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SCOTUS TO PONDER PROOF IN WAGE MISCLASSIFICATION CASE: 5 STEPS FOR EMPLOYERS TO COMPLY WITH OVERTIME EXEMPTION RULES

Insights
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What evidence does an employer need to show a court to prove it correctly classified employees as exempt from minimum wage and overtime pay? The Supreme Court announced on June 17 that it will address a disagreement among federal appeals courts on the standard of proof in such cases. Employers will want to track this case next term, as the decision will impact your litigation strategy when employees claim they were misclassified and owed wages and overtime premiums. Here are the key points you should know about the pending SCOTUS case and five steps you can take now to avoid misclassifying employees under wage and hour laws.

Why Is this Issue Important to Employers?

Federal Wage Law. In *E.M.D. Sales Inc. v. Carrera*, several employees of a grocery distribution company claimed they were misclassified as outside sales employees and were therefore owed overtime pay. Under the Fair Labor Standards Act (FLSA), employees generally must be paid an overtime premium of 1.5 times their regular rate of pay for all hours worked beyond 40 in a workweek — unless they fall under an exemption.

Exemptions. While the executive, administrative, and professional exemptions — which are collectively known as the "white-collar" exemptions – may be the most familiar to employers, this case focuses on the outside sales exemption. Under this exemption, the employee's primary duties must involve making sales, and the employee must be customarily and regularly engaged away from the

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employer's place of business. You should note, however, that the Supreme Court's ruling will likely impact all 34 of the FLSA's exemptions.

Burden of Proof. Employers have the burden to prove they properly classified employees as exempt – and this case focuses on how much proof the employer needs to offer. While the issue is a bit technical, the distinction makes a big difference for employers defending against misclassification claims. Here are the two standards of proof at issue:

- **Preponderance of the Evidence.** Under this standard, an employer must show that its position is more likely true than not true. This standard generally applies in civil cases. Some legal scholars say it means that you need to show there's at least a 51% chance that your position is correct.

- **Clear and Convincing Evidence.** This is a higher bar for employers to reach, requiring them to show more substantial evidence to prove their argument. While there's no definitive number to use as a gauge, some legal scholars say you need to prove there's an 80 to 90% chance that you're correct in order to meet this higher standard. In the case before the Supreme Court, the employer argues this standard is "an unusually heavy burden reserved for such weighty matters as civil commitment, termination of parental rights, and deportation."

Disagreement Among Courts. In *E.M.D. Sales*, the 4th U.S. Circuit Court of Appeals applied the "clear and convincing" standard, making it the sole federal appeals court to do so. In contrast, six other federal appeals courts (the 5th, 6th, 7th, 9th, 10th, and 11th) have applied the "preponderance of the evidence" standard. Thus, SCOTUS accepted the case to address this disagreement and will hopefully set a consistent standard nationwide.

Widespread Support for Employer. The 4th Circuit is clearly an outlier on this issue, and the employer has ample support from business groups – and even the federal government. For instance, the U.S. Chamber of Commerce said the 4th Circuit's position requires the employer "to shoulder a burden of proof that is inconsistent with the FLSA's text" and "threatens employers with significant and unanticipated overtime liabilities."

Moreover, the Biden administration filed a "friend of the court" brief asking the Justices to fast-track a ruling in favor of the employer due to "the lack of any valid rationale" for the 4th Circuit's position. "The court of appeals' adoption of the clear-and-convincing-evidence standard of proof for FLSA exemptions is unreasoned and inconsistent with this Court's precedent, which has long recognized that such a heightened standard of proof should not be applied to ordinary civil cases seeking monetary remedies," the federal government argued.

SCOTUS to Weigh In. The Supreme Court will take up the issue next term, which begins on October 7.

The Bigger Picture: 5 Compliance Steps to Take Now

Even if SCOTUS resolves this case in favor of the employer, wage and hour compliance should be top of mind, since errors can result in significant penalties and hefty litigation costs. The best way to avoid misclassification claims is to ensure you regularly review your practices. Consider taking the following five steps now:

1. **Prepare for Changes to the White-Collar Exemptions.** As you likely know, the FLSA's exemptions are under the spotlight right now as the first of two deadlines looms to raise the salary threshold for the white-collar exemptions. Currently, the standard salary threshold for these exemptions is $684 a week ($35,568 annualized). The Department of Labor's new rule raises the rate first to $844 a week ($43,888 annualized), then to $1,128 (or $58,656 a year). These significant increases will require some planning if you have exempt employees who earn less than the finalized amounts. You can click here for our comprehensive guide to the new overtime rule – and 10 steps you can take now to prepare.

2. **Review the Duties Tests for All Exemptions.** You should take this opportunity to review all your exempt employees' roles to ensure they are properly classified. As with all exemptions, neither the job title nor the job description alone determines whether an employee qualifies for an exemption. Instead, to be eligible for an exemption, the employee's primary job duties must meet both state and federal wage and hour law requirements. You should note that the duties test varies depending on the exemption. Click here for an overview of the "highly compensated employee" exemption and the duties tests

for the executive, administrative, and professional exemptions.

3. **Update Job Descriptions.** Remember that jobs evolve and duties change, so it's important to periodically review job descriptions to ensure they accurately reflect the roles and responsibilities of your workforce.

4. **Promptly Correct Any Misclassification Errors.** If employees have been misclassified, this error should be corrected, and any affected employees should be notified of their change in status. There is a strong possibility that your employees will not be thrilled at receiving news that they are being reclassified. They may question whether they were previously misclassified and owed overtime wages or whether your organization was otherwise noncompliant with the FLSA. As a result, you should consult with legal counsel to determine the best approach to correcting any misclassification errors, including potentially compensating misclassified employees for any overtime owed and how to best convey messaging to your employees.

5. **Check State Law**. It is important to remember that some jurisdictions can have higher, stricter, or different wage and hour requirements than federal law. For example, some states have a higher salary threshold for the white-collar exemptions than the FLSA. Additionally, some jurisdictions have higher minimum wage rates and/or additional overtime-type requirements. And while the FLSA regulates little in the way of actual wage payments, deductions, and notification of pay terms, many states have detailed requirements and might even have different provisions for non-exempt versus exempt employees.

Conclusion

We will continue to monitor developments from SCOTUS and the DOL's Wage and Hour Division, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Wage and Hour Practice Group.