

June 18, 2012

United States Supreme Court holds that pharmaceutical representatives are exempt from the overtime provisions of the Fair Labor Standards Act.

The Fair Labor Standards Act ("FLSA") is the law that governs minimum wage and overtime pay. However, the Act also provides that certain workers are exempt from the overtime provisions of the Act provided that they meet certain criteria set forth in the regulations. One category of exempt employees is outside sales employees. It often has been contested whether pharmaceutical representatives constitute outside sales employees for the purposes of the FLSA. In an opinion issued today, the high court decided that pharmaceutical sales representatives qualify as outside sales employees under the most reasonable interpretation of the FLSA and, as such, are exempt from the overtime provisions of the Act.

The Department of Labor's regulations define an outside sales employee, in simplified terms, as an employee whose primary duty is making sales. Of course, with regard to pharmaceutical sales, prescription drugs can be dispensed only upon a physician's prescription. Thus, pharmaceutical representatives do not have the ability to actually sell the drugs. Rather, through a process referred to as "detailing," they provide information to physicians about the company's products in an attempt to obtain non-binding commitments from the physicians to prescribe their company's products. Typically, this involves visiting physicians in an assigned territory to market the products as well as attending promotional events.

Consequently, the question often turns on whether the representatives ever really consummate a sale. The case in question was brought before the U.S. District Court in Arizona by two pharmaceutical representatives who claimed that they had been denied overtime pay in violation of the FLSA. The District Court dismissed their claims in favor of the employer. The case was appealed to the Court of Appeals for the Ninth Circuit which held that the non-binding commitment that the representatives

obtained from the physicians was tantamount to a sale because it was the maximum result possible under the rules applicable to the pharmaceutical industry.

In addressing this issue, the Supreme Court found that the definition of sale set forth in the regulations contains a catchall phrase of "other disposition" that can be interpreted to include arrangements in a particular industry that are tantamount to a sale. The activities engaged in by pharmaceutical representatives, the court held, fall within that definition. The Court found that, in addition to obtaining the physician's commitment to prescribe the product, the representatives demonstrated all of the outward signs of outside sales employees including being hired for their sales experience, being trained to close sales calls by obtaining the maximum commitment possible from the physician, working away from the office with minimal supervision, and being well-compensated for their work with salaries and commissions. This holding comports with the general premise that exempt employees typically earn higher salaries and enjoy other benefits not available to non-exempt employees, in part, because they perform a kind of work that that is not easily delegable to other employees after forty hours in a week. Thus, the Court concluded, pharmaceutical representatives are outside sales employees for the purposes of the FLSA. The Justices stated that to hold otherwise would require pharmaceutical companies to significantly change the way they do business.

This case underscores the importance of careful analysis when determining whether or not an employee is exempt from the overtime provisions of the FLSA. A failure to properly classify a position could result in a back pay award or a loss of exempt status for the entire class of employees.

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