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Another Day, Another Dollar but Still No Salary: Supreme Court Draws Bright Line

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February 27, 2023

In a 6 – 3 decision on February 22, 2023, the U.S. Supreme Court held that an offshore rig employee paid a "day rate" but earning more than \$200,000 annually is entitled to overtime.

The case arose under the Fair Labor Standards Act (FLSA), which guarantees covered employees a minimum hourly wage and, when hours exceed 40 in a workweek, overtime at time-and-a-half of their regular rate of pay. The FLSA also provides exemptions from the minimum wage and/or overtime rules for certain categories of workers, but only if specific requirements are met.

Hewitt was a toolpusher supervising 12 to 14 other employees. He typically worked 84 hours a week during his offshore hitches. He was paid a daily rate, which ranged from \$963 to \$1,341 per day over the course of his employment, with no overtime. The employer argued that Hewitt qualified for the executive exemption, which requires satisfaction of three tests: the salary basis test, salary level test, and duties test.

There was no question that Hewitt satisfied the duties test, which was relaxed in this situation under the regulations because his annual level of compensation met the highly compensated employee threshold of \$100,000 (now \$107,432). There was also no question that he satisfied the salary level test of wages in excess of \$455 per week (now \$684 per week).

The remaining question – whether Hewitt was paid on a salary basis – was the sole issue addressed by the Court. An employee is considered paid on a salary basis if they regularly receive a predetermined amount, constituting all or part of the employee's compensation, for any week in which the employee performs any work, regardless of how much or little the employee works in that week. This means the employee's pay is not subject to reduction because of variations in the quality or quantity of work performed in any given work week.

The Court noted that "[a] daily-rate worker's weekly pay is always a function of how many days [they have] labored," so it does not meet the salary basis test as defined by the regulations. The Court also emphasized that workers are not "deprived of the benefits of the Act simply because they are well paid."

This decision offers lessons for all employers. The FLSA's regulatory scheme is technical, definitional, and sometimes counterintuitive. While employers may have some latitude in how much and how they pay their employees, their choices may have unintended consequences under wage-and-hour laws, both federal and state. The more common exemptions typically require some combination of pay level, pay method, and duties, and the requirements can be challenging to navigate. Employers who have not considered or formally evaluated which exemptions they are relying on for their exempt employees and why would be well-advised to consult counsel and consider a classification audit.

If you have questions about this topic, reach out to Jennifer Anderson, Zachary Busey, Mary Gentry, or any member of Baker Donelson's [Labor & Employment Team](#).