

PUBLICATION

Overtime for Pharmaceutical Sales Reps Unsettled

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Based on differing court opinions, pharmaceutical companies must pay their sales representatives overtime in certain states, but not others. The U.S. Supreme Court has declined to weigh-in on widespread litigation over whether pharmaceutical sales representatives are entitled to overtime compensation under the Fair Labor Standards Act. A recent split has emerged among the U.S. Courts of Appeals which govern different geographic regions of the United States. The U.S. Court of Appeals for the Second Circuit, which covers New York, Vermont, and Connecticut, has ruled that pharmaceutical sales representatives do not qualify for the FLSA's outside sales exemption. Conversely, the U.S. Court of Appeals for the Ninth circuit, which covers California and much of the western United States, has ruled that pharmaceutical representatives are exempt as outside sales employees. Yesterday, the U.S. Supreme Court declined to hear the Second Circuit case, leaving intact the split of authority among the lower courts.

The outside sales exemption applies to employees whose primary duty is making sales. Employees who oppose the overtime exemption argue that pharmaceutical sales representatives are not making sales because they are not selling directly to patient, but instead, they are inducing health care providers to prescribe a drug. Pharmaceutical companies argue that their sales representatives are seeking to increase sales through their marketing efforts to health care providers, and the employees are compensated through commissions based on the success of their efforts in increasing sales.

For now, the issue remains unsettled outside of the Second and Ninth Circuits.