

U.S. Supreme Court Rules Drug Representatives Exempt from Overtime under FLSA: Could your sales representatives be next?

June 20, 2012

In a case rejecting the Department of Labor's Act (DOL) interpretation of its Fair Labor Standards (FLSA) regulations, on June 18, 2012, the U.S. Supreme Court held that outside pharmaceutical sales representatives are exempt from the overtime protections of the FLSA. In *Christopher v Smithkline Beecham Corp. d/b/a GlaxoSmithKline*, two pharmaceutical sales representatives, on behalf of themselves and other similarly situated employees, alleged that their employer violated the FLSA when it failed to pay them overtime. The sales representatives did not directly sell a product to the physicians they visited. Instead, their primary objective was to obtain a non-binding commitment from the physician to prescribe drugs in appropriate cases. The district court dismissed the case, finding that the employees were exempt from the FLSA's overtime requirements because they were "outside salesmen," and the Ninth Circuit affirmed.

Affirming the dismissal, the Supreme Court declined to give any deference to the DOL's interpretation of its regulations, expressed for the first time in *amicus* briefs, that pharmaceutical sales representatives are not exempt. Among other things, the Court found there were "strong reasons" for withholding deference, including that the DOL's interpretation would retroactively impose "potentially massive liability." The Court also noted that the DOL had never initiated enforcement actions regarding the industry's decades-long practice of classifying pharmaceutical sales representatives as exempt, thereby indicating that it believed that this industry practice was lawful. Overall, the Court concluded that the DOL's interpretation of the outside sales regulations was "unpersuasive."

Interpreting the FLSA and the regulations on its own, the Court relied on various textual clues in the definition of "making sales" to conclude that the sales representatives were exempt outside salesmen. The Court stated that the language of the outside sales exemption required a "functional, rather than a formal, inquiry" focusing on the particular industry to determine its applicability. Noting the "unique regulatory environment" in which the sales representatives operated, the Court explained that obtaining a non-binding commitment from a physician to prescribe was the most the sales representative was able to do to ensure a sale. The Court also stated that its conclusion was supported by the purpose of the FLSA exemption, which is premised on the belief that exempt employees typically earn salaries well-above the minimum wage. Here, the two sales representatives performed a kind of work that was difficult to standardize and earned on average more than \$70,000 per year. According to the Court, they were "hardly the kind of employees that the FLSA was intended to protect."

What does this case mean for employers?

The Court's broad interpretation of the outside sales exemption paves the way for employers to argue that the exemption should be applied to other types of salespersons. Because the impact of *Christopher* is uncertain, employers should keep abreast of further case law developments.

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