Cooley

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In a recent decision, the federal Second Circuit Court of Appeals decided that **outside pharmaceutical sales representatives were nonexempt employees, and therefore were entitled to overtime and subject to other nonexempt requirements**. The court found that: (a) these sales representatives did not qualify under the outside salesperson exemption to the overtime laws because they did not actually "sell" pharmaceutical products to anyone, including the physicians they called on, and (b) they did not qualify under the administrative exemption to the overtime laws because they did not exercise the requisite level of discretion and independent judgment. **This decision is especially important for pharmaceutical companies, and other employers in regulated industries that do not allow their outside representatives to actually sell products to customers. It suggests that such employers should evaluate their exempt classifications for all employees in positions similar to pharmaceutical sales representatives.**

The *Novartis* decision

In *In re Novartis Wage and Hour Litigation,* (2d Cir. July 6, 2010) No. 09-0437-cv, a class of thousands of Novartis "sales representatives" brought overtime and other wage and hour claims against Novartis, alleging they were improperly classified as exempt employees. The court analyzed various aspects of the sales representatives' job positions to determine whether they fit into either the outside salesperson exemption or the administrative exemption, and concluded that they did not meet the criteria for either exemption. Key to the court's decision was its deference to the opinion of the Secretary of Labor, as stated in an *amicus* brief filed by the Secretary in support of the appeal.

Outside salesperson exemption—do sales reps make sales?

Novartis sales representatives do not (and under federal regulations legally cannot) actually sell pharmaceuticals to physicians, pharmacies or patients. Rather, Novartis sells its products to wholesalers, which in turn sell them to individual pharmacies. Physicians write prescriptions that permit patients to purchase those products from the pharmacies. The sales representatives travel to various physicians' offices to promote Novartis's pharmaceutical products, hand out product samples, and attempt to get physicians to "commit" to prescribing Novartis products. However, they cannot sell products or samples to the physicians, no money ever changes hands, and the physicians cannot make binding commitments to prescribe Novartis products.

The *Novartis* court determined that because the sales representatives did not actually consummate sales, they could not fit within the outside salesperson exemption to the overtime laws. Rather, looking at the federal regulations regarding the definition of a "sale" and of "selling," the court found that when a sales representative "promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it," then **the employee is not making a sale as required by federal law and cannot be an exempt outside salesperson**.

Administrative exemption—do sales reps do exempt-level work?

Novartis also argued that their sales representatives fit within the administrative exemption to the overtime laws. The *Novartis* court rejected this argument, determining that the sales representatives did not have enough discretion or independent judgment to qualify for the administrative exemption. In making its decision, the court analyzed various aspects of the sales representatives' positions. The following briefly summarizes aspects of the Novartis sales representatives' positions that were considered relevant by the court:

Training. The sales representatives attended detailed trainings regarding sales techniques, methods for answering physician questions and specifications of Novartis products and the information they should give to physicians regarding those products.

Duties. Sales representatives developed a rapport with physicians using various techniques that they could tailor to each discussion based on the physicians' "social styles." They further built upon previous physician meetings to determine the future course of discussions, recognizing when particular messages had been persuasive and building upon them.

The representatives also visited physicians regularly, and were required by Novartis to visit a given physician a certain number of times per trimester. They also were required to promote a given drug a certain number of times per trimester, as determined by Novartis, and to inform physicians whether or not Novartis products were among those for which insurers would pay. They were required to deliver "core messages" regarding the products, but had no role in formulating those messages and were not allowed to deviate from them. They also had no role in planning Novartis's marketing strategy, and while they delivered reprints of clinical studies reporting findings about the products and other promotional materials developed by other Novartis employees, they were not involved in creating those materials and were not allowed to provide materials other than those given to them by Novartis.

In addition, sales representatives organized meals and other programs for physicians, which included speakers promoting Novartis's products. They were given budgets to manage for these events, within limits set by Novartis. Novartis also set the minimum number of events that it expected each representative to hold and maintained a list of cooperating doctors from which representatives were required to book speakers.

Supervision. Sales representatives reported to their district managers by telephone at least every week or two, sometimes daily, and their district managers accompanied them once or twice a month to observe and review their performance.

Compensation. Novartis received reports from about three-quarters of the pharmacies in a particular territory to determine whether and when prescriptions for its products were being filled. Sales representatives were paid up to 25% of their compensation as bonuses based on their performance with physicians, as shown by these reports.

The court held that under these circumstances there was no evidence that the sales representatives "have any authority to formulate, affect, interpret, or implement Novartis's management policies or its operating practices, or that they are involved in planning Novartis's long-term or short-term business objectives, or that they carry out major assignments in conducting the operations of Novartis's business, or that they have any authority to commit Novartis in matters that have significant financial impact." Therefore, **the sales representatives could not satisfy the administrative exemption**, and the employees were deemed nonexempt.

California/New York state law

Neither party argued that either California or New York law differed from federal law. The court thus found that the sales representatives did not qualify for these exemptions under either of those state's laws.

What this means

The *Novartis* decision is one of several recent decisions across the country in which courts have analyzed whether pharmaceutical company representatives in positions similar to Novartis's sales representatives are properly classified as exempt. Because this opinion was handed down from a federal appellate court, and considering the Secretary of Labor's influence on the decision, this opinion may have far-reaching effects for the pharmaceutical industry and other industries that are similarly regulated.

Our attorneys have deep experience in these issues as well as related class action issues. If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above. In addition, **we will be hosting a webinar for interested clients and friends** to address the ramifications of the *Novartis* decision and consider potential steps that employers with these issues should take moving forward. We will send out the invitation in a subsequent communication that will contain further information as well as

registration instructions.

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