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Supreme Court Is Sold On Outside Sales Exemption for Drug Company Reps

The United States Supreme Court has ruled in *Christopher v. SmithKline Beecham Corp.*, __ U.S. __, No. 11-204 (June 18, 2012), that pharmaceutical sales representatives for GlaxoSmithKline (formerly SmithKline Beecham) qualify for the outside sales exemption under the Fair Labor Standards Act ("FLSA"). The decision is a win for all employers, not just for the pharmaceutical industry. In particular, in reaching its holding, the Court declined to give deference to the U.S. Department of Labor's (DOL's) interpretation of the outside sales exemption. This rejection of the DOL's interpretation is almost certain to impact not only other exemption cases but also other hot-button wage and hour cases in which the DOL's proffered interpretation of the law may be a pivotal factor.

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The primary question in *Christopher v. SmithKline Beecham* was whether pharmaceutical sales representatives make "sales" as defined under the FLSA. The FLSA and applicable regulations define "sales" to mean "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *See* 29 U.S.C. § 203(k); 29 CFR § 541.501(b). More specifically, the Supreme Court had to resolve whether the sales representatives are engaged in "sales" when their main function is to persuade a physician to prescribe the company's product for a patient's use rather than to sell the product itself.

The DOL offered its first answer to this issue in an *amicus* brief filed in the Second Circuit Court of Appeals in 2009. There, the DOL announced a rather ambiguous interpretation of "sales," which rendered the pharmaceutical sales representatives non-exempt under the FLSA. The DOL reasoned that a "sale" for purposes of the outside sales exemption required a "consummated transaction directly involving the employee for whom the exemption is sought." But after the Supreme Court granted certiorari in the *SmithKline* case, the DOL asserted an even narrower interpretation, taking the position that an employee does not make a sale unless he or she actually transfers title to the property at issue.

In the new decision, all nine justices declined to give deference to the DOL's view. Although courts will ordinarily defer to an agency's interpretation of an ambiguous regulation, even when advanced in a brief, such deference is not warranted where there is reason to suspect that the agency's view lacks "fair and considered judgment." Noting that

the DOL's interpretation could impose massive liability on an industry for conduct that occurred well before the DOL announced its view in 2009 (indeed, for decades, pharmaceutical representatives were treated as exempt without any action by the DOL) and that the DOL's interpretation was unpersuasive (and actually inconsistent with regulations), the Court refused to defer to the DOL's interpretation that "sale" meant transfer of title.

Having declined to defer to the DOL's interpretation, the Court turned to the key issue in the case – whether pharmaceutical sales representatives are engaged in selling. Due to industry regulations, pharmaceutical sales representatives cannot actually sell drugs to end-users; *i.e.*, the patients who use the product. Based on this fact, the sales representatives argued that they are merely engaged in promotional work, *i.e*., they provide information to physicians and "promote" products to influence physicians to write prescriptions for those products. In contrast, the company argued that the prescribing physicians are the real customers because they are authorized to write prescriptions and give nonbinding commitments to the sales representatives to prescribe the company's products. The company also pointed out that pharmaceutical sales representatives have all the other traditional indicia of sales people: they are hired for their sales experience; they are trained on sales techniques; they work away from the office, with minimal supervision; they are rewarded for their efforts vis-à-vis incentive compensation; and they do not have to clock in or out or otherwise track their time.

The majority (5-4) of the justices agreed with the company. Looking to the FLSA's definition of "sales," the Court noted that the FLSA exempts anyone employed "*in the capacity*" of an outside salesperson. The Court held that this phrase permits a functional inquiry into whether, in the context of a particular industry, an employee is engaged in sales. The Court also noted that the examples of sales provided in the FLSA regulations are intended merely to be illustrative. Further, the Court explained that the regulations' catch-all "other disposition" category reasonably could be interpreted to include an arrangement that, within a particular industry, is tantamount to a sale. In light of this, the Court concluded that pharmaceutical sales representatives were exempt, noting that a nonbinding commitment (the most they can do) is the kind of arrangement in this particular industry that constitutes a sale.

While this decision is a big win for the pharmaceutical industry, it is an even bigger potential win for employers who are fighting cases in which the DOL is involved. The

unanimous rejection of the DOL's interpretation by the Court will almost certainly cause the DOL to rethink how it goes about providing guidance and issuing interpretations of frequently vague regulations.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or M. Michael Cole (mmc@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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