

Ninth Circuit Requests California Supreme Court Interpretation of Wage Orders for Pharmaceutical Sales Representatives

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In recent years, the alleged misclassification of employees under California's wage and hour laws has been a hotly contested issue and the subject of a great many class actions. Faced with several appeals pending before it, the Ninth Circuit has now sought guidance from the California Supreme Court on the outside salesperson and administrative exemption tests as they apply to pharmaceutical sales representatives. Such guidance should prove invaluable to employers in the industry, and to parties to these claims.

Case Overview

In *D'Este v. Bayer Corporation*, 07-56577(9th Cir. 2009), a pharmaceutical sales representative brought a class action lawsuit against her employer, claiming that she had been misclassified as an exempt employee and had not been paid overtime or provided meal and rest breaks in compliance with California's wage and hour laws. The district court granted summary judgment in favor of the employer, finding that the employee was exempt under California's outside salesperson exemption; it declined to reach the question whether she was exempt under the administrative exemption. The employee appealed to the Ninth Circuit.

D'Este is not the only class action on appeal to the Ninth Circuit on this issue. Three other class actions on appeal before the Ninth Circuit—and four other class actions filed in the Central District of California—all involve the question of whether pharmaceutical sales representatives are exempt under California's outside salesperson and administrative exemptions.

In light of the number of actions regarding the classification of pharmaceutical sales representatives, the Ninth Circuit certified the following two questions to the California Supreme Court:

1. Does a pharmaceutical sales representative qualify as an "outside salesperson" under Industrial Welfare Commission's ("IWC") Wage Orders 1-2001 and 4-2001 if the pharmaceutical sales representative 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. Is a pharmaceutical sales representative involved in duties and responsibilities that meet the requirements of a person employed in an administrative capacity as defined under IWC Wage Order 4-2001?

The Ninth Circuit will accept the California Supreme Court's decisions on these questions.

What This Means for Employers

The California Supreme Court's review of these questions should provide employers with a clear understanding of the application of outside salesperson and administrative exemptions from overtime and meal and rest break requirements for pharmaceutical sales representatives employed in California. The Supreme Court's ruling will provide invaluable guidance to employers in the industry about how to classify these persons going forward, and a clearer understanding to parties already litigating this issue. Should the ruling suggest that these persons normally fall under one or both exemptions, litigation of these claims by pharmaceutical sales representatives may end. Should the ruling suggest that these persons normally fall under neither exemption, a new wave of class actions could be expected.

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