LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
FEBRUARY 22, 2023

Supreme Court Limits "Highly Compensated Employee" Exemption under the Fair Labor Standards Act (FLSA): A Review of *Hewitt v. Helix Energy Sols. Grp., Inc.*

On Feb. 22, 2023, the Supreme Court of the United States (SCOTUS) decided *Hewitt v. Helix Energy Sols. Grp., Inc.*[1] In granting *certiorari*, the Court addressed the following question: Is a supervisor, who makes over $200,000 annually, calculated on a daily rate, considered a "Highly Compensated Employee" (HCE) who is overtime exempt under the FLSA? In a 6-3 decision, the Court ruled that the supervisor is not an HCE and is not overtime exempt.

Brief Facts

Helix Energy Solutions Group Inc. (Petitioner) is an oil and gas services company that provides offshore well services through the use of vessels. Each vessel has crews that maintain the proper working order and operations of the vessel. Michael Hewitt (Respondent) was employed as a "Tool Pusher" or the second-in-command within the crew. Among other things, Tool Pushers supervise between 12 to 14 employees on a given shift; ensure that company programs are carried out safely and effectively; and conduct pre-tour meetings to communicate objectives. In his role, Respondent was paid on a daily rate in the amount of at least $963 and, admittedly, made over $200,000 per year.

FLSA and Overtime

Before analyzing the case, it's important to have a general understanding of the FLSA. The FLSA was enacted after the Great Depression, in 1938, to protect "blue collar" workers from substandard wages and oppressive working hours. Because of this, the FLSA establishes, as a general rule, that hourly employees receive time and a half compensation for hours worked in excess of 40 hours during a seven-day workweek. But there are exemptions. The FLSA states that employees working in a "bona fide executive, administrative, or professional capacity" are overtime exempt. 29 U.S.C. § 213(a)(1). Among these exemptions are the "executive," "administrative," and "HCE."

Specifically, the HCE exemption applies to "highly compensated employees" who earn over $100,000 (now $107,432)[2] annually and whose (1) total compensation includes at least $455 (now $684) per workweek paid on a "salary basis," and (2) perform any of several enumerated supervisory executive duties. 29 C.F.R. § 541.601. "Salary basis" means that the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount . . . ." 29 C.F.R. § 541.602. Further, the regulation makes clear that "a high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties." 29 C.F.R. § 541.601(c).

1 598 U.S. ___ (2023).

2 After Jan. 1, 2020, the regulation was amended to raise the salary requirement from $100,000 to $107,432 and the "salary basis" from $455 to $684 per week.

Hewitt's Procedural History

At the District Court level, the Court ruled in favor of Petitioner. *See Hewitt v. Helix Energy Sols. Grp.*, Inc., 2018 WL 6725267 (S.D. Tex. Dec. 21, 2018). The Court found that Respondent (1) was paid on a "salary basis" because his pay never fell below $455 during any week regardless of days worked; and (2) that Respondent qualifies for the "executive" and "HCE" exemptions because he directed the work of two or more employees and earned well over $100,000.

The Fifth Circuit, however, reversed in a divided *en banc* decision. *See Hewitt v. Helix Energy Sols. Grp., Inc.*, 983 F. 3d 789 (5th Cir. 2020)[3]. Instead of limiting their analysis to regulation sections 541.601 and 541.602, the Court found that § 541.601 incorporates § 541.604(b)'s "reasonable relationship test." The Court reasoned that when an employee is paid on a "daily or shift basis," then that employee must be (1) guaranteed the minimum weekly required amount paid on "salary basis" ($455); *and* (2) there must be a "reasonable relationship" between the guaranteed amount and the amount actually earned to satisfy § 541.604(b). The Court concluded that Petitioner (1) does not pay Respondent a guaranteed weekly amount; and (2) the pay Respondent receives is "of magnitude greater" than the minimum amount required, so there is no "reasonable relationship" between the two amounts.

Final Decision

Today, in a 6-3[4] decision, SCOTUS affirmed the Fifth Circuit, finding that Respondent is not an HCE and is not overtime exempt.

The Court agreed with Respondent that this case turns on whether he was paid on a "salary basis." In its reasoning, the Court found that an employee can be paid on a "salary basis" under either § 541.602(a) or § 541.604(b). More specifically, § 541.602(a) applies to employees paid "by the week or longer." This necessarily does not include "daily-rate workers." But, under § 541.604(b), "daily-rate workers" can be considered paid on a "salary basis" *if* the employer (1) guarantees the employee at least $455 each week "regardless of the number of hours, days or shifts worked;" and (2) the amount bears a "reasonable relationship" to the "amount actually earned." Here, Respondent is not guaranteed any amount of money per week because his compensation is calculated daily. Accordingly, he fails the first prong of the § 541.604(b) test, so he is not overtime exempt.

The Court also addressed Petitioner's argument that the HCE rule operates independently of § 541.604(b). During his argument, Petitioner emphasized that the HCE rule involves § 541.601, and incorporates § 541.602(a), but it does not involve § 541.604(b) because that section only is for employees that don't meet the $100,000 HCE threshold. But, the Court disagreed, because even if his interpretation were correct, Petitioner fails the § 541.602(a) "salary basis" test. The Court also emphasized that sections 541.601, 541.602(a) and 541.604(b) must be read together to resolve the "salary basis" issue not only as a "general rule," but also for the "HCE rule."

In Justice Gorsuch's dissent, he expressed that the case should have been dismissed as improvidently granted because the Court should not have been tasked with resolving questions

3 The Fifth Circuit published their first opinion on April 20, 2020, but withdrew and substituted it with the Dec. 21, 2020 *en banc* opinion. The first decision's citation is *Hewitt v. Helix Energy Sols. Grp. Inc.*, 956 F. 3d 341 (5th Cir. 2020). The December 21, 2020 opinion reached the same conclusion, but with substantially different reasoning.

4 Justices Kagan delivered the opinion of the Court, which was joined by Justices Roberts, Thomas, Sotomayor, Barrett and Jackson. Justice Gorsuch filed a dissenting opinion, and Justice Kavanaugh filed a separate dissenting opinion, which Justice Alito joined.

about § 541.602(a) based on the briefing. Justice Kavanaugh, however, expressed in his dissent that he disagreed with the Court's analysis. In his reasoning, he agreed with Petitioner that this case should follow a simple, straight-forward analysis. Respondent "performed executive duties, earned about $200,000 per year, and received a predetermined salary of at least $963 per week," clearly making him a bona fide executive. Respondent satisfies § 541.602(a) because his predetermined rate of $963 per day was well above the $455 weekly minimum. Justice Kavanaugh also agreed with Petitioner that § 541.604(b) only would apply if Respondent made under $100,000, meaning that he was not an HCE.

Interestingly, Justice Kavanaugh also identifies the clear inconsistency between the FLSA and the Department of Labor (DOL) regulations. On June 30, 2022, SCOTUS decided *West Virginia v. E.P.A.*,[5] which placed a limit on regulatory authority. Applying the "major questions doctrine," SCOTUS found that administrative agencies must be able to point to "clear congressional authorization" when they make decisions of "vast economic and political significance." In that case, SCOTUS struck down the EPA's authority to require power plants to move away from the use of coal.

Overall, it's unclear if this case will implicate broader issues regarding "Chevron deference" and the DOL's ability to create salary requirements when they're not provided for within a statute. Either way, this decision has widespread implications for how courts determine exempt employees and it now requires the oil industry to modify a pay practice that helped their operations run more efficiently.

If you have any questions about the information presented in this memo, please contact James Taglienti, any attorney in Bond's labor and employment practice or the Bond attorney with whom you are in regular contact.

5 142 S. Ct. 2587 (2022).

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