

August 9, 2010 [www.mcvpr.com](http://www.mcvpr.com)**LABOR & EMPLOYMENT LAW ALERT*****U.S. Court of Appeals decides pharmaceutical sales representatives are nonexempt employees***

The United States Court of Appeals for the Second Circuit recently decided in In re Novartis Wage and Hour Litigation, (2d Cir. July 6, 2010) No. 09-0437-cv, that outside pharmaceutical sales representatives are nonexempt employees, and are therefore covered by federal wage-and-hour legislation requiring payment of overtime, among other requirements. This decision revived a group of consolidated class action suits for overtime pay in which the District Court had granted Novartis' Motion for Summary Judgment holding that these employees fell under the exemptions of the Fair Labor Standards Act ("FLSA") for outside salespersons and administrative employees.

In support of its decision, the Appeals Court relied on the U.S. Department of Labor's regulations defining "outside sales employees" and "administrative employees," and on the analysis of the actual work performed by these employees. Even though the sales representatives in this case visited doctors' offices to promote Novartis' products, handed out product samples, and secured non-binding commitments from physicians to prescribe these products, they legally could not and did not actually *sell* any of the products to physicians. The Court held that Novartis' sales representatives did not actually make sales as contemplated by federal law, since there was no transfer of products or receipt of payments. As such, they could not be considered to validly fall under the FLSA exemption for outside salespersons.

By the same token, the court rejected Novartis' argument that their sales representatives fell under the administrative exemption under FLSA. The Court held that Novartis did not allow these employees to exercise the necessary discretion or independent judgment for them to fall under the administrative exemption.

If you have any questions or comments, or wish additional information regarding this matter, please contact any of the following attorneys:

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