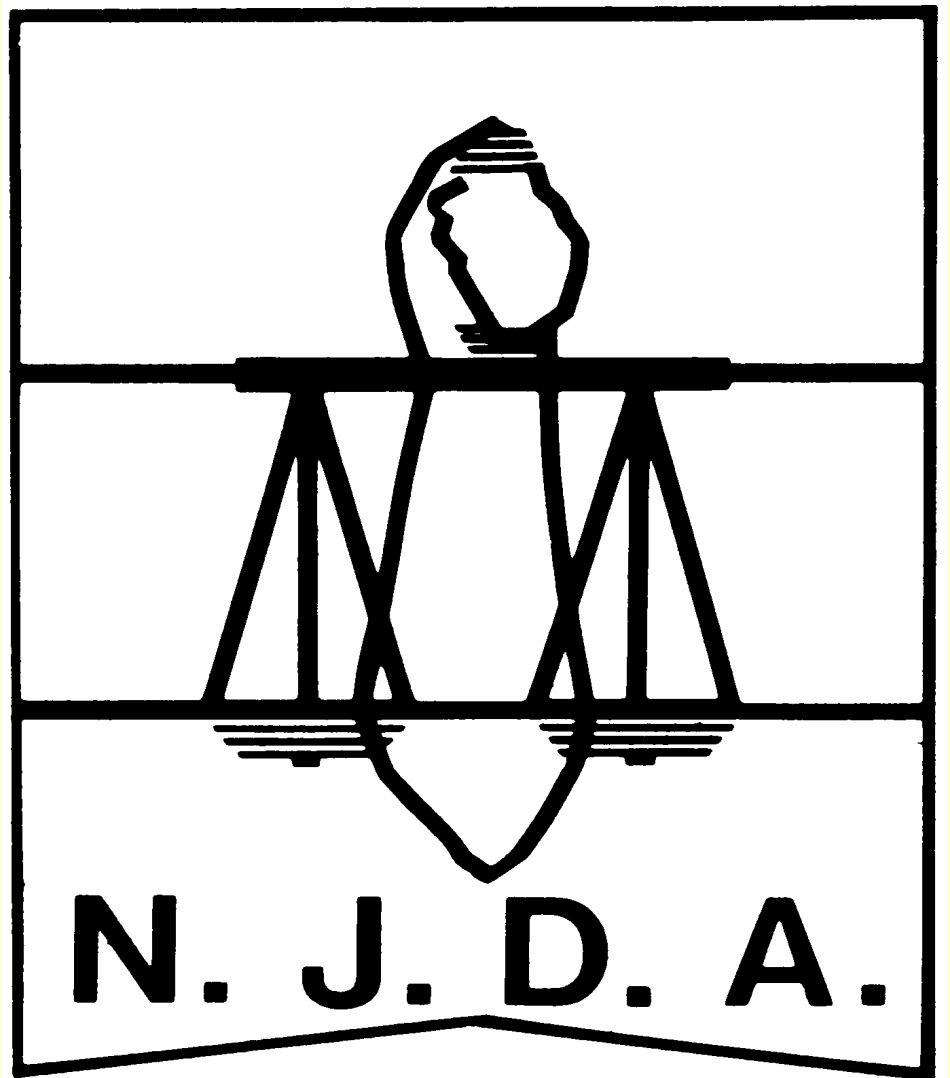


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COURT PRESCRIBES NO OVERTIME FOR PHARMACEUTICAL SALES REPS

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From coast to coast, the judiciary has been prescribing a much-needed remedy to some of the nation's largest pharmaceutical companies that have been at odds with their sales representatives over the payment of overtime compensation. To date, lawsuits have been filed against major pharmaceutical companies in New York, New Jersey, Connecticut and California. The plaintiffs in these cases claim these companies violated the Federal Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et. Seq.* (2008) by failing to pay their sales representatives, or "sales reps," overtime compensation. Plaintiffs claim that they are forced to work 50 to 60 hours a week, check and respond to emails at all times, return phone calls while on vacation, and, in exchange, are not receiving fair compensation for that tireless work.

It should come as no surprise that this most recent round of litigation against the pharmaceutical industry comes directly on the heels of class action suits against other large U.S. companies based upon similar claims. The FLSA has proven to be a fertile ground for disgruntled employees in other sectors of the economy. However, the law does not treat all employees equally when it comes to overtime compensation. Pharmaceutical sales reps in particular have more than one obvious hurdle to clear in seeking overtime under the FLSA.

Under the FLSA, employers must pay their non-management ("non-exempt") employees one-and-a-half times their regular wages for all hours worked above 40 in a regular work-week (*i.e.*, they must be paid "overtime"). 29 U.S.C. 201. That seems fairly straightforward. What becomes difficult, however, is determining which employees must be paid overtime and

which are exempt from this requirement, and thus not entitled to overtime compensation. The two most commonly cited exemptions for pharmaceutical sales reps are 1) "outside salesman;" and 2) "administrative" employees. 29 U.S.C. 213(a)(1). Even with only two possible exemptions, the determination is complex and fact-sensitive; unfortunately, a job title alone is insufficient to establish an employee's exempt status. 29 C.F.R. 541.2. What's more, the courts -- while seemingly able to agree that these employees are exempt -- have been unable to agree on why they are exempt.

To avoid paying overtime to one of its pharmaceutical sales representatives, a company must make certain that the sales rep meets the test for exemption. To qualify for the outside sales exemption, an employee's primary duty must be "making sales" or "obtaining orders" and the employee must be "customarily and regularly engaged away from the employer's place or places of business." 29 C.F.R. 541.500 (a).

The term "sales" is broadly defined by the regulations and includes "any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 C.F.R. 541.501. Sales will be considered an employee's primary duty if it is the principal or most important duty the employee performs. 29 C.F.R. 541.700. This determination must be made on a case-by-case basis with an emphasis on the employee's job as a whole.

In the realm of pharmaceutical sales, the first portion of the test is easily met. Sales and promotion are generally the primary duty of sales representatives, and they generally spend

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the majority of their workweek out of the office. The part most heavily litigated is whether the sales rep is actually “making sales,” and the courts have not taken a unanimous position on this.

Section 3(K) of the FLSA states that the term “sale” or “sell” includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. Plaintiffs in several lawsuits have argued that pharmaceutical reps actually spend the majority of their time engaged in “promotion” not “sales” -- and are therefore entitled to overtime. The courts are split on this argument.

Over the past two years, courts have ruled on several cases where pharmaceutical sales representatives claimed their employers unlawfully withheld overtime compensation to which they were legally entitled. Fortunately for the pharmaceutical industry, the outcomes in these cases have been very pro-employer.

Several recent cases in California have held that, under California’s labor laws, sales reps are exempt. In *Barnick v. Wyeth*, a pharmaceutical representative or “territory manager” brought an uncertified class action against his employer, Wyeth. 522 F. Supp. 2d 1257, 1258 (C.D. Cal. 2007). The plaintiff made every logical argument in support of his claim that he was not a “salesman.” He claimed that he merely attempted to influence physicians to prescribe Wyeth products. His actions were more closely related to promotions, not sales. The patients, not the physicians, were the ultimate purchasers of Wyeth’s products. He never consummated even an indirect sale because he never took any commitments from physicians to prescribe Wyeth products. None of these arguments were availing to the court. In applying a multi-factor test outlined in California’s labor laws -- the factors of which are substantially similar to the test contained in 29 C.F.R. 541.504 -- the court found that the plaintiff was largely unsupervised, solicited new business, received sales training, and received commissions. Thus, in

the eyes of the California judicial system, the plaintiff was an outside salesman. 522 F. Supp. 2d at 1263.

The Central District of California heard two other virtually identical cases in 2007 and 2008 and came to the same conclusion in each one: pharmaceutical sales representatives are exempt from overtime pay in the State of California. In *D’Este v. Bayer Corp.*, the plaintiff unsuccessfully claimed that she did not make sales, but only provided physicians with information. 2007 U.S. Dist. LEXIS 87229 at *13 (C.D. Cal. Oct. 9, 2007). The court once again focused on the general lack of supervision and the inability of her employer to control and/or monitor her hours. *Id.* at *15-16. In *Menes v. Roche Labs., Inc.*, the plaintiff unsuccessfully claimed that there were no sales, but only individualized promotion or one-on-one marketing. 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008). Once again, the fact that the plaintiff had been recruited and trained to sell, solicited business, had little supervision and received compensation based on her sales, was key to a determination that she was exempt from overtime pay. *Id.* at *6-7.

Though these courts specifically found that the pharmaceutical representatives were exempt outside salesmen, these cases arose under California law and, therefore, are not directly applicable to other jurisdictions. While the ultimate decisions rested on California’s comprehensive labor laws, the courts utilized FLSA analysis derived from federal jurisprudence. Therefore, the holdings in these cases, while not binding on other jurisdictions, may be persuasive.

Further to the analysis of the California courts, the FLSA provides employers with additional arguments against what might otherwise require them to pay out millions of dollars in overtime pay: the administrative exemption.

The judiciary in New York and New Jersey have both rejected the arguments that sales reps are exempt under the outside salesman ex-

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emption and, instead, in reaching the same overall conclusions, have applied the administrative exemption.

The Southern District of New York recently applied the administrative exemption to pharmaceutical sales reps. In *Amendola v. Bristol-Myers Squibb Co.*, the court found that pharmaceutical sales reps for Bristol-Myers Squibb were exempt from overtime as administrative employees -- not outside salespersons. 558 F. Supp. 2d 459 (S.D.N.Y. 2008). The court specifically rejected the company's claim that its sales reps were exempt as outside salesmen, instead finding that even a non-binding commitment would not constitute a "sale" under the FLSA. *Id.* Its analysis of the administrative exemption was closely followed by the most recent court to step foot on the pharmaceutical overtime battleground -- the District of New Jersey.

Like the *Amendola* court, in *Smith v. Johnson & Johnson*, the Federal District Court for the District of New Jersey specifically rejected the "outside salesman exemption" and instead found that, as a "professional sales representative," the plaintiff fell within the administrative exemption to the FLSA and was, therefore, not entitled to payment of overtime. 2008 U.S. Dist. LEXIS 104952, *36 (D.N.J. Dec. 30, 2008).

The administrative exemption covers any employee who fits the following criteria: (1) compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities; (2) whose "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;" and (3) whose "primary duty includes the exercise of discretion and independent judgment with respect to matter of significance." 29 *C.F.R.* 541.200.

In 2004, the U.S. Department of Labor promulgated new regulations relating to the FLSA, one of which explained that an employee can effect the "general business operations" of a company through "promoting sales." *Smith*,

2008 U.S. Dist. LEXIS 104952, at *26 (citing *Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,138 (Apr. 23, 2004)).

The *Smith* court found that the plaintiff's role was "an administrative advertising and marketing one with a substantial impact on J&J's business." *Id.* at *28. The court specifically found that although the marketing and promotion by the rep in this case, who was assigned one particular drug to promote, did not "dictate corporate marketing policy," it did "drive the market demand" and therefore substantially affected operation of a particular segment of the business. *Id.* at *30.

The court also found that the sales rep in this case exhibited a sufficient degree of discretion and independent judgment, as required for exemption under the regulations. *Id.* at *34. Some of the factors noted by the court were a representative's ability to determine how often to visit a physician, strategies to utilize on those calls, discretion in utilizing their promotional budget, ability to request permission to visit new physicians or update their annual marketing plan -- even if prior approval was needed for some of these things. *See Id.* at *33-34. While not addressing each, the court made note of the non-exhaustive list of factors included in the regulations. *Id.* at *32. Companies should be aware of these factors when determining whether to pay overtime compensation for pharmaceutical sales reps: (1) whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; (2) whether the employee carries out major assignments in conducting the operations of the business; (3) whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; (4) whether the employee has authority to commit the employer in matters that have significant financial impact; (5) whether the employee has authority to waive or deviate

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from established policies and procedures without prior approval; (6) whether the employee has authority to negotiate and bind the company on significant matters; (7) whether the employee provides consultation or expert advice to management; (8) whether the employee is involved in planning long- or short-term business objectives; (9) whether the employee investigates and resolves matters of significance on behalf of management; and (10) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances. 29 C.F.R. 541.202. Courts will generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment. *Smith*, 2008 U.S. Dist. LEXIS 104592, at *32.

Employees may still qualify under the administrative exemption, however, “if more than one person performs a task, or if an employee receives meaningful supervision.” *Id.* (citing 29 C.F.R. 541.202(c)-(d)). In fact, the regulations make it clear that an employee can exercise discretion and independent judgment by making “recommendations for action rather than actual taking of action” and “even if their decisions or recommendations are reviewed at a higher level.” 29 C.F.R. 541.202(c).

In *Smith*, the court found that the plaintiff satisfied at least two of the above factors. The plaintiff’s work in driving the market for Concerta in her territory “affects business operations to a substantial degree,” and she is involved with her manager “in planning long- or short-term business objectives” related to the marketing of Concerta within her territory. *Id.* at *34-35. In analyzing these factors, the court noted the lack of day-to-day supervision from her manager (who accompanied her only monthly on promotional visits), the requirement that she create an annual marketing plan, and the fact that she was able to request permission to visit new physicians or update her marketing plan to be more effective in her territory. *Id.* at *34.

In specifically rejecting Johnson & John-

son’s argument that the plaintiff fell within the “outside salesman” exemption, the *Smith* court admitted that the plaintiff’s position fell within “a somewhat ambiguous zone under the FLSA.” *Id.* at *15. However, the court was unconvinced that this zone was wide enough to find that these reps actually “make sales.” The plaintiff, like the typical pharmaceutical sales rep, could only provide useful information to physicians, and the regulations require more than a nonbinding declaration of intent by a physician to prescribe a drug in response to promotional inducements of sales reps. *Id.* at *21. The court noted that physicians “do indeed present a chokepoint in the sale of pharmaceuticals, but the nature of the prescription system insulates them from being amenable to “sales” within the definition of the FLSA.” *Id.* at *19. The court, compelled by prior Third Circuit precedent to narrowly interpret any exemption to the FLSA, found that the kind of pharmaceutical sales representative presented in this case had no capacity to “actually makes sales” and, therefore, was not covered by this exemption. *Id.* at *19.

There is no universal solution to the issue of exemption from overtime compensation for pharmaceutical sales representatives. Therefore, pharmaceutical companies should carefully analyze the duties and functions of their sales reps with an eye toward what duties and/or factors might entitle them to overtime. This is especially important since, if litigation ensues, it is the employer -- not the employee -- that has the burden of demonstrating that the exemption applies. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

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