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The FLSA: The *Helix* Case gets a New Twist

The Fair Labor Standards Act (FLSA) is more than eighty years old. The past decade has seen a surge of lawsuits brought under the FLSA, often-collective actions premised on claims that wages and overtime have not been properly paid. Claims might be based on alleged failure to pay overtime to an employee misclassified as exempt or as a contractor, or relate to whether an employee was not paid for time he was actually on-the-clock. The FLSA has been described, to borrow a phrase from Winston Churchill, as "a riddle, wrapped in a mystery, inside an enigma."

The stakes related to compliance can be high – if employers don't get it right, the wage award may be doubled or even tripled (depending on intent of the employer), and adding in the availability of attorney's fees can turn even a small, technical violation into a rather sizable liability. What some might consider an important mechanism for protection of worker's rights, others might view as a "shakedown" with plaintiff's lawyers going industry by industry and exploiting the unclear language and classification standards woven into the law and the regulations.

So after all these years and much litigation in this area, we have reached a point of predictability where bright lines permit employers to classify workers and pay them with clear guidance, right? Sorry to say it, but the answer is a resounding no. Even appellate judges disagree as to the interpretation of the regulations of the Department of Labor implementing the FLSA. And if judges disagree as to what the law requires, how can an employer be expected to know?

One of the latest issues *du jour* concerns day rates often used in oilfield services. The most common exemptions (to the overtime obligations) under the FLSA require that the employee be paid on a salary basis – that is, salaried employees must be paid a minimum weekly salary on a regular basis, regardless of the number of hours worked. Last year, a split panel of the Fifth Circuit Court of Appeals ruled that a "day rate" or flat amount paid for each day actually worked does not satisfy the "salary basis" where the employee (a tool pusher) did not receive a predetermined amount on a weekly basis but instead "received an amount contingent on the number of days he worked each week." *Hewitt v. Helix Energy Solutions Group, Inc.*, 956 F.3d 341 (5th Cir. 2020) ("Helix"). In other words, the court determined that a tool pusher suing Helix *who made upwards of $200,000 a year, was also entitled to overtime*.

In March of 2021, the Fifth Circuit Court of Appeals granted *en banc* reconsideration of the case – meaning the entire Court of 17 judges rather than the 3-judge panel – will hear and rule on the case. *En banc* rehearing is rare. The Court heard argument on Tuesday of this week and will no doubt render an interesting decision that will have a significant impact on pay practices in the oil patch and beyond.

Helix presents a good example of the types of technicalities that can determine liability under the FLSA, and perhaps the FLSA's enduring unpredictability. It is critical that employers not assume an exemption applies or that an employee's high level of pay could not entitle them to overtime. Consult with counsel, and perhaps consider having your exemptions audited, to avoid potential high-stakes litigation and liability.

Stay tuned to see if the mystery of the FLSA is further unraveled.

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