

Store Sampler Representatives Are Exempt Outside Salespersons, First Circuit Holds

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Wage and Hour

Who doesn't like free samples when shopping? But are the representatives providing those samples actually "selling" them so that they are exempt from overtime under the Fair Labor Standards Act (FLSA) as outside salespersons?

Yes, according to the U.S. Court of Appeals for the First Circuit. Although they may not undertake the *final* act of selling the products to customers, in-store brand representatives employed by a third party satisfy the requirements of the exemption. *Modeski v. Summit Retail Sols., Inc.*, 2022 U.S. App. LEXIS 5132 (1st Cir. Feb. 25, 2022).

The First Circuit has jurisdiction over the federal courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

The Outside Sales Exemption

The FLSA generally requires that employees be at least paid minimum wage for all hours worked and one-and-a-half times their hourly wage for hours worked beyond 40 in a week. 29 U.S.C. §§ 206(a), 207(a)(1). One of the exceptions to both of these requirements applies to anyone employed "in the capacity of outside salesman." *Id.* § 213(a)(1).

The FLSA itself does not define the term "outside salesman," instead leaving those details to the Department of Labor (DOL). The DOL, in turn, has established two primary requirements for the exemption: (1) the employee's primary duty must be making sales (as defined in the FLSA) or obtaining orders or contracts for services or for the use of facilities, for which a consideration will be paid by the client or customer; and (2) the employee must be customarily and regularly engaged away from the employer's place or places of business in performing such primary duty. 29 C.F.R. § 541.500(a)(1) - (2).

The Case

Summit Retail Solutions contracts with department stores, grocery stores, and wholesale clubs to provide in-store product samples and demonstrations designed to increase sales. To this end, Summit employs "Brand Representatives" to conduct these demonstrations and to engage with customers.

The Brand Representatives set up a display and hand out samples or otherwise demonstrate the product to customers. For efficiency purposes, if a customer decides to purchase the product, the sale is consummated by the store's checkout cashiers, rather than by the Brand Representatives themselves.

Summit determines the store(s) to which a Brand Representative will be assigned, sets the Representative's schedule, and determines which product(s) they will display. Brand Representatives' hours are carefully recorded and tracked, and they are paid an hourly wage of \$10 to \$15. In addition, they may qualify for a commission-type bonus if a sufficient quantity of the product is sold while they are operating the display, even if they

did not directly engage with every customer who purchased the product during that time. Conversely, if a Brand Representative's product sales are routinely poor during an extended period of time, they may operate with a "negative" balance for bonus purposes and ultimately may be disciplined or discharged.

A group of former Brand Representatives filed a collective and class action against Summit, seeking to recover unpaid overtime wages under the FLSA and analogous state wage laws. The Brand Representatives asserted that they were compelled to systematically underreport their actual hours to avoid the potentially adverse consequences of the company's bonus system. As a result, they sometimes worked more than 40 hours per week yet were not paid overtime.

Summit argued in part that the plaintiffs were exempt from overtime under the FLSA's outside sales exemption and, thus, were not entitled to overtime compensation at all. The trial court agreed with Summit on this issue and granted summary judgment to the company.

First Circuit Decision

On appeal, the Brand Representatives did not contest either that they were "customarily and regularly engaged away from the employer's place or places of business" or that their primary duty was to try to convince customers to buy the products they were featuring. They claimed instead that they were not "making sales" because they did not obtain a commitment from the customers to purchase the products.

Citing to the U.S. Supreme Court's analysis in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the First Circuit noted that the FLSA's use of the language "in the capacity of [an] outside salesman' ... counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works." Similarly, the statute's use of the words "sale" or "sell" to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," the Court said, suggests that the examples provided in the statute are "illustrative, not exhaustive." Moreover, "*Christopher* noted that the DOL itself has explained (in reports and regulations) that the exemption is applicable whenever an employee in some sense make[s] a sale" and "should not depend on technicalities, such as whether it is the sales employee or the customer who types the order into a computer system and hits the return button." (Internal quotations and citations omitted.)

In light of this broad definition of "sales," the First Circuit had no trouble concluding that the Brand Representatives qualified for the outside sales exemption. The Court noted, "Although they do not ring up any purchase at the register, Brand Reps do as much as practically possible to 'in some sense make[] a sale' in the retail store context in which they operate." In this respect, the Court explained, they "work to persuade shoppers, who then can demonstrate some intention (or 'nonbinding commitment') to buy a product by placing it in their shopping carts or baskets." By contrast, the cashiers make no effort to persuade customers to buy the product, the Court pointed out, so the Brand Representative "is the last person to make an actual sales effort; the finalization process – at the checkout register when the cashier rings up the purchase – is simply a nondiscretionary, ministerial act that does not involve any additional sales effort."

If you have any questions about this decision, the outside sales exemption, or any other

wage and hour issue, please contact a Jackson Lewis attorney.

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