CUT AND PASTE POST
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U.S. SUPREME COURT TO HEAR HCE SALARY BASIS CASE

In May of 2022, the U.S. Supreme Court agreed to hear an employer's petition to decide whether highly compensated employees who are paid a daily rate are exempt from overtime pay under the Fair Labor Standards Act ("FLSA").

As we all know:

- The FLSA and Montana's Wage and Hour laws require most employees to be paid at least the applicable minimum wage for all hours worked and overtime pay, at no less than time and one-half, for all hours worked in excess of 40 in a workweek.
- Both the FLSA and Montana law provide for an exemption from overtime pay requirements for bona fide executive, administrative, professional, and outside sales employees. To qualify for this exemption, the employees must meet certain tests regarding their job duties ***and*** must be paid on a salary basis at not less than $684 per week.
- Under 29 C.F.R. § 541.601(a), highly compensated employees (HCE's) can be exempt from the FLSA's overtime requirements if all of the following requirements are met:

    1. The employee earns a total annual compensation of $107,432 per year, which must include at least $684 per week paid on a salary or fee basis;
    2. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an executive, administrative or professional employee; and
    3. The employee performs office or non-manual work as part of his or her primary duties.

In Helix Solutions Group, Inc. vs. Hewitt, No. 21-984, Michael Hewitt ("Hewitt"), was a supervisor on offshore oil rigs and was paid at least $963 each day, regardless of the number of hours worked. This equated to more than $200,000 in annual compensation.

At some point, Helix fired Hewitt, and Hewitt brought suit under the FLSA, arguing that he was entitled to retroactive overtime pay for every week in which he had worked over 40 hours. Helix argued that his daily rate was not a "salary or fee" under the FLSA.

The district court dismissed Hewitt's claim on summary judgment, finding that Hewitt was "twice exempt", both as an executive employee and also based on the test for highly compensated employees. The Court further found that he was paid on a "salary basis" because he received a predetermined amount of pay regardless of how many hours he worked.

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Hewitt appealed to the Fifth Circuit, which determined he was eligible for overtime pay because his compensation was based on a daily rate, as opposed to a weekly rate described in §541.604(b).

The Split

In an earlier case involving a similar scenario, the Sixth Circuit said that what was important was not whether the employees actually *received* a salary meeting the requirements of §541.604(b), but whether the *employment agreement* provided for compensation meeting those requirements. In other words, the Sixth Circuit said that, regardless of what an employee is actually paid, what is important is what the employment agreement says about how an employee is to be paid

On to the Supreme Court

Whenever you have a split in Circuits, you have the opportunity for U.S. Supreme Court review. That is what has happened in this case, and the members of the Supreme Court have agreed this issue merits their review. So, within the next year, the Supreme Court will decide whether highly compensated employees can be paid on a daily rate and still qualify for the HCE overtime exemption under the FLSA. This case is worth watching, because the Court may decide to resolve this narrowly (e.g., address only the daily versus weekly rate issue), or more broadly (e.g., address various methods of compensating exempt employees.)

The case is scheduled for argument during the Court's 2022-2023 term. We will keep you updated!

Professional Pointer: In Montana, the HCE exemption only applies to employers subject to the FLSA. Depending on your organization, you may be subject to either Montana Law, or the FLSA, or both. See MCA 39-3-406 for the full list of exclusions from Montana's minimum wage and hour requirements.

9TH Circuit: Former HR Employee Is Disabled under the ADAAA

Karen Shields worked as an HR Generalist for Credit One Bank. It was suspected she had bone cancer, which precipitated a bone biopsy surgery which occurred in April of 2018 and which required a three-day hospitalization. Ms. Shields' physician completed a work evaluation form in which he initially estimated that Shields would be able to return to work on June 20, 2018. Based on this information, Shields was approved for an unpaid, eight-week "medical leave of absence as an accommodation under the ADA."

As June 20, 2018 approached, Shields lacked full use of her right shoulder, arm, and hand so, on June 18, 2018, her physician prepared a note indicating she was still unable to return to work and that her likely return to work date would be at least July 10, 2018.

Shortly after the physician's note was delivered, Credit One's Assistant VP of HR asked Shields to report to her office. When Shields asked if she was being fired, the Assistant VP said she was not being fired and that they needed her to come in to discuss her healthcare premium. However, when Shields reported to the office the next day (as requested), she was told her position was being eliminated and she no longer had a job.

Shields filed an Americans with Disabilities Act discrimination claim in District Court. The court dismissed the case, finding that Shields did not have a permanent or long term disability as defined under the ADA.

Shields appealed to the 9th Circuit, which reversed the dismissal, noting that under the Americans with Disabilities Act Amendments Act (ADAAA) of 2008, both the ADA and the applicable EEOC regulations had been updated and broadened to encompass protection for the "effects of an impairment lasting or expected to last fewer than six months." The Court further held that Shields had adequately demonstrated the presence of a disability under the ADAAA. Therefore, the Court found that Shields was a qualified individual with a disability under the ADAAA, and further found that Shields' physical impairment began immediately after surgery and concluded when her physician determined she was sufficiently healed to return to work.

Professional Pointer – This case was interesting because: 1) it directly involved Human Resources personnel, and 2) because the District Court that heard the case applied the wrong standard (the ADA instead of the ADAAA) in making its decision. This shows how important it is to check (and recheck) your sources!

Read the case: Shields v. Credit One Bank, N.A.

Montana District Court: Forced Arbitration and Title VII Claims

In July 2016, the University of Montana hired Shannon Schweyen to be its new head women's basketball coach. The parties executed an employment agreement making her head coach from September 1, 2016 to June 30, 2019. The employment agreement included a dispute resolution process which required that "*If any dispute arises under this Agreement, the parties agree to attempt to resolve the dispute in good faith…*" and laid out the dispute resolution process.

In 2019, a second employment agreement was negotiated, with the same dispute resolution provisions. Schweyen admitted she had read this language, but claimed the University never explained it to her and that she did not understand the effect it would have on any future sexual discrimination claims. She also claimed she had never negotiated an employment agreement before, and had no legal advice during the negotiations process.

When Schweyen's second employment agreement expired, it was not renewed. On November 11, 2021, Schweyen filed suit against the University, complaining of sex discrimination in violation of Title VII of the Civil Rights Act of 1964. In response, the University moved to compel arbitration based on the dispute resolution clauses in the two employment agreements.

In his decision, Judge Donald Molloy addresses the federal "Franken Amendment" which bars federal defense contractors from mandating arbitration of Title VII employment claims, and discusses the elements of a "knowing and voluntary waiver" under Montana law and "knowing and explicit waivers" under federal law. If you have arbitration requirements in your employment agreements, this case is definitely worth a read!

The bottom line, though, is that Judge Molloy found the University's dispute resolution language to be legally insufficient. Specifically, the Judge said the University's agreement failed to explicitly notify Schweyens that "[s]he was somehow entering into an agreement to waive a specific statutory remedy [the right to sue] afforded h[er] by a civil rights statute". Molloy also found this notification to be required under *Nelson v. Cyprus Bagdad Copper Corp*. Therefore, Molloy denied the University's motion to compel arbitration.

Read the case: Schweyen v .University of Montana-Missoula