

A Day Rate and a Dollar Short: The Fifth Circuit Continues to Make Key Wage and Hour Rulings

Labor & Employment Workforce Watch

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Lawsuits alleging Fair Labor Standards Act (“FLSA”) violations continue to be among the more “popular” filings in federal district courts, with over [6,500 such cases filed between December 2019 and December 2020](#). Perhaps the most significant rulings in this regard were issued in March of 2021 by the United States Court of Appeals for the Fifth Circuit when it opined upon the availability of FLSA exemptions as well as the extent to which the FLSA may preempt certain state laws.

Hewitt v. Helix – Round III

Among the most common issues raised in FLSA lawsuits is whether an employer is compensating its employees on a “salary basis,” which is required for an employer to take advantage of the white-collar administrative, professional, and executive exemptions to overtime pay requirements under the FLSA. Generally, an employee is considered to be paid a “salary” under the [FLSA's regulations](#) if he or she regularly receives a predetermined (guaranteed) amount of compensation each pay period on a weekly, or less frequent basis, which does not vary due to the quality or quantity of the employee’s work.

Last year, we [posted a Workforce Watch Update](#), which detailed the April 2020 opinion of *Hewitt v. Helix Energy Solutions Group, Inc.*, 956 F.3d 341 (5th Cir. 2020). In its original *Helix* opinion, the Fifth Circuit held that an oilfield services employer’s use of a day rate for its toolpushers did not constitute a salary because the employee “did not receive a predetermined amount on a weekly, or less frequent basis,” but instead “received an amount contingent on the number of days he worked each week.” As a result, the Fifth Circuit reversed what had been a district court victory for the employer, and revived the employee’s claims.

Eight months later, in December 2020, the Fifth Circuit changed its mind (partially) and withdrew its prior *Helix* opinion. In its place, the court held that an employee compensated on a daily rate *can* be considered to be paid on a “salary basis,” but only if:

1. The employment arrangement also includes a guarantee of at least \$684 a week paid on a salary basis, regardless of the number of hours, days, or shifts worked; and
2. A reasonable relationship exists between the guaranteed amount and the amount actually earned.

However, notwithstanding the first two opinions on the issue, on March 9, 2021, the Fifth Circuit drew guidance from the federal regulations, as well as opinions from its sister courts in the Sixth and Eighth Circuit Courts of Appeal, which similarly held that a day rate can, in limited circumstances, constitute a salary, and thus support

exempt status. While the Fifth Circuit provided an opening for day rates to be eligible for FLSA exemptions, it determined Helix still was not entitled to the exemption because—according to the Court—Helix did not comply with either of the two requirements.

Apparently not satisfied with its first two opinions on the issue, on March 9, 2021 the Fifth Circuit granted Helix’s request for rehearing *en banc* (i.e., a request to have the case reheard before all Fifth Circuit justices, as opposed to a typical panel of three justices, due to the importance of the matter). Accordingly, the December 2020 *Helix* opinion was withdrawn, with oral argument now scheduled to take place in May 2021.

Many industries, and in particular the energy sector with offshore workers, use the payment of a day rate to compensate their workforce. With the jurisdiction of the Fifth Circuit covering the entire Gulf Coast from Texas to Mississippi, the Court’s third (and hopefully final) determination of whether a day rate satisfies the salary basis test for exempt status will hopefully provide some needed clarity.

Fifth Circuit Rules FLSA Preempts Certain State Law Torts

In *Aldridge v. Mississippi Department of Corrections*, 990 F.3d 868 (5th Cir. 2021), nearly nine hundred current and former employees of the Mississippi Department of Corrections filed a lawsuit asserting not only alleged unpaid wage claims under the FLSA, but also claims for negligence, intentional infliction of emotional distress, conversion, civil conspiracy, and other state law torts. Importantly, the Fifth Circuit recognized that each of the state law tort claims were “all based on failure to pay minimum wages and overtime compensation.” The question presented to the Court then was whether or not the FLSA preempted these state law claims.

Generally, the law recognizes three instances in which federal law may preempt state law:

1. Express preemption: where the language within a federal statute expressly states it displaces state law;
2. Field preemption: where a federal law is so comprehensive to make reasonable the inference that Congress left no room for supplementary state regulations or that it can be assumed to preclude state laws on the same subject; and
3. Conflict preemption: where compliance with the federal and state law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes of the federal law.

In conducting a detailed analysis of the three types of preemption, the Fifth Circuit held that while the FLSA does not preempt state laws on express or field preemptions grounds, it does preempt state laws on conflict preemptions grounds because, the Court reasoned, “it is clear that there is a conflict” and “the purposes of the two laws overlap with each other and thus the federal law must control.”

The Fifth Circuit then clarified that if a separate state statute provides for unpaid minimum wages or overtime compensation, employees may bring lawsuits on those claims, or a cause of action under the FLSA, “but not both.” Because Mississippi and Louisiana have no such statutory framework, the Court held employees in these states may not assert wage and hour violations under state tort laws.

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