Supreme Court Holds That Day Rate Pay Is Not a Salary

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The United States Supreme Court recently decided in *Helix Energy Solutions Group, Inc. v. Hewitt* that paying employees a "day rate" does not qualify as being paid on a "salary basis." As a result of this 6-3 ruling, even highly paid employees do not qualify as overtime-exempt under the Fair Labor Standards Act (FLSA) if they are paid on a normal day-rate basis.

Background

From 2014 to 2017, Michael Hewitt worked for Helix as a "tool pusher" on an offshore oilrig. Reporting to the captain, he oversaw aspects of the rig's operations and supervised 12 to 14 workers. He usually worked 12 hours a day, seven days a week (84 hours a week) during a 28-day hitch. He then had 28 days off before reporting back to the rig. Hewitt was paid a day rate ranging from $963 to $1,341, with no overtime compensation. He received over $200,000 annually. Hewitt sued under the FLSA to recover overtime pay.

Helix asserted that Hewitt was exempt from overtime because he was an "executive" as defined by the FLSA. To be exempt, an employee must perform exempt duties (which wasn't at issue in the case) and be paid on a "salary basis" of at least $455 per week.

Under the FLSA, an employee is considered salaried 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." 29 CFR §602(a). An employee also may be salaried if the employee is guaranteed at least $455 per week "regardless of the number of hours, days or shifts worked" and the guaranteed amount has a "reasonable relationship" to the "amount actually earned" in a typical week. 29 CFR §602(b).

Helix conceded that its pay scheme did not comply with §602(b). Instead, Helix argued Hewitt was exempt under §602(a) because he received regular paychecks and his daily rate exceeded $455, so he

always received at least $455 in any week that he worked. The Fifth Circuit Court of Appeals rejected this argument, finding that a day-rate employee like Hewitt – even though he was highly paid – is not paid on a salary basis. The Supreme Court affirmed.

The Supreme Court's Decision

The "critical question" according to the Court was "whether a high-earning employee is compensated on a salary basis when his paycheck is based solely on a daily rate — so that he receives a certain amount if he works one day in a week, twice as much for two days, three times as much for three, and so on." The Court held that "the plain text of §602(a) excludes daily-rate workers" so "such an employee is not paid on a salary basis, and thus is entitled to overtime pay."

The Court reasoned that satisfying §602(a)'s requirement that an employee receive "a predetermined amount" of compensation "on a weekly, or less frequent, basis," requires the compensation be predetermined for the week. Here, Helix did not pay Hewitt on a salary basis as defined in §602(a); it paid him by the day. Section 602(a) "applies solely to employees paid by the week (or longer); it is not met when an employer pays an employee by the day." Day rate workers, of whatever income level, are paid on a salary basis only through the test set out in §602(b). "Those conclusions follow from both the text and the structure of the regulations."

Further, the Court rejected Helix's "operational and cost-based objections" and its complaint that the company would have to either pay Hewitt his high daily rate, even for days he doesn't work, or regularly pay overtime. Indeed, as the Court explained, "The whole point of the salary-basis test is to preclude employers from paying workers neither a true salary nor overtime." The Court pointed out that Helix (and similar day-rate paying employers) could comply with the salary basis by either adding to the per-day rate a weekly guarantee that satisfies §604(b)'s conditions, or by converting the compensation to a straight weekly salary for time spent on the rig. As for Helix's complaint that high earners will now get a "windfall" in overtime pay, "workers are not deprived of the benefits of the [FLSA] simply because they are well paid."

Conclusion

Employers paying on a day-rate basis should immediately review their compensation plans to ensure they comply with the FLSA and the Supreme Court's ruling. Contact your Vorys lawyer if you have questions about wage-hour compliance.