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Boehringer Sales Rep Not Exempt From OT, Judge Says

By Abigail Rubenstein

Law360, New York (July 13, 2011) -- A Florida federal judge on Monday held that a named plaintiff in a putative class action on behalf of Boehringer Ingelheim Pharmaceuticals Inc.'s drug sales representatives had been misclassified as exempt from overtime pay.

Ruling on cross-motions for summary judgment, U.S. District Judge Ursula Ungaro found that the Fair Labor Standards Act's outside sales and administrative exemptions did not apply to former Boehringer pharmaceutical sales representative Graciela Palacios. The parties did not dispute that Palacios was not paid overtime, but disagreed on whether she was exempt.

Palacios' case is one of a spate of recent lawsuits claiming that drug sales representatives — who are legally prohibited from closing sales, and whom the pharmaceutical industry has considered exempt from overtime pay requirements for 70 years — are entitled to overtime compensation. Circuits are split on whether the outside sales exemption applies to them.

Judge Ungaro noted in her ruling that the Eleventh Circuit, which includes Florida, had not ruled on the issue, but that the Second Circuit determined that pharmaceutical sales representatives were entitled to overtime pay, while the Ninth Circuit concluded that they were exempt.

"The court agrees with the Second Circuit's rationale," Judge Ungaro said. "Plaintiff's inability to transfer ownership of any one of the drugs she was responsible for in exchange for money, her inability to take a purchase order for any of the drugs, and her inability to obtain a binding commitment from physicians to prescribe a drug, renders her unable to make a 'sale' as defined under the FLSA and its implementing regulations."

As for the administrative exemption, the court held that Boehringer had failed to demonstrate that Palacios' role was directly related to the company's management or general business operations, and failed to show she exercised discretion and independent judgment with respect to matters of significance. As such, the exemption did not apply, Judge Ungaro ruled.

However, the court denied Palacios' bid for a judgment that Boehringer's violation of the FLSA was willful, and that she was therefore entitled to liquidated damages and a three-year statute of limitations for her claims, saying there was not enough evidence for a determination. The issue should go before a jury, the judge ruled.

Plaintiff Marta Lopez-Lima filed the class action against the pharmaceutical company in July 2010, alleging that Boehringer misclassified its pharmaceutical sales representatives

as exempt from overtime compensation. Palacios joined the suit two days later.

The plaintiffs are seeking to represent a nationwide class of Boehringer sales representatives.

Boehringer has faced several lawsuits over the treatment of its pharmaceutical sales representatives. In February, the U.S. Judicial Panel on Multidistrict Litigation refused to combine the present case with three others.

Palacios is represented by Andrew Frisch of Morgan & Morgan PA.

Boehringer is represented by William J. Anthony, David R. Golder, Tasos C. Paindiris and Paul DeCamp of Jackson Lewis LLP.

The case is Lopez-Lima v. Boehringer Ingelheim Pharmaceuticals Inc., case number 1:10-cv-22398, in the U.S. District Court for the Southern District of Florida.

--Editing by John Williams.

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