



Supreme Court of the United States Rules Some High-Earning Executives May Be Entitled to Overtime, Keith Gutstein, Kevin Yombor 3/27/2023

High-earning, bona fide executives are now only exempt from Federal Labor Standards Administration overtime requirements, if they are paid on a salary basis, according to a Supreme Court of the United States ruling last month. The Court affirmed the long-standing U.S. Department of Labor's opinion that a salary is generally considered a predetermined, steady stream of pay that an employee may rely upon week after week.

In *Helix Energy Solutions Group, Inc., et al. v. Hewitt*, 598 U.S. ____ (2023), the Supreme Court was tasked with answering a relatively narrow question: was Hewitt, a high-earning "bona fide executive" who was paid on a daily-rate basis with no overtime compensation, paid a salary, as defined by 29 CFR §541.602(a) or 29 CFR §541.604(b). Ultimately, the Court found that despite the considerable compensation paid to Hewitt, he did not receive a salary because he was not paid a predetermined amount weekly. Rather, Hewitt was paid bi-weekly only for the days he worked. Thus, Hewitt was not considered an FLSA exempt employee and he should have been entitled to receive overtime compensation.

Helix paid Hewitt on a daily-rate basis, with no overtime compensation, which ranged from \$963 to \$1,341 per day during the course of his employment. Hewitt was paid bi-weekly and was paid the number of days he worked in the pay period. Under this compensation scheme, Hewitt earned in excess of \$200,000.00 annually.

A bona fide executive employee may be exempt from FLSA overtime compensation provided they satisfy the following tests: (1) the "salary basis" test; (2) the "salary level" test; and (3) the "duties" test. Under federal law, the "salary level" test is satisfied if the executive employee is compensated more than \$684.00 per week, regardless of the number of hours, days, or shifts worked[1]. 29 CFR §541.100(a). The "duties" test requires an exempt executive employee to carry out three listed responsibilities: managing the enterprise, directing other employees, and exercising power to hire and fire. *Id.* For highly compensated executive employees like Hewitt, the "duties" test is relaxed, and an employer only needs to establish that the executive employee meets just one of those three responsibilities. 29 CFR §541.601(a). In this case, the parties did not dispute that Helix met the "salary level" and "duties" test. Rather, this case solely concerned whether Helix met the "salary basis" test.

Engaging in a strict "structural" and "textual" evaluation, the Court found that Helix did not pay Hewitt a salary, as required pursuant to the "salary basis" test. This resulted in Hewitt not being considered an FLSA exempt employee, thereby entitling him to overtime pay for all time worked in excess of 40 hours per week. On average, Hewitt worked 84 hours per week.

29 CFR §541.602(a) provides that for an employee to be considered to be paid on a "salary basis," that employee must regularly receive, "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." The statute further provides that the frequency of this payment must be made "on a weekly, or less frequent basis." [2]

Finding that Helix failed to comply with the general salary basis test, as defined in 602(a), and noting that Hewitt was compensated on a daily-rate basis, the Court next evaluated 29 CFR §541.604(b), which discusses salary for employees compensated on a less-than-weekly basis. However, the statute still required Helix to provide 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."

Helix argued that because of Hewitt's high daily-rate basis, Hewitt's salary basis would be sufficient to meet the salary level requirement even if he only worked one day per week. The Court, however, rejected this argument through explicit reference to 29 CFR §541.604(b), which requires the payment of a guaranteed salary that has a reasonable relationship with the amount the employee generally earns.

Instead of looking at the salary level paid to Hewitt, the Court insisted it must first evaluate the salary basis, which requires a pre-determined amount of money to be paid to the employee as a salary. Departing from the statutory text, the Court further noted that Hewitt was not paid a salary, as ordinary people generally think of a salary. But rather, he received a high rate of pay for the number of

days he worked.

This case will require employers to not only look at the amount of money it is paying its bona fide executive exempt employees, but also the guaranteed salary it is providing its executive exempt employees. This case will have the greatest impact on employers that pay their workers on a day-rate basis. Pursuant to this case, if an employer pays an employee a sum of money, but there is not a guaranteed, predetermined amount paid weekly, regardless of the time worked, then that employee will qualify for overtime compensation if that employee works in excess of 40 hours.

[1] The \$684 weekly threshold is the salary level required under the FLSA. Individual states often have a higher salary thresholds which must be satisfied in order to properly be classified as exempt.

[2] This pay frequency requirement is the frequency required under federal law. Individual states may have different frequency requirements, which must be followed to properly be classified as an exempt executive employee.

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