Supreme Court Clarifies the Application of the FLSA Outside Sales Exemption for Pharmaceutical Sales Representatives Rights

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On June 18, 2012, the United States Supreme Court held in *Christopher v. Smithkline Beecham Corp.*, that pharmaceutical company sales representatives — often called "detailers" because they provide physicians with detailed information about pharmaceutical products — are exempt from the overtime compensation requirements of the Fair Labor Standards Act ("FLSA") under the "outside sales" exemption. At issue was whether the exemption applied to detailers who, unlike traditional salespersons, do not actually take binding orders or transfer ownership of products to their customers. By concluding that detailers are nonetheless "outside sales" employees, the Supreme Court resolved an open question that affects nearly 90,000 employees working in similar roles within the pharmaceutical industry.

The case began when a class of former detailers sued Smithkline, claiming that they were owed compensation for overtime hours. Because of the regulatory environment applicable to pharmaceutical companies, detailers cannot sell products to physicians or patients. Rather, in order to protect physicians' independence to prescribe medications, detailers can only promote products and obtain non-binding commitments from physicians to prescribe products in appropriate circumstances. Thus the detailers argued that they were not exempt "outside sales" employees because they did not actually sell anything. Both the federal District Court for the District of Arizona and the Ninth Circuit Court of Appeals disagreed, holding that the detailers' argument elevated form over substance and that they were still "selling" within the meaning of the "outside sales" exemption. Shortly before the Ninth Circuit's decision, however, the Second Circuit Court of Appeals reached the opposite conclusion in a similar but separate case.

In order to resolve the split between the Ninth Circuit and the Second Circuit, the Supreme Court agreed to hear the case. It sided with the Ninth Circuit, concluding that detailers are exempt "outside sales" employees because Congress had intended the exemption to apply not just to those in traditional mode of selling, but to employees engaging on other similar "dispositions of products" as well. In its decision, the majority also took issue with the position asserted by the U.S. Department of Labor. The DOL, several years after the litigation had started, had intervened in the Second and Ninth Circuit cases and sided with the detailers, asserting that regulations governing the "outside sales" exemption applied narrowly only to persons who actually took orders or transferred title to products. The Court refused to defer to the DOL's interpretation, however, because it arose in the course of the litigation. The Court explained that under these circumstances, deferring to the DOL's interpretation would amount to imposing an unfair burden on an entire industry which had neither reasonable notice nor the opportunity to challenge the Department's interpretation.

While the decision obviously affects the pharmaceutical industry, it has implications for sales employees in other industries as well. By rejecting a narrow interpretation of the exemption, the *Smithkline* decision suggests that sales employees may fall under the "outside sales" exemption, even if they do not actually obtain orders or binding commitments from customers.

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