

## “Daily Rate” vs. “Salary Basis”

### New Developments Under the Fair Labor Standards Act

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On April 20, 2020, the U.S. Court of Appeals for the Fifth Circuit held that an employee who is paid a daily rate is not paid on a “salary basis” under the Fair Labor Standards Act. [Hewitt v. Helix Energy Solutions Group, Inc.](#)

The FLSA provides that employees paid on a “salary basis” are exempt from requirements under the FLSA, including the payment of overtime compensation. But in order to qualify for the exemption, the regulations require both that the employee be paid on a “salary basis” and that the employee perform exempt job duties. Put another way, the inquiry is a two-step analysis. That is, an employer must consider whether the employee’s job duties are classified as “exempt” and whether the employee is compensated on a “salary basis.”

As to the first question, in this case, Hewitt’s employer, Helix Energy Solutions, contended that Hewitt was either an exempt executive or highly compensated employee under the regulations. These categories, among others, meet the test for exempt job duties. See 29 C.F.R. § 541.100 (executive employees); § 541.601 (highly compensated employees). The Fifth Circuit did not take up the question of whether or not Hewitt met the duties part of the exempt test.

The decision turned on the second question which is whether Hewitt was compensated on a “salary basis.” There are two requirements in order to meet the salary basis test:

1. The employer must pay the employee a minimum per-week rate (\$684.00 per week as of January 1, 2020), and
2. The employer must pay the employee on a “salary basis.”

The Labor Department regulations define “salary basis” as follows:

An employee will be considered to be paid on a ‘salary basis’ within the meaning of this part if the employee *regularly receives each pay period on a weekly, or less frequent basis, a*

*predetermined amount* constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. 29 C.F.R. § 541.602(a) (emphasis added).

The Court provides an example for the typical "salary basis," which comports with the common sense understanding:

Consider an employee with an employment contract providing an annual salary to be paid biweekly. That employee can easily determine what he will receive every two weeks before he works—just divide his annual salary by twenty-six. He is thus "paid on a 'salary basis.'" See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (July 9, 2003) (reviewing a pay system guaranteeing that employees "will be paid at least 1/26th of their annual salary every other week").

Hewitt was employed as a "tool pusher" and managed other employees offshore on an oil rig. Each "hitch" lasted approximately one month. Hewitt was paid a daily rate for his work and received his paycheck on a biweekly basis. Because Hewitt worked more than forty hours per week, unless he was an "exempt employee," he would be entitled to overtime compensation. Hewitt argued that he was not paid on a "salary basis" because his pay was calculated on a daily, rather than weekly, rate. The Court agreed that he was not compensated on a salary basis.

The U.S. Court of Appeals for the Fifth Circuit concluded 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 and reversed the grant of summary judgment in favor of Helix Energy and remanded the case to the district court.

Use of daily rate compensation is ubiquitous in the energy exploration and production industries in states within the Fifth Circuit's purview (Texas, Louisiana and Mississippi). Employers that use a daily rate compensation structure should review their pay practices and consult with an employment attorney regarding the impact of the Court's decision.

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