

# Wage & Hour Insights

Guidance & Solutions for Employers



## Are Pharmaceutical Companies Losing the Exemption Battle?

By Staci Ketay Rotman on August 18, 2011



Recently, another group of pharmaceutical sales representatives successfully demonstrated that they are not exempt from overtime under the FLSA. [Kuzinski, et al., v. Schering Corp](#) Focusing on the administrative exemption, the District Court of Connecticut held that the sales representatives' work was not directly related to Schering's management or general business operations and they lacked the necessary exercise of discretion and independent judgment to meet the requirements of the exemption. The sales representatives did not directly sell pharmaceutical products, instead individualizing Schering's canned sales pitch to promote certain products to identified customers. At the end of the day, the sales representatives simply used the core messages and promotional strategies developed by Schering, rather than developing those messages and strategies themselves.

### **Litigation Background**

Pharmaceutical companies have traditionally classified sales representatives as exempt under the outside sales exemption, but have recently faced difficulty convincing courts that pharmaceutical representatives meet this exemption since they do not make "sales" in the traditional sense. While the results have been mixed at the district court level, the most noteworthy case, the *Novartis* wage and hour litigation, put a hole in the companies' defense. Affirming the district court, the Second Circuit concluded that the Novartis sales representatives do not make sales and, therefore, do not qualify for the outside sales exemption. The U.S. Supreme Court recently declined to review that decision and the holding remains.

Notwithstanding the impact of the *Novartis* decision, there was a glimmer of hope that pharmaceutical sales representatives could still be classified as exempt, but under the administrative exemption. In *Smith v. Johnson & Johnson*, the Third Circuit concluded that the administrative exemption was satisfied because Smith's work related to the company's core business operations and her primary duties involved the use of her discretion in making significant decisions. Specifically, Smith had to form a high-level strategic plan to maximize sales in her territory, and exercised significant discretion and independent judgment while performing her duties without direct oversight. But not all sales

# Wage & Hour Insights

Guidance & Solutions for Employers



representatives are alike and so the administrative exemption will not apply across the board. The *Schering* court focused on this issue, contrasting the “management-scripted,” “core messages” used by the Schering sales representatives with that of Smith, a senior professional sales representative who ran her territory as she saw fit. Finding the Schering sales representatives duties were more like those of Novartis, the Court concluded they did not fit the narrow facts supporting the holding in *Smith*.

## Insights for Employers

The decisions in *Schering* and *Smith* further underscore the fact intensive nature of the administrative exemption. This exemption is not a “one size fits all” category based on job title, but depends on whether the employee actually fulfills the requirements. To truly meet the administrative exemption, companies must prove that the employee’s work is directly related to its management or general business operations and that the employee exercises discretion and independent judgment in matters of significance.

For sales representatives, this may be achieved by giving the representatives actual control and management of their sales territory and allowing them to exercise the necessary level of discretion and independent judgment. Companies should consider holding the representatives accountable for specific sales goals or targets, while leaving the means of achieving those ends primarily up to them. This means that while the representatives may receive general guidance about how to approach a customer, the crafting of the precise message, the number of times conveyed and to whom, should be left up to the representative. While there is no guarantee that a court will find the exemption met, such a proactive approach will definitely put the company in a better position if sued or subjected to a DOL audit.

Copyright © Franczek Radelet P.C. All Rights Reserved. Disclaimer: Attorney Advertising. This is a publication of Franczek Radelet P.C. This publication is intended for general informational purposes only and should not be construed as legal advice.