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Six-figure Pay *Plus Overtime*?! The Full Fifth Circuit Court of Appeals on Rehearing Rules in Favor of Employee on FLSA Claim

As previously reported, the full United States Court of Appeals for the Fifth Circuit agreed to hear a case involving an overtime claim against Helix Energy Solutions Group. An oil rig crew supervisor, claimed entitlement to overtime pay from his employer despite being paid compensation of more than $200,000 per year and having a supervisory role.

The background: reversing the trial court's decision, a panel of the Fifth Circuit of Appeals previously held that the employer, Helix, failed to meet the technical requirements of the claimed exemption from overtime under the Fair Labor Standards Act (FLSA). Specifically, Helix didn't show that it paid Hewitt on a "salary basis" in accordance with the regulation, as necessary to demonstrate Helix's entitlement to the "highly compensated" worker exemption from required overtime. Despite Hewitt's substantial pay and undisputed supervisory duties, the Court concluded he qualified for, and should have been paid, overtime pay. The reported panel decision was *Hewitt v. Helix Energy Solutions Group, Inc*. 956 F.3d 341 (5th Cir. 2020).

The full (*en banc*) Fifth Circuit Court of seventeen judges re-heard the case in May, and issued its' much awaited decision earlier this month agreeing with the panel opinion. A decisive 12-5 majority of the judges joined in Judge James Ho's opinion, holding Helix did *not* demonstrate entitlement to the exemption and thus, Hewitt *is* eligible for overtime pay. Five judges strongly disagreed with the majority, and joined in a spirited dissent authored by Judge Edith Jones.

The case is a bit technical and hinges on the wording and interplay of the regulations governing exemptions. In candor, the Court's analysis is not an entertaining read to the non-lawyer, but the practical effect, particularly for those in the energy sector, is both interesting and profound.

The decision underscores the legal tenet that Courts should not render decisions on FLSA exemptions based on general notions of fairness but rather must strictly apply the letter of the law promulgated by Congress and the Department of Labor's regulations when it comes to FLSA exemptions. The Court emphasized this point repeatedly, noting in the opinion, "…respect for text forbids us from ignoring text."

The problem for Helix with the exemption was that Mr. Hewitt was paid a "day rate," a flat amount of $963 for each day *he actually worked*. Regulations require a guaranteed amount per week. With this "day rate," there was no guarantee that he would receive at least a certain minimum weekly sum and without that, the Court determined that a specific mandatory provision of the salary test could not be met.

A decision of the full appellate Court carries a great deal of weight, and various petroleum trade groups and five states filed briefs in the case in support of the employer's position, and their arguments were forceful. Day rate pay has been a widely used manner of compensation in the energy sector, including highly paid oil field and rig employees. Moreover, it was undisputed that Mr. Hewitt, the employee, made *twice* the annual amount required for the highly compensated employee exemption, and that the nature of his job duties otherwise easily satisfied the regulatory requirements. In short, Mr. Hewitt's job bore all the hallmarks of an exempt position. Lastly, the dissenting opinion argued that a *proper* textual reading of the broader set of related regulations led to a different result than the majority's, one which harmonized with the intent of the statute.

The results in this case, both at the panel and *en banc* Court level are somewhat surprising. The fact that this pay practice has been widespread in the industry, had not until recently been challenged, and did not raise the same equitable concerns that might apply to lesser paid laborers all make it stand out. Critical to the decision was the majority's view, based upon its textual assessment, that the employer must guarantee a weekly floor. The Court noted that its decision was in line with the Sixth and Eighth Circuit Courts, while the dissent noted its view aligned with the First and Second Circuit Courts. The split *may* ultimately propel the issue to the Supreme Court.

As the majority points out, the employer and others could, at least going forward, "fix the glitch" so to speak by simply guaranteeing a certain amount of pay per week for the workers. However, this may be little solace for companies which face significant liabilities for noncompliant practices over the past few years.

The takeaway for employers is that they should *always* carefully scrutinize whether an employee is exempt or non-exempt under the FLSA's overtime pay requirement. When any doubt may exist, look closely at the strict requirements of the FLSA plus its interpretive regulations and consider current classifications in consultation with counsel.

For more information, please contact Chuck Jeremiah.