



Sales Rep Exempt from Overtime Pay

By Kathleen Henderson, King & Ballow Partner & Healthcare Practice Chair
khenderson@kingballow.com

Employers, who seek to avoid overtime costs for employees who promote, but do not sell, pharmaceuticals, may find a potential option under the administrative duties exemption. The U.S. Court of Appeals for the Third Circuit upheld application of this exemption and denied overtime pay to a New Jersey pharmaceutical sales representative who promoted, but did not “sell,” pharmaceuticals to doctors.

On February 2, 2010, the appellate court in Philadelphia unanimously affirmed a New Jersey federal district judge’s decision denying overtime pay to Patty Lee Smith, a Senior Professional Sales Representative of McNeill Pediatrics, a Johnson & Johnson wholly-owned subsidiary. Smith sought overtime pay on behalf of herself and other sales reps who promoted Concerta, a controlled substance. Instead of making direct “sales” of such drugs, which is illegal, sales reps promote the drugs to physicians, and seek them to commit to issuing prescriptions for the drugs.

Smith earned a base salary of \$66,000, with a potential discretionary bonus based upon the number of Concerta prescriptions issued in her territory. She was required to average at least 10 physician visits per day using a list of targeted doctors, visual aids, and a prepared message, all of which Johnson & Johnson provided. Otherwise, she was unsupervised 95% of the time, given full discretion in making her itinerary and developing her approach with the physicians. This included creative ways to cultivate relationships with physicians’ staff in order to gain access to the physicians. Each day, Smith prepared pre- and post-visit reports of her visits.

Johnson & Johnson did not pay Smith overtime because it claimed her position was exempt from the overtime pay requirements under the outside sales exemption and the administrative employee exemption of the Fair Labor Standards Act. Although the district court determined the outside sales exemption did not apply, it found the administrative employee exemption test was met since the sales rep’s primary duty involved office work related to Johnson & Johnson’s business operations or its customers and included exercise of discretion with respect to matters of significance. The court considered significant Smith’s



responsibility for developing a strategic plan designed to maximize sales in her territory and the exercise of nearly all of her duties without direct oversight. The appellate court upheld the district court analysis.

Recently, there has been an increase in court actions against employers in the health care sector challenging the exempt status of employees. This emphasizes the importance of re-examining positions of exempt employees to ensure each employee's work satisfies both the salary basis test and the duties test. Remember that the employee's job title is irrelevant to the issue of whether an exemption applies; rather, focus on the actual duties of the employee.

Smith v. Johnson and Johnson, No. 09-1292 (3d Cir. Feb. 2, 2010)

For more information contact: Kathleen Henderson, Partner & Health Care Practice Chair at King & Ballow, khenderson@kingballow.com, phone (615) 726-5489.

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