

U.S. Supreme Court Holds That Pharmaceutical Sales Representatives Are Exempt from Overtime Requirements Under the “Outside Sales” Exemption

June 26, 2012

By Michael D. Thompson

The Supreme Court of the United States has ruled that pharmaceutical sales representatives (“PSRs”) are “outside salesmen” who are not entitled to overtime under the Fair Labor Standards Act (“FLSA”). The high court’s ruling was predicated on its finding that, in the pharmaceutical industry’s “unique regulatory environment,” the commitments obtained by PSRs equate to traditional sales. Furthermore, the Supreme Court rebuked the U.S. Department of Labor (“DOL”) for “unfairly surprising” the industry by filing amicus briefs arguing that PSRs were not exempt from the FLSA’s overtime requirements.

PSRs provide physicians with information about the efficacy and benefits of their company’s products but cannot “close” sales. Rather, within the regulatory scheme governing pharmaceuticals, PSRs attempt to convince doctors to make nonbinding promises to prescribe their products. For that reason, the DOL (along with plaintiffs and some federal courts) has contended that PSRs do not make “sales” and thus are not covered by the “outside sales” exemption.

However, the Supreme Court did not defer to the position asserted by the DOL. Rather than immediately diving into the language of the FLSA, the high court first considered the issue from a practical perspective.

The Supreme Court noted the pharmaceutical industry’s “longstanding practice” of classifying its salespeople as exempt outside salespeople. The high court then pointed out that the DOL has never brought an enforcement action challenging this classification. The majority opinion concluded that, “other than acquiescence” to this practice, “no explanation for the DOL’s inaction is plausible.” Accordingly, deference to the DOL’s interpretation would result in “unfair surprise” to the pharmaceutical industry.

Additionally, the Supreme Court pointed out that the DOL’s position was based on its interpretation of the term “sales” as used in the *Code of Federal Regulations* (“CFR”). The high court stated that the definition suggested by the DOL has shifted even since the agency began filing amicus briefs on this issue in 2009. Thus, the DOL’s interpretation of its own regulations lacked “the hallmarks of careful consideration” and was not entitled to controlling deference.

The Supreme Court went on to discuss its own interpretation of the term “sales.” After noting that the CFR defines the term to include any “sale ... or other disposition” of a product or service, the Supreme Court concluded that the term “other disposition” was a “catchall phrase” that should be interpreted according to the context in which it is applied. Thus, “when an entire industry is constrained by law or regulation from selling its products in the ordinary manner, an employee who functions in all relevant respects as an outside salesman should not be excluded from that category based on technicalities.” The high court therefore concluded that, in the context of the industry, the PSRs made “sales” for purposes of the FLSA and were exempt outside salespeople under the FLSA.

Finally, offering another dose of common sense, the Supreme Court pointed out that the PSRs bore the “external indicia of salesmen” because they were hired based on sales experience, were trained to close sales, worked away from the office with minimal supervision, and were compensated on an incentive basis. Furthermore, since the petitioners each earned more than \$70,000 per year and had flexible schedules, they were “hardly the kind of employees that the FLSA was intended to protect.”

The Supreme Court’s ruling is a huge win for the pharmaceutical industry and a signal that both employers and the DOL should consider the practical implications of classifying a position as exempt or non-exempt under the FLSA.

For more information about this Advisory, please contact:

Michael D. Thompson
Newark
(973) 639-8282
mdthompson@ebglaw.com

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., founded in 1973, is a national law firm with approximately 300 lawyers practicing in 11 offices, in Atlanta, Boston, Chicago, Houston, Indianapolis, Los Angeles, New York, Newark, San Francisco, Stamford, and Washington, D.C. The firm is uncompromising in its pursuit of legal excellence and client service in its areas of practice: [Health Care and Life Sciences](#), [Labor and Employment](#), [Litigation](#), [Corporate Services](#), and [Employee Benefits](#). Epstein Becker Green was founded to serve the health care industry and has been at the forefront of health care legal developments since 1973. The firm is also proud to be a trusted advisor to clients in the financial services and hospitality industries, among others, representing entities from startups to Fortune 100 companies. Our commitment to these practices and industries reflects the founders’ belief in focused proficiency paired with seasoned experience. For more information, visit www.ebglaw.com.

© 2012 Epstein Becker & Green, P.C.

Attorney Advertising

ATLANTA BOSTON CHICAGO HOUSTON INDIANAPOLIS LOS ANGELES NEW YORK NEWARK SAN FRANCISCO STAMFORD WASHINGTON, DC	 EPSTEIN BECKER & GREEN, P.C.
Attorney Advertising	www.ebglaw.com