



Pharma Sales Reps Are Entitled to Overtime Pay

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Despite “sales rep” job titles, two recent decisions issued by a federal court of appeals warn pharmaceutical companies that their sales reps do not qualify for the outside sales exemption from the overtime requirements of the Fair Labor Standards Act (FLSA). These decisions govern federal wage practices within New York, Connecticut and Vermont, and are persuasive authority elsewhere.

Although pharmaceutical sales reps are prohibited by law from selling prescription drugs directly to patients or physicians, pharmaceutical companies argue their reps make “sales” in the sense that “sales” are made within their industry. Reps spend significant time and resources promoting their products with physicians, who in turn, write prescriptions that permit patients to purchase those pharmaceuticals. Reps also typically end their visits with physicians asking for their commitment to prescribe their products. Pharmaceutical companies argue these factors, along with significant monetary bonuses, establish that sales representatives qualify for the outside sales exemption.

Sales rep bonuses can be significant. Novartis, a pharmaceutical company involved in one of the cases, provides a bonus to its reps according to whether goals were set for the number of prescriptions filled in the reps’ territory. Although Novartis cannot identify the physicians who issued prescriptions for their products, it can track sales of its products, determine whether sales goals are met within its various sales territories, and issue bonuses accordingly. In 2005, its reps’ annual total compensation averaged \$91,539.

The U. S. Court of Appeals for the Second Circuit (which reviews federal court decisions in New York, Vermont, and Connecticut) was not persuaded by Novartis’s arguments. On July 6, the court issued decisions in two separate cases holding the overtime exemption for outside sales representatives does not apply to employees who promote, but do not transfer ownership or obtain a binding commitment, in exchange for anything of value. Those cases, *In re Novartis* and *Kuzinski v. Schering Corp.*, are likely to trigger changes in pharmaceutical company policies concerning compensation for its sales reps.

In order to qualify for the outside sales exemption under the FLSA, an employee must have the primary duty of making sales or obtaining orders or contracts for services for which a consideration will be paid by the client or customer. The employee must also be customarily and regularly engaged away from the employer’s place or places of business when performing such activities. U.S.



Department of Labor regulations specify that promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work. In order to qualify for the exemption, the court emphasized an employer must demonstrate objectively that the employee has in some sense made the sales.

In *Novartis*, the court also rejected arguments that the sales reps qualified for the FLSA administrative exemption from overtime. In order to qualify for this exemption, an employer must establish: (1) the employee earns a guaranteed salary of at least \$455 per week; (2) their 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) that primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. Because the court found no evidence that the sales reps had any authority to formulate, affect, interpret or implement Novartis’s policies, the court rejected application of this exemption to Novartis.

Since the outside sales exemption does not apply in the Second Circuit and may not apply in other circuits, pharmaceutical companies should consult with counsel and examine the primary duties for their sales representatives and determine whether the administrative exemption may apply. Factors for consideration are set forth in *Novartis*, as well as, *Smith v. Johnson and Johnson*, No. 09-1292 (3d Cir. Feb. 2, 2010). See King & Ballow’s previous WebLINE post of Feb. 22, 2010 at http://www.kingballow.com/Publications_files/Healthcare/SalesRep.pdf.

In re *Novartis*, No. 09-0437, 2010 U.S. App. LEXIS 13708 (2d. Cir. July 6, 2010)

Kuzinski v. Schering Corp., No. 09-1945, 2010 U.S. App. LEXIS 13723 (2d. Cir. July 6, 2010)

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