

**focus** on Employment Law

# Wage-and-hour cases can alter how industries operate

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Over the past decade, the number of wage and hour lawsuits across of the nation has far exceeded the number of lawsuits in other areas of employment law, including employment discrimination.

Many of these lawsuits deal with whether certain employees are exempt under the Fair Labor Standards Act (FLSA). Some of these cases are attempts to break new ground, or at least dramatically alter the status quo.

Cases addressing the exempt status of pharmaceutical reps are prime examples. The pharmaceutical industry regards these employees as exempt from overtime under FLSA. Recent developments challenge this presumption, and the U.S. Department of Labor endorses this challenge.

Who's right?

The issue arises because of the peculiar nature of the pharmaceutical sales representative job. Do these reps sell and are they thereby exempt under the outside sales exemption under the FLSA?

If they do, they do not sell in the traditional fashion. Rather, they promote sales by convincing physicians to prescribe certain drugs to patients, who then turn to pharmacies to fill their prescriptions. Thus, the "sales

call" is with the physician and not with the ultimate consumer. Indeed, federal law prohibits sales reps from actually selling drugs.

If they are not exempt outside sales employees, then are they exempt administrative employees? That is, do they perform non-manual work, and exercise independent judgment and discretion on matters of significance relating to the employers' general business operations? Do they design marketing plans and implement them, for instance?

Answering these questions is more complicated than many assumed.

This issue has been hotly con-

tested over the past year in courts across the country. Indeed, several courts have addressed, and reached different conclusions, regarding whether pharmaceutical sales representatives are exempt employees.

For example, in *Schaefer-LaRose v. Eli Lilly and Co.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009), the court granted summary judgment to Eli Lilly on claims for unpaid overtime brought by its reps and held that the reps were exempt under the administrative exemption.

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performed non-manual work and that their primary duties were marketing and promoting drugs to physicians, or in other words, “administrative duties.”

The court also held that the reps were exempt outside sales employees because they were hired “not simply to educate and inform physicians about Lilly pharmaceuticals, but to generate sales of those products.”

Likewise, in *Smith v. Johnson & Johnson*, 593 F.3d 280 (3rd Cir. 2010), the Court of Appeals affirmed summary judgment in favor of the employer, finding that the plaintiff was an exempt administrative employee. The court reasoned that the plaintiff’s “primary duty” included the “management or general business operations of the employer” because she marketed the company’s products.

In addition, the court reasoned that the plaintiff exercised discretion and independent judgment because she chose which doctors to visit in her assigned territory, executed “nearly all her duties without direct oversight,” determined how to spend her own budget, and was generally considered an “expert” on her territory.

The court did not address the outside sales exemption.

However, the court in *Christopher v. SmithKline Beecham*, 2009 U.S. Dist. LEXIS 108992 (D. Ariz., Nov. 20, 2009) did address the outside sales exemptions and held that reps are exempt outside sales employees.

The panel reasoned that the sales reps were “the functional equivalent of an outside salesperson,” because the goal of their calls on physicians was to obtain a commitment to prescribe the assigned product. The court stated that “to hold otherwise is to ignore reality in favor of form over substance.”

These holdings are in direct contrast to *Ruggeri v. Boehringer Ingelheim Pharmaceutical*, 2009 U.S. Dist. LEXIS 44136 (D. Conn. May 26, 2009), an earlier case in which defendant’s summary judgment motion was denied.

The court reasoned that it was “impossible to say whether the matters over which plaintiffs had discretion were matters of significance to [defendant.]” As a result, the court concluded that administrative exemption did not apply.

The court also held that the outside sales exemption did not apply because, even though plaintiffs visit doctors and promote pharmaceuticals, federal regulations actually prevent them from selling pharmaceuticals.

Therefore, in the court’s view, the outside sales exemption was inapplicable.

The seminal case on these issues is *In Re Novartis Wage and Hour Litigation*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009). In this case, the employer won summary judgment on a class action brought by current and former pharmaceutical sales representatives.

Novartis argued that the sales reps were exempt from overtime pay under both the administrative and the outside sales exemptions. Agreeing with the employer, the court held that the reps were exempt administrative employees because they performed non-manual work, “[their] success in obtaining prescriptions [was] critical to [the defendant’s] business, and they exercised discretion and independent judgment by choosing when and how to use materials and by planning their daily call schedules.”

The court also held that there were exempt outside sales employees because they essentially sold the products to the “distributors”, i.e., the physicians; the court could not ignore the reality that without these “distributors,” the patients would be unable to buy the product. This case is pending appeal before the 2nd Circuit.

On Oct. 14, 2009, the U.S. Department of Labor (DOL) filed an amicus brief arguing for a stricter interpretation of both the outside sales and administrative exemptions. In its brief, the DOL urge that the employees be found nonexempt, because

they neither “make sales” nor exercise sufficient discretion to qualify for either of the exemptions.

The DOL’s argument, if successful, would dramatically change the way the pharmaceutical industry works. Currently, sales reps have significant freedom to schedule their time and frequently work varying hours from week to week.

In some weeks they may work less than 40 hours, but in others they may work significantly more due to travel. If reps are entitled to overtime, the pharmaceutical industry may have to dramatically alter how and when they travel and otherwise work, and also how they are paid.

Ultimately, this issue could end up in the U.S. Supreme Court. Creative lawyering may just turn this industry on its head, although such an outcome is far from clear.

Nonetheless, what is happening here is only an example of how turbulent wage-and-hour law is at this time. Wage-and-hour counsel for both employees and employers must be aware of the changing landscape with regard not only this class of employees, but also the general issues underlying the national tidal wave of wage and hour litigation.



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