



Supreme Court to Decide Whether Highly Compensated Supervisors Paid by the Day Should Get FLSA Overtime Pay

Insights

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Employers may be shocked to learn that a supervisor who earns \$200,000 a year could be entitled to overtime pay, but the Supreme Court might very well decide you could be on the hook for such payments in the near future. SCOTUS just agreed on May 2 to consider whether an oil rig supervisor who was paid a daily rate of at least \$963 – rather than a weekly salary – was entitled to receive overtime premiums. While most employers know that employees must be paid on a “salary basis” to qualify for the Fair Labor Standards Act’s (FLSA’s) so-called white-collar exemptions, federal appeals courts disagree on what is meant by the term. The Supreme Court just agreed to wade into the debate by accepting review of the *Helix Energy Solutions Group, Inc. v. Hewitt* case. Employers in the energy, oil, and gas industries – which commonly use a daily rate pay model – will be closely watching, but any business that pays highly compensated employees on a daily or shift basis could be affected by the ultimate ruling. What do employers need to know as they wait for an answer from the Supreme Court?

When is an Employee Exempt?

Under the FLSA, employees are generally entitled to receive overtime pay for hours worked beyond 40 in a workweek unless they qualify for an exemption. The executive, administrative, and professional exemptions are the most common and are collectively referred to as the “white-collar” exemptions.

To qualify for one of these exemptions, an employee must be paid on a salary basis of at least \$684 a week and perform certain duties. Employees who earn at least \$107,432 a year are considered “highly compensated” – but they are not automatically exempt. They still must meet a reduced duties test and earn “at least \$684 per week paid on a salary or fee basis,” according to the Department of Labor. *(Note: At the relevant time in this case, the weekly salary threshold was \$455, and the highly compensated exemption applied to employees earning at least \$100,000 a year.)*

But what if the employee is guaranteed a high *daily* rate? In this case, oil rig supervisor Michael Hewitt agreed that he was highly compensated and met the duties test for the executive exemption. However, he claimed he was due overtime premiums because he was paid a daily rate rather than a fixed weekly, monthly, or annual amount.

Despite being paid a daily rate, Helix argued that Hewitt was exempt because he never earned less than the FLSA's weekly salary threshold and was paid on a bi-weekly basis.

Initially, the trial court sided with the employer. "Although the plaintiff did not work every day that he was on the vessel, the pay he received for the days that he worked never fell below the requisite amount," the court said.

However, the 5th U.S. Circuit Court of Appeals reversed the trial court's ruling. "As a matter of common parlance, we typically associate the concept of 'salary' with the stability and security of a regular weekly, monthly, or annual pay structure," according to the majority opinion. "By contrast, we do not ordinarily think of daily or hourly wage earners – whose pay is subject to the vicissitudes of business needs and market conditions – as 'salaried' employees."

The 5th Circuit said an employee who is paid on a daily or hourly basis can meet the salary-basis test if two conditions are met:

- The employee is guaranteed to earn at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days, or shifts worked; and
- A "reasonable relationship" exists between the guaranteed amount and the amount actually earned.

"Helix does not even purport to meet these conditions. Instead, Helix asks us to ignore them altogether," the 5th Circuit majority said.

Notably, several 5th Circuit judges disagreed that the "reasonable relationship" test applies, and they would have found Hewitt exempt from overtime pay. He was "an experienced toolpusher who was paid over \$200,000 annually for supervising twelve to fourteen offshore oil and gas workers, comprising the drill crew, deck crew and subsea department of Helix's offshore operations," according to the dissent, which noted that fewer than 6% of workers in the U.S. are paid as much as Hewitt.

What's at Stake for Employers?

Right now, there is a split among the federal circuit courts, and different legal tests apply depending on where your workers are located. Employers need to watch this case if they pay their employees more than \$107,432 in annual compensation and use some method of daily, hourly, or shift pay. If the Supreme Court agrees with the 5th Circuit's majority, employers will need to guarantee a substantial portion of employees' weekly pay (on a salary basis) in order to satisfy the highly compensated employee exemption.

On the other hand, if the 5th Circuit is overturned, employers of highly compensated employees should have a lot more leeway in how they pay these employees. If this happens, you may be able to rely heavily on pay structures that offer hourly, shift, or daily pay.

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We'll have to wait until late 2022 or early 2023 for a decision from the Court. But there are some things you can do now to put yourself in the best position regardless of how SCOTUS decides.

Review Pay Policies and Practices

For now, the 5th Circuit's opinion is the law of that jurisdiction, which includes Louisiana, Mississippi, and Texas. So, if you are operating in the 5th Circuit, you need to make sure your pay plans are compliant with the findings of that order. Even if you are not in that jurisdiction –and especially if you operate in multiple jurisdictions – you may want to take the safe route and include weekly (or less frequent, such as bi-weekly or monthly) salary guarantees in compensation packages for employees who fall under the highly compensated employee exemption. For employees in the 5th Circuit's jurisdiction, the guaranteed amount should have a reasonable relationship to the employees' actual earnings.

Additionally, employers should be aware that not all states recognize a highly compensated employee exemption. If you have employees in a state that does not recognize this exemption, you will need to adopt payroll policies for those employees that comply with the applicable state's laws.

Conclusion

We will monitor this development and provide updates as appropriate, so you should ensure you are subscribed to [Fisher Phillips' Insight system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Wage and Hour Practice Group](#).

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