

# Client Alert

LABOR, EMPLOYMENT AND BENEFITS PRACTICE GROUP | FEBRUARY 2012

WIGGIN AND DANA

*Counsellors at Law*

## *United States Supreme Court to Decide Whether Pharmaceutical Sales Representatives are Exempt from the FLSA*

The United States Supreme Court is scheduled to hear oral argument on April 16, 2012 in Christopher v. SmithKline Beecham Corp., No. 11-204, and thereby take the first step toward resolving the divisive issue of whether Pharmaceutical Sales Representatives (“PSR’s”) are exempt from the overtime pay provisions of the Fair Labor Standards Act (“FLSA”).

An amicus brief submitted by the Obama Administration urges the Supreme Court to reverse the Ninth Circuit and hold that the FLSA’s exemption for outside salespersons does not apply to PSR’s. The Administration is of the view that because PSR’s are prohibited by law from actually consummating a sale of pharmaceutical products to health care providers or end users, they do not “make sales” and as such do not qualify for the outside salesperson exemption. This same position was advocated by the Department of Labor in an amicus filing with the Ninth Circuit. However, the Ninth Circuit determined that the Department’s interpretation was not entitled to deference and held that the PSR’s were properly classified as exempt, and therefore not entitled to overtime pay. In so holding, the Ninth Circuit parted ways with the Second Circuit, which in an earlier case deferred to the Department’s view and deemed the outside sales exemption inapplicable to PSR’s employed by Novartis.

It is this conflict between the Ninth Circuit and Second Circuit decisions that the Supreme Court has undertaken to reconcile. The precise issues before the Supreme Court are (1) whether deference is owed to the Secretary of Labor’s interpretation of the FLSA’s outside sales exemption and related regulations; and (2) whether the FLSA’s outside sales exemption applies to pharmaceutical sales representatives. Although the case centers on the outside sales exemption as applied to PSR’s, it is anticipated that the Supreme Court will shed significant light on the broader question regarding the degree of deference owed to the Department of Labor’s interpretations of its own regulations under the FLSA.

We will provide a follow-up alert once the Supreme Court issues its ruling, which is likely to be in the Summer of 2012.

### ABOUT THE LABOR, EMPLOYMENT AND BENEFITS DEPARTMENT

Wiggin and Dana’s Labor, Employment and Benefits Department provides prompt and comprehensive legal counseling to a wide range of employers and is a valuable partner to our clients, carefully guiding management through the maze of increasingly complex labor and employment laws and regulations.

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