

## Fifth Circuit Holds Highly Compensated Oilfield Workers Paid a Day Rate are Entitled to Overtime

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The day-rate tool pusher earning \$963.00 per day is not exempt from the overtime provisions of the Fair Labor Standards Act (“FLSA”) – in other words, he or she is entitled to overtime pay. So holds the Fifth Circuit.

The oil and gas industry has waited anxiously for the full (en banc) Fifth Circuit to re-consider the *Hewitt v Helix Energy Solutions Group* decision. On September 9, the majority held that the Highly Compensated Employee (“HCE”) overtime exemption was not applicable to an employee paid a *day rate*, even when his or her total compensation exceeds the HCE salary threshold (then \$100,000 per year) and the worker performs exempt duties. An individual paid a day rate (even a very high day rate) does not meet the “salary basis” prong required of the U.S. Department of Labor’s overtime exemption regulations. The decision can be accessed by this [link](#).

The 62-page decision of the divided Fifth Circuit included one concurring opinion and two dissenting opinions. Chief Judge Priscilla Owen joined the other four Judges dissenting.

The Court’s analysis began with the definition of “salary-basis” in the general rule, 29 C.F.R. § 541.602(a): “An employee will be considered to be paid on a ‘salary basis’ . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or party of the employee’s compensation.” The rule further provides that the exempt employee 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.”

With that background, the Court next reviewed the so-called “reasonable relationship” regulation, 29 C.F.R. § 541.604(b), which states that an employee whose pay is “computed on a daily basis” must meet the following criteria to satisfy the “salary-basis” test:

An 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.<sup>1</sup>

The other regulation of significance was the Highly Compensated Employee (“HCE”) exemption, which states that an employee with a total annual compensation of at least \$100,000 annually

(increased to \$107,432 as of January 1, 2020) and customarily and regularly performing one or more exempt duties of an executive, administrative or professional employee is exempt from overtime. 29 C.F.R. § 541.601(a). The regulation additionally states that total annual compensation must include at least a certain minimum amount per week (currently \$684) “paid on a salary basis.” The total annual compensation may include commission and non-discretionary bonuses and compensation, and permits a final “catch-up” payment if the annual threshold was not achieved. 29 C.F.R. § 541.601(b)(1)(2).

The dispute before the Court was whether the HCE exemption was to be interpreted and applied entirely separate from the other DOL regulations interpreting a salary - including the reasonable relationship test.

Helix did not assert that its day-rate method of pay met the reasonable relationship test. Rather, Helix argued (and the dissenting opinion authored by Judge Edith Jones agreed) that the analysis should start and stop with the application of the HCE exemption, and that the “reasonable relationship” test was inapplicable to an HCE. Interpreting the HCE exemption as a “stand-alone,” there was no dispute that the tool pusher met the exempt duties of at least one of the exempt duties of the executive exemption (if not all) and the tool pushers’ total compensation was well above the minimum threshold of \$100,000.

The majority rejected Helix’s argument that the reasonable relationship test did not apply to a day-rate worker whose annual salary of over \$200,000 and who was clearly exempt based upon his or her managerial/supervisory duties. The Court held that a day-rate worker, even highly paid and performing exempt duties, did not satisfy the “salary-basis” test and was not exempt from the overtime requirements of the FLSA.

The majority justified the basis for its decision: “Our job is to follow the text—not to bend the text to avoid perceived negative consequences for the business community.” While not labeling industry concerns as unimportant, the majority noted that “those concerns belong in the political branches, not the court.”

Notably, the Fifth Circuit relied upon the [Hughes v. Gulf Interstate](#) decision in the Sixth Circuit to support its opinion and distinguished the seemingly contrary [Litx v. Saint Consulting Group](#) case in the First Circuit and the [Anani v. CVSRX Services](#) case in the Second Circuit.

The end result - The decision has a significant impact on FLSA collective action litigation in the oil and gas industry, particularly those cases challenging the independent contractor status of highly specialized and highly paid consultants who may be paid on a day-rate basis, with no accompanying predetermined weekly salary that meets the “reasonable relationship test.”

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1. The Department of Labor suggests that the reasonable relationship test is satisfied if the additional amounts do not exceed approximately 50% of the guaranteed weekly minimum. Dep’t of Labor, Opinion Letter FLSA2018-25 (Nov. 8, 2018).