

# PUBLICATION

---

## U.S. Supreme Court Categorizes Pharmaceutical Sales Reps as Outside Salesmen

July 20, 2012

**In a recent 5-4 decision, the United States Supreme Court in *Christopher v. SmithKline Beecham Corp.* held that the "outside sales" exemption to the Fair Labor Standards Act ("FLSA") includes pharmaceutical sales representatives. At issue before the Supreme Court was whether pharmaceutical sales representatives are "outside salesmen" -- as defined by Department of Labor ("DOL") regulations -- for the purpose of eligibility to receive overtime benefits.**

In this case, two pharmaceutical sales representatives (sometimes referred to as "detailers") sued their employer for overtime wages. However, the regulatory field occupied by pharmaceutical sales representatives is unique since "pharmaceutical companies promote their prescription drugs to physicians . . . in hopes of persuading [physicians] to write prescriptions for the products in appropriate cases." As such, the sales activity of pharmaceutical sales representatives is less obvious, because the representatives are not transferring title to property in a manner similar to traditional salesmen.

The FLSA imposes minimum wage and maximum hours requirements on employers. These requirements, however, do not apply to workers employed "in the capacity of outside salesmen." Congress left interpretation of the term "outside salesman" to the DOL. Prior to *Christopher*, the DOL held the position that a sale "requires a consummated transaction directly involving the employee" for purposes of the outside salesman exemption. In *Christopher*, the DOL abandoned the so-called "consummated transaction" test in favor of a "title transfer" test. The DOL's current position is that for the purposes of the "outside salesman" exemption, an employee must actually transfer title to the property at issue to make a 'sale.'

While the Supreme Court generally defers to an agency's interpretation of its own regulations, it chose not to in *Christopher*. The Supreme Court reasoned that by accepting the DOL's latest interpretation it would "impose potentially massive liability" on the employer without the benefit of fair warning to comply with the DOL's "title transfer" test.

Once the Supreme Court held that it would not apply the "title transfer" test, it turned its attention to determining whether a pharmaceutical sales representative is exempt under the FLSA as an "outside salesman." the Supreme Court determined that pharmaceutical sales representatives makes 'sales' within the FLSA definition of the term, because the statutory definition is "illustrative, not exhaustive" and incorporates the act of obtaining a "nonbinding commitment" from a physician. From there, the SUPreme Court stressed that pharmaceutical sales representatives "bear all of the external indicia of salesmen." For example, "they work[] away from the office, with minimal supervision, and they [are] rewarded for their efforts with incentive compensation."

In *Christopher*, the Supreme Court held that pharmaceutical sales representatives are exempt from FLSA overtime requirements as "outside salesmen" and, in doing so, affirmed the old adage that "if it walks like a duck, quacks like a duck, and looks like a duck, then it must be a duck." As a result, employers should examine their exemption policies for employees that act as "outside salesmen."