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## THE FAIR LABOR STANDARDS ACT EXEMPTIONS AND THE PHARMACEUTICALS INDUSTRY: ARE SALES REPRESENTATIVES ENTITLED TO OVERTIME?

Steven I. Locke<sup>1</sup>

### INTRODUCTION

The pharmaceuticals industry is enormous. More than three billion prescriptions are written each year for approximately 8,000 products.<sup>2</sup> According to 2004 statistics, these prescriptions were filled by 54,000 retail pharmacies, and sales totaled \$168 billion.<sup>3</sup> Some more recent estimates put global sales totals in excess of \$820 billion.<sup>4</sup> Although drug companies engage in direct advertising, the bulk of promotions are aimed directly at doctors and other medical prescribers.<sup>5</sup> Reported amounts on this type of promotional spending vary, with the yearly range being between four and fourteen billion dollars.<sup>6</sup> This type of activity is done through face-to-face advocacy by sales representatives who visit doctors' offices and hospitals in order to meet with prescribing health care professionals.<sup>7</sup> The average primary care physician interacts with no less than twenty-eight sales representatives each week, and the average specialist interacts with fourteen.<sup>8</sup>

According to the Bureau of Labor Statistics, in 2006, the pharmaceutical industry employed 292,000 workers across the country.<sup>9</sup> Of this number, it has been

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2. Trends and Indicators in the Changing Health Care Marketplace, Kaiser Family Foundation [hereinafter Trends and Indicators], available at <http://www.kff.org/insurance/7031/print-secl.cfm> (cited in *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 70 (1st Cir. 2008) (Lipez, J., concurring in part and dissenting in part)).

3. *Id.*

4. Press Release, NAPRx Forecasts 4.5 – 5.5 Percent Growth for Pharmaceutical Market in 2009, Exceeding \$820 Billion (Jan. 7, 2009), available at <http://www.prlog.org/10164237-naprx-forecasts-45-55-percent-growth-for-pharmaceuticals>.

5. *IMS Health*, 550 F.3d at 46.

6. *Id.*

7. See, e.g., *IMS Health*, 550 F.3d at 70 n.17 (concurring and dissenting opinion) (collecting references Susan Okie, *AMA Criticized for Letting Drug Firms Pay for Ethics Campaign*, WASH. POST, Aug. 30, 2001 at A3 (the industry spent about \$4 billion in 2000); Memorandum from Rep. Harry Waxman, to the Democratic Members of the Committee on Government Reform, *The Marketing of Vioxx to Physicians*, at 6 n.15 (May 5, 2005) (the \$5.7 billion in 2003); Trends and Indicators, *supra* note 2, at 22 (\$7.8 billion in 2004); Sheryl Gay Stolberg & Jeff Gerth, *High-Tech Stealth Being Used to Sway Doctors Prescriptions*, N.Y. TIMES, Nov. 16, 2000 at A1 (\$13.9 billion in 1999).

8. *Id.* at 47; Consumers Union, *Prescription for Change*, <http://www.consumersunion.org/pdf/drugreps.pdf>.

9. Bureau of Labor Statistics, *Career Guide to Industries, Pharmaceutical and Medicine Manufacturing*, Table 1, *Employment of wage and salary workers in pharmaceutical and medicine manufacturing by occupation, 2006 and projected change, 2006-2016* (Dec. 18, 2007), <http://www.bls.gov/oco/cg/CGS009.htm> (accessed Apr. 29, 2009).

estimated that as many as 100,000 serve as sales representatives.<sup>10</sup> Employers prefer to give these sales representative positions and other related jobs to college graduates, particularly those with science backgrounds, and most new sales representatives must complete “rigorous formal training programs” involving their employer’s products.<sup>11</sup> Recent yearly salary estimates for sales representatives vary with some surveys indicating a range between \$85,000 and \$110,000.<sup>12</sup> Overall compensation, however, can increase dramatically depending on whether sales quotas for the sales representatives are met or exceeded.<sup>13</sup>

Presently, and as explained in detail below, a battle is raging in the courts as to whether these highly compensated sales representatives are entitled to overtime pay under the Fair Labor Standards Act (“FLSA” or the “Act”), or whether they are excluded from such an entitlement under one or more of the Act’s “exemptions.” As these cases are winding their way through the United States District Courts and appeals are starting to be taken, this article conducts a review of the courts’ various conflicting positions and charts a course for addressing the issue before the Courts of Appeals and ultimately the Supreme Court.

### THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act was enacted by Congress in 1938<sup>14</sup> to correct and eliminate labor conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>15</sup> The cornerstone of the Act was to provide minimum wages and overtime pay for covered workers.<sup>16</sup> According to these requirements, covered employees

10. See, e.g., Linda Wang, *Prescription for Success in Sales*, EMP. OUTLOOK, Vol. 85, No. 8 at 43-46 (Feb. 19, 2007), available at <http://pubs.acs.org/cen/employment/85/8508employment.html> (“In the past 10 [sic] years, the number of pharmaceutical sales representatives in the U.S. has tripled from 35,000 in 1995 to 100,000 today, says Bob Davenport, vice president and managing director for the consulting firm Hay Group”). See also John Mack, *Fewer Sales Reps Lead to Higher Costs*, Nov. 10, 2008, <http://pharmamktng.blogspot.com/2008/11/less-sales-reps-lead-to-higher-costs.html> citing Anthony Vecchione, *Sales Force Report: Loop of Faith*, MED. MARKETING & MEDIA, Nov. 2008, at 38, available at <http://www.mmm-online.com/Sales-Force-Report-Loop-of-Faith/article/120164/> (sales force numbers have been declining since 2005 when they peaked at 99,910 to 97,963 in 2006 and 94,308 in 2007. The number further declined in 2008 to 91,652). *Accord In re Novartis Wage & Hour Litig.*, 593 F. Supp. 2d 637, 641 (S.D.N.Y. 2009) (stating that of 13,000 employees nationwide, 6000 were sales representatives); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp.2d 459, 463 (S.D.N.Y. 2008) (company employs “about 2400” pharmaceutical representatives); Wang, *supra* note 10 (GlaxoSmithKline had approximately 10,000 sales representatives in 2007).

11. Trends and Indicators, *supra* note 2.

12. Pharmaceutical Sales Representative Salary Survey Data, Economic Research Institute (Apr. 29, 2009), <http://www.eri.com/index.cfm?fuseaction=research.Pharmaceutical-Sales-Representatives> (comparing salaries for Charlotte, North Carolina, Orlando, Florida, Phoenix, Arizona, Indianapolis, Indiana, Dallas, Texas, Atlanta, Georgia, Manhattan, New York, Houston, Texas, Los Angeles, California and Chicago, Illinois).

13. See, e.g., Clint Cora, *Starting Salary and Income Ranges for Pharmaceutical Drug Sales Representatives* (June 6, 2007), [http://www.yoursdaily.com/layout/set/print/money/starting\\_salary\\_and\\_income\\_ranges\\_for\\_pharmaceutical\\_drug\\_sales\\_representatives](http://www.yoursdaily.com/layout/set/print/money/starting_salary_and_income_ranges_for_pharmaceutical_drug_sales_representatives). *Accord* Mack, *supra* note 10 (average total compensation in 2007 for pharmaceutical sales representatives was \$94,200 which would be higher than the average salary).

14. Fair Labor Standards Act, Pub. L. No. 75-718, Ch. 676, 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201-19).

15. 29 U.S.C. § 202.

16. See 29 U.S.C. §§ 206, 207 (providing for minimum wage and overtime).

are entitled to a minimum hourly wage for each hour worked<sup>17</sup> and at least one and one-half times an employee's regular wage rate for hours worked over forty in a given workweek.<sup>18</sup> According to the Department of Labor, the minimum wage and overtime pay requirements are "among the nation's most important worker protections."<sup>19</sup>

The FLSA also contains various exemptions from the overtime requirement for, among others, executive, professional, and administrative workers, and outside salespersons.<sup>20</sup> These "exemptions" cover millions of workers.<sup>21</sup> As a matter of law, these exemptions are to be narrowly construed against the employer seeking to assert them and will be limited to those workers "plainly and unmistakably" within the exemptions' "terms and spirit."<sup>22</sup> The burden of invoking these exemptions rests with the employer.<sup>23</sup> According to the Department of Labor:

The legislative history [of the Fair Labor Standards Act] indicates that [the Act's] exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not easily be spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.<sup>24</sup>

Of particular relevance to overtime claims brought by pharmaceutical sales representatives are the exemptions for outside salespersons and administrative employees.<sup>25</sup>

17. See 29 U.S.C. § 206 (providing that presently the minimum hourly wage is \$7.25 under the FLSA).

18. 29 U.S.C. § 207.

19. Dep't of Labor, Wage & Hour Div., Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22122, 22123 (Apr. 23, 2004) [hereinafter Final Rule].

20. 29 U.S.C. §213(a)(1) (2009). The exemption for executive, professional and administrative employees is commonly referred to as the "white-collar exemptions." See, e.g., Scott D. Miller, *Revitalizing the FLSA*, HOFSTRA LAB. & EMPL. L.J. 1 (2001) (providing a comprehensive discussion of the FLSA and its history).

21. Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. SOC. PROBS. 495, 501 (2006).

22. *Arnold v. Ben Kanowsky, Inc.*, 362 U.S. 388, 392 (1960); *Davis v. Mountaire Farms, Inc.*, 453 F.3d 554, 556 (3d Cir. 2006); *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222 (2d Cir. 2002).

23. *Bilyou*, 300 F.3d at 222.

24. Final Rule, *supra* note 19, at 22123-24.

25. *Compare Ruggieri v. Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 254 (D. Conn. 2008) (finding sales representatives to be non-exempt and therefore covered by the FLSA's overtime provisions) with *In re Novartis Wage & Hour Litig.*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009) (concluding that sales representatives are exempt from the FLSA's overtime provisions both as outside salesmen and administrative employees).

### OUTSIDE SALESMAN EXEMPTION

Employers are granted an exemption from the FLSA's overtime requirements for outside salespersons as that term is defined by the Department of Labor's regulations.<sup>26</sup> Because the FLSA grants the Secretary of Labor the broad authority to define and delimit the exemptions to the statute's overtime requirements, the regulations have the force of law and will be controlling unless found to be arbitrary, capricious, or manifestly contrary to the statute.<sup>27</sup> The Department of Labor also promulgates regulations setting forth the Secretary's position on how the regulations should be applied. These interpretations, although lacking the force of law, may be relied upon for guidance by courts and litigants.<sup>28</sup>

The purpose of the outside sales exemption was explained by the United States Court of Appeals for the Tenth Circuit sixty years ago in *Jewel Tea Co. v. Williams*:

[The] salesman, to a great extent, work[s] individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day.<sup>29</sup>

The standard for whether an employee is exempt as an outside salesman is whether an employee's:

- (1) primary duty is:
  - (i) making sales as that term is defined in section 3(k) of the Act or
  - (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

26. 29 U.S.C. § 213(a)(1). See generally Allan J. Schwartz, *Who is employed in "capacity of outside salesman" within the meaning of § 13(a)(1) of Fair Labor Standards Act (29 U.S.C.A. § 213(a)(1)), as amended, exempting such employees from minimum wage and overtime requirements of Act*, 26 A.L.R. FED. 941 (1976).

27. *Freeman v. NBC, Inc.*, 80 F.3d 78, 82 (2d Cir. 1996).

28. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See also *Roth v. Perseus, LLC*, 522 F.3d 242, 247-48 (2d Cir. 2008) (stating that interpretations of regulations are given deference unless plainly erroneous or inconsistent with statutes or regulations).

29. *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941).

(2) who is customarily and regularly engaged away from the employer's place of business in performing the primary duty.<sup>30</sup>

The Act defines a "sale" to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."<sup>31</sup> The related regulations include in this definition the "transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property."<sup>32</sup>

The regulations also distinguish between promotional and sales work.<sup>33</sup> Promotional work actually performed incidental to, and in conjunction with, an employee's own outside sales or solicitations is exempt.<sup>34</sup> Promotional work that is incidental to sales made, or to be made, by someone else, however, is not exempt.<sup>35</sup> Examples of promotional work incidental to sales include a manufacturer's representative who visits a customer's shop for the purpose of putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves, or rearranging the merchandise.<sup>36</sup> By way of illustration, in 1999 the Department of Labor issued an opinion letter concluding that college recruitment counselors are not exempt as outside salespersons because they do not make sales of a college's services, or obtain contracts for those services.<sup>37</sup> This is because such work involves identifying customers, in this scenario students, which may lead to an application. This is because such work involves identifying customers, which in this scenario refers to students, which may lead to an application.<sup>38</sup>

If the employee at issue makes at least some sales or obtains some orders or contracts, then the outside sales exemption may apply, provided that such work constitutes the employee's primary duty.<sup>39</sup> The primary duty is the "principal, main, major or most important duty that the employee performs."<sup>40</sup> The determination is made based on all the facts of a case with emphasis on the character of the job as a whole,<sup>41</sup> although the time spent performing exempt work is a relevant guide.<sup>42</sup> Relevant factors include whether the job was advertised as a sales job, whether the employees were referred to as salespeople, whether they were provided with sales training, whether the employees received commissions, and whether

30. 29 C.F.R. § 541.500(a) (2004).

31. 29 U.S.C. § 203(k) (2009).

32. 29 C.F.R. § 541.501(b) (2004).

33. 29 C.F.R. § 541.503(a) (2004).

34. *Id.*

35. *Id.*

36. 29 C.F.R. § 541.503(b).

37. Opinion Letter No. 2138 (Apr. 20, 1999), 1999 DOLWH LEXIS 45.

38. *Id.*

39. The Department of Labor has stated that it would be improper to extend the outside sales exemption to someone who does not "in some sense make a sale." Dep't of Labor, Wage & Hour Public Contracts Div., Report and Recommendation of the Presiding Officer on Proposed Revisions of Regulations (Oct. 10, 1940) at 46. *See also* Final Rule, *supra* note 19, at 22162 (the exemption should apply only where the employee "in some sense, has made sales").

40. 29 C.F.R. § 541.700(a).

41. *Id.*

42. 29 C.F.R. § 541.700(b).

they operated independently.<sup>43</sup> All work that is “incidental to and in conjunction with the employee’s own outside sales or solicitations” and all work that furthers the employee’s sales efforts must also be considered exempt outside sales.<sup>44</sup> Initially, the inquiry focuses on whether the employee’s primary duty is to make actual sales.<sup>45</sup>

### ADMINISTRATIVE EMPLOYEES

Also relevant to the pharmaceutical sales representatives’ claims for overtime is whether these employees qualify as administrative employees and are therefore exempt. The FLSA exempts from coverage “any employee employed in a bona fide . . . administrative . . . capacity.”<sup>46</sup> To qualify, the employee must earn more than \$455 per week and his or her primary duties must include: (1) non-manual work directly related to the management or general business operations of the employer or the employer’s customers, and (2) the exercise of “discretion and independent judgment” with respect to “matters of significance.”<sup>47</sup> With respect to the first prong of the test, the work must be “directly” related to management or general business operations.<sup>48</sup> Work that is only indirectly or tangentially related to administrative functions will not be considered exempt.<sup>49</sup> The inquiry has two parts which consider both the type of work at issue and the level or nature of that work.<sup>50</sup>

In order to satisfy the first prong of the test, the employee has to “perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail service establishment.”<sup>51</sup> Advisory language from the Department of Labor in 2004 recognizes:

As explained in the 1949 Weiss Report, the administrative operations of the business include the work of employees “servicing” the business, such as, for example, “advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.” As the current regulations state at section 541.205(c), exempt administrative work

43. *Edwards v. Alta Colleges, Inc.*, No SA-03-CA-0538 OG (NN), 2005 U.S. Dist. LEXIS 3753, at 30 (W.D. Tex. 2005); *Nielsen v. Devry, Inc.*, 302 F. Supp. 2d 747, 756-58 (W.D. Mich. 2003). *See, e.g.*, *Hodgson v. Klages Coal & Ice Co.*, 435 F.2d 377, 382-84 (6th Cir. 1970); *Wirtz v. Charleston Coca Cola Bottling Co.*, 356 F.2d 428, 429-30 (4th Cir. 1966); *Wirtz v. Atlanta Life Ins. Co.*, 311 F.2d 646, 648 (6th Cir. 1963); *Jewel Tea Co.*, 118 F.2d at 208; *Olivo v. GMAC Mortgage Corp.*, 374 F. Supp. 2d 545, 550 (E.D. Mich. 2004); *Fields v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 971, 975 (W.D. Tenn. 2003); *Hodgson v. Krispy Kreme Doughnut Co.*, 346 F. Supp. 1102, 1104-07 (M.D.N.C. 1972); *Bradford v. Gaylord Prods., Inc.*, 77 F. Supp. 1002, 1004-05 (N.D. Ill. 1948); *Nunneley v. Farmers Ins. Exch.*, 564 P.2d 231, 235 (Okla. 1977).

44. 29 C.F.R. § 541.500(b).

45. *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1265 (10th Cir. 1999).

46. 29 U.S.C. § 213(a)(1).

47. 29 C.F.R. § 541.200(a).

48. Final Rule, *supra* note 19, at 22137.

49. *Id.*

50. Final Rule, *supra* note 19, at 22144.

51. 29 C.F.R. § 541.201(a).

includes not only those who participate in the formulation of management policies or in the operation of the business as a whole, but it “also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though those assignments are tasks related to the operation of a particular segment of the business.”<sup>52</sup>

The exemption covers a wide variety of workers who carry out major assignments in operating the business or those whose work affects operations to a substantial degree.<sup>53</sup> The Department of Labor has characterized such work as including:

but not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.<sup>54</sup>

The administrative/production distinction, however, is only one tool for determining the applicability of the exemption and will be dispositive only where the work involved “falls squarely on the production side of the line.”<sup>55</sup> The inquiry is fact specific and requires analysis of statutory and regulatory frameworks as a whole.<sup>56</sup>

With respect to the second prong of the test, the Department of Labor defines the exercise of discretion and independent judgment as the “comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.”<sup>57</sup> Here, the term “matters of significance” addresses the level of importance of the work at issue or the consequence of

52. Final Rule, *supra* note 19, at 22138.

53. *Id.*

54. 29 C.F.R. § 541.201(b).

55. Final Rule, *supra* note 19, at 22141 (“We do not believe that it is appropriate to eliminate the concept entirely from the administrative exemption but neither do we believe that the dichotomy has ever been or should be a dispositive test for exemption”). See *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) (quoted in Department of Labor position). That being said, some courts have nevertheless used the administrative/production dichotomy as a determinative factor in their analysis. See, e.g., *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 9 (1st Cir. 1997) (insurance marketers employed by company producing and marketing insurance policies were engaged in administrative work because they “are no way involved in the design or generation of insurance policies, the very product that the enterprise exists to produce and market”); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 903 (3d Cir. 1991) (sales employees working for electrical parts wholesaler were engaged in production work because employer’s business purpose was to produce sales of electrical products, the work that the employees did).

56. *Phase Metrics*, 299 F.3d at 1127; *Webster v. Pub. Sch. Employees of Wash., Inc.*, 247 F.3d 910, 916 (9th Cir. 2001).

57. 29 C.F.R. § 541.202(a).

that work.<sup>58</sup> The Department of Labor's non-exclusive list of factors to consider includes whether the employee:

- has authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting the operations of the business;
- performs work that affects the business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business;
- has authority to commit the employer in matters that have significant financial impact;
- has authority to waive or deviate from established policies and procedures without prior approval;
- has authority to negotiate and bind the company on significant matters;
- is involved in planning long- or short-term business objectives;
- investigates and resolves matters of significance on behalf of management; and/or
- represents the company in handling complaints, arbitrating disputes or resolving grievances.<sup>59</sup>

The list includes those activities "clearly related to servicing the business itself" and without which the employer "could not function."<sup>60</sup> This list does not include activities centering on what the business at issue specifically sells or provides. Rather, these are tasks that every business must engage in to function.<sup>61</sup> This requirement is met when the employee engages in running the business itself or determining its overall course or policies as opposed to the day-to-day carrying out of affairs.<sup>62</sup>

When two or three of these factors are met, the courts will generally find that the employee at issue is exercising discretion and independent judgment sufficient

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58. *Id.*

59. 29 C.F.R. § 541.202(b).

60. *Neary v. Metro. Prop. & Cas. Ins. Co.*, 517 F. Supp. 2d 606, 614 (D. Conn. 2007).

61. *Id.*

62. *Phase Metrics*, 299 F.3d at 1125.

to invoke the exemption.<sup>63</sup> When considering this test, it is important to note that use of well-established techniques, procedures, and specific standards in manuals or other sources will not qualify to satisfy the second prong of the test.<sup>64</sup> The employee must have the authority to make an independent choice without immediate direction or supervision.<sup>65</sup>

This requirement may be satisfied even if there is review at a higher level.<sup>66</sup> Accordingly, the exercise of independent judgment does not require that the decisions the employee makes have the type of finality that goes with unlimited authority and absence of review.<sup>67</sup> The authority may consist of making recommendations for action rather than actually taking action.<sup>68</sup>

The Department of Labor also recognizes that many employees in the same business may qualify for this exemption.<sup>69</sup> It is up to the employer to establish that this test has been satisfied in order for the exemption to apply.<sup>70</sup>

It should be noted that in 1945, the Department of Labor issued an Opinion Letter concluding that “medical detailists” employed by pharmaceutical companies are exempt from overtime coverage as administrative employees.<sup>71</sup> The work involved increasing the “use of subject’s product in hospitals and through physicians’ recommendations.”<sup>72</sup> According to the Department, this work required a “high degree of technical knowledge.”<sup>73</sup> The detailists’ duties were to:

train personnel, make special surveys and reports, and in general maintain th[e] company’s relations with the medical and associated professions. They are consulted with respect to individual nutri-

63. Final Rule, *supra* note 19, at 22143 (citing *Bondy v. City of Dallas*, 77 Fed. Appx. 731 (5th Cir. 2003)) (making recommendations to management on policies and procedures); *McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997, 1000-02 (8th Cir. 2003) (independent investigation and resolution of issues without prior approval and authority to waive or deviate from established policies and procedures without approval); *Cowart v. Ingalls Shipbuilding, Inc.*, 213 F.3d 261, 267 (5th Cir. 2000) (developing guidebooks, manuals, and other policies and procedures for employer or the employer’s customers); *Haywood v. N. Am. Van Lines, Inc.*, 121 F.3d 1066, 1071-73 (7th Cir. 1997) (negotiating on behalf of the employer with some degree of settlement authority and independent investigation and resolution of issues without prior approval); *O’Neill-Marino v. Omni Hotels Mgmt. Corp.*, 2001 WL 210360 \*8-9 (S.D.N.Y. 2001) (negotiating on behalf of the employer with some degree of settlement authority and developing guidebooks, manuals, and other procedures and policies for employer or the employer’s customers); *Stricker v. E. Off-Rd. Equip., Inc.*, 935 F. Supp. 650, 656-59 (D. Md. 1996) (authority to commit employer in matters that have financial impact); *Reich v. Haemonetics Corp.*, 907 F. Supp. 512, 517-18 (D. Mass. 1995) (negotiating on behalf of the employer with some degree of settlement authority and authority to commit employer in matters that have financial impact); *Hippen v. First Nat’l Bank*, 1992 WL 73554 \*6 (D. Kan. 1992) (authority to commit employer in matters that have financial impact).

64. 29 C.F.R. § 541.202(e).

65. 29 C.F.R. § 541.202(c).

66. *Id.*

67. *Id.*

68. *Id.* For a summary of these requirements, see Employment Standards Administration, Wage and Hour Division, U.S. Dep’t of Labor, Fact Sheet #17F: Exempt Outside Sales Employees Under Fair Labor Standards Act (FLSA) (Rev. July 2008).

69. 29 C.F.R. § 541.202(d).

70. Final Rule, *supra* note 19, at 22144.

71. See *Applicability of Exemption for Administrative Employees to Medical Detailists*, 1943-48 WAGES-HOURS LAB. L. REP. (CCH) ¶ 33,093 (May 19, 1945).

72. *Id.*

73. *Id.*

tional problems encountered by hospitals and physicians, such as determining whether the use of subject's product in a hospital was related to the occurrence of an epidemic. When necessary, they arrange for added deliveries of subject's product to take care of emergencies. They instruct the firm's salesmen in such technical matters as disease prevention, the chemical components of their product and nutritional research. They work virtually without supervision. . . .<sup>74</sup>

Based on these responsibilities, the Department of Labor concluded that the medical detailists were involved in matters related to general business operations requiring the use of discretion and independent judgment informed by special training and experience.<sup>75</sup> Accordingly, medical detailists were exempt from the Act's overtime requirements.<sup>76</sup>

### THE OVERTIME ANALYSIS AND PHARMACEUTICAL SALES REPRESENTATIVES

Court analysis of whether pharmaceutical sales representatives are entitled to overtime pay under the FLSA begins with a cluster of court decisions issued by the federal district court in the Central District of California addressing whether the sales representatives are exempt from overtime requirements under the California Labor Law's exemption for outside sales representatives.<sup>77</sup> The facts underlying the cases are similar.

In *Barnick v. Wyeth*, the plaintiff was hired into Wyeth's sales staff.<sup>78</sup> His essential job function was to "effect sales by educating and guiding health care professionals in their purchase and prescription of Wyeth products and by promoting treatment practices that are consistent with approved indications."<sup>79</sup> This central job duty is consistent across the industry.<sup>80</sup>

74. *Id.*

75. *Id.* See *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 887 (E.D. Pa. 1982) (pharmaceutical company detail person exempt under the FLSA as administrative employee).

76. *Id.*

77. See *Menes v. Roche Labs, Inc.*, No. 2:07-cv-01444-ER-FFMx, 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008); *D'Este v. Bayer Corp.*, No. CV 07-3206-JFW(PLAx), 2007 U.S. Dist. LEXIS 87229 (C.D. Cal. Oct. 9, 2007); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257 (C.D. Cal. 2007). See also *Yacobian v. Ortho-McNeil, Inc.*, No. 07-00127, 2009 U.S. Dist. LEXIS 27937 (C.D. Cal. Feb. 6, 2009); *Delgado v. Ortho-McNeil, Inc.*, No. 07-00263, 2009 U.S. Dist. LEXIS 28810 (C.D. Cal. Feb. 6, 2009); *Rivera v. Schering Corp.*, No. CV 08-1743-GW(JCx), 2008 U.S. Dist. LEXIS 111105 (C.D. Cal. Aug. 14, 2008).

78. *Barnick*, 522 F. Supp. 2d at 1258.

79. *Id.*

80. See, e.g., *Menes*, 2008 U.S. Dist. LEXIS 4230, at \*3 (The Sales Representative's job is "to inform medical personnel about Defendant's drugs in the hope that they will prescribe Roche products to their patients."); *D'Este*, 2007 U.S. Dist. LEXIS 87229, at \*1 ("[P]harmaceutical representatives . . . are responsible for promoting and selling Bayer's prescription pharmaceutical products to medical care providers, including primary care physicians, specialists, and hospitals."). See also *Amendola*, 558 F. Supp. 2d at 463-64 ("PRs are required to be in the field visiting medical providers from 8 a.m. to 5 p.m., and spend time in the evenings preparing for these visits. The goal of the visits is to influence the prescription practices of the providers."); *In re Novartis*, 593 F. Supp. 2d at 641 ("The primary function of the Reps is calling on physicians and giving them information about NPC's drugs."); *Ruggeri*, 585 F. Supp. 2d at 258 ("Plaintiffs' job duty was, centrally, to visit physicians and pharmacies

Barnick's responsibilities included calling physicians pre-assigned to a specific list to discuss Wyeth's pharmaceutical products, in this case two vaccines, Prevnar and FluMist, and two drugs, Altace and Protonix.<sup>81</sup> He spent, on average, between forty-five and forty-eight hours each week in the field and had a specific number of doctors he needed to see within a specified time period and a daily quota of calls to make.<sup>82</sup> Although his hours were not controlled, and he was rarely subject to direct supervision, the plaintiff was expected to work from 8:30 am to 5:00 pm and to log physician calls daily, file various reports, check his voicemail three times each day, and synchronize his computer once each day.<sup>83</sup>

Barnick did not, however, sell products directly to physicians.<sup>84</sup> Occasionally, he provided order forms for vaccines, and sometimes he filled them out.<sup>85</sup> The doctors would then order the vaccines from Wyeth and prescribe and administer the vaccines to patients, or prescribe drugs which would then be ordered through a pharmacy.<sup>86</sup>

The plaintiff referred to himself as a "salesperson" and was trained in sales techniques at numerous conferences throughout his employment where managers discussed sales data and sales strategies.<sup>87</sup> He was paid a yearly salary and received additional compensation tied into the sales he assisted in generating.<sup>88</sup> Further, half of Barnick's evaluation was based on meeting sales objectives for Wyeth's products.<sup>89</sup> The facts in this case are similar to those in *D'Este v. Bayer Corporation*<sup>90</sup> and *Menes v. Roche Laboratories*, both of which, as set forth above, were decided in the same judicial district.<sup>91</sup>

The plaintiffs in each case filed suit claiming, among other things, that they were never paid overtime under California's Labor Code.<sup>92</sup> Like the FLSA, the California Labor Code and the state Industrial Welfare Commission ("IWC") provide that outside salespersons are exempt from the state's overtime requirements.<sup>93</sup> According to the IWC, an outside salesperson is "any person, 18 years or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities."<sup>94</sup> The California

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in an assigned geographical territory and present information about, and samples of, Boehringer pharmaceutical products.").

81. *Barnick*, 522 F. Supp. 2d at 1258.

82. *Id.*

83. *Id.*

84. *Id.*; *In re Novartis*, 593 F. Supp. 2d at 642 (In fact, the sales representatives are prohibited from selling drugs directly to physicians.).

85. *Barnick*, 522 F. Supp. 2d at 1258-59.

86. *Id.* at 1259.

87. *Id.*

88. *Id.*

89. *Id.*

90. *D'Este*, 2007 U.S. Dist. LEXIS 87229, at \*1-3 (setting forth allegations).

91. *Menes*, 2008 U.S. Dist. LEXIS 4230, at \*2.

92. *Barnick*, 522 F. Supp. 2d. at 1260 (citing CAL. LAB. CODE § 510 (Deering 2009)); *D'Este*, 2007 U.S. Dist. LEXIS 87229, at \*3; *Menes*, 2008 U.S. Dist. LEXIS 4230, at \*2-3.

93. CAL. LAB. CODE § 1171; IWC Wage Order No. 4-2001(1)(C), CAL. CODE REGS. tit. 8, § 11070 (2009).

94. IWC Wage Order No. 4-2001(2)(M), available at <http://www.dir.ca.gov/IWC/IWCArticle4.pdf>.

analysis is quantitative and focuses on whether the employee spends more than fifty percent of his or her time in sales activities.<sup>95</sup> In *Barnick*, the court reasoned that the California exemption is similar to the FLSA exemption in that exempt outside salespersons under both statutes are those generally able to set their own schedules and are generally on the road, without the employer knowing what they are doing on an hourly basis.<sup>96</sup> As a result, it is difficult to control their hours or working conditions.<sup>97</sup>

Recognizing case law under the FLSA as persuasive authority,<sup>98</sup> and applying the factors collected from other FLSA cases, the court concluded that the plaintiff-pharmaceutical sales representative was exempt from California state overtime requirements as an outside salesperson because he was hired on the basis of his sales experience, to a position which both sides referred to as a sales position, he received specialized sales training at sales conferences, his pay was determined in part by the sales he generated, he had virtually no direct or constant supervision, and he occasionally solicited business.<sup>99</sup> Further, the plaintiff, although subject to quotas and assigned to a pre-determined list of physicians, was free to decide which physician to see and when.<sup>100</sup> Accordingly, the court determined summary judgment for the defendant was appropriate.<sup>101</sup>

In reaching this conclusion, the court found “unpersuasive” that the sales representative dealt with physicians rather than the end purchasers of the drugs being sold.<sup>102</sup> According to the court, because the doctors “control” the product’s ultimate purchase through their prescriptions, to conclude that the sales representatives are exempt would elevate the form of the salespersons’ work over its substance.<sup>103</sup> The court further concluded that while the Department of Labor’s interpretation of the FLSA distinguishes between promotional and sales work based on whether the employee obtained some type of commitment for sales, this reasoning was unpersuasive, and so the court declined to apply it under the California Labor Law.<sup>104</sup> Moreover, the fact that the employee’s work did not immediately result in some sort of commitment to buy was of no moment, especially where there was no other employee who reached out to confirm the sale.<sup>105</sup> Rather, this distinction better rested on whether the employees’ efforts were addressed to the general public ra-

95. *Barnick*, 522 F. Supp. 2d at 1261 (citing *Ramirez v. Yosemite Water Co., Inc.*, 978 P.2d 2, 9 (Cal. 1999)).

96. *Id.* (citing Cal. DLSE, Opinion Letter, Sept. 8, 1998, available at <http://www.dir.ca.gov/dlse/opinions/1998-09-08.pdf>).

97. *Id.*

98. *Id.* at 1262-63 (citing *Monzon v. Schaefer Ambulance Serv., Inc.*, 273 Cal. Rptr. 615, 623 (Cal. Ct. App. 1990); *Nordquist v. McGraw-Hill Broad. Co.*, 38 Cal. Rptr. 2d 221, 225 (Cal. Ct. App. 1995) (recognizing the interpretations of the federal statute as persuasive authority)).

99. *Barnick*, 522 F. Supp. 2d at 1262-63 (citing *Nielsen v. Devry, Inc.*, 302 F. Supp. 2d 747, 756-58 (W.D. Mich. 2003) (listing relevant factors)).

100. *Id.* at 1263.

101. *Id.* at 1265.

102. *Id.* at 1264.

103. *Barnick*, 522 F. Supp. 2d at 1264.

104. *Id.*

105. *Id.* at 1265

ther than an individual.<sup>106</sup> The *D'Este* and *Menes* courts reached the same conclusion applying similar reasoning.<sup>107</sup>

In the *D'Este* case, the litigants also presented the issue as to whether the sales representatives qualified as administrative employees, and were, therefore, exempt from the state overtime requirements under an alternative theory.<sup>108</sup> Because the district court found that the employees were outside salespersons, however, the issue was never decided.<sup>109</sup>

On May 5, 2009, the United States Court of Appeals for the Ninth Circuit in the *D'Este* case, which was consolidated with *Menes* and *Barnick* for the purposes of appeal, certified two questions to the Supreme Court of California:

1. [Under the Industrial Welfare Commission's Wage Orders] [d]oes a pharmaceutical sales representative (PSR) qualify as an "outside salesperson" under [the] definition [above], "if the PSR spends more than half the working time away from the employer's place of business and personally interacts with doctors and hospitals on behalf of drug companies for the purpose of increasing individual doctors' prescriptions of specific drugs?"
  
2. "In the alternative, Wage Order 4-2001 defines a person employed in an administrative capacity as a person whose duties and responsibilities involve (among other things) '[t]he performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers' and '[w]ho customarily and regularly exercises discretion and independent judgment.'" . . . Is a PSR, as described above, involved in duties and responsibilities that meet these requirements?<sup>110</sup>

In certifying Question 1, the Court of Appeals expressly noted that while interpretation of the FLSA may be relevant to the analysis of the IWC's interpretation of the outside sales exemption, any assistance in this regard "may be limited" because the IWC's exemption language does not closely track the language of the analogous federal regulations.<sup>111</sup> In certifying Question 2, the appellate court recognized that the administrative employee exemption under California law is to be treated in the same manner as the FLSA regulations.<sup>112</sup>

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106. *Id.*

107. *D'Este*, 2007 U.S. Dist. LEXIS 87229, at \*13-16 (also relying on cases decided under the FLSA as persuasive authority); *Menes*, 2008 U.S. Dist. LEXIS 4230, at \*3-7 (adding as a factor that the plaintiff in that case could identify and solicit physicians on her own).

108. *D'Este*, 2007 U.S. Dist. LEXIS 87229, at \*16.

109. *Id.*

110. *D'Este v. Bayer Corp.*, 565 F.3d 1119, 1120-21 (9th Cir. 2009).

111. *Id.* at 1124 (citing *Ramirez*, 978 P.2d at 9-10).

112. *Id.* at 1125 (citing CAL. CODE REGS. tit. 8 § 11040).

In the interim, while these cases are working their way through the appellate process, the California district court decisions have received mixed reviews in subsequent cases. In *In re Novartis Wage and Hour Litigation*, Judge Crotty in the federal district court for the Southern District of New York came to a similar conclusion on summary judgment when considering claims brought under the FLSA, California Labor Law and New York wage and hour law. Initially, the *Novartis* court decided the issue under the FLSA and New York law without reference to the California decisions despite the fact that those decisions relied on an FLSA analysis.<sup>113</sup> Here, the central issue was framed as whether the sales representatives were exempt because they actually executed “sales” within the meaning of the Act, or instead, engaged merely in non-exempt promotional activities.<sup>114</sup> This analysis is different than that applied by the California cases which focused more on other indicia, such as job title, past sales experience necessary to obtain the job, the nature of the job training, and whether compensation was on a commission basis.<sup>115</sup>

In answering this question in the affirmative, the New York district court first acknowledged the policy animating the outside sales exemption as explained by the Tenth Circuit:

*Jewel Tea* teaches that outside salespersons are exempt from the overtime requirement not because they “sell,” as that term is technically defined, but rather because they (1) generate commissions for themselves through their work and (2) work with minimal supervision, making adherence to an-hours based compensation scheme impractical. The *Jewel Tea* rationale is echoed in the DOL’s 2004 Final Rule, which notes that the “white collar” exemptions owe their existence to the fact that the employees they were meant to cover “typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement. . . . The DOL Final Rule also recognizes that the work done by these employees “was difficult to standardize to any time frame . . . making compliance with the overtime provisions difficult.”<sup>116</sup>

Applying this policy, the court then began its inquiry into whether the plaintiffs were actually engaged in sales.<sup>117</sup> In starting its analysis, the court recognized that any review required examination of the industry at issue.<sup>118</sup> In particular, the court

113. *In re Novartis*, 593 F. Supp. 2d at 648-53.

114. *Id.* at 648, 651.

115. See *supra* notes 98-101 and accompanying text.

116. *In re Novartis*, 593 F. Supp. 2d at 649.

117. *Id.*

118. *Id.* (citing *Nielsen*, 302 F. Supp. 2d at 755-56 (addressing the exemption in the context of the college admissions process); *Gregory v. First Title or Amer., Inc.*, No. 06-Civ.-1746, 2008 WL 150487 (M.D. Fla. Jan. 14, 2008) (addressing the exemption in the context of the title insurance industry where the plaintiff could not sell the insurance herself was nevertheless exempt because she “obtained orders”), *aff’d*, 555 F.3d 1300 (11th Cir. 2009)).

drew on a footnote from an earlier Minnesota decision that took place in the context of the medical devices industry, *Medtronic, Inc. v. Gibbons*.<sup>119</sup> In *Medtronic*, an employment contract case, the court noted that pacemakers are ultimately consumed by patients, not doctors or hospitals to which they are sold.<sup>120</sup> Nevertheless, the sale was based on a physician recommendation, and so sales efforts are focused on doctors and medical personnel.<sup>121</sup> As a result, the court in *Medtronic* reasoned that the term “customers” must include not only the hospital that pays for the product, but also the doctors who recommend its purchase.<sup>122</sup>

Similarly, reasoned the *Novartis* court, the physicians who prescribe pharmaceuticals are, in reality, the ones who control the purchase of the drugs by writing prescriptions.<sup>123</sup> Without the prescriptions, no sales can take place.<sup>124</sup>

Plaintiffs argue that “[Novartis] sells drugs to distributors. Distributors sell drugs to pharmacies. Pharmacies sell drugs to individuals.” . . . In other words, Plaintiffs ask this Court to conclude that the only true sales made by [Novartis] are to distributors. The Court cannot ignore reality. Distributors are not the end-users of [Novartis’s] products. If physicians did not prescribe [Novartis’s] products, patients would be unable to buy them and distributors would have no incentive to make purchases from [Novartis]. The purchase cycle commences with a prescription from physicians, who are therefore the appropriate target of the Reps’ sales efforts. When the physician writes a prescription for the [Novartis] product, then a sale can take place. Without prescriptions, patients cannot buy the drugs and there is no sale.<sup>125</sup>

The fundamental nature of this relationship is highlighted by the fact that Novartis spends in excess of \$500 million annually to have its sales representatives meet with physicians to get them to prescribe company products.<sup>126</sup>

This reasoning was subsequently endorsed and elaborated upon in the federal district court for the Western District of Pennsylvania in *Baum v. Astrazeneca LP*.<sup>127</sup> In that case, which was brought under Pennsylvania state wage and hour law, the court noted that the markets for pharmaceuticals and medical services do not function like typical markets.<sup>128</sup> This is due, at least in part, to the “profession-

119. *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), *aff’d*, 684 F.2d 565 (8th Cir.1982) (explaining sales in contract case).

120. *Id.* at 1094 n.3.

121. *Id.*

122. *Id.*

123. *In re Novartis*, 593 F. Supp. 2d at 650.

124. *Id.* at 650-51.

125. *Id.*

126. *Id.* at 650.

127. *Baum v. Astrazeneca LP*, 605 F. Supp. 2d 669 (W.D. Pa. 2009).

128. *Id.* at 675. Pennsylvania state law contains exemptions from coverage for outside salespeople and administrative employees. See 34 PA. CODE § 231.83 (2009) (administrative employees); PA. CONS. STAT. § 333.105(a)(5) (2009) (outside salesman).

al culture of physicians” who operate under what is sometimes referred to as a “professional paradigm.”<sup>129</sup> In this situation, regulation and professional ethics substitute for the workings of a free market, with physicians acting as substitute decision makers, rather than sources of education or advice for consumers.<sup>130</sup> The physicians’ decisions are made based on unbiased science.<sup>131</sup> Because the doctors possess knowledge generally inaccessible to lay-people, they control the decision making.<sup>132</sup>

This role of doctors as substitute decision-makers emerged concomitant to the belief that patients themselves are incapable of understanding sufficient information to make intelligent medical decisions [footnote omitted]. In other words, the information asymmetry between physician and patient is simply a bridge too far: because only physicians have the extensive required scientific knowledge and training to make informed health care choices, they alone, must make medical decisions, as patients simply could not possibly make wise decisions for themselves. This pure professional paradigm empowers physicians and subordinates individual consumer preference and choice.<sup>133</sup>

In reaching its conclusion, the *Novartis* court characterized the plaintiffs’ argument that the sales representatives’ work was non-exempt “promotional” work rather than “sales” work as “simply wrong.”<sup>134</sup> This is because the Department of Labor’s distinction between exempt sales work and non-exempt promotional work is invoked only where the promotional work is incidental to sales made by other employees as opposed to themselves, the latter being the situation in the pharmaceuticals industry where it is clear from the compensation structure that the sales representatives’ work is to generate sales for themselves.<sup>135</sup> This is because their work, namely visiting physicians to generate sales, is tantamount to obtaining a commitment to buy, which the Department of Labor considers exempt.<sup>136</sup> Further, the sales representatives have the independence typically associated with outside

129. *Id.* at 679-80 (“[T]he Court believes that the professional paradigm still accurately describes much of the actual practices of the health services industry.”); Clark C. Havighurst, *The Professional Paradigm of Medical Care: Obstacle to Decentralization*, 30 JURIMETRICS J. 415, 419-21 (1990).

130. *Id.* at 678 (citing James F. Blumstein, *Healthcare Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 CORNELL L. REV. 1459, 1466 (1994)).

131. *Id.* at 679.

132. *Id.*

133. *Id.* at 680. This type of thinking was echoed in a more recent article addressing in part why medical savings accounts in which consumers of healthcare, namely the public, would be more frugal because they would bargain with their physicians for services. The article compared this notion in the context of the doctor-patient relationship like relying “in the sheep to negotiate with the wolves.” Atul Gawande, *The Cost Conundrum*, THE NEW YORKER, June 1, 2009, at 44.

134. *In re Novartis*, 593 F. Supp. 2d at 651.

135. *Id.* (citing 29 C.F.R. § 541.503(a)) (“Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sale work.”).

136. *Id.* at 651-52 (citing Final Rule, *supra* note 19, at 22162).

salespersons, namely to set the schedule for their work day, to have rare direct supervision, and to work away from the office.<sup>137</sup> For all of these reasons, the *Novartis* court concluded that the company's sales representatives were exempt as outside salespersons under the FLSA.<sup>138</sup>

The inquiry did not end there, however. The court went on to conclude that even in the absence of the outside sales exemption, the plaintiffs were also exempt as administrative employees.<sup>139</sup> Initially, if the “administrative/production dichotomy” is applied, the plaintiffs were clearly not production employees because they were not involved in the production of the defendant's drugs.<sup>140</sup> Further, because the sales representatives were responsible for disseminating Novartis' information into the marketplace, meaning to the prescribing physicians, their work went to the heart of the company's success, and they are involved in the general business operations sufficient to satisfy the first part of the test for the administrative employee exemption.<sup>141</sup>

The court then concluded that the sales representatives also exercised enough independent judgment and discretion to satisfy the second prong of the test. Specifically, sales representatives were expected to “use initiative” to increase the number of prescriptions written, typically by developing a rapport with the medical staff with whom they had met, presenting information within certain parameters in the most effective way in light of variables including time constraints, patient base, and prescription history.<sup>142</sup> The sales representatives also set their schedules and used their entertainment budgets to host events and thereby increase sales.<sup>143</sup> As a result, the court determined that summary judgment was appropriate on this basis. Similar reasoning was applied by the Pennsylvania district court in *Baum v. AstraZeneca LP* to grant the employer summary judgment in that case as well.<sup>144</sup>

On the other side of the spectrum are two cases from the federal district court for the District of Connecticut.<sup>145</sup> In *Ruggeri v. Boehringer Ingelheim Pharma-*

137. *Id.* at 652. There is no doubt that the plaintiffs meet the minimum salary requirement to qualify for the exemption. *Id.*

138. *Id.* Interestingly, the Court then turned to the analogous California state overtime claims, and recognized that while the *Barnick*, *Menes*, and *D'Este* decisions may have been erroneous to some degree when considered in light of the California Supreme Court's decision in *Ramirez*, 978 P.2d at 5-9, which held that it is inappropriate to rely on the FLSA and interpreting guidance concerning the outside sales exemption when analyzing California state law on the issue because the language used for each exemption is not parallel, *Ramirez* was distinguishable from the case before the court because there the plaintiff was a deliveryman who also made sales and the inquiry concerned the primary function of his job. Here the issue is whether the plaintiffs were making sales at all.

139. *In re Novartis*, 593 F. Supp. 2d at 652.

140. *Id.* at 655 (citing *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997) (holding that insurance company's marketing representatives, who were the primary contacts with the agents that sold the policies, were exempt because they were not involved in production work—they did not create the insurance policies being written—rather they were involved in promoting them)).

141. *Id.*

142. *Id.* at 657.

143. *Id.* Based on this same reason, the court also concluded that the plaintiffs were exempt as administrative employees under California law. *Id.* at 658. In *Novartis*, the court also engaged in a brief analysis of the highly compensated employee exemption. *Id.* This exemption however is dependent to a certain degree on the factors relating to the administrative employee exemption and therefore, is not reviewed here.

144. *Baum*, 605 F. Supp. 2d 669.

145. *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385 (D. Conn. 2009) (motion for interlocutory appeal granted Apr. 17, 2009); *Ruggeri v. Boehringer Ingelheim Pharm., Inc. (Ruggeri I)*, 585 F. Supp. 2d 254 (D. Conn.

ceuticals, Inc., as in *Novartis*, the issue on summary judgment was whether pharmaceutical sales representatives were entitled to overtime pay under the FLSA, or whether the representatives were exempt from the Act's coverage, either because the plaintiffs qualified as outside salespersons (both sides moved for summary judgment on this issue) or administrative employees (only defendant moved for summary judgment on this issue).<sup>146</sup> And like in *Novartis*, the *Ruggeri* court determined that the initial inquiry concerning the outside sales exemption is whether the employees were actually engaged in "sales."<sup>147</sup> Yet the Connecticut district court reached the opposite conclusion, reasoning that because the pharmaceutical sales representatives did not actually make sales or obtain contracts for orders when they visited physicians, they did not qualify as outside salespersons for FLSA purposes.<sup>148</sup> Specifically, the sales representatives did not and could not obtain contracts or orders; they lacked the authority to negotiate the terms and conditions of their employer's sales; they were not permitted to negotiate or enter contracts with healthcare professionals; and they did not take orders for products from the pharmacies to which the products were sold.<sup>149</sup> Further, physicians did not place orders for the products the sales representatives promoted.<sup>150</sup> At most, the doctors created a demand for the product by writing a prescription.<sup>151</sup> As a result, given that the exemptions are to be narrowly construed as a matter of law, the sales representatives could not be said to make sales within the meaning of the statute.<sup>152</sup>

In reaching this conclusion, the court declined to rely on the California cases for three reasons.<sup>153</sup> Initially, those cases were based on California state law, not the FLSA, and the fact that the federal courts in California applied an FLSA analysis as persuasive authority does not mean that interpretations of California law are persuasive authority for interpretation of the FLSA.<sup>154</sup> Second, the California Supreme Court has concluded that it is inappropriate to rely on federal regulations or interpretations of the FLSA when applying the state's outside sales exemption because the language of the two exemptions do not track each other, indicating an intent that they are to be interpreted differently.<sup>155</sup> Accordingly, the California decisions interpreting the state's outside sales exemption based on the FLSA were incorrectly reasoned, even if they might otherwise constitute persuasive authority.<sup>156</sup>

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2008); *Ruggeri v. Boehringer Ingelheim Pharm., Inc. (Ruggeri II)*, 585 F. Supp. 2d 308 (D. Conn. 2008) (motion for reconsideration denied May 26, 2009).

146. *Ruggeri I*, 585 F. Supp. 2d at 266-77.

147. *Id.* at 266.

148. *Ruggeri I*, 585 F. Supp. 2d at 267.

149. *Id.*

150. *Id.*

151. *Id.* at 268.

152. *Id.* at 267.

153. *Id.* at 269.

154. *Id.*

155. *Id.* (citing *Ramirez*, 978 P.2d 2 (Cal. 1999)). See *Sav-On Drug Stores, Inc. v. Superior Court*, 96 P.3d 194, 206 (Cal. 2004) (*Ramirez* "reversed the Court of Appeal's ruling that the plaintiff was exempt under an IWC wage order defining 'outside salesperson,' largely because the court had inappropriately relied on certain federal regulations, which varied from California law, in making that determination.").

156. *Ruggeri I*, 585 F. Supp. 2d at 269-70.

Finally, the analysis in the California decisions was faulty because the courts never conducted an initial inquiry as to the appropriate threshold question, namely, whether the plaintiffs in those cases were actually engaged in sales.<sup>157</sup> Instead, the courts incorrectly focused on an indicia-of-sales analysis, such as whether the jobs at issue were advertised as “sales” positions, whether the employees referred to themselves as sales people, whether they received commissions, whether they received sales training, and whether they operated independently.<sup>158</sup> For these reasons, those cases should not be followed.<sup>159</sup>

Similarly, the sales representatives did not qualify as administrative employees as a matter of law. While no one disputes that the job required non-manual work and met the minimum compensation thresholds, it could not be said on the factual record presented whether the primary duties of the job related to the company’s general business operations, or that while the job required the exercise of some discretion, whether or not that discretion was exercised with respect to “matters of significance.”<sup>160</sup>

Without a full factual record about Boehringer’s operations, it is impossible to say whether the matters over which Plaintiffs had discretion were matters of significance to Boehringer. The record does not reveal, for example, whether demand for Boehringer’s products was ever affected-or whether Boehringer’s revenues ever fell-when PSRs other than Plaintiffs chose to formulate presentation ideas different from those [Plaintiff] Ms. Ruggeri formulated; or used metrics different from those she used to determine which physicians to entertain over a meal; or took a different route through their geographical areas than did [Plaintiff] Mr. Jaramillo; or stopped into retail pharmacies more or less frequently than he did; or read physicians’ demeanors differently than [Plaintiff] Mr. Naik in choosing when to be pushy, or even read physicians’ demeanors at all. Moreover, the record does not reveal whether Boehringer was even concerned about the effects of PSRs exercising their discretion in different ways. As Plaintiffs point out . . . [t]here is also no evidence of how significant Defendant considers the matters it left to its PSRs’ discretion. The fact that Boehringer so tightly controlled the message Plaintiffs presented to physicians

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157. *Id.*

158. *Id.* at 266, 270-71 (noting that one of the California cases, *D’Este*, is “difficult to parse” and that the plaintiff in that case would obtain a commitment from physicians to prescribe Bayer products and did sign a contract with a hospital to use Bayer products, unlike in the other sales representative cases, and which may have supported the conclusion that the representative in that case was engaged in actual sales, unlike here). *See also Ruggeri II*, 585 F. Supp. 2d at 315-16 (addressing *D’Este*).

159. *Id.*

160. *Id.* at 272-75.

could be found to mean that Defendant left to its PSRs' discretion matters it considered insignificant.<sup>161</sup>

Accordingly, application of the administrative exemption on summary judgment was inappropriate.<sup>162</sup>

In reaching this conclusion, the court distinguished the 1945 Department of Labor Opinion Letter concluding that “medical detailists” were exempt administrative employees because those employees had different responsibilities, including that they were consulted with respect to nutritional problems encountered by hospitals and determined whether the use of a subject’s product was related to the occurrence of an epidemic—responsibilities that the pharmaceutical sales representatives in this case did not have.<sup>163</sup>

The court subsequently denied the defendant’s motion for an interlocutory appeal with respect to its decision granting the plaintiffs’ motion for summary judgment concluding that they were not exempt as outside salespersons under FLSA, rejecting the argument that there was a substantial ground for difference of opinion on this issue.<sup>164</sup> At the time of this decision, the *Novartis* decision on summary judgment had not yet been handed down.

More recently, in *Kuzinski v. Schering Corporation*, the federal district court in Connecticut had an opportunity to revisit the issue, this time after the *Novartis* decision had been rendered.<sup>165</sup> Similar to the other cases, the plaintiffs were sales representatives whose job was to “introduce[] and make known its prescription drugs to physicians, pharmacists, hospitals, managed care organizations, and buying groups.”<sup>166</sup> Company revenue was dependent upon physician prescriptions.<sup>167</sup> To increase market share, the employer also relied upon its sales representatives who met with medical professionals in assigned territories and encouraged the prescription of company products.<sup>168</sup> Nevertheless, the sales representatives did not enter into contracts on the employer’s behalf for company products, obtain orders, or get binding commitments.<sup>169</sup>

As in other cases, the work required the representatives to be out of the company offices, doing field work, meeting with doctors, entertaining at lunches and dinners, and attending training sessions and conferences.<sup>170</sup> The company chose which physicians the sales representative would “target.”<sup>171</sup> Supervision of field work occurred when a district manager would sometimes “ridealong” with the

161. *Ruggeri I*, 585 F. Supp. 2d at 275-76.

162. *Id.* at 276-77.

163. *Id.* at 276.

164. *Ruggeri II*, 585 F. Supp. 2d at 311.

165. *Kuzinski*, 604 F. Supp. 2d at 385 (motion for interlocutory appeal granted April 17, 2009) (addressing *Novartis*).

166. *Id.* at 386-87.

167. *Id.* at 388.

168. *Id.*

169. *Id.* at 391.

170. *Id.* at 388.

171. *Id.* at 389.

sales representative.<sup>172</sup> Sales representatives were paid a base salary plus incentive payments, which in turn were based roughly on the number of company products prescribed in the representatives' respective geographic territories.<sup>173</sup> The company characterized the work as "sales," considered the plaintiffs' conduct as "selling," and sought people with "sales skills" to fill the sales representative positions.<sup>174</sup>

Analyzing these facts, which are similar to those in *Ruggeri*, the court came to the same conclusion that the plaintiff-sales representatives were not exempt from the FLSA as outside salespersons.<sup>175</sup> In so doing, the court criticized the *Novartis* court's outside sales analysis on several grounds.<sup>176</sup> Initially, in order to qualify as an outside salesperson, the employee has to make "sales."<sup>177</sup> Applying the FLSA's definition of that term, the sales representatives clearly did not engage in any sale, exchange, contract to sell, consignment for sale or other disposition, shipment for sale, or transfer of title to tangible property as required under the statute and regulations.<sup>178</sup> In fact, the sales representatives and physicians lacked the capacity to consummate sales, as the sales representatives are barred by law and by their employers from entering into contracts or binding commitments with doctors for prescriptions.<sup>179</sup> Accordingly, any argument that the plaintiffs were exempt is based on nothing more than an artificial attempt to "back-fit" the FLSA onto industry practices.<sup>180</sup> At most, the sales representatives worked to increase overall demand for a product by "laying the groundwork" for another employee to obtain a commitment for a purchase which, by definition, is non-exempt work.<sup>181</sup>

The court also distinguished *Medtronic, Inc. v. Gibbons* and relied upon in the *Novartis* decision for its description of the work that sales representatives of cardiac pacemaker manufacturers did in promoting the company's products.<sup>182</sup> While the *Novartis* court relied upon *Medtronic's* discussion that the company sold its products to hospitals based on physicians' recommendations, the decision in that case was unrelated to the FLSA's outside sales exemption and did not analyze the term "sales" as applied under the Act or the rule requiring narrow interpretation of

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172. *Id.* at 388.

173. *Kuzinski*, 604 F. Supp. 2d at 389-90.

174. *Id.* at 390.

175. *Id.* at 402-03.

176. *Id.* at 397-98. However, the court in *Kuzinski* did not engage in an administrative employee exemption.

177. *Id.* at 397 (citing *Clements v. Serco*, 530 F.3d 1224, 1227 (10th Cir. 2008) (civilian military recruiters for the army are not outside salesmen even though they engaged in sales training and "sold" the idea of joining the army to potential recruits)).

178. *Id.* at 398; 29 U.S.C. § 203(k); 29 C.F.R. § 541.501(b).

179. *Id.* at 398.

180. *Id.* at 399. See *Ruggeri I*, 585 F. Supp. 2d at 272.

181. *Kuzinski*, 604 F. Supp. 2d at 399. The court also distinguished *Gregory v. First Title of Amer., Inc.*, 555 F.3d 1300, 1309 (11th Cir. 2009) on the ground that there the marketing executive did make sales, because once an order for title insurance services was obtained by the plaintiff, the sale was complete. In *Kuzinski*, the marketing executive did all of the work necessary to reach an agreement with a customer. Pharmaceutical sales representatives on the other hand do not even communicate with the entities that do the actual purchasing of their products. *Kuzinski*, 604 F. Supp. 2d at 399-400.

182. *Kuzinski*, 604 F. Supp. 2d at 399.

the statutory exemptions.<sup>183</sup> Accordingly, *Medtronic* is inapposite, and the *Novartis* decision was wrongly decided.<sup>184</sup> That being said, in the wake of the *Novartis* decision, this time the district court granted the defendant's motion for an interlocutory appeal.<sup>185</sup>

Still, other courts take a position somewhere in between *Novartis*, *Baum* and the California cases on the one hand and *Ruggeri* and *Kuzinski* on the other. *Amendola v. Bristol-Myers Squibb*, another case in the federal district court for the Southern District of New York, involved a motion for discovery of the names and addresses of potential class members, authorization for notice of a collective action to be sent, and equitable tolling of any claims to be filed.<sup>186</sup> As with other pharmaceutical companies, the sales representatives promoted company products to physicians, hospitals, clinics and medical institutions, worked outside the company offices and were paid a salary plus incentive compensation.<sup>187</sup> Their primary responsibility was to be in the field visiting medical providers to influence prescription practices.<sup>188</sup> Each representative was given a list of medical providers to call, guidelines for how many calls should be made on an average day, and a core message to deliver.<sup>189</sup> The sales representatives set their own daily and weekly schedules and could add and subtract from their list of assigned providers subject to supervisor approval.<sup>190</sup>

Like the other cases, the physicians visited did not buy drugs.<sup>191</sup> Rather, they wrote the prescriptions for patients to present to pharmacies to purchase the prescribed medication.<sup>192</sup> The sales representatives also did not sell drugs to providers or take orders for drugs.<sup>193</sup> The representatives in this case did, however, ask for non-binding commitments to prescribe the medications they were promoting.<sup>194</sup>

Again, the court's inquiry began with whether the plaintiffs were actually engaged in "sales" work.<sup>195</sup> In reviewing the sales representatives' responsibilities, the court readily determined that influencing physicians to prescribe drugs and obtain non-binding commitments do not constitute a sale, exchange, contract to sell, consignment for sale or a shipment for sale "as these terms are customarily understood" under the FLSA.<sup>196</sup> Indeed, the *Amendola* court went so far as to cha-

183. *Id.* at 400-01. *Palmieri v. Nynex Long Distance Co.*, No. Civ. 04-138-PS, 2005 WL 767170 (D. Me. Mar. 28, 2005), *aff'd*, 437 F.3d 111 (1st Cir. 2006) is also inapplicable because in that case, there was no dispute that the plaintiff made some sales. As a result, an indicia-of-sales review was appropriate. Here, because the sales representatives make no sales, the subsequent indicia-of-sales analysis does not apply.

184. *See Kuzinski*, 604 F. Supp. 2d at 397, 401.

185. *Kuzinski v. Schering Corp.*, 614 F. Supp. 2d 247 (D. Conn. 2009) (court order denying motion for certification as collective action without prejudice and granting motion for interlocutory appeal).

186. *Amendola v. Britsol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 462 (S.D.N.Y. 2008).

187. *Id.* at 463.

188. *Id.*

189. *Id.* at 464.

190. *Id.*

191. *Id.*

192. *Amendola*, 558 F. Supp. 2d at 464.

193. *Id.*

194. *Id.*

195. *Id.* at 470.

196. *Amendola*, 558 F. Supp. 2d at 470-71. *See* 29 U.S.C. § 203(k).

racterize this conclusion as “unsurprising” given that the medical providers do not purchase the drugs from the sales representatives and, in fact, that federal law prohibits the sales representatives from selling pharmaceutical products.<sup>197</sup>

In reaching this conclusion, the court, like in *Ruggeri*, rejected the argument that the plaintiffs were exempt because they received specialized training, were given sales titles, their positions as originally advertised were in sales, and they lacked direct supervision.<sup>198</sup> This is because these factors become relevant only where the employee has “mixed duties” involving sales and non-sales work.<sup>199</sup> Here, the employees did not do any sales work at all.<sup>200</sup>

Similarly, the court declined to follow the California cases because those cases, which interpreted state law, failed to acknowledge that the FLSA exemptions are to be narrowly construed against the employers and relied on the various factors applicable in a mixed duty analysis without “grappling” with whether the plaintiffs were actually engaged in sales.<sup>201</sup> For these reasons, they were erroneously decided.

The *Amendola* court then reached the same conclusion as the other New York federal district court did in *Novartis* with respect to the administrative employee determination.<sup>202</sup> Bristol-Myers’s sales representatives, who clearly do non-manual work and earn above the mandatory minimum, represent the company in meetings with medical providers to promote company drugs.<sup>203</sup> Accordingly, reasoned the court, company success depends in part on the sales representatives’ ability to educate physicians about Bristol-Myers’s drugs, and as such, the work is “directly related to . . . management or business operations.”<sup>204</sup> Considering the administrative/production distinction, the court held that because the company’s products are the drugs it designs, patents, and manufactures, and the sales representatives do not produce these products, they fall on the administrative side of the line.<sup>205</sup>

Next, the court concluded that the plaintiffs’ work involved exercise of the type of discretion and independent judgment concerning matters of significance sufficient to render the work exempt.<sup>206</sup> Specifically, each representative tailored the content of his or her presentation to each medical provider based on a variety of factors and independently decided what message would be most effective.<sup>207</sup> Further, each one strategically managed a call list, exercising judgment in deciding how often to visit a doctor or whether to add new providers to that list.<sup>208</sup> In this case, the representatives also managed samples, deciding how effectively each provider would use the samples and determining how best to manage promotional

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197. *Id.*

198. *Id.*

199. *Id.* at 472.

200. *Id.* at 471.

201. *Id.* at 472.

202. *Id.* at 472-77.

203. *Amendola*, 558 F. Supp. 2d at 476-77.

204. *Id.* at 477.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

budgets, organizing group lectures or individual meals for providers.<sup>209</sup> These decisions were made free from supervision and drove the company's business.<sup>210</sup> Based on all of these facts, the court concluded that there was sufficient likelihood that the sales representatives were exempt administrative employees to deny their motion for authorization to send out notice of the lawsuit to other employees with potential claims.<sup>211</sup>

The federal district court in New Jersey came to a conclusion similar to that in *Amendola*. Relying on the rationale applied in *Ruggeri*, the court in *Smith v. Johnson & Johnson* held that the pharmaceutical sales representatives in that case were not exempt from FLSA overtime requirements as outside salespersons.<sup>212</sup> Where the employees had no capacity to make actual sales, they did not qualify for the exemption.<sup>213</sup> While it is true that physicians create a "chokepoint" in the sales of pharmaceuticals, this reality does not change the analysis.<sup>214</sup> Where the plaintiffs' conduct could not wind up in anything more than a non-binding declaration of intent to prescribe a drug, this is not enough to constitute "sales" under the FLSA and invoke the exemption.<sup>215</sup>

Nevertheless, following the *Amendola* decision, the New Jersey federal district court concluded that the sales representatives were exempt from the FLSA's overtime requirements as administrative employees.<sup>216</sup> Although the plaintiffs' work does not dictate corporate marketing policy, it does drive market demand and, therefore, substantially affects the operation of a particular segment of the business as required under the Department of Labor's interpretation of the exemption.<sup>217</sup> Similarly, under the administrative/production dichotomy, the sales representatives were not production workers because the employer's business is not about educating physicians about their products, rather it is about manufacturing and distributing those products.<sup>218</sup> In terms of exercising discretion and independent judgment, while the court recognized that the plaintiffs in *Amendola* had more discretion than Smith in this case, the fact that the plaintiff was able to request permission to visit new physicians and update her marketing plan to be more effective in her territory, even though she needed supervisory approval, was sufficient to qualify her as exempt under the FLSA.<sup>219</sup> This conclusion was further supported by Smith's work driving the market for the drugs she worked with and her involvement with her

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209. *Id.*

210. *Amendola*, 558 F. Supp. 2d at 477.

211. *Id.*

212. *Smith v. Johnson & Johnson*, Civil Action No. 06-4787 (JLL), 2008 WL 5427802, at \*6 (D.N.J. Dec. 30, 2008).

213. *Id.* at \*7.

214. *See id.*

215. *Id.* at \*7.

216. *Id.* at \*10.

217. *Id.* (citing Final Rule, *supra* note 19, at 22138).

218. *Smith*, 2008 WL 5427802, at \*11.

219. *Id.*

manager planning long-term and short-term business objectives.<sup>220</sup> Accordingly, summary judgment was granted in favor of the defendant.<sup>221</sup>

### ANOTHER INTERPRETATION

There is another statutory interpretation based on a simple analysis which leads to a more straightforward result than any of the decisions above. The FLSA defines the term “sale” as “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*.”<sup>222</sup> The phrase “other disposition,” which is not defined in the statute or the regulations, has received little attention from the courts. Accordingly, as the Supreme Court has repeatedly recognized, under standard rules of statutory construction, the term should be given its ordinary meaning.<sup>223</sup>

The American Heritage College Dictionary defines “disposition” in relevant part as an “[a]rrangement, positioning, or distribution;” a “final settlement;” an “act of disposing of; a bestowal or transfer to another;” and “[t]he power or liberty to control, direct, or dispose” and “[m]anagement control.”<sup>224</sup> Webster’s New International Dictionary defines the term similarly as the “[a]ct or power of disposing, or state of being disposed;” and “[t]he administering of anything; management.”<sup>225</sup> The same sources define the term “dispose” as “[t]o place or set in a particular order; arrange;” “[t]o put [(business affairs, for example)] into correct, definitive, or conclusive form;” “[t]o settle or decide a matter;” “[t]o distribute and put in place; to arrange; to set in order;” “[t]o assign to a certain place or condition; appoint;” and “[t]o regulate; adjust; settle; determine.”<sup>226</sup>

Applying these definitions, it is logical to conclude that the term “other disposition,” as it is used to define a “sale” under the Act, includes a physician’s decision to write a prescription for a particular medication. As the district court in *Baum* recognized, the purchase of pharmaceuticals does not operate in a typical free market. As part of the “professional paradigm,” the specialized knowledge necessary to make decisions concerning the purchase of drugs is beyond the ability of the typical layperson. As a result, the decision-making process is essentially assigned by the end purchaser—the patient—to a middleman—the physician. In fact, this assignment of responsibility is required as the medications at issue cannot be purchased in the absence of a prescription. The doctor then takes this assigned responsibility and executes it, although not by physically making the purchase, a ministerial act. Rather, the physician writes a prescription, the only legal method by which the drugs can be purchased. While it is true that the act of writing the prescription may not constitute a “sale” in the traditional sense, after all a patient

220. *Id.* at \*12 (citing 29 C.F.R. § 541.202(b)).

221. *Id.*

222. 29 U.S.C. § 203(k) (emphasis added).

223. *See, e.g.,* Gross v. Financial Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (using dictionaries to analyze statutory terms); Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252-53 (2004).

224. AMERICAN HERITAGE COLLEGE DICTIONARY 401 (3d ed. 1997).

225. WEBSTER’S NEW INTERNATIONAL DICTIONARY 752 (2d ed. 1950).

226. *See supra* note 224, at 250; *supra* note 225, at 117.

may never go to the pharmacy to pick up or pay for the medication, under a dictionary definition it does constitute a “management” of the process and exercise of the “[t]he power or liberty to control” the decision about whether the purchase of a prescribed medication is appropriate in a particular instance and which medication is best suited for that situation. Accordingly, it is appropriate for the courts to conclude that the pharmaceutical sales representatives’ core function—to influence physician prescription practices—constitutes an “other disposition” as that term is used to define a “sale” under the FLSA. As a result, the pharmaceuticals sales representatives’ “primary duty” is clearly to engage in “sales,” and they should be treated as exempt outside salespersons not covered by the Act’s overtime requirements.

Whether the sales representatives’ work qualifies as exempt administrative work is a more nuanced question because it cannot be answered by looking at the job’s central function—namely to influence medical prescription practices, and some of the other job responsibilities vary by employer.<sup>227</sup> Nevertheless, a review of some of the aspects of the job common across the industry reveals that this exemption likely does not apply here, or at least as the court in *Ruggeri* concluded, not as a matter of law. The Department of Labor has expressly recognized that work “promoting sales” constitutes the type of “servicing,” as opposed to production work that directly relates to the general business operations of a company, such that sales representative work might qualify as the type of administrative responsibilities exempt under the FLSA.<sup>228</sup>

Nevertheless, the work appears to lack the type of exercise of discretion and independent judgment that exempt administrative work requires. While it is true that the sales representatives typically operate without much direct supervision and set their schedules on a daily basis, this alone is not enough to satisfy the test. As set forth above, the applicable regulations issued by the Department of Labor set forth a non-exclusive list which demonstrates the type of discretion required to invoke the exemption.<sup>229</sup> A review of this list indicates that the sales representatives’ work is non-exempt. Generally speaking, pharmaceutical sales representatives do not have the authority to formulate, affect, interpret, or implement management policies or operating practices. They do not carry out major assignments in conducting the operations of the business. While as a group, their work affects business operations, each representative is typically assigned only a small number of products in a narrow territory, limiting the impact of any one or small group of representatives. The sales representatives do not have the authority to commit the employer to matters having a significant financial impact. They are not authorized to waive or deviate from established policies or procedures without approval. They do not have the authority to negotiate or bind the company on significant matters, and they are not involved in planning long-term or short-term business objectives, at least not beyond their own sales objectives, satisfaction of which typically leads

227. See, e.g., *Smith*, 2008 WL 5427802, at \*11 (noting responsibilities vary by company).

228. Final Rule, *supra* note 19, at 21138.

229. 29 C.F.R. § 541.202(b).

to increased compensation. They also are not authorized to resolve matters of significance on behalf of management, and they do not represent the company in handling complaints or dispute resolution. Rather, the sales representatives are more involved in carrying out the day-to-day operations of the business. All of these factors weigh against invoking the administrative exemption.

While it is true that the sales representatives do decide how to best formulate their presentations to physicians to increase sales, this responsibility is unconvincing as a basis upon which to invoke the exemption.<sup>230</sup> As the *Ruggeri* court recognized, there is little evidence that the sales representatives' exercise of discretion was with regard to any matter that the employers considered significant.<sup>231</sup> Indeed, if this type of exercise of discretion were enough, it is hard to imagine an outside sales representative who spends the majority of his or her time in the field that would not qualify as an administrative employee.

In reaching this conclusion, it should be noted that the medical detailists addressed in the Department of Labor's 1945 Opinion Letter are different than the sales representatives involved in current litigation. Unlike the medical detailists, there is no indication in any of the recent cases that the sales representatives are consulted with respect to individual nutrition problems or whether a product is related to the outbreak of something like an epidemic. There is also no discussion of the sales representatives at issue training other sales personnel.<sup>232</sup> Accordingly, the Opinion Letter is of little value to the analysis here. In short, while there may be exceptions, as a general matter, pharmaceutical sales representatives likely do not qualify as administrative employees under the FLSA.

## CONCLUSION

Whether sales representatives in the pharmaceutical industry are entitled to overtime under the Fair Labor Standards Act is unclear from the decisions of the federal district courts across the country. The issue is complicated because, although the function of these employees is to increase sales, they do not address their efforts to the actual purchaser of the products they represent. Yet, a careful review of the Act reveals that although sales representatives generally lack sufficient discretion to qualify them as administrative employees, their work is sufficiently sales-based to invoke the FLSA's statutory exemption for outside salesperson. Accordingly, as these cases wind their way through the appellate process, the courts should conclude that pharmaceutical sales representatives are not entitled to overtime pay.

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230. See, e.g., *Amendola*, 558 F. Supp. 2d at 472-77 (applying the administrative employee exemption).

231. See *supra* notes 161-162 and accompanying text.

232. See *Applicability of Exemption for Administrative Employees to Medical Detailists*, *supra* notes 71-74 and accompanying text.