

The Ninth Circuit Adopts Common Sense Interpretation of the Term “Sales” to Find Pharmaceutical Sales Representatives Exempt from Overtime

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On February 14, 2011, the U.S. Court of Appeals for the Ninth Circuit ruled in *Christopher v. SmithKline Beecham Corp.* that pharmaceutical sales representatives were exempt from overtime under the Fair Labor Standards Act (FLSA) as “outside sales” employees because they were “in some sense” engaged in sales. This decision directly contradicts last year’s Second Circuit decision in *In re Novartis Wage and Hour Litigation*, which relied heavily on the Department of Labor’s amicus brief that pharmaceutical sales representatives are entitled to overtime pay. While the Supreme Court may ultimately resolve this split between the courts of appeal, *Christopher* lends immediate support to a practical and common sense reading of FLSA overtime exemptions.

Background

The defendant-employer, GlaxoSmithKline (Glaxo), produced, marketed, and sold pharmaceutical products. Because federal law requires pharmaceutical companies to sell prescription drugs to distributors or pharmacies instead of directly to consumers, Glaxo’s sales efforts focused on the physicians who decide which drugs to prescribe patients. Pharmaceutical sales representatives (PSRs) were responsible for building business relationships with prescribing physicians, making sales calls, and organizing social events. During a typical sales call, a PSR would provide product samples and information about Glaxo products, answer questions, and ask for the physician’s non-binding commitment to prescribe Glaxo products when medically appropriate. Glaxo recruited PSRs with prior sales experience, equipped them with training in effective selling techniques, and compensated them on a combination salary and incentive compensation basis.

The plaintiffs, former Glaxo PSRs, brought a class action lawsuit against the employer on behalf of former and current employees alleging that Glaxo violated the FLSA by requiring overtime work without paying additional compensation. Glaxo contended that plaintiffs were exempt under the FLSA’s “outside sales” and “administrative” exemptions. The district court did not discuss the administrative exemption, but found plaintiffs “unmistakenly fit within the terms and spirit” of the “outside sales” exemption. Plaintiffs then filed a motion to alter or amend this decision, claiming the district court failed to consider a Department of Labor (DOL) amicus brief filed in the *Novartis* case, which articulated the DOL’s position that PRs were entitled to overtime pay. The district court denied the motion, and plaintiffs timely filed an appeal.

The Court’s Holding

The Ninth Circuit found that Glaxo PSRs fall within the FLSA’s “outside sales” exemption, and are therefore not entitled to overtime pay. To reach this ruling, the court held:

- Although the FLSA is to be construed narrowly due to its remedial nature, that general principle does not mean that every word is to be given a “rigid, formalistic interpretation.” With this backdrop, the court analyzed the reality of the “reality of the nature of the work” of the PSRs and determined that they were “in some sense” selling. Because federal law prohibits drug companies from selling directly to patients, a “sale” in this context occurs with the exchange of non-binding commitments between the PSR and physician. That commitments are non-binding is not relevant because pharmaceutical companies value these commitments enough to reward the PSR with increased commissions.
- PSRs are exempt because they share many characteristics with other types of sales employees. Although PSRs do not engage in traditional door-to-door sales, their primary duty is the same -- obtaining a commitment to purchase (here prescribe) a product, which also distinguishes them from those who promote products generally.
- PSRs’ exempt status is supported by industry norms, to which the DOL acquiesced for over seventy years. Until the DOL articulated a contrary position in *Novartis*, it had not challenged the conventional wisdom that PSRs engage in pharmaceutical sales.
- Contrary to the Second Circuit’s holding in *Novartis*, the DOL regulations defining the term “sales” were entitled to no deference. Relying on the Supreme Court’s decision in *Gonzales v. Oregon*, the Ninth Circuit held the DOL regulations merely parroted the FLSA’s language, rather than using its agency expertise to elucidate meaning, and thus no deference was warranted.
- The Secretary of Labor’s amicus brief submitted in *Novartis* was entitled to no deference because the Secretary was merely reinterpreting the FLSA as opposed to applying the DOL regulations to the facts at hand. Furthermore, to defer to the Secretary’s amicus brief would bypass the Administrative Procedures Act and agency rulemaking requirements.

Implications and Lessons for Employers

Although the *Christopher* decision emphasized the unique nature of the pharmaceutical industry in finding PSRs exempt, its common sense application of the “outside sales” exemption may well translate beyond the pharmaceutical industry. This decision remains at odds with the Second Circuit’s decision in *Novartis*. *Novartis* has petitioned for Supreme Court review of the Second Circuit’s decision, and the Court may be more likely to take the case in light of *Christopher* due to the split in authority between the courts of appeal. At minimum, however, employers should welcome the *Christopher* decision as an effective example of a common sense application of the FLSA overtime exemptions. Moreover, the fact that the Ninth Circuit gave no deference to the Secretary of Labor’s amicus brief is also good news for employers as the DOL, in this administration, has decidedly become more pro-plaintiff in its stepped-up enforcement efforts.

The issue of whether pharmaceutical representatives engage in “sales” is still an open question under California law. Orrick obtained summary judgment on this issue for a major pharmaceutical company with the district court finding that the plaintiff in that case “clearly qualify[ed] as an outside salesperson,” but the case is currently on appeal.

How We Can Help

Orrick’s Global Employment Law Group deals regularly with wage and hour compliance, including overtime exemption, giving practical advice to help our clients choose the best options for meeting their legal obligations in this ever changing area of law, and by litigating wage and hour class actions.

Regarding wage and hour compliance, we can help by:

- Strategizing with you about how to utilize *Christopher* in pending class actions.
- Advising you on conducting wage and hour audits of your current practices.
- Reviewing your current employment practices and policies.
- Creating and implementing new employment practices and policies.
- Creating training materials for exempt employees and their managers.