

## 7th Circ. Says Admin OT Exemption Covers Pharma Sales Reps

By **Abigail Rubenstein**

*Law360, New York (May 09, 2012, 6:15 PM ET)* -- The Seventh Circuit ruled Tuesday that Eli Lilly & Co. and Abbott Laboratories' sales representatives are overtime-exempt administrative employees, which experts say could give the drug industry a lifeline if the U.S. Supreme Court does not find pharmaceutical sales reps to be outside salespeople.

The pharmaceutical industry has long considered its sales reps — who are legally prohibited from closing sales — exempt from the Fair Labor Standards Act's overtime requirements, but in recent years a slew of class actions have challenged the industry's classification and the issue has been hotly contested in courts across the country. The issue has even made it to the Supreme Court, which heard oral arguments in April on whether the outside sales exemption applies to GlaxoSmithKline PLC's drug reps.

And on Tuesday, the Seventh Circuit became the most recent court to weigh in, finding that the FLSA's administrative exemption, which covers employees who primarily perform nonmanual work directly related to the business operations of their employer, applies to pharmaceutical sales reps.

"The decision gives the pharmaceutical industry a safety net in the event that the Supreme Court rules against the industry on the outside sales exemption," Seyfarth Shaw LLP partner Richard Alfred told Law360.

"If the Supreme Court rules against the industry on the outside sales exemption, then the administrative exemption is going to become the battleground for all the pending cases and for the many more cases we can expect to be filed," Alfred said. "Having the Seventh Circuit join the Third Circuit and rule contrary to the Second Circuit on the administrative exemption will help the defendants make their arguments in all these other cases."

The Third Circuit in February 2010 found a Johnson & Johnson sales rep subject to the administrative exemption, while the Second Circuit held in July 2010 that the administrative exemption did not apply to sales reps at Novartis Pharmaceutical Corp.

While the administrative exemption presents another way for pharmaceutical companies to try to fend off suits, a clear win at the Supreme Court on the outside sales exemption is the industry's best bet for shutting down the wave of suits, according to David Prather of Ford & Harrison LLP.

“If I were a pharmaceutical company and I had my choice as to which exemption to use, I would rather have the outside sales exemption because it is less fact intensive and has less gray, so I would be more comfortable relying on it, but if the Supreme Court rules that these employees are not making sales for the purposes of the outside sales exemption, at least they have the administrative exemption,” Prather said.

If GSK wins at the high court, overtime litigation involving pharmaceutical sales reps will come to an end, while there are many more legal battles to come if the companies must prove that the administrative exemption applies, Prather says.

In the present pair of cases, which the Seventh Circuit consolidated for its opinion, the employers argued that their reps were properly classified as exempt under both exemptions. But because the Seventh Circuit found the plaintiffs to be exempt under the administrative exemption, it did not consider the outside sales exemption.

Rejecting arguments made by the plaintiffs and the U.S. Department of Labor that the sales reps did not satisfy the requirements for administrative employees, the Seventh Circuit concluded that the sales reps' duties fell within those encompassed by the administrative exemption as it is defined by Labor Department regulations.

The appeals court held that the sales reps did work directly related to the general business operations of their employers because they served as the public face of their employer to the most important decision-maker regarding use of their companies' products, the prescribing physicians.

The court further determined that the workers exercised discretion and independent judgment because they spend most of their time unsupervised and must tailor their messages to respond to the circumstances when they visit a particular physician.

As such, the appeals court upheld a district court's grant of summary judgment to Lilly and reversed a trial court's judgment in favor of Abbott.

Attorneys for the plaintiffs in both suits told Law360 that they were considering their options in the wake of the ruling.

Lawyers representing Lilly and Abbott did not immediately respond to requests for comment.

The Supreme Court's decision on the outside sales exemption is expected in June.

Judges Frank H. Easterbrook, Kenneth F. Ripple and Michael S. Kanne sat on the panel for the Seventh Circuit.

The Lilly sales reps are represented by James A. O'Brien III of Seeger Weiss LLP. The Abbott sales reps are represented by Eric Kingsley of Kingsley & Kingsley APC.

Lilly is represented by Ellen E. Boshkoff of Faegre Baker Daniels LLP. Abbott is represented by Daniel E. Reidy of Jones Day.

The cases are Susan Schaefer-LaRose v. Eli Lilly & Co., case number 10-3855, James Jirak et al. v. Abbott Laboratories Inc., case numbers 11-1980 and 11-2131, in the U.S. Court of Appeal for the Seventh Circuit.

--Editing by Andrew Park.

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