

No Overtime For Pharmaceutical Sales Reps

February 15, 2011

The federal Ninth Circuit recently held that pharmaceutical sales reps of GlaxoSmithKline are "outside salesmen" and so not entitled to overtime pay under the FLSA. The DOL's regulations at 29 C.F.R. § 541.500(a) define an "outside salesman" as an employee whose "primary duty" is "making sales ... and ... who is primarily and regularly engaged away from the employer's place of business." It was clear that the PSRs were regularly engaged away from Glaxo's place of business; the issue was whether what they did was "making sales." The plaintiffs argued that a PSR's primary duties were promoting Glaxo's products in general and schooling physicians in drug development, neither of which, they contended, was "sales." The court, however, held that the primary duty of PSRs was to convince physicians to prescribe medications manufactured by the company. The court cited factors such as PSRs generally have prior sales experience; they are trained in sales methods and on how to make persuasive presentations to doctors; their compensation includes a 25% incentive if Glaxo's market share for a product increases within the PSR's territory; etc. The court reasoned that the fact the commitments of the doctors to use Glaxo's products was non-binding did not mean the commitment was not a sale; the court noted that pharmaceutical manufacturers value these commitments enough to increase commissions when a physician increases her use of the products. The Ninth Circuit's decision creates a split among the federal Circuits. The DOL last year convinced the Second Circuit that PSRs do not meet the requirements of the outside salesmen exemption.

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