

## Alert | Labor & Employment



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### Are Highly Paid Daily Rate Workers Entitled to Overtime Under FLSA? Supreme Court Resolves Issue

A high-earning employee is not compensated on a “salary basis” when their paycheck is based solely on a daily rate calculated by the number of days worked, the Supreme Court held in *Helix Energy Solutions Grp., Inc. v. Hewitt* Feb. 22, 2023. Because the employee is not paid on a salary basis, the Court ruled, the employee cannot satisfy the highly compensated employee (HCE) exemption (or any of the white-collar exemptions) and thus is nonexempt and entitled to overtime pay.

#### Go-To Guide:

- Supreme Court rules employees paid a daily rate are not compensated on a “salary basis”
- Such employees are nonexempt, and are thus entitled to overtime pay

#### Facts of the Case

Michael Hewitt worked for Helix as a tool pusher, managing other employees while working offshore on an oil rig for one-month periods. Helix paid Hewitt a set bi-weekly amount for each day worked. Hewitt sued Helix, contending the company owed him hundreds of thousands of dollars in overtime because he worked more than 40 hours per week and was nonexempt under the Fair Labor Standards Act (FLSA). Helix argued Hewitt was either an exempt executive (29 C.F.R. § 541.100) or an HCE (29 C.F.R. § 541.601) not entitled to overtime. Both exemptions require that the position in question satisfy a duties test and a salary test. Under the salary test, the employer must pay the employee (a) at least \$684 per week and (b) on a “salary basis.” At issue was whether Helix paid Hewitt on a “salary basis.”

Hewitt argued Helix did not pay him on a “salary basis” because it calculated his pay based on a daily, rather than weekly, rate. Helix countered that because Hewitt’s daily rate was greater than the weekly salary requirement per DOL regulations (29 C.F.R. § 541.602), so long as he worked at least a single day during any particular week, he would receive more than the weekly salary requirement, and was therefore paid on a “salary basis.” The district court agreed with Helix and granted summary judgment in its favor, holding Hewitt was exempt as either an executive or a highly compensated employee.

Hewitt appealed, and the **Fifth Circuit en banc reversed**. Interpreting 29 C.F.R. § 541.602, the Fifth Circuit held that “the salary basis test requires that an employee know the amount of his compensation for each weekly (or less frequent) pay period during which he works, *before* he works.” 956 F.3d 341, 343 (5th Cir. 2020) (emphasis in original). Because Hewitt did not receive a constant fraction of his annual compensation, but rather “had to take the number of days he worked (past tense) and multiply by the operative daily rate to determine how much he earned,” Hewitt “knew his pay only *after* he worked through the pay period.” He therefore “did not receive a ‘predetermined amount’ ‘on a weekly, or less frequent basis.’” *Id.* at 344. Instead, he received an amount contingent on the number of days he worked each week. Accordingly, the Court determined he was not paid on a “salary basis” per DOL regulations.

### **U.S. Supreme Court Decision**

Helix appealed and the Supreme Court affirmed. In an opinion authored by Justice Elena Kagan and joined by Chief Justice Roberts, Justices Barrett, Jackson, Sotomayor, and Thomas, the Court explained that Hewitt was paid on a daily basis, meaning his compensation was tied to the number of days he worked. The Court rejected Helix’s argument it paid Hewitt on a “weekly basis” because he received his paycheck on a bi-weekly basis. Per the Supreme Court, whether an employee is paid on a “salary basis” is a function of how the employee’s pay is calculated and not the frequency of their paycheck. Nor does Section 541.604(b) alter the result: “Helix did not guarantee that Hewitt would receive each week an amount (above \$455) bearing a ‘reasonable relationship’ to the weekly amount he usually earned” as Section 541.604(b) requires.

Justice Gorsuch dissented, contending the Court granted certiorari to decide the question of whether an employee whose pay scheme meets the three-part test of the highly compensated exemption (§541.601) must also meet §604(b)’s salary basis requirement to be exempt from the FLSA. He did not agree that the question of whether Hewitt should be considered salaried or not under Section 602(a) was addressed properly before the Court, suggesting the door may remain open on this issue.

Justice Kavanaugh (joined by Justice Alito) reached a different conclusion about whether Hewitt met the salaried test. He found Hewitt met the three requirements of Sections 601 and 602 because “[a]s everyone agrees, Hewitt performed executive duties, earned about \$200,000 per year, and received a predetermined salary of at least \$963 per week for any week that he worked.” Justice Kavanaugh agreed with Helix’s position that “a supervisor whose ‘pay is calculated based on a day rate above the weekly minimum receives more than enough on a salary basis to satisfy’ the regulation.” Using this approach, if the amount paid on a weekly basis is at least \$684, the current statutory minimum amount, and the employee receives at least that amount for any week he works, the requirement is met. Justice Kavanaugh also cited a 2018 DOL Opinion Letter that addressed §604 as support for his position that executives who earn less than \$100,000 per year are not entitled to overtime pay if they are guaranteed at least \$455 (now \$684) per week, and at least two-thirds of their total compensation comes in the form of a weekly guarantee. Dept. of Labor, Wage and Hour Div., Opinion Letter (FLSA 2018– 25, 2018). The two-thirds rule does not apply to employees who earn over \$100,000 (now \$107,432) annually, but because Hewitt earned over \$100,000 per year and was guaranteed at least \$455 for every week he worked (actually, for

him, more than twice that amount), Justice Kavanaugh concluded Hewitt was exempt and not entitled to overtime.

### Practical Implications

Employees who are highly compensated but not guaranteed to be paid the same amount every week no matter how many hours they work are likely to be considered nonexempt and eligible for overtime. The dissenting opinions suggest the door may not be closed on potential arguments with respect to whether the salary basis test applies to the HCE exemption. However, to ensure compliance, employers should consider reviewing pay practices to determine whether employees earning over \$107,432.00 per year are in fact being paid on a salaried basis. If not, employers risk overtime exposure.

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