

Porzio Compliance Alert

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The law firm of Porzio, Bromberg & Newman P.C. (Porzio) furnishes regulatory counseling, risk management and litigation avoidance counseling to pharmaceutical, biotechnology and medical device manufacturers. Our experience and dedication to the life sciences industry led us to create Porzio Pharmaceutical Services.

Porzio Pharmaceutical Services LLC (PPS) is committed to helping life sciences organizations comply with ever evolving marketing and sales regulations. PPS provides valuable, easily accessible information through Internet-based products and customized compliance services.

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U.S. Supreme Court declares pharmaceutical sales representatives exempt from overtime under the Fair Labor Standards Act By Kerri A. Wright, Esq.

On Monday, June 18, 2012, the United States Supreme Court handed the pharmaceutical industry a long-overdue victory on the issue of whether pharmaceutical sales representatives or detailers ("sales reps") are covered by the "outside sales" exemption under the Federal Fair Labor Standards Act ("FLSA"). Putting an end to a split between the circuits and years of uncertainty, the Supreme Court held that sales reps are exempt from the overtime provisions of the FLSA. In other words, sales reps are not entitled to overtime compensation.

In November 2011, the Supreme Court agreed to review the decision of the United States Court of Appeals for the Ninth Circuit in *Christopher v. Smithkline Beechman Corp.*, 635 F.3d 383 (9th Cir. 2011). This decision directly conflicted with the previous decision of the United States Court of Appeals for the Second Circuit in *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010). In two drastically different opinions, the two circuit courts came to opposite conclusions on the question of whether sales reps fell within the outside sales exemption. The Second Circuit concluded that sales reps did not "make sales" and, therefore, were not exempt from overtime requirements. The Ninth Circuit held that sales reps did in fact "make sales" in the only way possible given the highly regulated industry in which they were employed.

After declining to grant *certiorari* to review the decision of the Second Circuit, the Court agreed to review the Ninth Circuit's decision in *Christopher*. In agreeing to review the case, the Court was presented with two questions: (1) whether deference is owed to the Secretary of the Department of Labor's interpretation of the

FLSA's outside sales exemption and related regulations; and (2) whether the FLSA's outside sales exemption applies to pharmaceutical sales reps. After answering the first question in the negative, the Court quickly moved to the second question. In doing so, it undertook a detailed analysis of both the text of the FLSA and the duly promulgated regulations of the Department of Labor.

Throughout its decision, and beginning with the very first page, the Court's majority in this 5-4 decision took a decidedly pro-employer stance on this issue. It noted that Congress's intent in enacting the FLSA in 1938 was to promote the goal of "protect[ing] all covered workers from substandard wages and oppressive working hours." 567 U.S. ____ (2012) (citing *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981); 29 U.S.C. § 202(a)). It then clearly confirmed that sales reps are not forced to accept substandard wages or work oppressive hours and, thus, are "hardly the kind of employees that the FLSA was intended to protect." The Court noted that the petitioners in the case each earned an average of more than \$70,000 per year and spent between 10 and 20 hours outside normal business hours each week performing work related to his or her assigned portfolio of drugs in an assigned sales territory. The Court was not convinced that these employees needed protection under the statute.

Taking it a step further, the Court remarked that "it would be challenging, to say the least, for pharmaceutical companies to compensate [sales reps] for overtime going forward without significantly changing the nature of that position." Added to the challenge is the sheer number of sales reps employed across the country. Apparently concerned with the impact on the industry, the Court noted that the position has existed in the pharmaceutical industry in substantially its current form since at least the 1950s and, in recent years, the industry has employed more than 90,000 sales reps nationwide. The impact on the industry if it were required to monitor hours worked and compensate sales reps for overtime pursuant to the FLSA would have a devastating effect on the industry.

In a refreshing turn of events for employers across the country, not just in the pharmaceutical industry, the Court took a very practical approach to determining whether a sales rep is an "employee employed in the capacity of outside salesman." See 29 U.S.C. 213. On an issue that clearly could have gone either way (and had done so before different courts), the Court rejected the petitioner's argument that only pharmacies actually "make sales." It noted that such an argument was "formalistic" and inconsistent with the "realistic" approach that the exemption was meant to reflect.

Given the recent, and continuing, onslaught of FLSA individual and collective action lawsuits, employers across the country are hopeful that this decision forecasts a more "realistic" and employer-friendly approach by courts to these types of cases. At least for the pharmaceutical industry, the forecast is clear -- the uncertainty as to sales reps is over.

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