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California Supreme Court Refuses to Say Whether Pharmaceutical Sales Representatives are Exempt

June 2009

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By:

[Tyler M. Paetkau](#)

In connection with its review of a federal district court decision in *D'Este v. Bayer Pharmaceuticals*, the Ninth Circuit Court of Appeals certified two important questions to the Supreme Court of California, the answers to which could resolve several pending putative wage-hour class actions against pharmaceutical companies involving the exempt classification of their sales representatives. However, on June 10, 2009, the Supreme Court of California summarily denied the Ninth Circuit's request:

The request, made pursuant to California Rules of Court, Rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit is denied. (See *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999).)

It appears from the Supreme Court's summary denial of the Ninth Circuit's request, and its citation to its prior decision in *Ramirez*, that it believes it already answered the two certified questions in its *Ramirez* decision. In *Ramirez*, the court noted that "whether Ramirez was an outside salesperson within the meaning of applicable statutes and regulations is, like other questions involving the application of legal categories, a mixed question of law and fact." 20 Cal. 4th at 794. Indeed, "the predominant controversy" before the Court in *Ramirez* was "the precise meaning of the term 'outside salesperson,' a question of law."

The Ninth Circuit's Questions

The Ninth Circuit had certified the following two questions to the Supreme Court of California:

1. The Industrial Welfare Commission's Wage Orders 1-2001 and 4-2001 define "outside salesperson" to mean "any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." 8 Cal. Code Regs., tit. 8, §§ 11010, subd. 2(J); 11040, subd. 2(M). Does a pharmaceutical sales representative (PSR) qualify as an "outside salesperson" under this definition, if the PSR spends more than half the working time away from the employer's place of business and personally interacts with doctors and hospitals on behalf of drug companies for the purpose of increasing individual doctors' prescriptions of specific drugs?
2. In the alternative, Wage Order 4-2001 defines a person employed in an administrative capacity as a person whose duties and responsibilities involve (among other things) "[t]he performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers" and "[w]ho customarily and regularly exercises discretion and independent judgment." Cal. Code Regs., tit. 8 § 11040, subd. 1(A)(2)(a)(I), 1(A)(2)(b). Is a PSR, as described above, involved in duties and responsibilities that meet these requirements?

Job Duties and Compensation of Pharmaceutical Sales Representatives in *D'Este v. Bayer*

In the underlying case, the plaintiff, Gina D'Este, worked for Bayer Pharmaceuticals for 13 years as a pharmaceutical sales representative (PSR). Bayer's job description states that her job was to "[p]romote and sell Bayer Pharmaceutical Division's anti-infective products to targeted offices and hospital-based, high-potential physicians, including specialists." Bayer gave D'Este a roster of doctors and hospitals in her area and a list of Bayer products for which she was responsible. D'Este's job was to communicate information about her Bayer products to her roster of doctors and seek their non-binding commitment to write prescriptions for those products. She also was responsible for communicating with hospitals in her territory to influence them to add the Bayer products for which she was responsible to their formularies.

Bayer refers to its PSRs as a sales force and individual PSRs as salespersons; Bayer also trains its PSRs on sales skills. Specifically, Bayer trained D'Este in a "consultative" selling method of engaging doctors in a dialogue about the products in order to influence their prescribing behavior. Bayer trained D'Este on a message, and she had to adhere closely to the information provided by Bayer about its products. Otherwise, she had the freedom to develop her own strategy for communicating with and influencing doctors. D'Este learned to customize her sales presentations "based upon physician style, time constraints, prescribing habits, and managed care status." D'Este also received training in how to handle questions from doctors about the different products for which she was responsible. D'Este was responsible for planning speaking events and could choose the speakers from the list provided by Bayer.

Bayer compensated PSRs in part based on their success in increasing sales of Bayer products in

their areas. Bayer tracked prescriptions written and filled for D'Este's list of products by the doctors in D'Este's territory. D'Este was rewarded when sales figures exceeded certain quotas. D'Este earned between \$81,000 and \$103,000 per year during the 2000-2004 period at issue in the case.

The unique duties of PSRs as a non-traditional "sales force," resulted in the Ninth Circuit's certified questions to the Supreme Court of California. Unlike more traditional sales representatives, PSRs do not complete sales transactions directly with doctors. PSRs do not receive any payment from doctors for Bayer products, and do not sign binding contracts for sales with doctors. Doctors do not place orders for Bayer products with PSRs. Rather, PSRs are limited to influencing doctors to increase the number of prescriptions they write for each drug. D'Este also solicited hospitals to include Bayer pharmaceuticals on their formularies, and on occasion signed contracts with hospitals to do so. The hospitals, however, would buy the pharmaceutical products from a wholesaler, not from D'Este or Bayer.

As a PSR, D'Este had flexibility regarding how she spent her day. She developed her own schedule for meeting with the doctors on her list. She received little or no daily supervision, and saw her manager once every six to eight weeks. D'Este could take care of personal obligations during the day, although Bayer expected her to make eight to 10 calls per day on doctors in the field. D'Este alleged that she routinely worked more than eight hours a day and more than 40 hours a week. She claimed that she also often worked weekends. In addition, her job required that she frequently have lunch and dinner with doctors. During the course of her employment, she regularly had working lunches with doctors at least three times a week.

During the course of her employment at Bayer, D'Este was treated as an exempt employee. She did not receive any additional overtime compensation or meal breaks, but she was also not required to keep or maintain set hours.

In 2004, D'Este left Bayer after Bayer reduced its workforce. In 2007, she sued Bayer in California state court on behalf of herself and others similarly situated, claiming that her former employer had improperly classified her as an exempt employee and that she was entitled to back pay and damages under California's wage and hour laws. The district court granted summary judgment in favor of Bayer, finding that D'Este was exempt under California's outside sales exemption and declining to reach the question whether D'Este was exempt under California's administrative exemption. D'Este appealed to the Ninth Circuit Court of Appeals.¹

The Ninth Circuit's Analysis

The Ninth Circuit first noted that "the question whether PSRs are exempt under California's outside salesperson and administrative exemptions is the central issue in multiple class action lawsuits in the Ninth Circuit as well as in other circuits."² The Ninth Circuit opined that "[t]he answers given by the California Supreme Court will dispose of the three pending appeals currently before the Ninth Circuit, as well as guide the decisions in the other federal cases applying California law."

In referring the above two questions of California state law to the Supreme Court of California,

the Ninth Circuit wrote, "[i]n order to assist the California Supreme Court in evaluating our request, we briefly explain why we believe there is no controlling precedent or clear state court guidance on the question whether PSRs are exempt under the outside salesperson exemption."

Outside Sales Exemption

California Labor Code section 1171 exempts an employee who is "employed as an outside salesperson" from the overtime pay requirement. The IWC's Wage Orders 4-2001 and 1-2001 define "outside salesperson" as someone whose job involves "selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." The Ninth Circuit observed that the "regulations do not further define these key terms, the IWC provides no authoritative guidance regarding how these regulations apply to PSRs, and the California Supreme Court has not construed the particular terms "selling" and "obtaining orders" so as to be instructive in this case." In the absence of any authoritative state construction, the Ninth Circuit turned first to the "plain language" of section 1171 and Wage Orders 1-2001 and 4-2001, finding "neither the plain language of the statute nor the language of the interpretive orders answer the question whether a PSR is an outside salesperson." D'Este claimed that the ordinary meaning of "selling" is the transfer of property for consideration. Similarly, D'Este argued that "obtaining orders or contracts" means acquiring a written direction to deliver property or obtaining a contractual agreement to exchange property for consideration. In other words, D'Este "contends that outside salespersons must consummate their own sales, and, because PSRs do not, they are not outside salespersons." Bayer argued that the plain language of the wage order does not require employees to consummate their own sales; that the exemption covers employees who engage in any part of the multiple-step process of selling or obtaining orders, and therefore does not require that the salesperson have the capacity to close a sale or receive a completed order. According to Bayer, D'Este is involved in selling because she is involved in the sales process and engaged primarily in "sales activities."³ Moreover, Bayer argued that D'Este is also involved in "obtaining orders" because she influences doctors to write prescriptions, which are "orders" under California law.⁴

The Ninth Circuit found the plain language of section 1171 and the Wage Orders to be susceptible to either D'Este's or Bayer's interpretation, and that the "California Supreme Court's guidance that 'exemptions from statutory mandatory overtime provisions are narrowly construed,'⁵ does not provide clear direction regarding which of the two interpretations the California Supreme Court would determine to be correct."

The Ninth Circuit also considered whether federal interpretations of the parallel exemption under the Fair Labor Standards Act provide any guidance in interpreting California's outside sales exemption. One California Court of Appeals has held that "[b]ecause the California wage and hour laws are modeled to some extent on federal laws, federal cases may provide persuasive guidance."⁶ However, "where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced."⁷ In *Ramirez*, the California Supreme Court noted that the IWC's interpretation of the outside sales exemption does not closely track the language of the analogous federal regulations defining an outside salesperson.⁸

The Ninth Circuit concluded, based on the above authority, that "interpretations of the federal outside sales exemption under the FLSA, including federal regulations and case law, may be of limited assistance."⁹

Administrative Exemption

As an alternative to finding the PSRs exempt as outside salespersons," the Ninth Circuit asked the California Supreme Court to answer its second question regarding the applicability of two key sections of the administrative exemption to pharmaceutical sales representatives.

Wage Order No. 4-2001 provides a detailed multi-element definition of "persons employed in an administrative capacity," which delineates the scope of the administrative exception. At issue in this case is: (1) whether, under California law, D'Este was engaged in work that "directly related to management policies or general business operations of his/her employer or his employer's customers"; and (2) whether she "customarily and regularly exercise[d] discretion and independent judgment." In determining whether D'Este was engaged in work that is "directly related to management polices or general business operations," the court sought guidance from Wage Order 4-2001, which provides that "[t]he activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205...."¹⁰ Section 541.205(b) explains that the "administrative operations of the business include the work performed by so called white-collar employees engaged in 'servicing' a business." This work includes "promoting sales." In addition, an employee must "perform work of substantial importance to the management or operation of the business." The parties dispute whether D'Este was "promoting sales" and whether she was engaged in "work of substantial importance to the management or operation of the business" as a matter of California law. The Ninth Circuit stated that "[n]o California case has addressed this issue."

The Ninth Circuit also found no clear state guidance on the second question, whether a PSR in D'Este's position "customarily and regularly exercise[d] discretion and independent judgment." One California Court of Appeals has held that an employee who merely relies on "skills and knowledge" does not qualify for this exemption.¹¹ In order to exercise "discretion and independent judgment," the employee must be involved in making decisions related to "matters of consequence," and which are of "real and substantial significance to the policies or general operations of the business of the employer or the employer's customers."¹² The Ninth Circuit observed:

In this case, the record establishes that D'Este had significant autonomy and decisionmaking authority with respect to designing and implementing a strategy for influencing doctors' prescribing behavior and hospitals' decisions regarding their formularies. On the other hand, D'Este's discretion was substantially constrained by Bayer's control over the message and target audience. Neither the language of the exemption nor the case law clearly answers the question whether, under California law, D'Este exercised "discretion and independent judgment" in this context. The one directly applicable federal case decided prior to the adoption of Wage Order 4-2001, *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 887 (E.D. Pa. 1982), found that

PSRs do exercise such responsibility.

What Happens Now

Given the California Supreme Court's refusal to provide guidance on the questions posed, other than a referral to its 1999 outside salesperson decision, *Ramirez v. Yosemite Water*, the Ninth Circuit will proceed with the *D'Este v. Bayer Corp.* putative class action and the other pending pharmaceutical sales representatives putative class action cases. The Ninth Circuit's Order states in relevant part: "If the California Supreme Court denies the request for certification, this case will be resubmitted automatically upon notice of that denial." Thus, the Ninth Circuit will now presumably decide in these cases whether the district court properly granted summary judgment in Bayer's favor, finding D'Este exempt under the California outside salesperson exemption and declining to reach the question whether she was exempt under the California administrative exemption. The Ninth Circuit will have to decide these questions with what it believes is little guidance as to the applicable California law regarding both the outside sales and administrative exemptions.

¹ On appeal, the Ninth Circuit consolidated the *D'Este v. Bayer* case with two other cases pending before the Ninth Circuit, *Barnick v. Wyeth*, 07-56684, and *Menes v. Roche*, 08-55286, both raising nearly identical state law claims.

² See *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. 07-00127 (C.D. Cal. Feb. 6, 2009); *Delgado v. Ortho-McNeil, Inc.*, No. 07-00263 (C.D. Cal. Feb. 6, 2009); *Rivera v. Schering Corp.*, No. 08-1742 (C.D. Cal. Aug. 14, 2008); *Brody v. Astrazeneca Pharm., LP*, No. 06-6862 (C.D. Cal. June 11, 2008); *In re Novartis Wage & Hour Litig.*, No. 06-1794, 2009 WL 63433 (S.D.N.Y. Jan. 12, 2009).

³ See *Walsh v. Ikon Office Solutions, Inc.*, 148 Cal. App. 4th 1440, 1454 (2007) (referring to cold calls, client visits, and face-to-face contacts as "sales activities").

⁴ See Cal. Bus. & Prof. Code § 4040(a) (defining prescription as "an oral, written, or electronic transmission order" that is "given individually for the person ... for whom ordered" and "[i]ssued by a physician" or other medical personnel).

⁵ *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 794 (1999); accord *Nordquist v. McGraw Hill Broad. Co.*, 32 Cal. App. 4th 555, 562 (1995),

⁶ *Nordquist*, 32 Cal. App. 4th at 562.

⁷ *Ramirez* 20 Cal. 4th at 798; accord *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 594 (2000).

⁸ *Ramirez*, 20 Cal. 4th at 796. Compare 29 C.F.R. § 541.500(a) (2004) (defining outside salesperson as "any employee whose primary duty is making sales ... or obtaining orders or

contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and [w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty"), with 8 Cal. Code Regs. § 11040 subd. 2(M) ("any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities") (emphasis added); see generally Cal. Div. of Labor Standards Enforcement, Opinion Letter, Outside Salesman (July 14, 1994), available at <http://www.dir.ca.gov/dlse/opinions/1994-07-14.pdf>.

⁹ See *Ramirez*, 20 Cal. 4th at 797 ("By choosing not to track the language of the federal exemption and instead adopting its own distinct definition of 'outside salespersons,' the IWC evidently intended to depart from federal law and to provide, at least in some cases, greater protection for employees.").

¹⁰ 8 Cal. Code Regs., tit. 8, § 11040 subd. 1(A)(2)(f); accord *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1129 (9th Cir. 2002).

¹¹ *Nordquist*, 32 Cal. App. 4th at 563.

¹² *Id.*, see also *Combs*, 159 Cal. App. 4th at 1254.

[Tyler M. Paetkau](#) is a Shareholder in Littler Mendelson's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Paetkau at tpaetkau@littler.com.