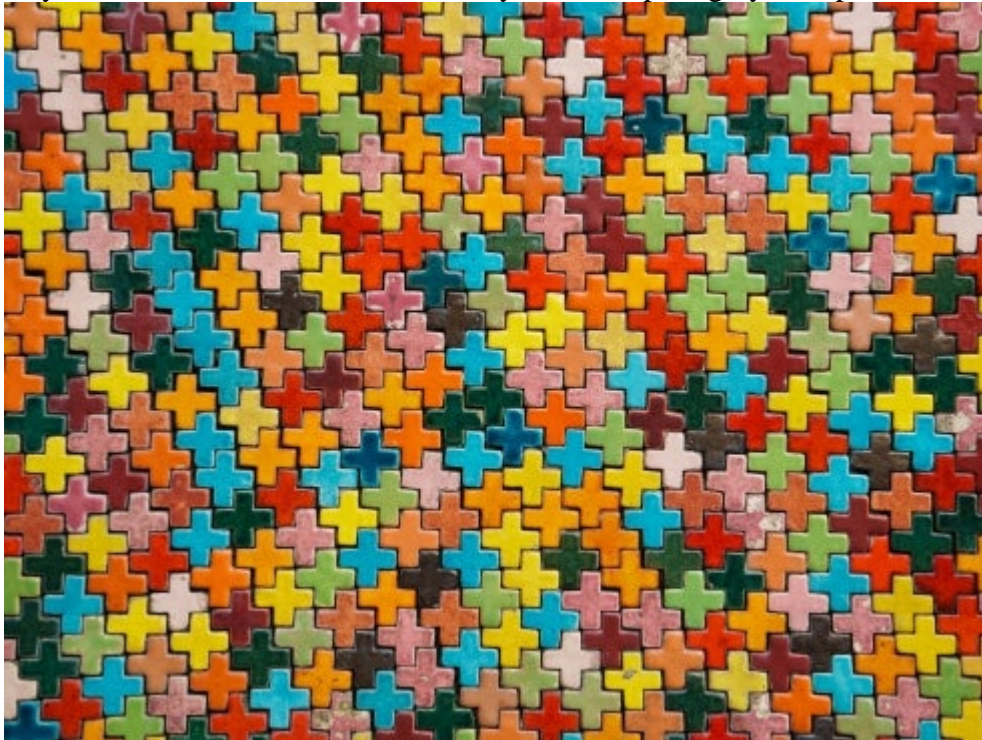


## [Updates](#)

March 02, 2023

### Day-Rate Rules Result in Overtime Pay for Exempt Highly Compensated Employee



Recently, in *Helix Energy Solutions Group v. Hewitt*, the U.S. Supreme Court [ruled](#) that a daily-rate worker who earned over \$200,000 annually was not exempt from the Fair Labor Standards Act's (FLSA) overtime requirements. In an opinion authored by Justice Elena Kagan, the Court held that compensation based on a daily rate did not satisfy the "salary basis test," which is required for an employee to be exempt from overtime compensation. The decision, while specific to day-rate compensation, also applies to exempt employees paid an hourly or shift rate.

#### ***Helix Energy Solutions Group v. Hewitt***

Michael Hewitt was an employee of Helix Energy Solutions Group who worked on an offshore oil rig as a tool pusher, a supervisory position classified as exempt from overtime compensation. Hewitt typically worked a 28-day "hitch" (consisting of 28 days on, followed by 28 days off work). During the relevant time, he was compensated a day rate that ranged from \$963 to \$1,341, and his weekly compensation was based on the number of days he worked. Under this compensation scheme, he earned over \$200,000 annually.

After Helix terminated Hewitt's employment, he filed suit under the FLSA asserting that he was entitled to overtime compensation because he did not meet the "salary basis" test required for the FLSA's overtime exemptions. Hewitt argued that because his weekly compensation was not a guaranteed predetermined amount and could vary depending on the number of days he worked in a workweek, his compensation scheme did not satisfy the salary basis test. The Court agreed.

Hewitt was classified as exempt under the FLSA's bona fide executive exemption. That exemption has three parts: (1) The employee must be paid on a "salary basis"; (2) the employee must be paid the "salary level"—a preset salary that exceeds a specified amount; and (3) the employee must meet the duties test. The issue on

appeal was limited to whether Hewitt's compensation was paid on a salary basis. The Court noted that Hewitt fell under a separate set of rules for exempt status specific to "highly compensated employees" (HCE), or those earning more than \$100,000 annually. But the Court found the salary basis test to be the same regardless of compensation level.

The Court's analysis focused on the two FLSA regulations that give content to the salary basis test: the main salary basis provision, 29 C.F.R. §541.602(a); and the special rule provision applicable to daily-rate workers in 29 C.F.R. §541.604(b). Section 602(a) provides that an employer meets the definition of a "salary basis" if the employee "receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation ... " Helix argued that Hewitt technically "received" his pay every pay period and, accordingly, met the salary basis test. However, the Court rejected this argument, finding that Section 602(a) applied only when employees were paid by the week (or longer) and was not applicable to daily rate workers.

The Court ultimately held that Section 604(b) is the relevant provision for daily-rate workers. That section provides that an employee may be paid a day-rate without violating the salary basis requirement so long as the employer guarantees the employee weekly compensation (of at least \$455), and that the promised amount bears a "reasonable relationship" to the "amount actually earned" in a typical week. The Court noted that Helix could have attempted to take advantage of the daily rate provisions in Section 604(b), but it conceded that Hewitt's pay was not guaranteed and, therefore, could not fully meet the test. In reaching its decision, the Court focused on the concept of salary, which is linked to "the stability and security of a regular weekly, monthly, or annual pay structure." According to the Court, even highly paid day-rate employees who could earn less in a workweek because they are not needed do not have the security of being paid on a salary basis and therefore are entitled to overtime under the FLSA.

## Takeaways

The Court in *Helix* noted that a similar employer could come into compliance with the FLSA salary basis test if it added to the day rate a weekly guarantee that satisfied the conditions of Section 604(b). It could also convert an employee's compensation to a straight weekly salary for time spent at the worksite. Employers that cannot avail themselves of these options face significant overtime exposure for exempt-classified employees paid a day rate given the high compensation rate. Employers with questions about day-rate compensation for exempt and nonexempt employees under the FLSA should contact experienced counsel.

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