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### THIRD CIRCUIT HOLDS PHARMACEUTICAL SALES REPS ADMINISTRATIVELY EXEMPT FROM FLSA'S OVERTIME REQUIREMENTS

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In recent years, pharmaceutical companies have been the targets of lawsuits brought by sales representatives claiming they were denied overtime pay in violation of the Fair Labor Standards Act (FLSA) and similar state laws. Lower court decisions on the proper classification of sales representatives have been varied and unpredictable. These decisions have typically centered on the question of whether pharmaceutical sales representatives meet the criteria for the "outside sales" exemption under the FLSA.

To qualify as an "outside salesperson" under the FLSA, an employee's primary duty must be "making sales" or "obtaining orders or contracts." When deciding whether this exemption applies to pharmaceutical sales representatives, lower courts have struggled with the fact that the law prohibits sales representatives from selling pharmaceuticals directly to the doctors and hospitals they service. Rather, their job is to extol the benefits of certain drugs to doctors in their territory, in the hopes that the doctors will choose to prescribe that drug to their patients.

Although the focus of court decisions concerning the exemption status of pharmaceutical sales representatives is typically the outside sales exemption, a recent Third Circuit decision demonstrates that pharmaceutical defendants may also have success by arguing that such employees are exempt administrative employees. In *Smith v. Johnson & Johnson*, Johnson & Johnson moved for summary judgment on the grounds that the plaintiff, who had brought suit for unpaid overtime, was exempt from the FLSA's overtime requirement under both the administrative exemption and the outside sales exemption. The district court for the District of New Jersey agreed that the plaintiff was an exempt administrative employee and granted Johnson & Johnson's motion for summary judgment.<sup>[1]</sup> The plaintiff appealed this adverse grant of summary judgment.

The Third Circuit affirmed the district court's grant of summary judgment in favor of Johnson & Johnson. Holding that the plaintiff was an exempt administrative employee, the Third Circuit found that the plaintiff herself had testified to the independent and managerial qualities of her sales position.

According to the plaintiff, she had been responsible for developing a strategic plan to maximize sales in her territory. This, the Third Circuit found, satisfied the administrative exemption requirement that a plaintiff be engaged in non-manual work "directly related to the management or general business operations of the employer because it involved a high level of planning and foresight, and the strategic plan that [plaintiff] developed guided the execution of her remaining duties." The court also held that the plaintiff exercised independent judgment and discretion in the performance of her duties. During her deposition, the plaintiff had testified that she executed nearly all of her duties without direct supervision. She also described herself as "the manager of her own business who could run her own territory as she saw fit."

*Johnson & Johnson* may provide the pharmaceutical industry with new support to fight the growing wave of FLSA litigation it faces. In addition, the decision may guide cases pending before the Second and Ninth Circuit Courts of Appeals dealing with similar pharmaceutical sales representative exemptions. The cases pending before the Second and Ninth Circuits may also provide further clarity to the industry on the application of the outside sales exemption.

The outcome of these decisions will certainly affect the future of FLSA litigation against the industry. Employers must continue, however, to take steps to minimize their FLSA exposure by making sure their policies and practices satisfy the FLSA to the greatest extent possible. Pharmaceutical companies, like all employers, must closely examine their timekeeping and compensation policies and make sure all employees are aware of and adequately trained on these policies.

The Third Circuit's decision is available at:  
<http://www.ca3.uscourts.gov/opinarch/091223p.pdf>

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[1] We note that the district court denied Johnson & Johnson's motion for summary judgment on the ground that plaintiff was an exempt outside sales employee.

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