



Pharmaceutical Sales Reps Qualify for Admin Exemption from Overtime

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Pharmaceutical companies who contend their sales reps are exempt from federal overtime pay are increasingly finding courts denying their use of the outside sales exemption. A recent federal decision may provide support for another option: the administrative exemption.

On July 19, the Chief Judge for the U. S. District Court in New Jersey found Alparma, Inc. did not violate the Fair Labor Standards Act (FLSA) by not paying overtime to its pharmaceutical sales reps (PSRs). Despite their “sales” title, PSRs are prohibited by federal law from selling Alparma’s pain medications. Instead, they market and encourage physicians to prescribe those medications to patients. Alparma alleged the unlimited autonomy given to PSRs in doing their job qualified for them for the administrative exemption.

In order to qualify for the administrative exemption from the FLSA, the employee’s job must satisfy three requirements: (1) the employee must be compensated on a salary or fee basis of not less than \$455 per week, exclusive of board, lodging or other facilities; (2) the employee’s primary duty must be 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) their primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance.

There was no dispute the first requirement was met. The court found the second requirement was satisfied based upon U.S. Department of Labor (DOL) regulations which specifically include “marketing” and “promoting sales” within the definition of general business operations. Although PSRs argued they did not qualify for the administrative exemption because Alparma “micro-managed” their work, the evidence established PSRs exercised discretion and independent judgment with respect to matters of significance in promoting Alparma’s products.

DOL regulations set forth 10 non-exhaustive factors, none of which are determinative, for consideration as to whether an employee exercises the requisite discretion and independent judgment to satisfy the exemption. In this case, the court found two factors were met which sufficiently established PSRs qualified for the exemption: (1) the PSRs’ marketing “affects business operations to a substantial degree” and (2) they are “involved in long- or short-term business objectives” relating to the marketing of Alparma’s products.



PSRs argued they were micro-managed by Alharma who provided training on corporate approved messages and written materials about the drugs, which the PSRs could not alter or modify. However, there were other areas involving their primary duty of marketing in which the PSRs had significant discretion. PSRs worked alone the majority of the time, using independent discretion in their approach with physicians and choosing which Alharma materials they would use. The PSRs were also required to write reports, detect trends in sales, and develop their own schedules and written plans for business growth.

Although courts are increasingly holding that pharmaceutical sales reps do not qualify for the outside sales exemption, some find the employees' primary job of marketing may qualify for the administrative exemption. Therefore, pharmaceutical companies should examine the job descriptions and actual duties performed for their sales reps to determine if the administrative exemption applies.

Jackson v. Alharma, Inc., No. 07-3250 (USDC NJ July 19, 2010)

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