

HIGHLY PAID EMPLOYEE ENTITLED TO OVERTIME PAY: 4 TIPS FOR EMPLOYERS AFTER SCOTUS'S "HEAD-SCRATCHING" DECISION

Insights
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High-earning workers making more than \$200,000 a year might be eligible for overtime pay thanks to a new Supreme Court ruling this morning. The decision is a wake-up call for all employers to review their OT exemptions to ensure they are compliant with applicable federal and state requirements. To be exempt from overtime pay under the Fair Labor Standards Act's "white-collar" exemptions, employees must earn at least \$684 a week on a salary basis, among other requirements. In this case, an oil rig worker was paid a guaranteed daily rate of at least \$963, which is significantly higher than the weekly salary threshold. In a 6-3 ruling, however, the Supreme Court said the worker was eligible for overtime pay because he was not paid on a salary basis. What do you need to know about this shocking decision and what are four key steps you should consider taking in light of the ruling?

What is a Salary?

As you know, nonexempt employees generally must be paid 1.5 times their regular rate for all hours worked beyond 40 in a workweek. To qualify for the FLSA's white-collar exemptions, employees must be paid on a salary basis at least \$684 a week and perform certain duties. Compliance is crucial: If an employee is misclassified as exempt, the employer could be on the hook for thousands – or even hundreds of thousands – of dollars in unpaid overtime premiums, as well as an equal amount of liquidated damages and attorneys' fees and costs.

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That's exactly what the former employee sought in [*Helix Energy Solutions Group, Inc. v. Hewitt*](#). After he was fired, Hewitt claimed that he was entitled to such premiums because he was paid a guaranteed daily rate, rather than a weekly salary – even though he earned more than \$200,000 a year.

The employer, Helix Energy Solutions, relied on the “highly compensated employee” exemption and made the following arguments:

- The employee was guaranteed at least \$963 if he worked any amount of time in one day during the workweek, which serves the same purpose as the minimum guarantee provided by a weekly salary; and
- The minimum guarantee of \$963 is more than enough to meet the \$684 weekly amount (and the prior weekly minimum of \$455) required under the FLSA.

The legal battle boiled down to determining what really is a “salary” and whether a daily minimum guarantee can be a salary. Helix initially won the case at the district court level, but the employee struck back with a win from the 5th U.S. Circuit Court of Appeals.

SCOTUS agreed with the 5th Circuit today and sided with the employee. The Court relied on a strict textual interpretation of the FLSA’s regulations to hold that an employee paid exclusively with a day rate cannot satisfy [the salary basis test](#), even if that day rate exceeds the required weekly salary level. Because the employer failed the salary basis test, the Court held that the employee was not exempt from the FLSA’s overtime requirements.

“Most simply put, an employee paid on an hourly basis is paid by the hour, an employee paid on a daily basis is paid by the day, and an employee paid on a weekly basis is paid by the week,” Justice Kagan wrote for the majority.

She said the regulatory language reflects “the standard meaning of a ‘salary,’ which connotes a steady and predictable stream of pay, week after week after week. Put it all together and a daily-rate worker does not qualify under §602(a) as a salaried employee — even if (like Hewitt) his daily rate is high.”



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The majority noted that an employee paid with a day rate can satisfy the salary basis test under a "special rule" if the employer guarantees the minimum weekly salary level and the employee's actual weekly earnings have a reasonable relationship to the guaranteed amount of pay — but those facts were not present in this case.

In a heated dissent, Justice Kavanaugh called the majority's conclusion "head scratching." The employee "was guaranteed \$963 for any day that he worked," Kavanaugh said. "Therefore, he was guaranteed at least \$963 for any week that he worked."

How Did We Do With Our Predictions?

Justice Kavanaugh is not the only one scratching his head about this ruling. No legal observers predicted the conservative trio of Chief Justice Roberts, Justice Thomas, and Justice Barrett would join the three liberal Justices (Justices Kagan, Sotomayor, and Jackson) in ruling in favor of the worker – and certainly neither did we. Our prediction was that the majority would "rule in favor of Helix Energy Solutions and conclude that the employee was exempt from overtime pay." Only one of our authors thought it would be a close 5-4 decision, while two of our authors believed we'd see an employer win by a 6-3 majority. This gives you a clue into how surprising this decision is.

But we did get one thing correct: we predicted at that least one Justice would write a separate opinion arguing that the FLSA's regulations — to the extent that they require that an employee be paid on a salary basis to be exempt under the white-collar exemptions — are an impermissible exercise in regulatory action. And that's just what Justice Kavanaugh did.

Not only did he wonder whether the DOL's regulations may be inconsistent with the FLSA, he said it is questionable whether the regulations "would survive if and when they are challenged as inconsistent with the statute." He all but invited employers to challenge the rules in the lower courts and "ultimately" at the Supreme Court, where we know they'll have at least one receptive member of the bench eager to throw them in the shredder. In other words, Justice Kavanaugh may have lost this battle, but he's hoping to win the larger war.

In a footnote, the majority sidestepped some of the issues Kavanaugh noted, stating that the employer failed to raise the arguments in the courts below — but we'll likely see these question litigated in the near future.

4 Tips for Employers in Light of the Ruling

Today's SCOTUS ruling resolves the regulatory question of whether a day rate can count as a salary and sets a nationwide standard. What should you do now? Here are four important steps:

1. **Review your practices for compliance.** In particular, employers in the energy, oil, and gas industries – which commonly use a daily rate pay model – will need to carefully review their practices. But any business that pays highly compensated employees on a day rate, shift rate, or similar method should work with experienced legal counsel to review their employee classifications and ensure compliance with the ruling.
2. **Spotlight on weekly guarantee.** 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. The safest route is to include weekly (or less frequent, such as bi-weekly or monthly) salary guarantees in compensation packages for these employees.
3. **Note that state rules vary.** 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 need to adopt payroll policies for those employees that comply with the applicable state's laws.
4. **Watch for changes from the Labor Department.** As you may know, the Department of Labor is [planning to update federal overtime regulations](#), and we expect the department to propose a substantial increase to the salary threshold to somewhere around \$900-\$1,000 a week. We expect business groups to challenge the DOL Wage and Hour Division's attempts to increase the minimum salary level — and they may use Kavanaugh's reasoning to do so.

Conclusion

We will continue to monitor this case and provide updates as appropriate. Make sure 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](#).