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CLIENT ALERT

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Pharmaceutical Companies Await Judicial Clarity On Overtime Exemption For Sales Representatives

Over the last few years pharmaceutical companies have been the targets of lawsuits brought by sales representatives claiming they were denied overtime pay in violation of the Fair Labor Standards Act ("FLSA") and similar state laws. Lower court decisions on the proper classification of sales representatives have been widely divergent and unpredictable. Now, three appellate courts are poised to weigh in and should bring some needed clarity to the debate.

Those who have followed the onslaught of FLSA collective actions brought against pharmaceutical companies are all too familiar with the divergent and often unpredictable decisions reached by the lower courts in the last few years. These decisions have centered on the question of whether pharmaceutical sales representatives meet the criteria for the "outside sales" exemption under the FLSA. To qualify as an "outside salesperson" under the FLSA, an employee must have as his or her primary duty "making sales" or "obtaining orders or contracts." The Department of Labor regulations define "sale" to include "any sale, exchange, contract to sell, consignment of sale, shipment for sale, or other disposition."

To date, lower-level courts have been evenly split on this case, with half the courts finding the exemption applies and half coming to the opposite conclusion. Most recently, this split was highlighted by two federal court opinions, issued just one day apart, rendering opposite conclusions on the applicability of the outside sales exemption. *Kuzinski, et al. v. Schering-Plough Corp.*, U.S.D.C., D. Conn., No. 3:07cv233, and *Baum v. AstraZeneca*, U.S.D.C., W.D. Penn., No. 3:2007-cv-90.

In *Kuzinski, et al. v. Schering-Plough Corp.*, the U.S. District Court for the District of Connecticut denied Schering's motion for summary judgment, holding that pharmaceutical sales representatives do not "make sales" as defined by the FLSA and its implementing regulations and, therefore, do not fit the outside sales exemption. In reaching its conclusion, the Connecticut court rejected rulings of other district courts and discarded the rationale that sales representatives are an integral part of the overall sales cycle in the pharmaceutical industry since patients cannot purchase the products directly from the sales representative. Instead, the court held that because pharmaceutical sales representatives do not make sales to the ultimate purchaser (the patient) they do not "make sales" under the FLSA and do not meet the outside sales exemption.

In *Baum v. AstraZeneca*, however, the U.S. District Court for the Western District of Pennsylvania granted summary

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If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' labor and employment law practice covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws.

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judgment for AstraZeneca, concluding that pharmaceutical sales representatives *do* "make sales" and are exempt under the Pennsylvania Minimum Wage Act, which largely mirrors the FLSA. The Pennsylvania court noted that decisions to the contrary ignore the realities of selling in the pharmaceutical industry, including that sales representatives perform all the functions of outside salespersons, even if they do not (and cannot) sell directly to patients.

It is interesting, and perhaps unsettling, that these two courts were faced with virtually identical facts, yet came to opposite conclusions. The industry may soon get clarity, however, from the appellate courts. On *Schering*'s motion, the Connecticut court has authorized an immediate appeal to the U.S. Court of Appeals for the Second Circuit of its order denying summary judgment on the outside sales exemption. Similar appeals also are pending before the U.S. Court of Appeals for the Ninth Circuit in *Barnick v. Wyeth*, U.S.D.C., C.D. Cal., Case No. 07-3859; *D'Este v. Bayer Corp*., U.S.D.C., C.D. Cal., Case No. 07-3206; and *Menes v. Roche Laboratories*, U.S.D.C., C.D. Cal., Case No. 07-1444. Likewise, the U.S. Court of Appeals for the Third Circuit has been asked to review the district court's decision in *Smith v. Johnson & Johnson*, 3d Cir., Nos. 09-1223 and 09-1292. The outcome of these appellate court decisions, whatever it is, will have widespread ramifications for the pharmaceutical industry and could have a significant impact on the future of FLSA litigation against the industry as a whole.

For now, pharmaceutical companies can do more than just wait for these cases to work their way through the courts. With advice and guidance of legal counsel to protect any privileged information from disclosure, employers can take steps to minimize their exposure and put themselves in the best position to convince courts to rule in their favor.

For example, pharmaceutical companies can review and tailor their job descriptions and employment policies to ensure that they satisfy the requirements of the FLSA and applicable state exemptions to the greatest extent possible. Companies also can tailor their sales training materials to better reflect the focus on selling as part of the sales representatives' job duties. In addition, such employers can examine their timekeeping and compensation systems and look for ways to minimize overtime and enhance their ability to track actual employee working time to better disprove claims that employees worked more time than they actually did.

While these steps may not prevent a government audit or collective action litigation, they can put an employer in the best posture to defend these types of actions and reduce the risk of an adverse finding or judgment.

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