Connecticut Law Tribune
JANUARY 31, 2011
VOL. 37, NO. 5 • $10.00
An ALM Publication
CTLAWTRIBUNE.COM

White-Collar Workers Challenge Overtime Exemptions

Insurers, financial firms and retailers all targeted by litigation

By LAWRENCE PEIKES

Collective action lawsuits alleging violations of the federal Fair Labor Standards Act (FLSA) continue to proliferate at a dizzying rate. Many, if not most, of these suits challenge the classification of mid-level, white-collar jobs as exempt from the FLSA's overtime pay requirements.

While no employer is immune from this ongoing scourge of FLSA litigation, some industries are especially vulnerable, including many that are staples of the Connecticut economy. Among them are insurance companies, large retailers, fast-food and convenience store chains, drug manufacturers and financial services firms.

This article focuses on recent developments under the FLSA that are pertinent to employers in these targeted industries.

Insurance Claims Adjusters

Virtually every major insurer has been hit with a suit by adjusters claiming to have been misclassified as exempt. Generally, an adjuster qualifies for the administrative exemption if he or she is responsible for conducting interviews, inspecting damage and preparing estimates, evaluating coverage, determining liability, and negotiating settlements.

There is, however, no bright-line rule, as vividly illustrated by a pair of decisions issued in separate suits brought against GEICO, one finding that GEICO's auto damage adjusters qualified for the administrative exemption as a matter of law, *Robinson-Smith v. Government Employees Ins. Co.,* 590 F.3d 886 (D.C. Cir. 2010), and the other ruling that a factual dispute existed as to the exempt status of similarly tasked claims representatives, *Harper v. Government Employees Ins. Co.,* 2010 U.S. Dist. LEXIS 12210 (E.D.N.Y. Nov. 16, 2010).


Lawrence Peikes

Retail Stores

The 11th Circuit's decision in *Morgan v. Family Dollar Stores Inc.*, 551 F.3d 1233 (11th Cir. 2008), was a wake-up call for large retailers. There, the court affirmed a jury's determination that Family Dollar's store managers were misclassified as exempt executives largely because they spent 80 percent to 90 percent of their time performing manual labor and virtually every aspect of the stores' daily operations was controlled by an operations manual or directives issued by district managers.

By contrast, a Dollar General store manager who spent only slightly more time performing managerial functions was deemed to qualify for the executive exemption, with the court reasoning that "if the plaintiff did not stock shelves, run the register and clean the floors, the performance of the store would certainly be adversely affected; however, if she did not hire clerks, manage employee intake, make a work schedule, assign tasks, train employees, and supervise her staff, the store would cease to function." *Roberts v. Dolgencorp,* 2010 U.S. Dist. LEXIS 122682 (M.D. Tenn. Nov. 18, 2010).

Fast Food Establishments

The exempt status of managers and assistant managers of fast food establishments and convenience stores has been at issue in numerous FLSA collective actions. These cases are highly fact-specific, and hence unpredictable.

A recent example is *Guinip v. Petr-All Petroleum Corp.,* 2010 U.S. Dist. LEXIS 86280 (N.D.N.Y. Aug. 23, 2010), where the manager of a combination convenience store and gas station with responsibility for "interviewing and hiring new employees, scheduling, training, writing performance evaluations, reporting employee and customer injuries to corporate, discussing sales performance and promotions with corporate, conducting surveys of competitors' gas prices and convenience store business, and controlling 'shrink'" who made "recommendations to corporate regarding product ordering and pricing, new hire pay rates, employee discipline and termination, and certain ... security measures" was found to be properly classified as an exempt executive.

Pharmaceutical Companies

A spate of collective actions brought by pharmaceutical sales representatives implicates both the administrative and outside sales exemptions. The latter exemption turns

Lawrence Peikes is a partner in Wiggin and Dana's Stamford office where he represents management in all aspects of labor and employment law. His practice encompasses federal and state court litigation, arbitration and mediation of employment discrimination claims, wrongful discharge claims, wage and hour claims and disputes over the enforcement of covenants not to compete.

on whether the representatives actually "make sales," an issue that arises because it is unlawful for representatives to sell prescription drugs directly to the target of their solicitation activities, typically doctors, pharmacies and health care institutions. Adopting a strict reading of the operative regulation, the U.S. Department of Labor has filed amicus briefs in several cases urging courts to find the outside sales exemption inapplicable to pharmaceutical representatives.

This tactic proved successful in *In re Novartis Wage and Hour Litigation,* 611 F.3d 141 (2d Cir. 2010), where the 2nd Circuit deferred to the Labor Department and determined that Novartis' representatives did not qualify for the outside sales exemption, reasoning that, "where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, ... it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or regulations, made a sale."

At least one district court found the *Novartis* decision sufficiently compelling to reverse an initial determination that the outside sales exemption applied to pharmaceutical representatives, *Harris v. Auxilium Pharmaceuticals Inc.,* 2010 U.S. Dist. LEXIS 102730 (S.D. Tex. Sept. 28, 2010), while another declined to do so. *Schaeffer-LaRose v. Eli Lilly and Co.,* 2010 U.S. Dist. LEXIS 105736 (S.D. Ind. Sept. 29, 2010).

The 2nd Circuit also held that because Novartis' representatives were subject to strict oversight and detailed work assignments they did not exercise the requisite degree of discretion or independent judgment to qualify for the administrative exemption. Novartis dictated the frequency of physician visits and provided scripted answers to common questions, from which the reps were directed not to deviate. The reps, moreover, did not have input on Novartis' marketing strategy or the "core messages" that drove their sales presentations. Novartis reps' interactions with doctors, the court observed, were predicated largely on skills gained or honed during training sessions run by Novartis and were not the product of independent thinking.

By contrast, in *Smith v. Johnson & Johnson,* 593 F.3d 280 (3d Cir. 2010), the 3rd Circuit determined that a pharmaceutical sales representative exercised sufficient discretion and independent judgment to come within the administrative exemption where she was "required ... to form a strategic plan designed to maximize sales in her territory" and functioned without direct supervisory oversight.

Financial Services Firms

Employees in the financial services industry generally meet the duties requirements for the administrative exemption if they are responsible for collecting and analyzing financial information, recommending investments, and advising clients regarding the advantages and disadvantages of different investment vehicles. The 2nd Circuit has observed that "an employee in the financial sector whose primary duty includes marketing, servicing or promoting the employer's financial products likely falls under the administrative exemption," but "an employee whose primary duty is *selling financial products* does not." *Reiseck v. Universal Communications of Miami Inc.*, 591 F.3d 101 (2d Cir. 2010).

In a closely watched case, the 2nd Circuit ruled in *Davis v. J.P. Morgan Chase & Co.,* 587 F.3d 529 (2d Cir. 2009) that underwriters constrained by detailed credit guidelines, such that their work was "primarily functional rather than conceptual," did not qualify for the administrative exemption. The financial services industry was dealt another blow with the federal Department of Labor's issuance of Administrator's Interpretation No. 2010-1 (March 24, 2010), which reversed a long-held position that mortgage loan officers qualified for the administrative exemption. ■