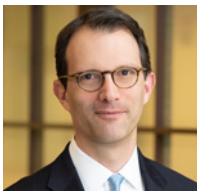
U.S. Supreme Court: Highly Compensated Employees Entitled to Overtime Unless FLSA Exemption Requirements Satisfied

A Practical Guidance® Article by Jonathan D. Lotsoff, Stefanie Moll, Thomas Cullen Wallace, and Brian D. Fahy, Morgan, Lewis & Bockius LLP



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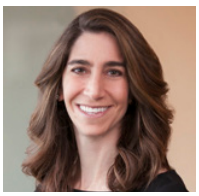

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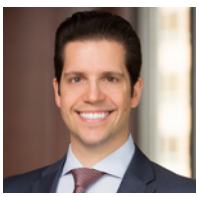

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In *Helix Energy Solutions Group Inc. v. Hewitt*, the U.S. Supreme Court held (on the facts of that case) that an employer had improperly classified a supervisory employee earning more than $200,000 per year as an exempt "executive" employee under the Fair Labor Standards Act (FLSA), and that the employee therefore was also entitled to overtime pay. The case serves as a powerful reminder that employers cannot assume an employee is ineligible for overtime simply because the employee is highly paid and performs at least one exempt duty.

The Court reaffirmed in a 6-3 decision that to qualify for the "bona fide executive" exemption from the FLSA's overtime requirements, an employer must (among other requirements) meet the "salary basis" test even as to highly compensated employees (HCE) receiving base compensation over $100,000 per year. The Court noted that its ruling analyzed the applicable DOL regulations in effect as of 2015 (the period in dispute), and that "[n]ew regulations went into effect in 2020, making some changes but retaining the salary basis test." The amendments effective January 1, 2020 made certain changes to other aspects of the exemption regulations, including, among other things, raising the $100,000 HCE compensation threshold applicable in *Helix* to $107,432. For a discussion of changes made in the 2020 regulations, see Morgan Lewis' prior LawFlash. Those amendments, however, do not alter the fundamental import of the Court's holding in *Helix*.

The Court also held that payment on a weekly (or less frequent) basis of a predetermined daily (or, by extension, hourly or shift) rate does not itself satisfy the main salary basis test, even if that predetermined daily amount is well in excess of the minimum weekly salary amount generally required under the FLSA's executive exemption (then $455 per week; now $684 per week). The Court held that a worker paid a day rate—i.e., where the worker's paycheck varies depending on the number of days worked and thus is not an amount that is "predetermined and fixed" on at least a weekly basis—does not earn a "salary" under the FLSA. The Court noted that employees are not "deprived

of the benefits of [overtime compensation] simply because they are well paid." Jewell Ridge Coal Corp. v. Mine Workers, 325 US 161, 167 (1945).

While the case involved application of the FLSA's executive exemption to an HCE, employers should be mindful that the Court's interpretation of the FLSA's salary basis test applies to non-HCEs as well, and to many employees who employers classify as exempt from overtime under other exemptions, including many (but not necessarily all) "administrative" and "professional" employees.

Background

At issue in *Helix* was whether the employer, a Houston-based oil and gas company, was liable for unpaid overtime to Michael Hewitt, a tool pusher working on an oil rig who earned over $200,000 per year. Hewitt's schedule involved him working 12 hours a day, seven days a week during a 28-day "hitch," followed by 28 days off. Helix paid Hewitt a predetermined day rate for days worked, which ranged over the course of his employment from $963 to $1,341 per day— well in excess of the minimum (then) required weekly earnings of $455 under the executive exemption. His annual compensation exceeded $200,000, but he was not paid overtime. He also oversaw certain rig operations and supervised about a dozen workers.

Hewitt sued Helix under the FLSA, seeking unpaid overtime. The district court found that Hewitt *was* compensated on a salary basis and granted summary judgment to Helix on Hewitt's overtime claim, finding he was exempt from overtime requirements as a bona fide executive. The US Court of Appeals for the Fifth Circuit reversed, finding that because Hewitt was paid a day rate (which, as discussed below, did not meet the separate exemption requirements specifically applicable to employees paid daily, hourly, or shift rates), he was not paid on a "salary basis" within the meaning of the Department of Labor's (DOL's) regulation at 29 C.F.R. § 541.602(a). The Supreme Court granted certiorari and affirmed the Fifth Circuit's decision.

The Supreme Court's Majority Opinion

The Supreme Court's majority opinion, authored by Justice Elena Kagan, focused on one narrow issue: "whether Hewitt was paid on a salary basis under § 602(a) of the Secretary's regulations." That DOL regulation provides in relevant part:

> An employee will be considered to be paid on a "salary basis" within the meaning of this part 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 of the work performed [subject to certain exceptions not relevant here].

As the Court noted, this "salary basis" test regulation applies to both HCEs and non-HCEs. The separate HCE regulation (29 C.F.R. § 541.602) principally modifies the *duties* test for the executive, administrative, and professional exemptions, and requires that an HCE perform at least *one* exempt duty, rather than *all* of the exempt duties typically required for non-HCEs.

The Court held that Section 602(a) "embodies the standard meaning of the word 'salary,'" and "demand[s] that an employee receive a fixed amount for a week no matter how many days he has worked," i.e., "a preset weekly (or less frequent) salary, not subject to reduction because of exactly how many days he worked."

The Court further held that "nothing in that description fits a daily-rate worker, who by definition is paid for each day he works and no others." In other words, "[a] daily-rate worker's weekly pay is always a function of how many days he has labored. It can be calculated only by counting those days once the week is over—not, as §602 requires, by ignoring that number and paying a predetermined amount."

In so holding, the majority rejected the employer's argument, adopted by Justice Brett Kavanaugh in dissent, that as long as a worker was paid on a weekly (or less frequent) basis according to some predetermined rate that exceeded the required weekly amount, the salary basis test was met.

Helix contended that because Hewitt received a paycheck every two weeks that always exceeded the required statutory amount (as noted, Hewitt was paid at least $963 *per day*, in contrast to the then-requirement of at least $455 *per week*), he was effectively paid a salary that qualified under §602. However, the Court rejected that argument, noting that Helix's interpretation of the phrase "weekly basis" was "not the most natural one" and that a salary typically connotes something other than daily pay.

Helix also argued that public policy considerations supported a finding that Hewitt was properly classified as exempt from overtime, contending that high earners would receive a "windfall" under the Court's opinion. However, the Court dismissed this argument as well, reiterating that workers are not outside the FLSA's protections simply because they are well paid, and noting that such policy arguments are for Congress, not the judiciary.

Alternative 'Salary Basis' Regulation for Day Rates

Notably, Section 604(b) of the DOL's exemption regulations, 29 C.F.R. § 541.604(b), offers another route for satisfying the salary basis requirement as to daily, hourly, or shift rate workers:

> An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, 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. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek.

However, that regulation was not at issue in *Helix* because, as the Court noted, "Helix acknowledges that Hewitt's compensation did not satisfy §604(b)'s conditions. That is because Helix did not guarantee that Hewitt would receive each week an amount (above $455) bearing a 'reasonable relationship' to the weekly amount he usually earned."

The Dissent and Possible Future Challenges to the DOL's Salary Basis Regulation

While the majority deemed the argument waived as it was raised too late and thus did not address it, in two dissents that may presage future challenges to the DOL's salary basis test, the three dissenting justices noted Helix's argument that, as Justice Neil Gorsuch summarized it, "those [DOL] regulations are inconsistent with and unsustainable under the terms of the statute on which they are purportedly based." As Justice Kavanaugh elaborated more fully:

> Recall that the Act provides that employees who work in a 'bona fide executive . . . capacity' are not entitled to overtime pay. 29 U.S.C. §213(a)(1). 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. It is especially dubious for the regulations to focus on how an employee is paid (for example, by salary, wage, commission, or bonus) to determine whether the employee is a bona fide executive. An executive employee's duties (and perhaps his total compensation) may be relevant to assessing whether the employee is a bona fide executive. But I am hard-pressed to understand why it would matter for assessing executive status whether an employee is paid by salary, wage, commission, bonus, or some combination thereof.

Implications for Employers

Unless and until the courts address any potential inconsistency between the FLSA and the current (or governing) DOL regulations, employers seeking to avail themselves of exemptions from the overtime requirements of the FLSA should take care to meet any applicable salary basis test (including, where relevant, the Section 604(b) variation thereof for employees compensated on an hourly, daily, or shift basis)—even in the case of highly compensated employees earning six-figure compensation or more annually.

To this end, employers should also review their master services agreements with any staffing companies with whom they contract to ensure that these companies are likewise meeting the salary basis test for exempt employees and not paying such employees a day rate.

Finally, employers should be mindful in all cases of any applicable state and local laws, which in some cases can have different requirements from the FLSA and impose overtime or other requirements that do not have exemptions mirroring the FLSA.

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Cases

- Helix Energy Sols. Grp., Inc. v. Hewitt, 214 L.Ed.2d 409 (U.S. 2023)

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