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Sales Representative Overtime Lawsuits Continue to Disrupt the Pharmaceutical Industry

By now most in the pharmaceutical industry have heard about the wave of litigation by sales representatives seeking overtime pay. Almost all the big names in the pharmaceutical industry have been targeted by these lawsuits. Despite some early victories in favor of the industry, two recent court decisions indicate that the fight is far from over.

Years ago, many assumed that overtime was for blue-collar workers in factories, not sharply dressed, college educated, and highly paid company representatives. But a growing trend in employment litigation has challenged that assumption. Indeed, employers in virtually every industry have faced class action and "collective action" lawsuits on behalf of employees who traditionally were thought to be exempt from overtime, seeking three or more years' worth of back pay. A number of employers have paid tens of millions of dollars to settle such claims.

Overtime Laws and the Rise of Overtime Litigation

Overtime pay is provided for under a Depression-era federal law known as the Fair Labor Standards Act ("FLSA"), which is enforced by the federal Department of Labor ("DOL") and through civil litigation in state and federal courts. Many states have their own minimum wage and overtime laws which are coextensive with the FLSA, and some state laws are more onerous for employers than the federal law.

Under the FLSA, all employees are entitled to overtime (a "time and a half"

premium) for all time worked in excess of 40 hours per week, unless the employer can show that Congress has expressly exempted such employees from coverage. The FLSA contains a number of exemptions, including exemptions for bona fide executive, administrative, and professional employees (generally referred to as "white collar" employees) and for "outside sales" employees. Most state laws also exempt these types of employees, but they are not all the same.

The penalties for non-compliance can be stiff. Employers who fail to pay overtime to non-exempt employees must pay up to three years of back wages, liquidated damages equal to the back pay amount, and attorneys' fees. Where an entire category of employees is incorrectly classified as exempt, the amount of liability can be staggering.

Over the past decade or so, an ever-growing number of attorneys have taken notice of the FLSA and filed literally hundreds of class action and "collective action" lawsuits alleging failure to pay overtime. The dramatic increase in this type of litigation may be explained by a number of factors, not the least of which is the potential scale of recovery and the availability of attorneys' fees as a remedy. Generally, the employer has the burden to prove an exemption, so it is easier for a plaintiff's attorney to succeed with an overtime claim. Some of the reasons for increased litigation may reflect our changing culture. Technology has expanded the work day to include

many tasks that can be performed “after hours” or at home. Some employees feel compelled to “push back” against what they see as being overworked, even if they do not necessarily consider themselves underpaid.

Overtime Lawsuits by Pharmaceutical Sales Representatives

For many years, pharmaceutical companies and other employers in the life sciences industry have considered their sales representatives exempt from overtime laws. Indeed, most sales representatives are well-educated and well-paid individuals who regularly interact with health care professionals with minimal supervision. The assumption for most employers in the industry has been that sales representatives fall within one or more of the statutory exemptions in the FLSA as bona fide professional or administrative employees, or as outside sales employees.

The recent wave of lawsuits in the industry have challenged these claimed exemptions. DOL regulations interpreting the FLSA are quite rigid. To succeed on an exemption defense, the employer must be able to show that the employee meets all the required elements of specific tests set forth in the regulations. Each exemption has its own test.

Outside Sales Employee Exemption

To satisfy the “outside salesperson” test under the FLSA, the employer must show that the individual (1) has as his or her primary duty “making sales...or...obtaining orders...for which a consideration will be paid by the client or customer,” and (2) is “customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.” Attorneys representing plaintiffs have challenged the first prong of this test, arguing that sales representatives do not actually make sales or obtain orders, but instead merely “promote” pharmaceutical products to health care providers. They contend that no sale occurs until the patient buys a product at

a pharmacy, a transaction in which the sales representative does not participate.

Pharmaceutical companies have argued that their sales representatives perform all the functions of an outside sales person, even if they do not (and cannot) sell directly to the patient. They argue that the sales process should be viewed much more broadly. The sales representative’s job is to increase sales of the product by informing the physician of the approved uses and benefits of the product, and seeking commitments from the physicians to prescribe the product for appropriate patients. These activities are essentially the same as for any sales representative except for the regulatory environment in which they work. Since no sale of a product can occur without a prescription, the physician arguably acts as a “purchasing agent” for the patient. As in other contexts, pharmaceutical sales representatives also work in the field without direct daily supervision.

Bona Fide Administrative Employee Exemption

To qualify as an exempt “administrative employee” under the FLSA, an individual must satisfy a salary test and a duty test. For the salary test, the employer must show that the individual is paid on a salary basis (a predetermined amount each week, constituting all or part of the employee’s compensation, which is not subject to reduction due to the quality or quantity of work performed) at a level of at least \$455 per week. For the duty test, the employer must show that the employee’s primary duty (1) consists of “office or non-manual work directly related to the management or general business operations of the employer” and (2) “includes the exercise of discretion and independent judgment with respect to matters of significance.” Attorneys for sales representatives contend that their clients are not exempt because they do not satisfy either of these requirements.

Pharmaceutical companies have argued that, if sales representatives are not engaged in “sales,” then they are

performing work related to management and general business operations, such as advertising, marketing, public relations, or generally representing the company. Further, sales representatives must have detailed knowledge of the products they promote, and exercise discretion with respect to overall business planning, daily and weekly call planning, deciding which physicians to call on and how often, getting in to see physicians, responding to specific questions about their products, managing marketing budgets, and various other functions. Although there are regulatory and compliance restrictions on sales representatives’ interactions with health care professionals, most sales representatives work with minimal direct supervision and have significant discretion in the performance of their jobs.

Highly Compensated Employee Exemption

Because the FLSA is intended primarily to protect lower and middle-range wage earners, the “white collar” exemptions generally include individuals who have a total annual compensation of at least \$100,000 and who “customarily or regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.” For purposes of overtime under the FLSA, these employees are exempt as “highly compensated employees.” To satisfy the test for this exemption, an employer would have to show that an individual not only earns at least \$100,000 per year, but also regularly performs an exempt duty such as exercising discretion and independent judgment.

Developments in Pharmaceutical Sales Representative Cases

Although many overtime lawsuits have been filed on behalf of pharmaceutical sales representatives, the early results are encouraging overall. Thus far, there have been no verdicts against the industry and no widely reported settlements. In addition, a number of early favorable decisions seemed to stem the tide of

these lawsuits. In 2007, three cases in California were dismissed on summary judgment (See *D'Este v. Bayer Corp.*, U.S.D.C., C.D. Cal. No. 07-3206; *Menes v. Roche Labs. Inc.*, U.S.D.C., C.D. Cal., No. 07-0702; *Barnick v. Wyeth*, U.S.D.C., C.D. Cal., No. 07-3859). The courts were persuaded that the plaintiffs were exempt outside sales employees, notwithstanding arguments that they did not actually sell products directly to patients.

In dismissing the sales representative overtime lawsuits, the California courts relied on a combination of factors, including: the positions were advertised as sales positions; candidates were recruited based on sales experience; the job provided specialized sales training; the job entailed solicitation of new business; compensation was based on commissions; and the plaintiffs received little or no day-to-day direct supervision. It is important to note, however, these decisions are from lower level district courts rather than appellate courts, and therefore other employers cannot necessarily rely on them as settled law. Also, these cases were decided under California law and not under the FLSA. To the extent these decisions have any precedential value, arguably they apply only to claims under California law.

Some courts in California and other jurisdictions have declined to certify FLSA claims of pharmaceutical sales representatives as collective actions (so that they could encompass hundreds of individual claims) based on arguments that there are sufficient variations in their duties, pay structures, and reporting relationships to preclude litigation of all the potential claims in a single

proceeding. (See *Evancho v. Sanofi-Aventis U.S. Inc.*, U.S.D.C., D.N.J., No. 07-2266; *Silverman v. SmithKline Beecham Corp.*, U.S.D.C., C.D. Cal., No. CV 06-7272.) These courts concluded that determining whether an individual is exempt from overtime depends on too many individualized inquiries to warrant proceeding with a class or "collective action."

More recently, however, some courts have declined to dismiss lawsuits under the FLSA based on exemption defenses. A district court in New York recently concluded that there were genuine issues of material fact as to whether pharmaceutical sales representatives actually make sales, which the court deemed to require trial before a jury. (See *Coultrip v. Pfizer, Inc.*, U.S.D.C., S.D.N.Y., No. 07-4532.) If that case is not otherwise resolved before trial, it could be the first one of its kind to proceed to a jury verdict.

In another decision out of New York, a federal district court rejected the employer's outside sales exemption defense, and suggested that California courts had incorrectly interpreted the term "sales" and should not have dismissed sales representative overtime lawsuits. (See *Amendola v. Bristol-Myers Squibb Co.*, U.S.D.C., S.D.N.Y., No. 07-6088.) However, the court refused to certify the case as a collective action based on a finding that sales representatives likely would satisfy both prongs of the administrative exemption test. The court noted that the administrative exemption has been applied in many cases even though employees' discretion is limited by industry guidelines or regulations.

In light of these decisions, the future of these cases is unclear. Although the favorable California decisions on the California version of the outside sales exemption gave good reason for optimism, the more recent decisions indicate that much continued litigation lies ahead.

What to Expect in the Future

These decisions demonstrate that sales representative overtime lawsuits will continue to disrupt the pharmaceutical and life sciences industries for years to come. Hopefully, employers in the industry will continue to press for judicial interpretation of the outside sales and administrative employee exemptions under the FLSA to include sales representatives, both at the trial court and appellate court level. Perhaps more importantly, employers can take action now to increase the potential for successful defenses and possibly to reduce their exposure in the future. For example, employers should carefully examine the documents and processes that define the sales representative position and take steps to ensure that job descriptions, performance appraisals, and other working documents accurately reflect the nature of the jobs that sales representatives actually perform. Employers also can examine their time keeping and compensation systems and look for ways to minimize the working of overtime, while enhancing their ability to disprove claims that employees worked more time than they actually did.

It may be some time before the tide of litigation recedes. Employers should take action now to assess their potential exposure and strengthen their defenses.

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