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ALERT

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Supreme Court Rules That Day Rates Are Not A Salary

Seventy-five years after it was enacted, the Fair Labor Standards Act (FLSA) continues to surprise, and to remind us that it's not how much you pay, but how, that really matters. On February 22, 2023, the U.S. Supreme Court ruled in *Helix Energy Solutions v. Michael Hewitt* (No. 21-984) that even a very highly compensated individual may be entitled to overtime pay if the employer hasn't checked all the boxes to qualify for an exemption.

Michael Hewitt worked as tool-pusher on an offshore oil rig, and typically worked 12 hours a day, seven days a week, for a 28-day period. Then he would have 28 days off. He supervised 12 to 14 other workers. Critically, he was paid a per-diem or day rate that ranged from $963 to $1,341. His annual compensation was over $200,000.

Hewitt sued Helix, claiming he was entitled to unpaid overtime wages. Given his schedule, these would be substantial. Let's do the numbers.

Section 207 of the FLSA requires overtime pay at the rate of 1 ½ times the regular rate for every hour worked over 40 in any work week. (Lest we forget, this was devised to spur employers to hire more people.) Given his 84-hour-per-week schedule, that's 44 hours of overtime. At $1,000/day ($175/hour), that would mean he was owed a whopping $11,550 per week in overtime. (There's an argument that he would only be due additional half-time for those hours because he already had been paid for "all hours worked," but let's stick to the worst-case scenario for now.) Assuming his 28-days on, 28-days off schedule, that would mean back wages of $300,300 per annum; with liquidated damages, $600,600 for each year (2 or 3, depending). Not a bad payday, especially on top of the $200K he'd already pocketed. And the FLSA also requires the employer to pay a prevailing employee's attorneys' fees, which can easily dwarf the amount of back wages recovered.

Helix Energy maintained that Hewitt was exempt, and not entitled to overtime as a bona fide executive employee under the "highly compensated employees" rule. 29 USC §213(a)(1); 29 CFR §541.100; 29 CFR §541.601. To be exempt from the overtime requirement one must satisfy three tests. The tests are: (1) the employee must be paid on a salary basis; (2) the salary must exceed a certain threshold; and (3) the employee's job duties must be managerial in nature. The only issue on appeal was whether the day rate satisfied the salary basis test.

To satisfy the salary basis test, 29 CFR §602(a), an employee must:

a. . . . 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 of the work performed.

1. . . . an 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.

The regulations provide a special rule for otherwise exempt employees who are paid on an hourly, daily or shift basis: the salary basis test is met for such employees "if the employment arrangement also includes a guarantee of 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." 29 CFR §541.604(b).

Helix acknowledged that their compensation plan did not satisfy the requirements for 29 CFR §541.604(b). There was no guaranteed minimum weekly amount at all, much less a guaranteed amount that bore a "reasonable relationship" to his typical weekly earnings. The case hinged solely on whether the day rate paid to Mr. Hewitt could satisfy the general salary basis test set forth in 29 CFR §602(a).

In a 6-3 opinion authored by Justice Elena Kagan the U.S. Supreme Court held that the day rate paid to Mr. Hewitt did ***not*** satisfy the salary basis test. At its core, a day rate is inconsistent with a fixed salary paid regardless of the amount of time worked, or dollars paid. Likewise, a day rate is not a fixed compensation scheme "without regard to the number of days or hours worked." (Justices Kavanaugh and Alito dissented; Justice Gorsuch thought certiorari was improvidently granted and that the high court shouldn't have taken the case.)

Comment: When Justice Kagan was confirmed, she famously observed that "we are all originalists now." This was a nod to her colleague Justice Antonin Scalia, who was a strict textualist and insisted that it was the Court's job to give meaning to the actual words in a statute and that it must refrain from inferring or applying legislative intent to alter the plain meaning of the words. This is a shining case in point. The FLSA's salary test requires a guaranteed, predictable salary and the day rate Mr. Hewitt was paid – generous as it was – didn't qualify. Words mean what they say and it is encouraging that Justice Kagan is sticking to her guns.

Christopher D. Adams contributed to this article.

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