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Insights

HIGHLY-PAID EXECUTIVES MAY BE ENTITLED TO OVERTIME COMPENSATION

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After an extensive analysis of the Fair Labor Standard Act's (FLSA) provisions governing overtime pay as applied to highly-paid employees, the Supreme Court has upheld the FLSA's "salary basis test" – finding that not only is the rate of pay important, so is the basis on which the pay rate is determined. The Court's holding confirms that even very highly compensated executives may be entitled to overtime.

In *Helix Energy Solutions Group, Inc. v. Hewitt*, an offshore oil rig worker working 84 hours per week was paid on a daily-rate basis – his daily compensation rate times the number of days worked in a two-week period – with no overtime compensation. His annual compensation exceeded $200,000. Hewitt sued Helix for failure to pay him overtime as required by the FLSA. Helix asserted that Hewitt was exempt from overtime because he was a "bona fide executive" and a highly compensated employee ("HCE").

In its opinion, the Court provides a thorough explanation of the purpose of the FLSA (the elimination of "substandard wages" and "oppressive working hours"), and the Department of Labor's regulations concerning the FLSA.

The FLSA requires employers to pay overtime compensation to most employees who work more than 40 hours in a week, while certain employees are "exempt" from the overtime pay requirement. 29 U.S.C. § 206. An employee is exempt as a "bona fide executive" if the employee meets three tests: (1) the employee is paid a "predetermined and fixed salary" (salary basis test); (2) the salary exceeds a specified amount (salary level test); and (3) the employee regularly performs certain job responsibilities (duties test). *See* 29 U.S.C. 213(a)(1); 84 Fed. Reg. 51230.

The test at issue in *Helix* is the salary basis test. But, as the Court explained, the analysis has "a layer of complexity" due to the Secretary of Labor's two separate rules applicable to bona fide executives – one that applies to employees paid less than $100,000 annually, and another (the "HCE" rule) that applies to employees paid at least $100,000 annually. (That threshold has been raised to $107,430 since the events in *Helix*.)

Like an employee earning less than $100,000, HCEs satisfy the bona fide executive test if they are compensated on a salary basis (salary basis test) and are paid a specified minimum amount per week (salary level test). The third part of the test, the duties test, is relaxed for HCEs. (HCEs must perform only one of the three specified duties for exemption.)

The salary basis test can be satisfied in two ways. Under 29 CFR §541.602(a) ("§602(a)"), an employee meets the salary basis test if, "the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount," which does not vary based on the amount of hours worked or the quality of the work. For example, an employee whose pay is computed on a weekly salary basis "must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked."

Alternatively, under 29 CFR §541.604(b) ("§604(b)"), an employee whose compensation is determined hourly, daily, or on a shift basis may still qualify for exemption if two conditions are met: (1) the employee is paid at least a specified minimum amount each week, regardless of the amount of time worked, and (2) the minimum amount promised "bear[s] a reasonable relationship to the amount actually earned in a typical week."

At issue in *Helix* is the way Hewitt was compensated. Helix and Hewitt disagreed as to whether the salary basis test was satisfied. The district court found for Helix, but the Fifth Circuit reversed.

On appeal to the Supreme Court, Helix conceded that the conditions of §604(b) were not met but contended that it paid Hewitt as allowed under §602(a). Helix argued that §602(a) is not concerned with the basis on which pay was determined (a daily rate, weekly rate, etc.), but rather the frequency of payment. Specifically, Helix asserted that §602(a) requires only that the employee receive a paycheck no more than once a week. According to Helix, Hewitt met the salary basis test because (a) he was paid every two weeks, and (b) each paycheck exceeded the salary level test ($455/week at that time). (Hewitt's actual daily rate ranged from $963 to $1341.)

Pointing to the statutory language, the definition of salary, and the common understanding of salary as having the "stability and security" of a regular pay structure, the Court disagreed with Helix's reading of §602(a). As the Court explained by analogy, if a lawyer asked to be paid on an hourly basis, the client would not believe that this required delivery of a check to the lawyer every hour. Section 602(a) does not govern the frequency of payment; it governs the basis of payment. It does not require that compensation be <u>paid</u> weekly or less frequently; it requires that the compensation be <u>calculated</u> on a weekly (not hourly or daily) <u>basis</u>.

The Court found that nothing in §602(a) applies to a daily-rate employee, paid only for each day he works and nothing additional. Because Hewitt was not paid on a salary basis pursuant to §602(a), he was entitled to overtime compensation.

The Court reaffirmed that "[e]mployees [] are not deprived of the benefits of overtime compensation simply because they are well paid." *Helix*, 598 U.S. ___ (2023) (quoting *Jewell Ridge*

Coal Corp. v. Mine Workers, 325 U.S. 161, 167 (1945)).

To determine whether your highly compensated executive (earning at least $107,432 annually) is exempt from the FLSA's overtime pay requirement, you must consider whether all three elements of the bona fide executive test are met:

- **Salary Basis** – employee is paid a predetermined and fixed salary and satisfies the rules set out in one of the following:
  - 602(a) – employee's compensation is a predetermined, weekly or less frequent basis, amount, which is unaffected by the time or quality of work performed; *or*
  - 604(b) – employee is promised at least $684/week and the promised amount bears a reasonable relationship to the work performed
- **Salary Test** – employee makes at least $684 per week; *and*
- **Duties Test** – employee regularly performs one of the following:
  - manages the business;
  - directs other employees; *or*
  - has the power to hire and fire employees

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