

In This Issue:

February 2009

The Eleventh Circuit Court of Appeals rules that the “outside sales” exemption to the FLSA overtime requirements was properly applied to an executive for a title insurance company whose primary duty was conducting “promotional work” with the company’s clients, even though the employee did not finalize sales herself. According to the court, the executive, who was credited with sales through commission-based compensation, was conducting “sales in some sense.”

Eleventh Circuit Holds Title Insurance Executive Who Conducts “Promotional Work” Exempt Under the FLSA “Outside Sales” Exemption

By Angelo Spinola and Matthew G. Laflin

In a recent decision that provides a potentially expansive counterpoint to recent federal authority and Department of Labor opinion letters, the United States Court of Appeals for the Eleventh Circuit applied the “outside sales” exemption to the Fair Labor Standards Act (FLSA) to employees who perform “promotional work” to obtain commitments for sales, but who do not finalize or process those sales. In *Gregory v. First Title of America, Inc.*, 2009 U.S. App. LEXIS 1630 (11th Cir. Jan. 27, 2009), the Eleventh Circuit affirmed the district court’s ruling that the plaintiff employee who obtained orders for title insurance was an exempt employee under the “outside sales” exemption to the FLSA, and, therefore, was not entitled to overtime compensation.

Background of *Gregory v. First Title*

The plaintiff, an employee with the title “Marketing Executive,” sued her former employer, First Title of America, a title insurance company based in Florida, under the FLSA for failure to pay overtime wages. Her employment contract with First Title stated that her job description was “to provide the services for referring and closing title insurance companies.” She was initially paid a weekly salary, but later was compensated solely through commissions based on title insurance orders from her clients that “closed” with First Title. The plaintiff contended that although she performed “promotional work” for First Title’s title insurance services, she was never involved in the actual sale of title insurance to realtors, brokers and lenders, or to end users. In fact, she was not licensed to sell title insurance or any other kind of insurance. On summary judgment, First Title argued that she was an outside sales employee exempt from the FLSA’s overtime pay requirements. The trial court agreed.

The Outside Sales Exemption to the FLSA and “Promotional Work”

FLSA section 13(a)(1) provides a complete minimum wage and overtime pay exemption for “any employee employed in the capacity of outside salesman.” An employee qualifies for this exemption if he or she meets a duties test and a location test set forth in 29 C.F.R. Part 541. In order to qualify for the outside sales exemption, an individual

must have the primary duty of making sales to, or obtaining orders or contracts for services or the use of facilities for, customers. There is no salary test for the outside sales exemption.¹

The Preamble to the regulations regarding the outside sales exemption states that “technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales.”² “Employees have a primary duty of making sales if they ‘obtain a commitment to buy’ from the customer and are credited with the sale.”³ “Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button.”⁴ Consequently, an employee need not complete a face-to-face sale with a customer in order to qualify for the exemption; however, the employee’s primary duty must be sales.

Depending upon the circumstances under which it is performed, “promotional work” may or may not be exempt outside sales work.⁵ “Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work.” “On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.” Thus, if the employee performing the promotional work has the primary duty of making sales, then the work is exempt; however, if the employee performing the promotional work does not make sales, the work is not exempt.

The Eleventh Circuit Holds that “Promotional Work” Is Exempt Outside Sales Work Where the Employee Is Credited with the Sale to the Client

On appeal to the Eleventh Circuit, the plaintiff contended that the district court had improperly analyzed her work with First Title under the outside sales exemption. Specifically, she argued that the primary duty she performed for First Title constituted nonexempt work, because she never actually consummated a sale with any person or business during her employment. Instead, she argued that her primary duty was to induce realtors, brokers and lenders to *refer* their customers to First Title to obtain title insurance services. In her view, this work consisted of “stimulating sales,” not actually making sales of title insurance, which she contended was non-exempt “promotional work” under 29 C.F.R. section 541.503(a).

The plaintiff also attempted to analogize her work to that of two positions found to be nonexempt under an outside sales analysis. First, the plaintiff compared her primary duty to that of college recruitment counselors for whom the Department of Labor recommended classification as nonexempt employees in a 1999 opinion letter.⁶ The plaintiff also cited a 2008 district court case, which held that a class of pharmaceutical representatives was improperly classified as exempt under the outside sales exemption.⁷ In each case, the employees promoted the employer’s product and influenced potential clients, but did not conduct or finalize sales. Rather, a series of independent events had to occur before the sales process concluded. The plaintiff argued that her primary duty was similar in that she “influenced” realtors, brokers and lenders to offer First Title’s title insurance services, but did not process the final sale, which was completed by First Title.

In response, First Title, citing various authorities, argued that the plaintiff’s work was covered under the outside sales exemption because, as her primary duty, she obtained orders for title services, promoted business with the goal of obtaining orders, and, importantly, was paid on commission for title services that ultimately closed from her clients. First Title also cited language in the Preamble to the regulations regarding the outside sales exemption stating that the outside sales exemption applies if an employee “obtains a commitment to buy” from the potential client and is credited with the sale, arguing that how the sales order is actually placed is immaterial to the analysis.

In affirming the district court’s ruling that the plaintiff was exempt under the outside sales exemption to the FLSA, the Eleventh Circuit concluded that the plaintiff’s primary duty was to obtain orders for First Title’s title insurance services and to promote the company’s business with the goal of obtaining orders for title insurance. The court held that she, therefore, made sales “in some sense” because she obtained the commitments of her clients to buy First Title’s title insurance services and, crucially, was credited with sales for which she was paid a commission. The court also agreed that, under the Preamble to the Final Rules, how the order was actually placed by the end user was immaterial and, therefore, the fact that the plaintiff’s clients ultimately placed their orders with First Title did not render her work nonexempt.

In addition, the Eleventh Circuit agreed that the college recruitment officer and pharmaceutical representative positions to which the

plaintiff attempted to analogize her own position were distinguishable. The court stressed that the plaintiff's primary duty was different because there was no intervening sales efforts between the plaintiff's "promotional work" and the final sale, and that the plaintiff was "acting as a conduit" to the sale rather than "paving the way" for a later salesperson to step in and make the final sale. Moreover, the plaintiff's compensation was tied directly to her sales efforts, in the form of commission. Finally, the court determined that she was not a "pseudo-salesperson" that simply collects names of potential clients to be turned over to salespersons, which is not a covered position under the "outside sales" exemption.

Conclusion

The *Gregory* decision provides useful guidance to employers with salespersons who mostly conduct outside activities that may be described as "promotional work," but whose primary duty is closely related to obtaining sales commitments. Such employees may still be exempt from FLSA overtime and minimum wage requirements under the "outside sales" exemption, even if they do not complete or process the final sale. Further, their efforts must be geared towards promotion of their own sales, rather than the company's sales in general, and their sales efforts should be reflected in their compensation.

The Eleventh Circuit's decision also provides a counterpoint to other recent federal decisions. For example, the Tenth Circuit Court of Appeals held in *Clements v. Serco, Inc.*⁸ that civilians whose primary duty was meeting with potential recruits and encouraging and assisting them with the process of joining the Army performed "promotional work" that was nonexempt under the "outside sales" exemption. The Tenth Circuit's rationale was that the employees could not obtain commitments from the recruits, and instead referred them to enlisted recruitment personnel to do so. Similarly, as described above, the Southern District of New York held in a recent decision that a class of pharmaceutical representatives who met with physicians to promote the employer's prescription drugs and encourage their prescription to patients were not exempt outside salespersons because they did not obtain orders from the physicians and were not paid a commission.⁹

In contrast, the *Gregory* decision provides employers with a detailed analysis that favorably applies the DOL's regulations on the outside sales exemption. The elements necessary to satisfy the requirements of the outside sales exemption under *Gregory* are: (1) work geared toward individual sales; (2) compensation that is based on employee's sales efforts; and (3) the absence of any layer of sales work between the employees and the final sales. Employers should be aware that the authority cited above is applicable to analysis under the FLSA, and that application of the "outside sales" exemption pursuant to the laws of certain states may be different. The Eleventh Circuit covers federal courts in Alabama, Florida and Georgia.

.....
 Angelo Spinola is a Shareholder and Matthew G. Laflin is an Associate in Littler Mendelson's Atlanta office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Spinola at aspinola@littler.com, or Mr. Laflin at mlaflin@littler.com.

¹ See 29 C.F.R. 541.500(c).

² 69 Fed. Reg. 22162.

³ *Id.*

⁴ *Id.* at 22163.

⁵ 29 C.F.R. § 541.503(a).

⁶ See 1999 WL 1002391.

⁷ See *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008).

⁸ 530 F.3d 1224 (10th Cir. 2008).

⁹ See *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008).