

# PUBLICATION

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## Are Pharmaceutical Sales Reps Exempt or Non-Exempt? U.S. Supreme Court Will Decide.

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An important employment issue which could impact many businesses has made its way to the U.S. Supreme Court. In *Christopher v. SmithKline Beecham Corp.*, the Court will consider whether pharmaceutical sales representatives are exempt under the Fair Labor Standards Act.<sup>1</sup> Several class actions filed throughout the country by sales representatives have challenged the propriety of paying representatives by salary instead of hourly wages. The circuit courts have split. For example, the *Christopher* case, a Ninth Circuit Court of Appeals' decision, determined sales representatives were exempt under the outside sales exemption.<sup>2</sup> The Third Circuit held the representatives were exempt under the administrative exemption as have several district courts:

- In *Smith v. Johnson & Johnson* and *Baum v. AstraZeneca*, the Court classified representatives as exempt under the administrative exemption.<sup>3</sup>
- In *Schaefer-Larose v. Eli Lilly and Co.*, the Court classified representatives as exempt under both the administrative and outside sales exemptions.<sup>4</sup>
- In *Ibanez v. Abbott Laboratories, Inc.*, the Court held that representatives were exempt under the administrative exemption.<sup>5</sup>

In contrast, the Second Circuit Court of Appeals refused to hold that the sales representatives were exempt under either the outside sales exemption or the administrative exemption.<sup>6</sup> Instead, it found persuasive an *amicus* brief filed by the Department of Labor. In the brief, the DOL outlined its interpretation of the exemptions. Specifically, the DOL argued that because the pharmaceutical sales representatives do not sell drugs directly to the patients and at most can only obtain verbal, non-binding commitments from physicians to prescribe the drugs, the representatives are not "making sales." In addition, as the pharmaceutical sales representatives do not make or implement management policies nor do they have the authority to establish policies or provide expert advice, the appellate court held they are not "administrators" and thus are not exempt. A district court in Houston followed the Second Circuit's reasoning; however, the case is on appeal to the Fifth Circuit Court of Appeals.<sup>7</sup>

The Supreme Court will resolve the split in the circuits over whether the sales representatives have been correctly classified by the pharmaceutical industry as exempt under the FLSA. In so doing, the Court should give some guidance on the outside sales exemption. In addition, the Court will likely address what deference should be accorded an *amicus* brief filed by a governmental agency. The DOL will argue its interpretation as set forth in its *amicus* brief should be accorded the greatest deference, while the pharmaceutical defendant will echo the sentiment expressed by the Ninth Circuit: the *amicus* brief short-circuits the Administrative Procedures Act and bypasses notice and comment requirements and therefore the DOL interpretation should not be entitled to any deference.<sup>8</sup>

We will continue to follow this important employment issue and keep you apprised of developments. Should you have any questions regarding how exemption status can potentially affect your workforce, or any other labor issue, please contact your Baker Donelson attorney.

- <sup>1</sup>. See *Christopher v. SmithKline Beecham Corp.*, 2011 U.S. LEXIS 8505 (Nov. 28, 2011)
- <sup>2</sup>. See *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 400-01 (9th Cir. 2011)
- <sup>3</sup>. *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010); *Baum v. AstraZeneca*, 372 Fed. Appx. 246 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 332 (2010)
- <sup>4</sup>. *Schaefer-Larose v. Eli Lilly and Co.*, 2010 U.S. Dist. LEXIS 105376 (S.D. Ind. 2010)
- <sup>5</sup>. *banez v Abbott Laboratories, Inc.*, 2011 U.S. Dist. LEXIS 131945 (E.D. Pa. Nov. 15, 2011)
- <sup>6</sup>. *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011)
- <sup>7</sup>. *Harris v. Auxilium Pharmaceuticals, Inc.*, 2010 U.S. Dist. LEXIS 102730 (N.D. Tex. Sept. 28, 2010).
- <sup>8</sup>. E.g., *Christopher*, 635 F.3d at 393.