Watch Out for FLSA Misclassification:
Supreme Court Rules Daily Rate Pay Cannot Meet Salary Basis Test for Exempt Status

By Natalie Pattison & Becky Zuschlag

Correctly classifying workers as exempt or non-exempt under the Fair Labor Standards Act (FLSA) can be a complicated process, and a costly one if not done correctly. Earlier this year, in Helix Energy Solutions Group, Inc. v. Hewitt (*Helix*), the United States Supreme Court weighed in on the matter, finding that an employee who earned more than $200,000 a year was misclassified as exempt and entitled to recover overtime pay.

FLSA's Requirements

The FLSA obligates employers to pay employees at least the federal minimum wage for all hours worked, and overtime pay for any hours worked in excess of 40 hours in a workweek. If the employee works in a state that offers a more generous minimum wage (such as Oregon), or has daily overtime requirements, the employer must pay at least the state's minimum wage for all hours worked and comply with the state's overtime regulations.

If the employee meets certain conditions, however, the FLSA provides an exemption from both the minimum wage and overtime pay requirements. The three most common exemptions – executive, administrative, and professional – are often referred to as "white collar" exemptions. The executive exemption was the one at issue in *Helix* and requires that an employee satisfy three separate tests: (1) "salary basis" test, (2) "salary level" test, and (3) the job "duties" test. Crucially, if even one test is not met, the employee does not qualify for exempt status.

An employee will be considered to be paid on a "salary basis" if the employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. Importantly, the predetermined amount cannot be reduced based on the quality or quantity of work performed in a given week. Subject to only a few exceptions, an exempt employee must receive their full weekly salary for any week in which they perform any work. An employee will not be considered to be paid on a salary basis if the employer makes improper deductions from an employee's predetermined compensation and will thus be entitled to overtime pay.

The employee must also meet the "salary level" test by earning at least $684 per week or $35,568 annually. Note, Oregon law provides a slightly lower weekly salary requirement equivalent to a monthly salary calculated by multiplying the applicable regional minimum wage by 2,080 hours and dividing that amount by 12 months, but Oregon employers must comply with the law most favorable to employees—in this case, federal law.

Finally, the duties test for the executive exemption requires that the employee's primary duty be managing the enterprise, or a customarily recognized department or subdivision of the enterprise. Additionally, the employee must customarily and regularly direct the work of at least two other full-time employees (or their equivalent), and either have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to hiring, firing, advancement, or any other change of status of other employees must be given particular weight.

Note that under the FLSA if the employee in question is a "highly compensated employee" earning at least $107,432 annually, the duties test is slightly more lenient, requiring that the employee satisfy just one (not all) of the three responsibilities included in the rule. However, there is no comparable exemption for highly compensated employees under Oregon law.

Helix **Decision**

The *Helix* case involved an employee who worked on an offshore oil rig for Helix Energy Solutions Group. The employee worked for 28 days straight, followed by 28 days off. When he was on the rig, he typically worked 12 hours a day, 7 days a week, roughly 84 hours a week.

The employer classified the employee as "exempt" under the executive exemption test and paid him on a daily-rate basis every two weeks, with no overtime compensation. His daily rate changed over time during his employment but ranged between $963 to $1,341 per day. His paycheck was calculated by multiplying his daily rate by the number of days he worked in the pay period. Under this compensation scheme, the employee earned over $200,000 annually.

The employee argued that his compensation structure did not meet the salary basis test necessary to qualify for the FLSA's executive exemption. The Supreme Court agreed, and ultimately held that his pay structure did not satisfy the salary basis test under § 602(a) of the FLSA because even though the employee was paid on a bi-weekly basis, his pay was calculated using the number of days actually worked. In other words, his pay was calculated *with* regard to the number of days he worked—in direct conflict with the rule. Accordingly, the employee did not qualify as an exempt employee and was entitled to overtime pay.

Notably, it is possible for daily-rate workers to satisfy the salary basis test and qualify for an exemption from overtime under § 604(b) of the FLSA, "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." Because the employer in the *Helix* case conceded that it did not meet the requirements in § 604(b), the Court did not analyze its applicability.

Employers that use daily rate compensation should review the pay structure to ensure employees are properly classified under applicable law. Important distinctions between federal and state law can further complicate the analysis, and employers are encouraged to reach out to employment counsel with questions.

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