Employers, Have You Reviewed Your Compensation Structure Lately?

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By: Garcia Samuylov

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Employers have long operated under the premise that "highly compensated" employees are exempt from the overtime pay guarantee of the federal Fair Labor Standards Act ("FLSA"). Under the FLSA, employers must pay their employees 50% more than the employee's regular rate of pay for any time worked above 40 hours per week. However, regulations implemented by the U.S. Department of Labor exempt certain employees, such as "highly paid" employees and "bona-fide executives," from this overtime pay requirement. *See* 29 C.F.R. 541.602(a) and 604(b). As a result, the current pay schemes used by most employers are structured to apply this exemption to their highly-paid and salaried employees, which under labor regulations, include employees who are paid at least $107,432 annually. Over the years, employees have challenged this overtime exemption with mixed results. Federal circuit courts across the nation vary in their interpretation of the FLSA and apply different tests to decide the issue of whether a highly compensated employee is entitled to overtime compensation. Until recently, the legal community waited with bated breath for the Supreme Court of the United States to resolve the conflict between the federal circuit courts and address the issue of whether the FLSA permits the payment of overtime for highly compensated employees.

To resolve this circuit split, the Supreme Court granted certiorari in the matter of *Helix Energy Solutions Group, Inc., et al. v. Hewitt*. In a 6-3 ruling, the Supreme Court altered the employment compensation landscape by holding that a supervisor who was paid by the day and earned $200,000 in annual salary is entitled to overtime compensation despite his sizeable income. *See Helix Energy Solutions Group, Inc., et al. v. Hewitt*, 598 U.S. _____, No. 21-984, *slip opinion* (2023).

In *Helix*, oil rig worker Michael Hewitt was a daily rate employee, earning more than $200,000 annually. He worked for Helix for about three years, from 2014 to 2017. Hewitt typically worked over 80 hours per week but was paid on a daily rate basis – his daily rate times the number of days worked – with no overtime pay. In other words, his compensation did not change regardless of the number of hours he worked. Hewitt received a paycheck bi-monthly showing a sizeable daily rate of $963.

Hewitt's employment was terminated in 2017, and he later filed a suit challenging Helix's compensation structure. Because of Helix's daily-rate pay structure, and the number of hours he worked, Hewitt contended that he was entitled to receive overtime compensation because his daily rate was not a salary. Conversely, Helix argued that Hewitt is exempt from overtime compensation because he received a daily rate that met the weekly wage requirement of Section 604(b) under the FLSA. Helix pointed out that because Hewitt's daily rate far exceeded the statutory minimum of $455, he would be exempt from overtime compensation even if he worked as little as one day per week. Helix further argued that Hewitt was a "highly compensated" employee and thus exempt.

The question before the Supreme Court was whether Helix's pay structure satisfied the "highly-compensated" salary-basis component of the FLSA and its implementing regulations. After analyzing the regulations, the Supreme Court ruled in Hewitt's favor, holding that Hewitt was not paid on a salary basis. In reaching its decision, the Court relied on the "salary basis test" provided in the regulations, which states that "an employee is paid on a salary basis if he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount which is not subject to reduction

because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.602(a). In applying the plain meaning of this provision to Hewitt, the Court concluded that as a day-rate employee, Hewitt did not receive a "predetermined amount" on a weekly or less frequent basis and did not receive a "steady and predictable stream of pay" (e.g., weekly payments) for his pay to be considered a salary. *Helix*, (Slip Op. at p. 12). Further, the Court reasoned that since day-rate employees are not compensated for the number of hours they do not work, their pay changes depending on the number of hours or days worked. *Id.* That change does not equate to a predetermined amount or a steady and predictable pay stream. Therefore, although Hewitt received his paychecks bi-monthly, the Court found that he was not exempt from overtime compensation because his pay was determined daily.

The Court also considered Hewitt's compensation in light of the "reasonable relationship" test provided under the regulations, which permits an exempt employee's compensation to be "computed on an hourly, daily or shift basis, without losing the [overtime] exemption or violating the salary basis requirement." 29 C.F.R. 541.604(b). The Court held that the test does not apply to day-rate employees because it requires a guarantee that the employee receives a minimum weekly amount bearing a "reasonable relationship" to the employee's usual weekly earnings. *Helix*, (Slip op. at p. 15). Here the Court found, based on its analysis of Section 541.602(a), that Helix's pay structure did not satisfy this requirement because a day-rate pay structure does not provide a weekly guarantee related to typical weekly earnings. *Id*.

Notably, in response to Helix's argument that extending overtime compensation to any highly paid employee violates the purpose of the FLSA and could severely impact the labor industry, the Court stated that employees are not to be deprived of the benefits of the FLSA simply because they are well paid. *Helix*, (Slip op. at p. 17). The Supreme Court proposed that employers may readily achieve compliance with the FLSA by "adding a weekly guarantee onto a day rate or by using a minimum salary guarantee -- converting day pay into a straight weekly salary for time worked." *Id.*

Takeaways For Employers

The *Helix* decision has broad implications. First, the decision impacts any employer who compensates its employees on a day-rate schedule. Second, it brought a new class of employees under the protective umbrella of the FLSA's overtime guarantee and increased employers' exposure to retroactive liability for failure to pay overtime compensation. Third, it could exponentially increase labor and operation costs by extending overtime pay to employees who are already highly compensated. Although the full impact of this ruling has not yet materialized, employers are encouraged to review their policies and pay structures before a lawsuit or claim is filed. The key here for employers is to, where possible, move away from day-rate pay structures. Otherwise, employers risk paying forced overtime compensation to highly compensated employees.