

Employment Alert: Second Circuit’s Novartis Ruling is a Wake-Up Call for Pharma Companies and Others Requiring Overtime Pay for Sales Reps under the FLSA

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A recent ruling against Novartis by the United States Court of Appeals for the Second Circuit threatens to change the way that pharmaceutical companies—and perhaps others—compensate sales reps. In the *Novartis* case, approximately 2,500 current and former pharmaceutical sales representatives of Novartis Pharmaceuticals Corp. had commenced a class action against Novartis for its failure to pay them overtime. The lower court ruled in favor of Novartis, but the Second Circuit reversed the decision and held that the sales representatives were not exempt from the overtime pay requirements of the Fair Labor Standards Act (the FLSA).

The FLSA’s Overtime Pay Requirement

The FLSA requires employers to pay employees one and one-half times their regular rate of compensation for all hours worked in excess of 40 hours per week, but excludes certain categories of workers from this requirement. Among those excluded from the overtime pay requirement are outside salespersons and administrative employees.

In order to be considered an exempt outside salesperson, the employee’s primary duties must include making sales. In order to be properly classified as an exempt administrative employee, the employee’s primary duties must include the regular exercise of discretion and independent judgment with respect to matters of significance.

The Novartis Sales Representatives’ Duties

Federal law prohibits drug companies like Novartis from making pharmaceutical sales directly to patients. Novartis typically sells its products to wholesalers, which sell them to individual pharmacies. Physicians write prescriptions enabling patients to purchase the drugs from pharmacies.

In order to increase its sales, Novartis engages approximately 6,000 sales representatives across the U.S. and assigns them to territories in which the sales representatives must make “sales calls” upon physicians in their territory. The sales representatives do not actually sell the products to the physicians. Rather, the sales representatives make personal visits to the physician, which last approximately five minutes, provide the physicians with information about Novartis’s products, and encourage the physicians to prescribe them. The sales representatives also give the

physicians samples, but no money is exchanged and the physicians do not make any commitment to prescribe the drug.

Novartis requires its sales representatives to attend a training program that lasts several weeks. In the training program, the sales representatives are given instruction on the medical benefits of each drug and how they should explain the benefits to physicians, various “sales” techniques, and how to question physicians who may be hesitant about prescribing the drug.

Novartis sets the number of times per trimester that the sales representatives must call on each physician in their territory and how often specific drugs should be promoted. They are provided with promotional materials prepared by Novartis to give to physicians and may not use any other materials. They are instructed to convey a specific “core message” to the physicians on each visit, and may not stray from that message. The sales representatives have no role in developing either the promotional materials or the “core message.” The sales representatives must report to their district managers by telephone at least every week or two, and some report daily. In addition, the managers, at least twice a month, accompany the sales representatives on their physician visits and critique the sales representatives’ performance. Sales representatives are also required to host and organize a set number of events to promote Novartis’s products.

Up to a quarter of the sales representatives’ salary consists of a bonus based on their performance with physicians. Because it is not possible to accurately measure whether the physicians actually prescribe the Novartis product, Novartis sets goals for the number of prescriptions it anticipates should be filled within in a particular geographic territory, and pays the sales representatives a bonus when the number of filled prescriptions attributable to physicians in the sales representatives’ territory exceeds the goal set by Novartis.

The Court Holds that the Sales Representatives Are Not Exempt Outside Sales Persons or Administrative Employees

Largely adopting the U.S. Department of Labor’s interpretation of the FLSA, the Court held that the Novartis sales representatives were neither exempt outside sales persons nor administrative employees.

The Court held that the sales representatives were not exempt outside sales persons because their primary duties do not consist of making actual sales or obtaining orders for sales, or even a commitment to buy (indeed, the physicians couldn’t make a commitment to buy because they have an ethical obligation to prescribe only drugs suitable for patients’ medical needs). Rather, their duties were non-exempt “promotional” work directed at growing sales for Novartis generally rather than their own specific sales.

The Court also held that the sales representatives were not exempt administrative employees because they did not exercise discretion and independent judgment with respect to matters of significance. Specifically, they:

- have no role in planning Novartis’s marketing strategy;

- do not formulate and cannot change Novartis’s “core message”; are required to visit a given physician a specified number of times;
- are required to promote a drug a given number of times;
- are required to hold a specified number of promotional events; and
- could not deviate from a script developed by Novartis for describing the drugs.

The Court held that the “four freedoms” that the sales representatives do have—deciding in what order to visit physicians’ offices, determining the best way to gain access to the offices, allocating their Novartis budgets for promotional events and deciding the best way to allocate samples—did not show that they were allowed to exercise either discretion or independent judgment in the performance of their duties.

Action Items for Employers

While lower courts across the country have reached other conclusions on this issue, and the Second Circuit’s ruling is not binding outside its jurisdiction (New York, Connecticut, and Vermont), the *Novartis* ruling is likely to be highly influential on other courts, and, at a minimum, throws into question the classification of pharmaceutical sales reps as non-exempt from the FLSA’s overtime requirements. While each case will be decided on its own facts, companies should work with counsel to examine the duties of their sales representatives and determine whether they are properly classified, and, if not, consider appropriate remedial measures.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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