



HR CORNER

FEES & BURGESS, P. C.



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Department of Labor Narrows Interpretation of Administrative and Outside Sales Exemptions

Fees & Burgess, P.C., Emphasizes:

The Department of Labor (DOL) recently filed a friend-of-the-court brief in a case involving exemptions from the overtime provisions of the Fair Labor Standards Act (FLSA) for pharmaceutical sales representatives. In a case filed against Novartis Pharmaceutical Corporation (NPC), the trial court determined that NPC properly classified its sales representatives as exempt from the FLSA overtime requirements through the outside sales exemption, or alternatively, through the administrative exemption. The case is now on appeal to the Second Circuit Court of Appeals.

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NPC’s sales representatives “call on” medical professionals and provide them information about various medicines that NPC sells. Through these “calls,” the sales representatives attempt to persuade the physicians to prescribe NPC’s medicines to their patients. However, the sales representatives do not directly sell any products to doctors and do not take orders for sales. NPC provides basic training to its representatives regarding the types of medicines sold by NPC, including the “message points” to be used by the sales representatives on their calls and visual materials for the same. The representatives are not allowed to deviate from these talking points or use alternative visual aids without authorization from NPC. NPC does not directly supervise the day-to-day activities of the representatives, and it allows them the freedom to choose when to call on each doctor and the frequency of their visits. However, NPC provides each representative with a list of doctors to visit, by priority, and a list of specific medications to advertise, by priority. Each representative is responsible for creating their own schedule to meet these general guidelines.

In an effort to persuade the court on the limitations on the applicable exemptions, the DOL filed its brief with the court. In it, the DOL argued that these sales representatives do not qualify for the outside sales exemption since they do not “sell” products in accordance with the exemption’s requirements. The DOL argues that a “sale” involves more than simply promotional activities and must generally involve some type of transfer of title to goods or other transaction. Specifically, to qualify for an outside sales exemption, the individual must involve a consummated transaction.

Continued on page 2



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In addition, the DOL argues that these sales representatives do not qualify for the administrative exemption as they do not exercise the requisite independent judgment and discretion required by the exemption. Because these sales representatives are bound by the products limitations and customer limitations imposed on them by NPC, and because the sales representatives simply choose when to visit their customers, the sales representatives are not making independent decisions of significant importance. The DOL focuses heavily on the insignificance of scheduling decisions versus the judgment to choose which doctors to see and what information to provide them.

While this brief is not binding on the court's decision, it may be cited as persuasive authority. More importantly, the case evidences the DOL's changing stance on at least two of the overtime exemptions under the FLSA. Employers should review their job classifications in light of existing regulations to ensure that they can justifiably maintain any exemptions from FLSA overtime requirements.

Agencies Issue Interim Rule Regarding Mental Health Benefits

Passed in 2008, the Mental Health Parity and Addiction Equity Act (MHPAEA) prohibited group health insurance plans from limiting benefits and increasing costs for mental health benefits versus benefits for general medical needs. The MHPAEA applies to employers with at least 50 employees, and it only governs plans that choose to provide mental health benefits. (Nothing in the MHPAEA requires a health plan to provide mental health benefits.)

The interim final rules, published by the Department of Labor, the Department of Health and Human Services, and the Treasury Department, provide additional details to help define the "parity" that the MHPAEA mandates. The rules categorize all benefits into six categories and provide specific rules regarding the treatment of mental health coverage in those categories versus their medical and surgical counterparts. Health plans must provide similar financial requirements and similar treatment limitations in each category. "Financial requirements" includes all deductibles, co-pays, and out-of-pocket maximums. Treatment limitations include both quantitative limits (such as 50 outpatient visits) and non-quantitative limits on treatment (benefits not limited by quantity but by scope or duration).

The rules govern all plan years starting on or after July 1, 2010. The regulations are available here: <http://edocket.access.gpo.gov/2010/pdf/2010-2167.pdf>.

*** Affirmative Action Plans ***

Please remember that the Obama administration has generally stepped up enforcement in most agencies. This is a good time to ask **F&B** if you are compliant with Executive Order 11246 and have a compliant Affirmative Action Plan, if you have 50 or more employees and have \$50,000 or more in government contracts.

For more information, please call (256) 536-0095.

Fees & Burgess, P.C.—Calendar of Events for 2010

Fees & Burgess, P.C., is proud to present, or participate in the presentation of, the following upcoming seminars/webinars. Click on title name for details:

**February 17, 2010 ~ March 17, 2010 ~ April 21, 2010 ~ May 12, 2010—Huntsville, Alabama;
11:30 AM - 1:00 PM**

[International Commercial Contracting: Identifying, Avoiding, and Managing Risk Areas](#)

This four-part course provides a practical introduction to international contracting, focusing particularly on risk identification and avoidance. Attendees will gain an understanding of the laws and provisions governing international agreements, and how international contractual relationships differ from domestic counterparts. The course will provide a solid grasp of the concepts, theories, and practical considerations necessary for drafting, interpreting, and negotiating international contracts. This course will be held at Holiday Inn, Research Park and can be used toward ISM and NCMA recertification credit.

Session 1: Introduction to International Contracting ~ February 17, 2010 ~ [Click here for details](#).

Session 2: Drafting 101 ~ March 17, 2010 ~ [Click here for details](#).

Session 3: Drafting 101 ~ Continued ~ April 21, 2010 ~ [Click here for details](#).

Session 4: Special Considerations in International Contracting ~ May 12, 2010 ~ [Click here for details](#).

February 24, 2010—Huntsville, Alabama; 8:00 AM - 3:30 PM

[Uniform Commercial Code/ CCCM Certification](#) — This program consists of 6 hours of training in one day covering an overview of the Uniform Commercial Code, Articles 1, 2, and 2A. This training, similar to the basic material presented by the same presenters for the National Contract Management Association at its 2009 World Congress held in Long Beach, California, was used as a FastTrack study session as preparation for the Certified Commercial Contracts Manager exam.



Fees & Burgess, P.C.—Calendar of Events
Continued from page 3

March 9, 2010—Huntsville, Alabama; 1:00 PM – 4:00 PM

[March NASHRM Full Day Workshop](#)

Fees & Burgess, P.C., will be presenting the legislative update portion of NASHRM's full-day workshop. For more information go to <http://www.nashrm.org/>

March 16, 2010—Webinar; 11:00 - 1:00 PM CST

[Negotiation and Resolution of Federal Government Contractor Claims under the Contracts Disputes Act Webinar](#)

Attendees of this program will learn how to prepare, negotiate, and submit contract disputes to the government for resolution under the Contract Disputes Act of 1978, as well as options for appealing claims denied by the government. This course is designed to meet the requirements of the National Contract Management Association's (NCMA) certification programs for 1 hour of CPE. [Click here for details.](#)

April 12, 2010—Florence, Alabama; 8:00 AM - 4:00 PM

[Employment Law Survival Training for Managers: 10 Key Areas of Legal & Practical Knowledge For Successful Leadership](#)

This daylong program presented for, and sponsored by the University of North Alabama, is a must for training managers and supervisors to recognize and deal with challenging employee issues that arise daily in the workplace. Attendees will learn key aspects of critical issues and how to work with human resources within existing company policies to address and resolve them.

April 20, 2010—Birmingham, Alabama; 8:30 AM – 4:30 PM

[2010 FMLA Master Class for Alabama Employers: Overcoming Compliance and Employee Leave Challenges](#)

This program, presented for, and sponsored by M. Lee Smith, will help you become even more proficient in FMLA administration and handle top management's and your employees' questions with even greater confidence.

If you would like more information on these and other seminars, please go to www.feesburgess.com, or contact seminars@feesburgess.com.

Watch for Other Upcoming Seminars and Webinars



SPEAKERS

Fees & Burgess, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, contact newsletters@feesburgess.com

NEWSLETTERS

Fees & Burgess, P.C., also publishes *F&B Quarterly Bytes*, focusing on multiple practice areas; and *F&B SCM Memo*, focusing on the supply chain management industry. To receive any of these e-newsletters, please e-mail newsletters@feesburgess.com with your contact information.

To remove your name from our mailing list, please e-mail newsletters@feesburgess.com.

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“No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”

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