

FYI[®]

For Your Information[®]

Highly compensated employees may be entitled to overtime pay

In a case with broad implications for employer pay practices, the Supreme Court recently held that a high-earning oil rig worker who was paid a daily rate was improperly classified as an exempt employee and wrongly denied overtime pay.

Background

The Fair Labor Standards Act of 1938 (FLSA or Act) guarantees overtime pay to employees when they work more than 40 hours a week, unless they qualify for one of the Act's enumerated exemptions. Under U.S. Department of Labor (DOL) regulations, employees who work in a "bona fide executive capacity" generally are "exempt" if they meet a three-part test: (1) they receive a predetermined amount on a weekly or less frequent basis without regard to the number of days or hours worked (the "salary-basis" test); (2) make at least the statutory minimum per week paid on a salary or fee basis (the "salary-level" test); and (3) carry out three job responsibilities — managing the enterprise, directing other employees, and exercising power to hire and fire (the job "duties" test). "Highly compensated employees" (HCEs) — currently those who make at least \$107,432 per year — are also subject to the salary tests but only a relaxed job duties test.

The regulations provide a "special rule" allowing an employer to base an employee's pay on an hourly, daily, or shift rate without losing the exemption provided two conditions are met. First, the employer must guarantee the employee is paid at or above a minimum salary threshold (currently \$684 per week) regardless of the number of hours, days or shifts worked. Second, the weekly guarantee must bear a reasonable relationship to the employee's earnings in a typical workweek.

Helix Energy Solutions Group v. Hewitt

From 2014 to 2017, Michael Hewitt worked for Helix Energy Solutions Group as a tool pusher on an offshore oil rig, typically working 84 hours a week while on the vessel. He also oversaw certain rig operations and supervised about a dozen workers. His schedule involved him working 12 hours a

Volume 46

Issue 04

April 26, 2023

Authors

Nancy Vary, JD

Amy J. Heinze

day, seven days a week during a 28-day “hitch,” followed by 28 days off. Helix paid Hewitt on a day-rate basis, which ranged from \$963 to \$1,341 per day. Hewitt was paid every two weeks in an amount calculated by multiplying his day rate by the number of days he had worked during the pay period. He earned over \$200,000 annually but received no overtime pay.

Lower court rulings

Hewitt sued for unpaid overtime. Helix asserted that Hewitt qualified for the bona fide executive exemption from the FLSA’s overtime pay guarantee. While conceding that his employment met the salary-level and job duties tests for an executive exemption, Hewitt claimed that Helix had wrongly classified him as exempt since he was paid on a day-rate basis. Helix argued that Hewitt was, in effect, guaranteed a salary above the minimum threshold for any week in which he worked because his daily rate was so high. The district court agreed and granted summary judgment to Helix.

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed, finding that Hewitt’s compensation failed to satisfy the special exemption criteria for workers whose pay is computed on an hourly, daily or shift basis. Helix appealed. The Supreme Court granted certiorari.

The Supreme Court’s ruling

In a 6-3 [decision](#), the Supreme Court affirmed the Fifth Circuit’s decision. According to the Court, the critical question before it was “whether a high-earning employee is compensated on a salary basis when his paycheck is based solely on a daily rate — so that they receive a certain amount if they work one day in a week, twice as much for two days, three times as much for three, and so on.”

The Court observed that a “true salary” is “a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week.” Linking the concept of “salary” to “the stability and security of a regular weekly, monthly, or annual pay structure,” the Court opined that the idea of a salary dissolves if that kind of paycheck security is taken away.

Helix argued that Hewitt was paid on a salary basis because he received a paycheck every two weeks, and it always exceeded the required salary level for any week he had worked at all. The Court rejected that argument, reasoning that the “basis” of payment refers to the method for calculating pay (e.g., by the hour, day, etc.), not “when or how often his employer actually doles out the money.” It found that even though Hewitt was paid biweekly, his paycheck was based solely on a daily rate and fluctuated based on the number of days he worked.

The Court noted that the rules governing exemptions for HCE’s did not eliminate the need to satisfy the “salary-basis” test. While those rules make it easier to show the employee performed exempt job duties, they leave the salary-basis requirement untouched.

The Court concluded that day-rate workers, regardless of income level, can qualify as paid on a salary basis only if the conditions set out in the special rule are met — a weekly salary guarantee that is reasonably related to the employee’s earnings in a typical workweek. Because Hewitt did not

receive a predetermined amount of compensation on a weekly or less frequent basis irrespective of days worked, the Court held that Hewitt was entitled to overtime pay.

The Court dismissed Helix’s concerns about potential “windfalls” for high earners and its “operational and cost-based objections,” citing two ways in which Helix could come into compliance with the salary-basis requirement. It could either add a weekly guarantee to the per-day rate or convert the day-rate compensation to a straight weekly salary. Finally, the Court noted that “workers are not deprived of the benefits of the [FLSA] simply because they are well paid.”

Dissenting view

Justice Kavanaugh, joined by Justice Alito, dissented, arguing that Hewitt qualified for the FLSA’s bona fide executive exemption since he was guaranteed a predetermined amount for any day that he worked which far exceeded the amount generally required by the regulations for any week that he worked.

Perhaps a harbinger of future legal challenges, Justice Kavanaugh questioned whether the DOL’s salary basis regulation is consistent with the Act itself, writing:

“The Act focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So it is questionable whether the Department’s regulations — which look not only at an employee’s duties but also at how much an employee is paid and how an employee is paid — will survive if and when the regulations are challenged as inconsistent with the Act.”

In closing

Employers seeking to avail themselves of exemptions from the FLSA’s overtime pay provisions should take a close look at their compensation structures to make sure they satisfy all applicable requirements — even in the case of highly compensated employees. Employers should also be mindful that state and local wage and hour laws may impose different requirements.

Produced by the Compliance Consulting Practice

The Compliance Consulting Practice is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, training, and knowledge management. For more information, please contact your account executive.

You are welcome to distribute *FYI* publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.