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Supreme Court Reaffirms Long-Held View of Outside Salesperson Exempt Status

By Suzanne M. Glisch

One of the consistently debated issues in employment law is whether an employee is exempt as defined by the Fair Labor Standards Act ("FLSA"), and therefore not subject to the FLSA's requirements regarding overtime pay. The Supreme Court of the United States recently addressed this debate in the context of pharmaceutical sales representatives, who have long been considered exempt by employers within the pharmaceutical industry, as well as by the Department of Labor ("DOL") - or so it was thought.

In the case of *Christopher, et al. v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012), decided on June 18, 2012, the Supreme Court concluded that pharmaceutical sales representatives qualify as "outside salesm[e]n" for purposes of the FLSA and are therefore exempt from the FLSA's provisions regarding, among other things, overtime pay. This particular suit was filed by two former employees of SmithKline Beecham Corporation ("SmithKline"), Michael Christopher and Frank Buchanan. Like many pharmaceutical companies operating within the prescription drug industry, SmithKline - which develops, manufactures, and sells prescription drugs - focuses its direct marketing efforts on the medical practitioners who possess the authority to prescribe drugs, promoting its prescription drugs to physicians through a process called "detailing." During the detailing process, "detailers" or "pharmaceutical sales representatives" provide information to

physicians about the Company's products in hopes of obtaining a nonbinding commitment from the physicians to prescribe those products in appropriate cases. Because of the unique and heavily regulated nature of the pharmaceutical drug market, detailers cannot make direct sales of the drugs to physicians (unlike salespersons in other markets, such as for cars or clothes), but rather can only obtain from physicians a nonbinding commitment that the physician will consider prescribing a certain drug in appropriate cases.

Christopher and Buchanan were employed by SmithKline as pharmaceutical sales representatives, spending approximately 40 hours each week in the field during normal business hours and an additional 10 to 20 hours each week attending promotional events, reviewing product information, returning phone calls, responding to emails, and performing other miscellaneous tasks. Both Christopher and Buchanan were classified as exempt outside salesmen, received an annual gross salary of over $70,000, and were not required to punch a clock or report their hours. Christopher and Buchanan eventually sued SmithKline, challenging their exempt status.

The District Court granted summary judgment in favor of SmithKline, agreeing with the Company that Christopher and Buchanan were employed in the capacity of outside salesmen and were therefore exempt from the FLSA's overtime requirements. Subsequently, Christopher and Buchanan challenged the decision based on new interpretations of FLSA regulations by the DOL, which the DOL announced for the first time in a case then pending in the United States Court of Appeals for the Second Circuit, *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2010). The DOL's new interpretation announced for the first time the DOL's view that pharmaceutical detailers were not exempt outside salesmen, based on their new view that "a 'sale' for the purposes of [this exemption] requires a consummated transaction directly involving the employee for whom the exemption is sought." The District Court did not change its decision, and the United States Court of Appeals for the Ninth Circuit agreed with the District Court on appeal. Because the Ninth and Second Circuits had conflicting decisions on whether pharmaceutical detailers were exempt under the FLSA, the Supreme Court took the case.

The Supreme Court, in a 5-4 decision, agreed with the District Court and Ninth Circuit, holding that pharmaceutical detailers are exempt employees under the FLSA. In making its decision, the Supreme Court looked both at how much deference the DOL should be given in its interpretation of FLSA regulations and at the nature of the pharmaceutical detailer job in its unique and heavily regulated market. Typically, courts will give deference to the view of an agency, such as the DOL, that is interpreting its own regulations. Here, however, the Supreme Court found that the circumstances of the DOL's view did not entitle it to the normal level of deference. For approximately 70 years, detailers were viewed as exempt under the FLSA, and the DOL never initiated any enforcement actions against their employers or otherwise indicated that detailers should not be classified as exempt. However, in 2009 the DOL changed course, advancing for the first time its position that detailers were not

exempt under the FLSA. Further, rather than do so in a method that would invite public comment or give notice of the change, the DOL advanced its position in a court brief. The Supreme Court found that under these circumstances, the DOL's position was inconsistent and resulted in precisely the kind of unfair surprise against regulated parties that the Supreme Court's past cases warn. Thus, the new interpretation was not entitled to the standard level of deference.

Having given the DOL interpretation less deference, the Supreme Court then looked at the wording of the pertinent regulations and the nature of the detailer position. DOL regulations define an "employee employed *in the capacity* of outside salesman" to mean "any employee... [w]hose primary duty is... making sales within the meaning of [29 U.S.C. 203(k)]" and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. §§ 541.500(a)(1)-(2) (emphasis added). The referenced statutory provision, 29 U.S.C. 203(k), states that "'[s]ale' or 'sell' *includes any* sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*." (emphasis added).

The Court stated that the phrase "in the capacity" calls for a functional, rather than a formal, inquiry that "views an employee's responsibilities in the context of the particular industry in which the employee works." Similarly, it concluded that the use of the wording "includes any" ultimately meant that transactions that might not be considered sales in a technical sense could be included in the word "sale." Finally, the Court focused on the broad, catchall phrase of "other disposition," stating that in the unique regulatory environment in which pharmaceutical companies operate, the phrase could "reasonably be construed to encompass a nonbinding commitment from a physician to prescribe a particular drug, and nothing in the statutory or regulatory text or the DOL's prior guidance plainly requires a contrary reading." In this regard, the Court found that the DOL's interpretation that a sale requires a firm agreement/commitment was too narrow and defeated Congress' intent to define sale in a broad manner, and thus rendered the statutory language meaningless.

Finally, the Court looked at the circumstances surrounding Christopher's and Buchanan's employment to further support its conclusion that they were exempt. Specifically, Christopher and Buchanan were hired for their sales experience, were trained to close each sales call by obtaining the maximum commitment possible, worked away from the office with minimal supervision, were rewarded for their efforts with incentive compensation, and made a significant amount of money, removing them from a group of employees the FLSA was intended to protect. The Court therefore concluded that pharmaceutical sales representatives, such as Christopher and Buchanan, were exempt outside salesmen and thus were not owed overtime pay.

Had the nature of Christopher's or Buchanan's employment been different, or had the DOL gone about its change in interpretation differently, the decision may have come out differently. Thus, just because a certain job has long been

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viewed as exempt may not be a guarantee it will always be considered as such under the FLSA. For now, however, employers of detailers have some welcome guidance on the classification of their employees.