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Supreme Court: Pharmaceutical Sales Reps Are Exempt from Overtime Pay Requirements Per FLSA'S Outside Sales Exemption

BY DAVID BARMAK

In a major win for pharmaceutical companies, the Supreme Court has ruled that pharmaceutical sales representatives (PSRs) are exempt from federal overtime pay requirements under the "outside sales exemption" of the Fair Labor Standards Act (FLSA). The case, *Christopher v SmithKline Beecham Corp., DBA GlaxoSmithKline* (No. 11-204, Decided June 18, 2012), resolves a conflict between the Second and Ninth Circuit Courts of Appeal and impacts some 90,000 pharmaceutical sales representatives throughout the United States.

Under the relevant provision of the FLSA's outside sales exemption, the employee's primary duty must be making sales. But because of the unique regulatory environment that applies to drug companies, PSRs do not actually sell their employer's products to physicians. Rather, PSRs meet with physicians and provide information about the benefits and uses of the company's drugs and other medical products in the hope that the physician will be persuaded to prescribe the products to patients, as medically appropriate. Prescription drugs are then sold by pharmacies that dispense the drugs to individual customers who have a physician's prescription. Therefore, PSRs do not actually make sales in the usual sense of the word.

As the Supreme Court noted, pharmaceutical companies have promoted their drugs through "sales reps" or "detailers" since at least the early 1950s, treating PSRs as exempt from the FLSA's overtime requirements without objection from the Department of Labor (DOL). In fact, the DOL did not voice any objection to this classification until 2009, when it filed an *amicus* brief in a case pending against Novartis in the Second Circuit Court of Appeals, *In re Novartis Wage and Hour Litigation*, 611 F. 3d 141 (2nd Cir. 2010). DOL supported the PSRs' bid for overtime pay in that case, arguing that PSRs are not exempt under the outside sales exemption because they were not involved in a "consummated transaction," as contemplated by the regulations issued under the FLSA. The Second Circuit gave substantial deference to the DOL's interpretation of its regulations and ruled that the exemption did not apply, and the Supreme Court declined to review the Second Circuit's ruling. Meanwhile, a similar case against SmithKline Beecham (which trades as "GlaxoSmithKline") had proceeded to the Ninth Circuit Court of Appeals. The DOL supported the PSRs' claims in that case, too, but the Ninth Circuit ruled that the DOL's interpretation of the FLSA was not entitled to controlling deference and that the sales reps *did* make sales within the meaning of the regulations. The Supreme Court then agreed to review the Ninth Circuit's ruling. (During the same period that the *Novartis* and *SmithKline Beecham* cases were wending their way through the courts, two other pharmaceutical companies, Johnson & Johnson and Eli Lilly, had won rulings in the Third and Seventh Circuits, respectively, that pharmaceutical sales reps qualified as exempt under a separate FLSA exemption, the administrative exemption.)

In a 5-4 decision written by Justice Alito, the Supreme Court affirmed the Ninth Circuit, ruling that SmithKline Beecham's PSRs qualified as outside salesmen within the meaning of the FLSA exemption, and holding that, at least in the highly regulated environment of pharmaceutical sales, the PSRs were engaged in sales even though physicians do not actually purchase prescription drugs from them. This is so, the Supreme Court reasoned, because the FLSA broadly defines "sale" to include "… any sale, exchange, contract to sell, consignment for sale,

shipment for sale or other disposition." It concluded that the "catchall phrase 'other disposition' is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity," and that the PSRs' efforts to persuade physicians to prescribe their company's drugs met this standard.

Significantly, the Supreme Court's interpretation of the relevant FLSA and regulatory provisions was contrary to the DOL's own interpretations. Usually, the agency's interpretation would have been accorded substantial deference. It was not, in this instance, because the Court found that the DOL's interpretation was, in effect, *ex post facto*, arrived at following decades of silence and only after there was litigation between Novartis and SmithKline Beecham and some of their PSRs.

While the Supreme Court was clearly influenced by the unique regulatory environment in which the pharmaceutical industry operates and its decision applies first and foremost to the pharmaceutical industry, the Court's reasoning may provide the basis for other employers to argue for the application of exemptions in other situations where there has been a long history of treating a particular class of employees as exempt without DOL interpretive guidance or enforcement activity to the contrary.

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