



October 2007

**Wage and Hour Trends:
Collective Overtime Claims Against Pharmaceutical Companies**

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In the past year, wage and hour class actions against pharmaceutical companies have become increasingly trendy. In virtually every major litigation market, plaintiffs' lawyers have targeted the industry with complaints that are, in many respects, nearly identical. They typically seek certification of national and statewide classes. Some of the more sophisticated firms on the plaintiffs' side have teamed up – from New York to Los Angeles – to coordinate efforts aimed at recruiting plaintiffs and marketing their claims to the public.

Typical Allegations

The complaints in these actions allege that members of the class of pharmaceutical “sales associates” and “sales representatives” have been misclassified as exempt under the Fair Labor Standards Act (FLSA) and state labor laws. Outside California, the complaints allege that the defendants failed to pay class members overtime for hours worked in excess of 40 hours per week. In California, the complaints also allege that the defendants failed to pay class members overtime compensation for hours worked beyond eight in any day.

The following allegations, drawn from the actual pleadings, are representative:

“Covered Positions” includes only those representatives that visited physicians for the purpose of promoting prescription medication or equipment for use in human medicine.

... [U]pon information and belief, Defendants' managers, with the knowledge and consent of corporate management, systemically violated the law throughout the United States, in the following respects:

- a. Failing to pay employees overtime compensation for hours worked in excess of forty (40) hours per week; and*
- b. Failing to maintain accurate records of employees' time.*

Defendants, through their corporate management deliberately trained, supervised, instructed, and authorized managerial employees to engage in the above unlawful practices and have ratified their actions thereafter, in order to enhance corporate profits and reduce their labor costs.

The complaints seek payment of unpaid overtime wages, plus liquidated (double) damages under federal law and penalties under state law, as well as attorneys' fees and interest.

The suits alleging violations of California's wage and hour laws raise issues unique to California. The California complaints allege that defendants violated California's unfair competition law (UCL) and seek restitution of unpaid wages going back four years. The California complaints also seek waiting time penalties for terminated employees equal to the regular rate of pay for thirty days. The California complaints also seek penalties for alleged failures to maintain proper work records (in the amount of \$100 per employee for the initial pay period in which a violation occurs and \$200 per employee for each violation in a subsequent pay period). Finally, the California complaints seek an additional hour of pay for each alleged missed meal period.

The "Outside Sales" Exemption Under Federal and California Law

At the crux of these lawsuits is the question of whether pharmaceutical sales representatives qualify under the FLSA's outside sales exemption and a related exemption under California law.

The federal exemption takes a *qualitative* approach, focusing on defining the employee's primary function. In a nutshell, if the employee's chief duty or primary function is making sales, then all of his duties are funneled into the exempt category. See *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 797 (1999).

On the other hand, California law, in the form of the Industrial Welfare Commission's Wage Order No. 7, takes a purely *quantitative* approach, focusing on whether the employee "works more than half the working time ... selling ... or obtaining orders or contracts." *Id.* To qualify under the outside sales exemption, a California employee must spend 51% or more of her time on sales-related activities. California cases are especially fact-intensive, requiring detailed analysis of the time an employee spends on various daily activities.

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