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CLIENT ALERT

Supreme Court Grants Overtime to Highly Compensated Day-Rate Workers

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Key Takeaways

- Under the Fair Labor Standards Act, employees paid a daily rate, regardless of amount, are not paid on a salary basis and thus are entitled to overtime pay.
- Employers of highly skilled day-rate employees—such as field supervisors, welders, medical professionals, consultants, etc.—now face high overtime-pay expenses for personnel widely thought to be exempt from overtime pay based on their high compensation and job duties.
- The FLSA's overtime-pay requirement applies only to employees. The Court's opinion does not affect day-rate independent contractors.

Summary

Respondent Michael Hewitt earned over $200,000 a year as a toolpusher—a specialized supervisor on offshore oil rigs. Because of the unique demands of offshore oil-rig operations, Hewitt worked for 28 days straight on the oil rig, and then he had 28 days off. When he was on, he typically "worked 12 hours a day, seven days a week—so 84 hours a week." His employer, Helix Energy Solutions Group, Inc., issued him a paycheck every two weeks. Helix paid Hewitt a daily rate between $963 and $1,341 throughout the course of his employment. Thus, for every week Hewitt worked at all on any given day, he earned at least $963.

Hewitt sought overtime pay under the Fair Labor Standards Act (FLSA). Absent a defined exemption, the FLSA requires employers to pay employees an overtime rate of 150% of their normal rate for working hours in excess of forty hours in a week. 29 U.S.C. § 207. The FLSA exempts "bona fide executive[s]" from this requirement. *Id.* § 213(a)(1).

The Secretary of Labor has defined two categories of "bona fide executive[s]"—those making less than $100,000 a year, and those making more than $100,000 a year. 29 C.F.R. §§ 541.100, 541.601(a), (b)(1). Helix considered Hewitt to be a highly compensated "bona fide executive" because of his role as a specialized supervisor and his

$200,000+ yearly pay. Highly compensated bona fide executives, also referred to simply as "highly compensated employees," must (1) be compensated on a salary basis; (2) earn at least $455 a week; and (3) carry out at least one of three defined duties. 29 C.F.R. § 541.601. The Court's decision turned on whether Helix satisfied the first requirement by paying Hewitt on a salary basis.

Two regulations define "salary basis." *First*, section 602(a) states that an employee is paid on a salary basis "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity or work performed." 29 C.F.R. § 541.602(a). The "exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." 29 C.F.R. § 541.602(a).

Second, section 604(b) states that an employer may pay an employee on a salary basis but calculate the compensation "on an hourly, a daily[,] or a shift basis" if (a) the employer "also" guarantees a minimum of $455 each week "regardless of the number of hours, days[,] or shifts worked," and (b) "a reasonable relationship exists between the guaranteed amount and the amount actually earned." 29 C.F.R. § 541.604(b).

The Court held that section 602(a) and section 604(b) state separate definitions of "salary basis." Section 602(a) states the definition for workers paid weekly or less frequently. Section 604(b) states the definition for workers paid by hour, day, or shift. Because Helix paid Hewitt by the day, Helix satisfied the salary basis requirement only if it satisfied each of the requirements of section 604(b). Because the Court read Helix's opening brief as conceding there was no reasonable relationship between Hewitt's minimum $963 weekly guarantee and his actual pay, Helix did not satisfy section 604(b). Helix thus owed Hewitt overtime pay.

In reaching this conclusion, the Court rejected two arguments from Helix. *First*, Helix focused on the distinction between bona fide executives making less than $100,000 a year and the highly compensated employees making more than $100,000. In Helix's view, only the executive making less than $100,000 had to satisfy the requirements of both section 602(a) and 604(b); highly compensated employees, on the other hand, had to satisfy only section 602(a). The Court rejected this view because the plain text of the highly-compensated-employee rule did not support the conclusion. The Court also noted that Helix could not satisfy section 602(a) in any event because it paid Hewitt a daily rate, as discussed above.

Second, Helix alerted the Court to the "policy consequences" of subjecting highly compensated employees to the requirements of section 604(b). Helix warned of windfalls to high earners and disruption to industries, such as oil and gas, that rely on highly skilled, and thus highly compensated, day-rate labor. In an Amicus Brief to the Court, the Chamber of Commerce emphasized these policy consequences. The Chamber listed examples of lawyers, pharmacists, project managers, political consultants, welding inspectors, and PhDs who subjected their employers to years of protracted litigation over claims to overtime pay despite high daily rates. The Court determined that these policy objections could not overcome its plain-text reading of the governing rules. The Court has long rejected the view that the concern of a windfall due to high pay disentitles an employee to the FLSA's protections. And as for industry consequences, companies such as Helix can adjust by simply paying overtime or converting daily rates to salaries. In short, the potential far-reaching consequences of its holding did not move the Court to change its reading of the rules.

What this Means

Going forward, an employer compensates a day-rate employee on a salary basis, regardless of the amount of the employee's income, only if:

- the employee receives his pay weekly or less frequently;
- the employer guarantees that the weekly pay will amount to at least $455;
- that minimum guarantee does not change with the number of hours, days, or shifts worked; and
- there is a "reasonable relationship" between the minimum guarantee and the actual amount paid.

29 C.F.R. §§ 541.602(a), 541.604(b). Employers now face greater, and potentially very costly, liability for overtime pay for day-rate employees.

Although the Court acknowledged that *Helix* involved a prior version of the highly compensated employee rule, the Court nevertheless determined that the distinction between the prior version and the current version made no difference. Thus, the holding of *Helix* should apply to day-rate employees going forward absent a further rule change.

The Court noted that employers can comply with their day-rate overtime-pay obligations by either simply paying the required overtime or converting daily rates to actual salaries. Additionally, employers have the option of restructuring day-rate worker agreements from employment agreements to independent contractors' agreements. Properly classified independent contractors are not employees and thus not subject to the FLSA's overtime pay requirement. Converting day-rate employees to independent contractors, of course, implicates considerations beyond FLSA overtime pay. Companies should tread carefully and consult with counsel before making any personnel adjustments in reaction to *Helix*.

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