5th Circ. OT Ruling Widens Path For Employer FLSA Liability

By **Meghan McCaig and Peter Hall** (September 29, 2021)

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On Sept. 9, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, ruled in Hewitt v. Helix Energy Solutions Group Inc. that a management-level oil rig employee making over $200,000 per year must receive overtime because his employer paid him a fixed daily rate that did not qualify as a salary.

Employers that have historically paid very high day rates are now exposed to potentially enormous liability, even if they immediately restructure their pay practices going forward.

It may seem odd that someone in the top 10% of wage earners could possibly be entitled to even more, especially after considering that some day-rate oilfield workers often earn such high wages while enjoying four to six months off work every year.

That intuition is consistent with the stated congressional intent of the Fair Labor Standards Act, which is to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[1]

In 1945, the U.S. Supreme Court recognized that legislative purpose in Brooklyn Savings Bank v. O'Neil, when it held that the primary purpose of the FLSA

> was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.[2]

The U.S. Department of Labor has similarly acknowledged that highly compensated employees are often exempt from the FLSA's overtime requirements.

Specifically, in adopting a "highly compensated exemption" in 2004, the DOL noted that "the higher the salaries paid[,] the more likely the employees are to meet all the requirements for exemption."[3] In fact, such highly paid "employees have almost invariably been found to meet all the other requirements of the regulations for [highly compensated employee] exemption."[4]

So why did the en banc Fifth Circuit conclude that the FLSA's highly compensated employee exemption did not apply to Michael Hewitt, a tool pusher making over $200,000 per year?

The answer traces its roots back to 1945, when, less than 30 days after explaining that the FLSA was meant to protect the "lowest paid of the nation's working population," the Supreme Court commented in Jewell Ridge Coal Co. v. Local No. 6167, United Mine Workers of America, that

> employees are not to be deprived of the benefits of the [FLSA] simply because they are well paid or because they are represented by strong bargaining agents.[5]

Notably, however, historical data from the Department of Labor shows that the union rates for the coal mining jobs at issue in Jewell Ridge would yield only about $52,000 per year, in today's dollars.

Like the Supreme Court in Jewell Ridge, the Fifth Circuit majority was not persuaded that high levels of compensation could overcome a strict application of the regulation's text.

According to the court's majority, employers that pay a fixed daily rate — even one that is double the weekly minimum for a salary — cannot meet the salary-basis requirement for the exemption unless they also satisfy the conditions set forth in Title 29 of the Code of Federal Regulations, Section 541.604(b).

Section 541.601 outlines the FLSA's highly compensated employee exemption and requires, among other things, compensation of "at least $684 per week paid on a salary or fee basis."

Section 541.604(b) specifies that

> [a]n exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned.[6]

The Fifth Circuit majority applied Section 541.604(b) to the salary-basis requirement in Section 541.601. Because the employer had not satisfied Section 541.604(b), it could not claim an entitlement to the highly compensated employee exemption.

Conflicting Circuit Law — Ripe for Supreme Court Review?

The U.S. Court of Appeals for the Tenth Circuit is considering an identical issue following an appeal in Scott v. Antero Resources Corp., in which the U.S. District Court for the District of Colorado held on May 20 that an employee's day rate could be considered payment on a salary basis and therefore qualified for the FLSA's exemption for highly compensated employees.[7]

If the Tenth Circuit affirms the district court's conclusion, it will create a direct circuit split on this issue and invite Supreme Court review.

In addition, the Fifth Circuit's application of Section 541.604(b) to the highly compensated employee exemption diverges from the positions taken by the U.S. Courts of Appeal for the First and Second Circuits.[8] In 2013, the Second Circuit held in Anani v. CVS RX Services Inc., and the First Circuit held in Litz v. Saint Consulting Group Inc. the following year, that employers need not meet the requirements of Section 541.604 to establish the highly compensated employee exemption if the employer can meet the requirements of Section 541.601.

In those cases, some portion of the employees' compensation was paid on a salary basis, but the employees argued that the employers did not satisfy Section 541.604(b)'s requirement that the minimum guaranteed amount — i.e., the salaried portion — bear a reasonable relationship to their total compensation.

The First and Second Circuits concluded that as long as some portion of the employees' compensation was guaranteed, employers need not otherwise satisfy the requirements of Section 541.604(b).

Although the Fifth Circuit distinguished those cases because they involved employees who were paid a guaranteed minimum that satisfied Section 541.601 and therefore differed factually from Hewitt, the legal conclusions reached by those courts diverge from the Fifth Circuit's analysis, setting up an argument that a circuit split exists.

Effect on the Industry

The Fifth Circuit's ruling will significantly affect those employers who pay a fixed daily rate, regardless of the number of hours an employee works.

This trend is particularly prevalent in the oil and gas industry, where rig workers are often paid in this manner because they work in multiday hitches, followed by significant time away from work, such as 28 days on followed by 28 days off.

Employers — particularly those in Texas, Louisiana and Mississippi — should be aware that, if they have paid employees on a fixed-day-rate basis without a weekly guarantee within the last two years, they may have liability exposure for their past practices after the Fifth Circuit's opinion in Hewitt.

And continuing to pay employees a fixed daily rate, regardless of the number of hours worked, on a going-forward basis will result in further FLSA exposure, including a potentially expanded limitations period and potential liquidated, or double, damages. Under the FLSA, successful plaintiffs may recover unpaid overtime compensation, an additional, equal amount as liquidated damages, attorney fees and costs.

Within the Fifth Circuit, employers who currently pay a fixed daily rate to certain employees who might otherwise meet the FLSA's executive, administrative or professional exemptions, or its exemption for highly compensated employees, should either begin paying those employees a salary or satisfying Section 541.604(b)'s requirements if they want to avoid FLSA liability.

Employees who are paid on a salary basis must receive a predetermined amount each pay period at regular intervals. The predetermined amount cannot be reduced because of the employee's quantity or quality of work and, absent certain exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work.

Under Fifth Circuit law, employers that want to continue paying employees on a day-rate basis must now provide a guaranteed minimum amount paid on a salary basis, and that guaranteed minimum amount must bear a reasonable relationship to the amount actually earned.

Consistent with the example given in the regulations, a rig worker who is guaranteed compensation of at least $3,500 in any week in which he or she performs any work and who, on average, works four shifts in any given week may be compensated $1,000 per day without violating the salary-basis requirement.[9]

As described above, however, within the First and Second Circuits, employers must pay some portion of the employees' compensation as a guaranteed minimum, but that minimum does not need to bear a reasonable relationship to the amount actually earned by

employees.

Employers who pay employees a fixed daily rate but plan to revise their compensation structure to comply with Hewitt should carefully consider the messaging when rolling out the new structure to employees. In our experience, careful, strategic messaging can affect the likelihood of FLSA litigation over past practices.

We anticipate Hewitt to change how employers compensate employees who currently are paid a fixed daily rate, but we do not expect the decision to change how much those employees make. Changing the way these employees are paid, not how much they are paid, will prevent future FLSA liability.

Conclusion

Because the state of the law is in flux, any employer paying a daily rate, without a guaranteed weekly minimum, to an employee classified as exempt should carefully examine its pay practices to determine the risk for unpaid overtime and take prompt steps to mitigate that risk.

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[1] 29 U.S.C. § 202(a).

[2] Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945).

[3] 69 Fed. Reg. 22122, 22173 (April 23, 2004).

[4] Id.

[5] Jewell Ridge Coal Co. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 167 (1945).

[6] 29 C.F.R. § 541.604(b).

[7] Scott v. Antero Resources Corp., -- F. Supp. 3d ---, 2021 WL 2012326 (D. Colo. May 20, 2021), appeal filed.

[8] Litz v. Saint Consulting Group, Inc., 772 F.3d 1 (1st Cir. 2014); Anani v. CVS RX Services, inc., 730 F.3d 146 (2d Cir. 2013).

[9] See 29 C.F.R. § 541.604(b).