal adjudications and interpretations promulgated by an agency pursuant to notice-and-comment rulemaking are

Based on the explanations provided in the Advisory Memorandum, therefore, this Court should accord *Chevron* deference to section 552.109(a).[2] Affording *Chevron* deference in this case would align this Court with the Supreme Court's *Auer* decision and other courts of appeals that have given such deference to FLSA regulations included in the "Interpretations" section of the Part 552 regulations. *See Madison v. Res. For Human Dev., Inc.*, 233 F.3d 175, 181 (3d Cir. 2000) (according *Chevron* deference to 29 C.F.R. 552.101 because, like section 552.3, it is a formal regulation promulgated after notice and comment); *McCune v. Oregon Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990) (upholding 29 C.F.R. 552.106 because it is a reasonable interpretation of a statute the Secretary is charged with administering).

B. Section 552.109(a) Permissibly Interprets the FLSA's Companionship Services Exemption.

The Advisory Memorandum also provides a comprehensive analysis of the history of the statute and regulation that should lead this Court to reject its previous conclusion that section 552.109(a) is inconsistent with Congressional purposes, inconsistent with other Departmental regulations, and inadequately explained. *See Coke*, 376 F.3d at 133-135. The Department's reasonable interpretation of its own regulation, as set forth in the Advisory Memorandum, is entitled to the highest level of deference. *See Auer*, 519 U.S. at 461.

1. The Advisory Memorandum explains that section 552.109(a) permissibly interprets the FLSA's companionship services exemption because it is consistent with the Act's text and congressional intent as set forth in the legislative history. *See* Advisory Memorandum, at 1-2; *cf. Coke*, 376 F.3d at 133 (omitting any discussion of the statutory text or legislative history). The applicability of the exemption, by its terms, does not depend on the identity of the employer. *See* Advisory Memorandum, at 1. Rather, the exemption applies to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15). Congress's use of the term "any" is naturally read to include all employees providing such services, regardless of who employs them. *See* Advisory Memorandum, at 1-2; *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997).

Explaining why legislative history supports this reading of the exemption, the Advisory Memorandum concludes that "Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern that has nothing to do with the source of the companions' employment." Advisory Memorandum, at 2 (citing statements from legislative history); *see also Welding v. Bios Corp.*, 353 F.3d 1214, 1217 (10th Cir. 2004) ("Congress created the 'companionship services' exemption to enable guardians of the

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generally accorded *Chevron* deference"). While notice-and-comment procedures alone cannot transform an interpretive rule into a legislative rule, if Congress has given the agency the power to issue legislative rules, and the agency issues such rules after notice and comment, those rules are entitled to *Chevron* deference. *See Brand X*, 125 S. Ct. at 2698-99.

[2] The statement in 29 C.F.R. 552.2(c) that "[t]he definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6" does not alter the deference that section 552.109(a) is due. This statement merely points out that certain regulations contained in 29 C.F.R. Part 552 are strictly definitional, while other regulations, such as section 552.109(a), establish the contours of the companionship services exemption. The statement does not change the substantive effect of section 552.109(a) and the Department's reliance on two grants of substantive rulemaking authority in promulgating all of the Part 552 regulations.

elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them.") (internal quotation marks omitted); *cf. McCune*, 894 F.2d at 1110.[3] The Memorandum also states that congressional reports repeatedly emphasized that the key factors for determining whether an employee qualifies for the companionship exemption are the nature of the employee's duties and the place where the activities are performed. *See* Advisory Memorandum, at 2. The legislative history generally describes the place of employment as a "private home" or "private households," not as the home of the person employing the companion. *Id.*

2. In finding section 552.109(a) inconsistent with Congressional intent, this Court reasoned that when Congress amended the FLSA in 1974, persons employed in domestic service by a third party were "outside the category of domestic service employees" and already protected by the FLSA. *Coke*, 376 F.3d at 133. From this premise, the Court found it "implausible" that Congress intended the companionship exemption to apply to employees of third parties because, in the Court's view, the companionship exemption applied only to employees who were within the FLSA's newly-expanded coverage of domestic service employees. *Id.*

The Advisory Memorandum explains that the Court's premise is wrong: persons employed in domestic service by a third party were not covered unless they were employed by a covered enterprise, currently defined as a business with annual gross sales of more than $500,000. *See* Advisory Memorandum, at 5. The Memorandum also explains that if persons employed in domestic service employment by a third party are outside the category of domestic service employees, "then those domestic workers who are employed by third party employers that are not covered enterprises would to this very day not be covered by the FLSA." *Id.* The Memorandum explains that such a result would be "contrary to Congress' express intent, and cannot be correct." *Id.*; *see also* S. Rep. No. 93-690, at 20 (1974); H.R. Conf. Rep. No. 93-413, at 27 (1973); S. Conf. Rep. No. 93-358, at 27 (1973) (discussed in Advisory Memorandum, at 5).

3. The Advisory Memorandum also addresses this Court's concern that section 552.109(a) is "jarringly inconsistent" with 29 C.F.R. 552.3, which "define[s] the term 'domestic service employment' to refer 'to services of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed.*'" *Coke*, 376 F.3d at 133-134 (quoting 29 C.F.R. 552.3; Court's emphasis). The Memorandum explains that the regulations are consistent for four reasons. First, the only regulation that expressly addresses the issue of third party employment is section 552.109(a), and it would have been superfluous for the Department to have proposed and promulgated that regulation if the issue had already been resolved by section 552.3. Advisory Memorandum, at 2-3. Second, the reference in section 552.3 to household services in a private home "of the person by whom [the employee] is employed" is not inconsistent with section 552.109(a); rather, it is "an extraneous vestige of the language's origin" in social security regulations. *Id.* at 4. The Advisory Memorandum clarifies that this language was imported into the regulation to specify that domestic service

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[3] Plaintiff argues that most people who employ companions are able to pay FLSA wages, and if they cannot, the government, primarily through Medicare and Medicaid, will pay the costs. *See* Plaintiff's Supplemental Brief at 8, n.8. However, the affordability concern applies regardless whether the government or a private individual pays for these services. Indeed, the Department cited the economic impact on government agencies as a reason for withdrawing its proposed changes to the third party regulation in 2002. *See* 67 Fed. Reg. 16,668 (Apr. 8, 2002).

employment must be performed in a private home, and that the legislative history makes it clear that this language was not intended to address the issue of third party employment. *Id.* at 4-5. Third, as described in section 2, *supra*, reading section 552.3 to exclude employees of third parties from the concept of "domestic service employment" "would have the perverse effect of excluding many domestic workers from the coverage of the FLSA -- despite Congress' express intent."[4] *Id.* at 5. Finally, the Department explained that, if the reference in section 552.3 to the social security concept of domestic employment in the employer's home were read to exclude third party employment from domestic service employment, that regulation and another regulation, 29 C.F.R. 552.101(a), would be rendered internally inconsistent because they expressly include "private household workers" -- a term that the Department and Congress have long understood to include third party employees -- within the definition of domestic service employment. *Id.* at 6. The Advisory Memorandum states that for all these reasons, "the Department reads sections 552.3 and 552.101(a) as not addressing the issue of third party employment" and finds "no inconsistency between sections 552.3 and 552.109(a)." Advisory Memorandum, at 7. The Department's interpretation is entitled to controlling deference under *Auer*. 519 U.S. at 461-63 (agency's interpretation of its own regulations entitled to controlling deference); *see also Acs v. Detroit Edison Co.*, 444 F.3d 763, 769-70 (6th Cir. 2006) (controlling deference to Wage-Hour opinion letter); *Belt v. EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) (controlling deference to Department's interpretation in amicus brief, Wage-Hour opinion letter, and Wage-Hour Field Operations Handbook).

4. The Department's Advisory Memorandum also addresses this Court's concern that the Department has inadequately considered the issue of third party employment. *See Coke*, 376 F.3d at 134-135. The Memorandum thoroughly considers the issue and finds no need to change the Department's longstanding conclusion, encapsulated in section 552.109(a), that the FLSA's companionship exemption applies to companions employed by third parties. The Memorandum repudiates prior statements to the contrary by the Department in a January 19, 2001 proposed rule to amend section 552.109(a). Advisory Memorandum, at 7. It is axiomatic that an agency cannot be bound by statements in a proposed regulation. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986).

In sum, the Department's Advisory Memorandum should significantly add to this Court's understanding of the Department's rationale for including third party employers within the companionship services exemption and give this Court good reasons to uphold section 552.109(a). In particular, the Memorandum explains why section 552.109(a) is a legislative rule that is consistent with Congressional intent and entitled to *Chevron* deference, and also why sections 552.3 and 552.109(a) are complementary; that explanation is entitled to *Auer* deference. These explanations are reasonable, and should compel this Court to accord controlling deference to 29 C.F.R. 552.109(a), and to uphold it as a permissible interpretation of the FLSA's companionship services exemption.

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[4] Plaintiff argues that section 552.3's definition of "domestic service employment" applies only to section 13(a)(15), *see* Plaintiff's Supplemental Brief at 9, but as the Department explains in the Advisory Memorandum -- and as is reflected in the broad terms of both 29 C.F.R. 552.3 and 552.101(a) -- it "intended the provision to supply a general definition of the term as used throughout the Act." Advisory Memorandum, at 5 n.1; *see also Marshall v. Rose*, 616 F.2d 102, 104 (4th Cir. 1980) (referring to section 552.3 to determine whether an employee was covered by the FLSA as a domestic service employee).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2006, I sent by Federal Express overnight delivery the original and nine copies of the foregoing Supplemental Brief for the Secretary of Labor as *Amicus Curiae* to the Clerk of the United States Court of Appeals for the Second Circuit. A digital version of this Brief in Portable Document Format (PDF) was also submitted to the court on this same date by sending it as an e-mail attachment to <briefs@ca2.uscourts.gov>.

I also certify that two copies of this Brief and a digital PDF version have been served on each of the following counsel of record by First Class U.S. Mail, postage prepaid, and by e-mail, this 19th day of June, 2006:

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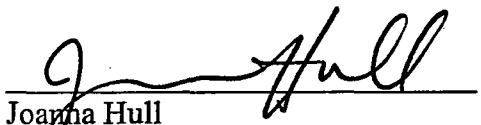

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(1)(E)

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