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Supreme Court To Determine Whether Highly Paid Employees Are Entitled to Overtime Pay Under the FLSA

The U.S. Supreme Court recently granted certiorari in *Helix Energy Solutions Group, Inc. v. Hewitt* and will decide whether a highly compensated executive employee paid a daily rate, rather than on a salary basis, is entitled to overtime pay under the Fair Labor Standards Act (“FLSA”).

Employee Exemptions From Overtime Pay

The FLSA requires employers to pay covered employees “one and one-half times the regular rate” for any additional time worked (i.e., overtime pay) over 40 hours in a workweek. 29 U.S.C. § 207(a). The FLSA exempts “highly compensated” employees from overtime pay if they (1) earn a total annual compensation of at least at least \$107,432 per year, which must include at least \$684 per week paid on a salary or fee basis, and (2) customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. 29 C.F.R. § 541.601.

“An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis.” 29 C.F.R. § 541.602(a). Similarly, the exemption is not lost if an exempt employee who is guaranteed at least \$684 each week paid on a salary basis “also receives additional compensation based on hours worked for work beyond the normal workweek” paid as a flat sum, a bonus payment, a straight-time hourly amount or time and one-half or on any other basis. *Id.* Separately, an exempt employee’s earnings may be computed on an hourly, a daily or a shift basis without losing the exemption or violating the salary basis requirement, so long as (1) the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and (2) a reasonable relationship exists between the guaranteed amount and the amount actually earned. 29 C.F.R. § 541.604(b).

Helix Energy Solutions Group, Inc. v. Hewitt

The issue in *Helix* was not whether the employee's earnings exceeded the threshold to be considered highly compensated. Rather, the Court addressed whether the employer's decision to pay the employee a daily rate—as opposed to a salary—resulted in the loss of the employee's exemption under the FLSA.

Highly paid employees are frequently compensated through fixed weekly, monthly or annual salaries, but the plaintiff Michael Hewitt was a supervisor on an offshore oil rig and was paid bi-weekly at a daily rate of at least \$963. Hewitt's position was "largely administrative," and he was "typically second-in-command on the entire vessel." Although Hewitt was not guaranteed a salary, his employer argued that working for one day a week at that rate was sufficient to meet the highly compensated employee earnings threshold. This pay structure is very common in the energy, oil and gas industries, but some employers in other industries also use daily or shift pay for their highly compensated employees.

Although Hewitt's annual pay averaged \$200,000, he argued that he was entitled to overtime pay because he was paid daily—not weekly, monthly or annually. The employer countered that Hewitt was exempt because his pay exceeded the FLSA's salary threshold and he was paid bi-weekly.

The district court granted summary judgment in favor of the employer because Hewitt's pay never fell below the threshold amount to be considered highly compensated. The Fifth Circuit, in a 2-1 panel decision, initially reversed the district court's grant of summary judgment, finding that an employee who was paid a daily rate was not paid on a salary basis.

The Fifth Circuit then took the case en banc, where the full Fifth Circuit reheard the case. In a 12-6 split decision, the en banc Fifth Circuit affirmed the prior panel's conclusion that Hewitt did not qualify for the highly compensated exemption to the FLSA's overtime pay requirements. The en banc court reasoned that daily and hourly wage earners may meet the salary requirement to be considered exempt under the FLSA if:

1. The employee is guaranteed to earn the required threshold amount regardless of the time actually worked by the employee; and
2. A "reasonable relationship" exists between the guaranteed pay and the employee's actual pay.

The Fifth Circuit's en banc majority opinion held that the employer failed to demonstrate that both conditions were satisfied.

The dissenting judges argued the majority incorrectly applied a "counterintuitive" and "textualist" interpretation of the law to require Hewitt receive overtime pay while ignoring the fact that Hewitt earned over \$200,000 per year, placing him in the top 7% of U.S. earners.

The federal circuit courts of appeal are currently split on this issue, with the Fifth, Sixth and Eighth Circuits applying the “reasonable relationship” test, while the First and Second Circuits apply a different interpretation that allows an exemption for daily-rate workers under a salary-basis test. The Supreme Court’s decision, which is not expected until late 2022 at the earliest, will resolve this circuit split.

Because the Supreme Court’s decision may have costly implications for employers and require changes to employee classifications, we will continue to monitor developments in this case. In the meantime, if you have any questions about the U.S. Supreme Court’s upcoming ruling, or how it might impact your organization’s practices, please contact your Kutak Rock attorney or a member of the firm’s [FLSA Litigation and Wage and Hour Defense Group](#) or [National Employment Law Group](#). You may also visit us at www.KutakRock.com.

