

Employee Relations LAW JOURNAL

U.S. Supreme Court to Ponder Proof in Wage Misclassification Case: 5 Steps for Employers to Comply with Overtime Exemption Rules

By Sarah Wieselthier

In this article, the author discusses a case pending before the U.S. Supreme Court regarding the evidence an employer must show to prove it correctly classified employees as exempt from minimum wage and overtime pay.

What evidence does an employer need to show a court to prove it correctly classified employees as exempt from minimum wage and overtime pay? The U.S. Supreme Court announced on June 17, 2024, that it will address a disagreement among federal appeals courts on the standard of proof in such cases. Employers will want to track this case next term, as the decision will impact your litigation strategy when employees claim they were misclassified and owed wages and overtime premiums. Here are the key points you should know about the pending Supreme Court case and five steps you can take now to avoid misclassifying employees under wage and hour laws.

WHY IS THIS ISSUE IMPORTANT TO EMPLOYERS?

Federal Wage Law

In *E.M.D. Sales Inc. v. Carrera*, several employees of a grocery distribution company claimed they were misclassified as outside sales employees

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and were therefore owed overtime pay. Under the Fair Labor Standards Act (FLSA), employees generally must be paid an overtime premium of 1.5 times their regular rate of pay for all hours worked beyond 40 in a workweek – unless they fall under an exemption.

Exemptions

While the executive, administrative, and professional exemptions – which are collectively known as the “white-collar” exemptions – may be the most familiar to employers, this case focuses on the outside sales exemption. Under this exemption, the employee’s primary duties must involve making sales, and the employee must be customarily and regularly engaged away from the employer’s place of business. You should note, however, that the Supreme Court’s ruling will likely impact all 34 of the FLSA’s exemptions.

Burden of Proof

Employers have the burden to prove they properly classified employees as exempt – and this case focuses on how much proof the employer needs to offer. While the issue is a bit technical, the distinction makes a big difference for employers defending against misclassification claims. Here are the two standards of proof at issue:

- *Preponderance of the Evidence.* Under this standard, an employer must show that its position is more likely true than not true. This standard generally applies in civil cases. Some legal scholars say it means that you need to show there’s at least a 51% chance that your position is correct.
- *Clear and Convincing Evidence.* This is a higher bar for employers to reach, requiring them to show more substantial evidence to prove their argument. While there is no definitive number to use as a gauge, some legal scholars say you need to prove there is an 80 to 90% chance that you are correct in order to meet this higher standard. In the case before the Supreme Court, the employer argues this standard is “an unusually heavy burden reserved for such weighty matters as civil commitment, termination of parental rights, and deportation.”

Disagreement Among Courts

In *E.M.D. Sales*, the U.S. Court of Appeals for the Fourth Circuit applied the “clear and convincing” standard, making it the sole federal appeals

court to do so. In contrast, six other federal appeals courts (the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh) have applied the “preponderance of the evidence” standard. Thus, the Supreme Court accepted the case to address this disagreement and will hopefully set a consistent standard nationwide.

Widespread Support for Employer

The Fourth Circuit is clearly an outlier on this issue, and the employer has ample support from business groups – and even the federal government. For instance, the U.S. Chamber of Commerce¹ said the Fourth Circuit’s position requires the employer “to shoulder a burden of proof that is inconsistent with the FLSA’s text” and “threatens employers with significant and unanticipated overtime liabilities.”

Moreover, the Biden administration filed a “friend of the court”² brief asking the Justices to fast-track a ruling in favor of the employer due to “the lack of any valid rationale” for the Fourth Circuit’s position. “The court of appeals’ adoption of the clear-and-convincing-evidence standard of proof for FLSA exemptions is unreasoned and inconsistent with this Court’s precedent, which has long recognized that such a heightened standard of proof should not be applied to ordinary civil cases seeking monetary remedies,” the federal government argued.

THE BIGGER PICTURE: 5 COMPLIANCE STEPS TO TAKE NOW

Even if the Supreme Court resolves this case in favor of the employer, wage and hour compliance should be top of mind, since errors can result in significant penalties and hefty litigation costs. The best way to avoid misclassification claims is to ensure you regularly review your practices. Consider taking the following five steps now:

1. *Prepare for Changes to the White-Collar Exemptions.* As you likely know, the FLSA’s exemptions are under the spotlight right now as the first of two deadlines looms to raise the salary threshold for the white-collar exemptions. Currently, the standard salary threshold for these exemptions is \$684 a week (\$35,568 annualized). The Department of Labor’s new rule raises the rate first to \$844 a week (\$43,888 annualized), then to \$1,128 (or \$58,656 a year). These significant increases will require some planning if you have exempt employees who earn less than the finalized amounts.
2. *Review the Duties Tests for All Exemptions.* You should take this opportunity to review all your exempt employees’ roles to ensure they are properly classified. As with all exemptions,

neither the job title nor the job description alone determines whether an employee qualifies for an exemption. Instead, to be eligible for an exemption, the employee's primary job duties must meet both state and federal wage and hour law requirements. You should note that the duties test varies depending on the exemption.

3. *Update Job Descriptions.* Remember that jobs evolve and duties change, so it is important to periodically review job descriptions to ensure they accurately reflect the roles and responsibilities of your workforce.
4. *Promptly Correct Any Misclassification Errors.* If employees have been misclassified, this error should be corrected, and any affected employees should be notified of their change in status. There is a strong possibility that your employees will not be thrilled at receiving news that they are being reclassified. They may question whether they were previously misclassified and owed overtime wages or whether your organization was otherwise noncompliant with the FLSA. As a result, you should consult with legal counsel to determine the best approach to correcting any misclassification errors, including potentially compensating misclassified employees for any overtime owed and how to best convey messaging to your employees.
5. *Check State Law.* It is important to remember that some jurisdictions can have higher, stricter, or different wage and hour requirements than federal law. For example, some states have a higher salary threshold for the white-collar exemptions than the FLSA. Additionally, some jurisdictions have higher minimum wage rates and/or additional overtime-type requirements. And while the FLSA regulates little in the way of actual wage payments, deductions, and notification of pay terms, many states have detailed requirements and might even have different provisions for non-exempt versus exempt employees.

NOTES

1. https://www.supremecourt.gov/DocketPDF/23/23-217/284567/20231010145336710_Chamber%20NFIB%20NFR%20RLC%20Amici%20Brief%20in%20EMD%20Sales%20et%20al.%20v.%20Carrera%20et%20al.%2010.10.23.pdf.
2. https://www.supremecourt.gov/DocketPDF/23/23-217/309172/20240507124434122_23-217%20EMD%20Sales.pdf.

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