CLIENT ALERT: Court of Appeals Finds Pharmaceutical Representatives Not Exempt Under Federal and State Wage-Hour Law

The United States Court of Appeals for the Second Circuit has ruled that pharmaceutical representatives of Novartis are not exempt employees under federal or state law, finding that they do not meet the exemptions for outside sales or administrative employees.

The pharmaceutical representatives employed by Novartis make "sales" calls on physicians. However, the physicians do not buy pharmaceuticals from the representatives nor do they commit to buy because they are legally prohibited from doing so. Instead, the company sells its drug to wholesalers who, in turn, sell them to pharmacies. The physicians prescribe the drugs to patients who, in turn, purchase them from the pharmacies.

Regulations promulgated by the Secretary of Labor regarding the outside sales exemption, which the Court found were entitled to "controlling" deference, require that in order to meet the outside sales exemption, an employee's primary duty must be making sales. This primary duty requirement is to be contrasted with employees whose duty is to promote sales by other persons.

The Court concluded that the act of making sales calls by the Novartis drug representatives did not meet this standard. The Court found the "sales" calls by pharmaceutical representatives to be promotional activities. The representatives provide physicians with: information about the benefits of a particular drug; reprints of clinical studies reporting findings about the drugs; information as to whether insurers will pay for the drugs; and free drug samples. While the drug representatives encourage physicians to prescribe the company's products, no binding commitments are obtained from the physician.

The Court also rejected the contention that Novartis pharmaceutical representatives fall within the exemption for employees employed in a *bona fide* administrative capacity. That exemption requires that (1) employees

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earn at least $455.00 a week; (2) have a primary duty consisting of "the performance of office or non-manual work directly related to the management or general business operations of the employer's customers; and (3) the "primary duty" must "include the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. §541.200.

The Court focused solely on the third prong of the test and found that the pharmaceutical representatives did not exercise discretion or independent judgment in the performance of their primary duties. (The United States Court of Appeals for the Third Circuit reached a different conclusion in the case of a Senior Professional Sales Representative of Johnson and Johnson.) There was no evidence that the representatives had authority to negotiate or bind the company on any matters of significance. Further, they had no authority to deviate from established policies and procedures without prior appeal.

Because no party argued that the state requirements of New York and California law were different in any meaningful sense, the Court vacated the lower court's ruling that the pharmaceutical representatives were exempt from payment of overtime under state law.

The effect of the Court's ruling allows Novartis' pharmaceutical representatives to proceed with their lawsuit seeking overtime pay under federal and certain state laws. The judgment covers approximately 2500 pharmaceutical representatives employed by Novartis from March 2000 to April 2007 in California, New York and other states where employees opted to join the action.

This class action is yet another example of the complex issues related to the payment of wages. Employers are encouraged to work with their MBJ attorney to address potential issues related to minimum wage, overtime, and the status of an employee as exempt or non-exempt under state and federal law.

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