

What A Fight Over Salary-Basis Pay Says About DOL's Power

By **Daniela Porat**

Law360 (November 7, 2022, 4:35 PM EST) -- From the concept of a salary to tipped-wage regulations, the fundamentals of wage and hour law are facing high-stakes challenges that are testing the relationship between the Fair Labor Standards Act and its enforcer, the U.S. Department of Labor, attorneys say.



Courts appear to be more skeptical of the authority of federal agencies such as the Department of Labor to interpret laws and issue regulations, say some experts. (Photo by Daniel Slim/AFP via Getty Images)

In particular, a U.S. Supreme Court fight over whether an oil rig worker earning more than \$200,000 a year is **entitled to overtime pay** because he was paid a day rate instead of on a salary basis encapsulates how the FLSA's dictates may be in friction with the DOL's rulemaking.

This clash over salary regulations comes as the high court appears more willing to express skepticism of agency authority, said Catherine Ruckelshaus, general counsel and legal director for worker-side organization the National Employment Law Project. Ruckelshaus cited the Supreme Court's **June decision** in *West Virginia et al. v. EPA et al.*, which found the Environmental Protection Agency had overstepped its authority in regulating power plant greenhouse gas emissions under the "**major questions doctrine**" because the EPA did not have clear authorization from Congress to do so.

"These agencies are the experts. They're the ones that have been interpreting their statutes, have been applying their statutes and enforcing them," she said. "So when the court comes in and second-guesses

that, I think it sets a dangerous precedent."

Here, Law360 explores how the salary dispute at the Supreme Court is a microcosm for larger debates about the limits of administrative agency power.

Salary Regulations Unique

At issue in [Helix Energy Solutions Group Inc. et al. v. Michael J. Hewitt](#) before the Supreme Court, which held **oral arguments** in October, is how, if at all, the DOL's salary regulations apply to highly compensated workers.

Most FLSA regulations, like the **new proposed independent contractor rule**, are interpretive regulations — what the DOL interpreted Congress to have said in the statute, said Zach Hutton, a partner with management-firm Paul Hastings LLP. But the regulation outlining **pay on a salary basis**, defined as a guaranteed weekly amount that does not fluctuate based on the quality or quantity of work performed, is different, Hutton said.

White-collar workers are exempt from overtime if they perform specific duties and are paid on a salary basis.

Section 13(a)(1) of the FLSA states that the law's overtime protections do not apply to workers employed in a "bona fide executive, administrative, or professional capacity ... as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]."

That language places the white-collar exemption regulations in a unique realm where the DOL was explicitly tasked with coming up with what those words mean, Hutton said.

"Because these are legislative regulations where Congress conferred authority on the DOL to act, not just interpretative regulations where they may have no better idea than a court of what the statute means, they're entitled to greater deference," he said.

Another reason why the salary regulations are distinct is because they have remained consistent for many decades, Hutton said.

"You don't have the issue of courts being less willing to defer to agency interpretations when they go back and forth," Hutton said.

A separate section of the federal code, Section 541.604(b), allows salaried professionals' pay to be calculated on a shift or day basis without losing their exempt status if "the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis" and "a reasonable relationship exists between the guaranteed amount and the amount actually earned."

In the case before the high court, oil rig worker Michael Hewitt's day rate of \$963 was well above the minimum weekly requirement for salaried professionals, which at the time was \$455 and is **now \$684**. However, the pay was tied to days worked and consequently failed to constitute a real salary, the Fifth Circuit ruled in September 2021.

Since the statute grants the DOL explicit authority to define the exemptions, it would be "pretty radical" if the Supreme Court were to override the long-standing salary basis test, Ruckelshaus said.

"If they are going to go that way, and rule that that regulation is improper under the statute, it is going to open up more opportunities for gaming by employers, unfortunately," she said.

Ultimately, the FLSA and its regulations are supposed to prevent employers from overworking employees — what happened in the Helix case, Ruckelshaus said.

What was missing from the **October oral arguments** in the Helix case was a recognition of that purpose of overtime, she said.

"I think when you look at statutory interpretation devoid of its context and devoid of its purpose, that's where you get an undermining of workers' rights and civil rights," she said. "I think the emphasis on the statutory terms devoid of context is where you get dangerous rulings."

Agency Deference TBD

The oral arguments in *Helix* raised a broader philosophical question that goes beyond wage and hour law and concerns the breadth of administrative agencies' authority, said Rafael Nendel-Flores, a member with management-side firm Clark Hill PLC.

"I think this goes towards the conservative justices, particularly the current composition of the court, their skepticism about the overarching power of administrative agencies to ... use their enforcement power to expand far beyond what in their view the statute actually provides for," he said.

Nendel-Flores pointed to the standard from the Supreme Court's 1984 ruling in [Chevron USA Inc. v. Natural Resources Defense Council Inc.](#) that says courts should give deference to federal regulations.

"You really go back to justices who want to give administrative agencies deference in how they interpret statutes versus judges that don't like the Chevron deference standard because they think in their view, it allows administrative agencies to go far beyond the statute," he said.

From the conservative justices' viewpoint in this case, Congress did not intend for the FLSA to protect such high-wage earners on a technicality, Nendel-Flores said.

"I think the bigger picture issue is, is the Fair Labor Standards Act really designed to protect high-wage earners?" he said. "The secondary question is, regardless of whether it is, whether or not the statute actually offers that protection, should it?"

In a **co-authored amicus brief** from September in the *Helix* case, the DOL and the U.S. Department of Justice told the high court that *Helix* could not justify exempting Hewitt from overtime.

"No sound reason exists to excuse petitioners from complying with the salary basis requirement to obtain an exemption," the departments said. "Given the regulations' text and long history, it should have been no surprise that daily-rate pay does not qualify as payment on a 'salary basis.'"

A separate legal challenge from restaurant groups contesting the DOL's **new tipped-credit rule** highlights how consistency in rulemaking may also factor in to agency deference.

Under the FLSA, tipped workers can earn as little as \$2.13 per hour as long as tips carry the worker to the standard federal minimum wage, which is \$7.25. The new rule seeks to ensure tipped workers earn full minimum wage once they perform "a substantial amount of directly supporting work that does not itself produce tips."

Its focus on a tipped worker's duties as opposed to their occupation, however, is what restaurant groups the Restaurant Law Center and the Texas Restaurant Association said is an unlawfully excessive use of power, as the DOL is "impermissibly attempting to rewrite the statute via a regulation," according to groups' complaint in December 2021.

Attorneys **previously told Law360** that such arguments may fail since the DOL has regulated tipped wages across presidential administrations.

But unlike the salary requirements, the tipped regulations have changed depending on which party holds the executive branch, Hutton said.

Hutton said he does not believe the Supreme Court will wholesale do away with the salary basis test. Instead, the justices will likely come to a narrower ruling that will deal with the "extreme facts" of the case, he said.

That is partly due to the status of the salary basis regulation.

"I think that if you combine the fact that this is a legislative rule, not an interpretive regulation, with consistency in their interpretation, that it's probably going to receive greater deference," he said. "The DOL's rationale for 78 years now for imposing a salary test is that someone isn't really bona fide unless they receive a guaranteed salary. And the question is, how far does that go?"

--Additional reporting contributed by Irene Spezzamonte and Max Kutner. Editing by Aaron Pelc and Roy LeBlanc.

