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MILLIONAIRES AND THE ABILITY TO RECEIVE OVERTIME COMPENSATION

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I. Introduction

The Fifth Circuit recent decision in *Hewitt v. Helix Energy Sols. Grp., Inc.,* could change how oil and gas companies have been operating for decades.[1] In addition, this split could potentially change how oil and gas companies run their business in the foreseeable future. This can change how employers pay their employees and who is entitled to overtime. This could also have lasting impacts on the economy of states that are heavily involved in the oil and gas industry. Oil and gas companies may decide to leave states because of this decision. The issues in this case focus on wages for individuals working in the oil and gas field and which employees qualify for overtime.

The Fair Labor Standards Act ("FLSA") requires employers to pay time and a half for additional work employees perform over the standard 40 hours.[2] To be exempt from overtime, an employee must (1) meet certain criteria concerning the performance of executive, administrative, and professional duties; (2) meet certain minimum income thresholds; and (3) be paid on a salary basis.[3] Most oil and gas companies pay on a day-rate, and the argument of whether or not those highly compensated employees paid on a day-rate are entitled to overtime is where the split is causing

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1. *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289 (5th Cir. 2021).
2. 29 U.S.C. § 207(a) (2010).
3. FTC Credit Practices Rule, 29 C.F.R. § 541.601 (2019).

tension. When an employer computes an employee's pay daily, rather than on a monthly or yearly basis, it is considered a day-rate pay. The FLSA defines salary as compensation paid "on a weekly, or less frequent basis, without regard to the number of days or hours worked."[4] Therefore, a salaried employee is paid the full salary for any week they perform any work no matter how many days or hours were actually worked. An employee whose compensation is computed on a daily basis satisfies the salary basis test if: "(1) the employment arrangement includes a guarantee of at least the minimum weekly required amount 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 worked."[5]

The Fifth Circuit held that the highly compensated employee was not exempt from FLSA's overtime requirement,[6] while the First Circuit[7] and Second Circuit[8] held that the employees were exempt. This split can potentially impact the entire oil and gas industry and how companies calculate paying their employees. This split is the result of how courts are interpreting the regulations. The First and Second Circuits have been interpreting the regulations by using common sense and thinking about the intent behind the regulations. The Fifth Circuit is strictly looking to the text and basing their decision on that. Companies in the oil and gas industry are taking notice of this split and examining who is entitled to overtime and how to follow the rules set out in *Hewitt v. Helix* to avoid paying overtime. Courts are examining how other circuits have decided on this issue and are using those rulings to make their rulings on whether or not oil companies need to abide by the FLSA regulations when it comes to highly compensated employees. The decision to follow the plain text of the regulation or to think of congressional intent has cause the conflict and confusion for the oil and gas industry. Looking at the law prior to *Hewitt*, the reasoning behind the *Hewitt* decision, and the impact of that decision will show why the court made the correct decision in ruling that the employee was not exempt from overtime.

4. 29 C.F.R. § 541.602(a) (2019)
5. 29 C.F.R. § 541.604(b) (2019).
6. *Hewitt*, 15 F.4th at 298.
7. *Litz v. Saint Consulting Grp., Inc.*, 772 F.3d 1 (1st Cir. 2014).
8. *Anani v. CVS RX Servs., Inc.*, 730 F.3d 146 (2d Cir. 2013).

II. Legal Landscape Before Hewitt

Before *Hewitt*, highly compensated day-rate workers could be considered salaried employees and would be exempt from overtime. Courts relied on the Secretary of Labor's exemption list to avoid paying the highly compensated workers' overtime. Under 29 C.F.R § 541.601, an employee is exempt if they (1) meet certain criteria concerning the performance of executive, administrative, and professional duties; (2) meet certain minimum income thresholds; and (3) be paid on a salary basis.[9] The salary basis issue was and is the most contested. Many oil and gas companies pay employees on a daily-rate basis. An employer who pays an employee on a daily or shift rate basis is exempt from overtime if "(1) the employment arrangement includes a guarantee of at least the minimum weekly required amount 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 worked."[10] There was a significant amount of litigation in the industry to determine whether or not day-rate workers satisfied the salary-basis test for overtime pay. The Sixth Circuit has taken a textual approach that requires employers to comply with 29 C.F.R. § 541.604(b) even if 29 C.F.R. § 541.601 is satisfied.[11] The Eighth Circuit followed the Sixth Circuit in using the textual approach to dissect the issue.[12] However, other courts like the First[13] and Second[14] Circuits have looked beyond just the text and considered the intent of the regulations and concluded § 541.604(b) is not relevant when an employee meets the requirements in § 541.601.

III. How the Split Occurred

There was a split among circuits and district courts on how to approach the two-step test from § 541.604(b). Who constitutes a highly compensated employee? How should courts interpret the FLSA and similar regulations? Some courts, such as the District Court of Colorado in *Scott v. Antero Resources Corp.*, found § 541.604(b) does not apply to highly compensated

9. 29 C.F.R. § 541.601.

10. *Id*. at § 541.604(b).

11. *Hewitt*, 15 F.4th at 294 (citing *Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d 183 (6th Cir. 2017)).

12. *Id.* at 295 (citing *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1042 (8th Cir. 2020).

13. *Litz*, 772 F.3d at 5.

14. *Anani*, 730 F.3d at 149.

employees if a party meets the salary-based requirement for a day rate worker and meets the requirements of § 541.601.[15] In *Scott,* the plaintiffs' predetermined day-rate pay was at least $1,000 for a total of at least $200,000.[16] The plaintiffs argued that they were entitled to compensation for overtime because they were paid only for days that they worked, so they were not paid a guaranteed weekly minimum salary.[17] Defendants argued the plaintiffs were highly compensated employees under 29 C.F.R. § 541.601 and paid a weekly minimum guarantee, so they are not entitled to overtime compensation.[18] The court first found the plaintiff's met salary-based requirement.[19] The plaintiffs were compensated on a salary basis "because their day rate guaranteed them $1,000 for every day that they worked and thus, perforce, they would receive more than the minimum of $455 per week for any week in which they performed any work."[20] No matter how many hours the plaintiffs worked in a given week, they were guaranteed $1,000.[21] The plaintiffs regularly received a predetermined amount that followed the requirement in 29 C.F.R. § 541.602(a).[22] The court explained the intent of the FLSA does not align with paying highly compensated employees high overtime wages.[23] The court then held that the reasonable relationship test does not apply when the issue is regarding the highly compensated employee exemption.[24] A key component of the court's reasoning was "that common sense dictates" that highly compensated employees should not be entitled to overtime.[25] The plaintiffs met the salary basis requirement, and there was no need to look at the reasonable relationship element. Therefore, the overtime exemption applied to the highly compensated employee.

Other courts, such as the Sixth Circuit in *Hughes v. Gulf Interstate Field Services, Inc.,* have rejected the idea that § 541.604(b) does not apply when dealing with a highly compensated employee.[26] In *Hughes*, appellants were welding inspectors working on a pipeline for the employer, appellee. Before

15. *Scott v. Antero Res. Corp.*, 540 F.Supp.3d 1039, 1048 (D. Colo. May 20, 2021).
16. *Id.* at 1041.
17. *Id.*
18. *Id.* at 1042.
19. *Id.* at 1046.
20. *Id.* at 1047.
21. *Id.*
22. *Id.*
23. *Id.* at 1048.
24. *Id.*
25. *Id.* at 1047 (citing *Hewitt*, 15 F.4th at 802 (Wiener, J., dissenting)).
26. *Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d at 190-91 (6th Cir. 2017).

they began work, they received an offer letter from their employer that stated they were entitled to $337 per day worked.[27] The employees/welders told inspectors that they base the projects on working a six-day workweek at ten hours a day and that the employer only paid inspectors for days worked only.[28] Over the year, the employees earned over $100,000.[29] The employer argued that the employees were exempt from overtime because they were highly compensated employees.[30] The employees argued that there was no guarantee of at least the minimum weekly required amount paid, so § 541.604(b) was not satisfied.[31] The employer contended that the court should ignore § 541.604(b) like the other circuits have done when dealing with a highly compensated employee.[32] The court rejected the employer's argument because, in those situations, employees met § 541.601 and § 541.602(a) because there was a weekly minimum guaranteed salary in those situations.[33] The court explained that the central issue here is whether or not there was a guaranteed salary. The court noted that "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit."[34] The court denied the employer's motion for summary judgment because a reasonable trier of fact could find that there was no guaranteed salary.[35]

The First Circuit in *Litz v. Saint Consulting Group, Inc.,* held that the highly compensated employees were exempt from overtime.[36] The employee was a project manager at a political consulting firm.[37] She earned over $100,000 per year.[38] Project managers were not paid a higher rate for working more than forty hours, but they were guaranteed a minimum weekly salary of $1,000 regardless of whether they bill any hours or not.[39]

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27. *Id.* at 185.
28. *Id.* at 186.
29. *Id.*
30. *Id.* at 187.
31. *Id.* at 189.
32. *Id.* (citing *Anani v. CVS RX Servs., Inc.*, 730 F.3d 146 (2d Circ. 2013); *Litz v. Saint Consulting Grp., Inc.*, 722 F.3d 1,5 (1st Circ. 2014).
33. *Hughes*, 878 F.3d at 190-91.
34. *Id.* at 192 (quoting *Arnold v. Kanowsky, Inc.*, 361 U.S. 388 (1960).
35. *Hughes*, 878 F.3d at 193.
36. *Litz*, 772 F.3d at 6.
37. *Id.* at 2
38. *Id.*
39. *Id.*

Employee filed suit for unpaid overtime compensation.[40] The employer argued that the employee was a highly compensated employee that was exempt from overtime under § 541.601.[41] Employee asserted that the employer did not pay her on a salary basis.[42] The court stated that the employee was paid on a salary basis because the $1,000 was predetermined and not subject to reduction because of quality or quantity concerns.[43] Because they received a salary and made over $100,000 per year, the court concluded that the employee was a highly compensated employee that was exempt from overtime under § 541.602.[44] The court refused to apply the § 541.604(b) requirements because Adverse party met § 541.601.[45]

The Second Circuit in *Anani v. CVS RX Services, Inc.*, held § 541.604 does not apply to highly compensated employees.[46] The appellant pharmacist's base salary was based on a 44-hour work week.[47] That appellant's base salary was to be in excess of $1,250 at all times.[48] The appellant earned over $100,000 per year[49] and was paid an hourly compensation rate for additional hours worked.[50] Appellant brought suit claiming he was entitled to time and a half overtime pay.[51] The court determined the appellee paid appellant on a salary basis because appellee paid a guaranteed minimum weekly amount and that satisfied § 541.602, so appellant was exempt from overtime under § 541.601.[52] Appellant argued that his total earnings were greater than his guaranteed salary, so the relationship between his guaranteed salary and total earnings was unreasonable.[53] The court held that when a party meets § 541.601, there is no reason for a party to meet § 541.604.[54]

Day-rate pay and overtime have led to many conflicting decisions and the reversal of decisions. *Hewitt,* for example, is a case in which the Fifth

40. *Id.* at 1.
41. *Id.* at 4.
42. *Id.*
43. *Id.* at 5.
44. *Id.*
45. *Id.*
46. *Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 149 (2d Cir. 2013).
47. *Id.* at 147.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 148.
53. *Id.* at 149.
54. *Id*.

Circuit reversed and remanded the district court's ruling.[55] *Hughes* is also an example where the Sixth Circuit disagreed with the district court on the salary basis guarantee and reversed and remanded the case as well.[56] The number of reversals has left this question up in the air as there is no definitive ruling on whether or not the day-rate counts as salary.

IV. Facts and Procedural History of Hewitt

Michael Hewitt was a tool pusher working on an offshore oil rig for Helix.[57] Hewitt also had supervising responsibilities on the rig.[58] Helix indicated in their offer letter that they would pay him a daily rate of $1,341, and they would pay him on a bi-weekly basis.[59] Hewitt filed suit and argued he was entitled to overtime because Helix paid him based on a day rate and not salary.[60] Hewitt argued that Helix did not pay him based on salary because his pay fluctuated based on how many days a week he worked.[61] Helix claimed that they always paid Hewitt more than $455 a week and they paid him on a bi-weekly schedule.[62] Helix attempted to avoid paying overtime compensation to Hewitt because they classified Hewitt as a highly compensated executive employee.[63] In order to be exempt, Helix needed to show that they paid Hewitt on a salary basis.[64]

The district court agreed with Helix that Hewitt was not entitled to overtime. The court found Hewitt's predetermined daily rate was more than the weekly required amount and that amount remained constant, so Helix paid Hewitt on a salary basis.[65] The court also found Hewitt performed duties that aligned with the executive exemption requirement.[66] The court ultimately found Hewitt was considered a highly compensated employee

55. *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289, 298 (5th Cir. 2021).
56. *Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d 183, 193 (6th Cir. 2017).
57. *Hewitt v. Helix Energy Sols. Grp., Inc.*, No. 4:17-CV-2545, 2018 WL 6725267 (S.D. Tex. Dec. 21, 2018) *rev'd en banc* 989 F.3d 418 (5th Cir. 2021).
58. *Id.* at 1.
59. *Id.*
60. *Id.* at 2.
61. *Id.* at 3.
62. *Id.*
63. *Id.* at 4.
64. 29 C.F.R. § 541.600(a).
65. *Hewitt*, 2018 WL 6725267 at 3.
66. *Id.* at 4.

because he earned over $100,000 per year.[67] The district court did discuss § 541.604(b).

V. Hewitt on Appeal at the Fifth Circuit

The court and both parties agreed that Hewitt met the duties requirement and the income threshold to be exempt as a highly compensated employee,[68] so the court primarily focused on the concept of salary.[69] Both parties agree Helix paid Hewitt on a daily basis.[70] The court noted that an employee whose pay was calculated on a daily basis must meet the salary-based test to be exempt from overtime.[71] The two-prong salary-based test allows a daily-rate worker to be exempt from overtime if "(1) the employment arrangement includes a guarantee of at least the minimum weekly required amount 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 worked."[72] The court found Helix did not comply with either prong.[73] First, Helix paid Hewitt a daily rate but there was no guarantee of a minimum weekly amount.[74] Second, Helix did not satisfy the reasonable relationship requirement.[75] Helix paid Hewitt "orders of magnitude greater than the minimum weekly guaranteed amount theorized by Helix."[76]

Helix's main argument was that they did not have to comply with the salary basis test under § 541.604(b) because Hewitt was not entitled to overtime compensation as he was a highly compensated employee under 29 C.F.R. § 541.601.[77] They argue that because Hewitt is a highly compensated employee, they do not have to satisfy the salary-basis test.[78] The court explained Hewitt cannot be a highly compensated employee unless his total annual compensation satisfies the salary based-test. The

67. *Id.; see* 29 C.F.R. § 541.601.
68. *Hewitt v. Helix Energy Sols. Grp. Inc.,* 15 F.4th 289, 291(5th Cir. 2021).
69. *Id.* at 294.
70. *Id.* at 297.
71. *Id.* at 293 (citing 29 C.F.R. § 541.604).
72. 29 C.F.R. § 541.604(b).
73. *Hewitt*, 15 F.4th at 294.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 296.
78. *Id.*

court further explained the meet the salary-basis test in § 541.604(b) must be met because Hewitt's pay is calculated on a daily-rate.[79]

The court held that because Helix failed both prongs of the two-step test, Hewitt was not exempt from FLSA's overtime requirement and reversed and remanded the case.[80] A petition for Certiorari was filed by Helix on January 7, 2022. On May 2, 2022, the United States Supreme Court granted review.

VI. The Fifth Circuit's Rationale

On appeal, the court focused specifically on the plain text of the regulations.[81] The court decided that not all employers that pay all highly compensated employees on a daily-rate schedule are automatically exempt from overtime. The court explained that even if an employee satisfies 29 C.F.R. § 541.602, they must also prove that the employee is paid on a salary basis and comply with § 541.604(b).[82] The appellate court reversed the ruling of the trial court.[83] The main thing the court was worried about was the salary-basis test.[84]

This court employed a textual approach to determine the meaning of the regulation. The court noted that § 541.601 requires the employee to be compensated on a salary basis to be exempt, and when an employer pays an employee on a daily-rate basis, § 541.604(b) must also be met.[85] The court noted that Helix does not satisfy the two-prong test of § 541.604(b).[86] This court looked at examples from other Circuits. The court began by looking at the general rule under § 541.602(a) which says an employee is paid on a salary basis if they regularly receive each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee's compensation.[87] Next, the court discussed the exception where employees are paid daily or hourly and can still be exempt.[88] The court looked at the Sixth Circuit who rejected the idea that highly compensated

79. *Id.*
80. *Id.* at 298.
81. *Id.* at 293.
82. *Id.* at 296-97.
83. *Id.* at 298.
84. *Id.* at 291.
85. *Id.* at 297.
86. *Id*. at 292.
87. *Id.*at 293 (citing 29 C.F.R § 541.602(a)).
88. 29 C.F.R. § 541.604(b).

employees are not subject to the requirements in § 541.604(b).[89] The court also relied on a statement by the Labor Department that said daily rate workers "would not qualify as highly compensated employees because daily rate does not constitute payment on a salary basis."[90] They relied on this because the Labor Department created a specified list of exemptions to satisfy the salary-basis test when employers pay executive employees on a daily rate.[91] This showed that the department has a narrow list of those types of employees.

This court also looked around the country at other courts that have said that daily-rate workers are subject to § 541.604(b) no matter how much employers pay them. For example, in *McQueen v. Chevron*, Chevron argued they were exempt from paying overtime because the individual's day rate was $1,000.[92] That court rejected that argument and explained the day-rate basis was still insufficient to satisfy the weekly salary requirement.[93] In looking at *McQueen,* the *Helix* court mentioned that highly compensated daily-rate workers may still be subject to § 541.604(b) regardless of how much an employer pays them. They also looked at *Wellman v. Grand Isle Shipyard*, where the court said employee compensation doesn't need to be calculated weekly, but there does need to be a guarantee of a minimum weekly amount paid.[94]

VII. Rejecting Helix's Arguments

One of Helix's main arguments was that they did not need to comply with § 541.604(b) because Hewitt was a highly compensated employee.[95] Helix believes that if an employee satisfies § 541.601, there is no need to look at § 541.604(b).[96] Instead, they wanted the court to look at decisions like the one in *Scott* where employers were not required to comply with § 541.604(b).[97] The court again stressed that § 541.601 has a salary-basis test,

89. *Hewitt*, 15 F.4th at 294 (citing *Hughes*, 878 F.3d 183).

90. *Hewitt*, 15 F.4th at 295 (quoting U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-13, 2020 WL 5367070 (Aug. 31, 2020)).

91. *Hewitt*, 15 F.4th. at 295 (citing 29 C.F.R. § 541.709).

92. *McQueen v. Chevron Corp.*, No. C 16-02089 JSW, 2018 WL 1989937, 1 (N.D. Cal. April 3, 2018).

93. *Id.* at 1.

94. *Wellman v. Grand Isle Shipyard, Inc.*, Civil Action No. 14-831, 2015 WL 2169786, 2 (E.D. La. May 8, 2015).

95. *Hewitt*, 15 F.4th at 293.

96. *Id.* at 296.

97. *Id.* at 297.

and the only way for a daily-rate worker to satisfy that test is to comply with § 541.604(b).[98] Helix then argued that because it satisfies § 541.602, it does not need to comply with § 541.604(b).[99] The court rejected that argument as well because Hewitt's pay is based on a daily basis, which is what § 541.604(b) is designed to address.[100]

The court was able to look at cases that Helix presented and distinguish them from the current situation. Helix presented the *Anani* and *Litz* cases to show the court's understanding of the salary-based test was not the correct interpretation.[101] *Litz* held that the employees were highly compensated employees and thus exempt from overtime.[102] *Anani* held that the requirement for a reasonable relationship between the guaranteed amount of compensation and the amount actually earned does not apply to highly compensated employees.[103] The court in *Anani* made comments directly in conflict with the court's decision here.[104] The *Anani* court explained that when a party meets § 541.601's requirements, there is no reason why a party need to meet § 541.604.[105]

This court was able to distinguish these cases because of those plaintiffs' payment structures. In both *Litz* and *Anani*, the employers did not pay employees on a daily-rate basis.[106] *Litz* received a guaranteed minimum weekly salary of $1,000 whether or not they billed any hours.[107] *Anani,* the employee, received a base weekly salary of how many hours that employee worked.[108] In both cases, there was a guaranteed weekly base compensation above the qualifying limit and calculated on a weekly basis.[109] Therefore, both of those employees satisfied the § 541.602 salary requirement.

The court finally reached its conclusion after rejecting Helix's argument that the purpose of the FLSA does not apply to highly paid employees.[110]

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98. *Id.* at 296.
99. *Id.*
100. *Id.* at 292.
101. *Id*. at 297.
102. *Litz*, 772 F.32 at 6.
103. *Anani*, 730 F.3d at 149.
104. *Hewitt*, 15 F.4th at 297.
105. *Anani*, 730 F.3d at 149.
106. *Hewitt*, 15 F.4th at 297.
107. *Id. See Litz v. Saint Consulting Grp., Inc.*, 772 F.3d 1, 2 (1st Cir. 2014).
108. *Hewitt*, 15 F. 4th at 297. *See Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 148 (2d Cir. 2013).
109. *Hewitt*, 15 F. 4th at 297 (quoting *Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d 146, 148 (2d Cir. 2013).
110. *Hewitt*, 15 F.4th at 297.

The court explained the text governs their decisions. They look at how Congress never changed the FLSA to exempt employees from overtime because employers highly compensate them.[111] They also look at a Supreme Court statement saying, "employees are not to be deprived of the benefits of the FLSA simply because they are well paid."[112] If highly compensated employees were supposed to be exempt, then the regulations would explicitly state that they are exempt. But instead, employees must be paid a certain amount of compensation and be paid on a salary basis to be exempt.[113]

A main argument of Helix and the dissent is that § 541.601 and § 541.604(b) apply to different subsections of employees. Both follow the *Anani* and *Litz* understanding the idea that an employee does not have to meet the requirements under § 541.604 if the employee meets the requirements of § 541.601.[114] Another argument from the dissent was that even though following a textual approach is correct, the majority followed the incorrect textual approach.[115] The dissent explained that if an employee has satisfied §541.601 (the highly compensated executive provision), then the text does not plainly incorporate the separate provisions of § 541.604.[116] The dissent felt that the text and structure of § 541.601 does not incorporate § 541.604 into it.[117]

This court stated multiple times that their decision was based solely on the text. Therefore, they will not change what the text says in order to "avoid perceived negative consequences for the business community."[118]

VIII. Analysis

This ruling can potentially create problems for the oil and gas industry in the future. Employers are now potentially going to have to rethink the structure in which they compensate employees. Many employers will no longer compensate employees using the day-rate payment option or if they continue to do so, they will have to pay them a guaranteed weekly minimum to keep them from being entitled to overtime pay. This decision

111. *Id.* at 297-98.

112. *Id.* at 298 (quoting *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am*, 325 U.S. 161, 167 (1945)).

113. *Hewitt*, 15 F.4th at 298 (citing 69 Fed. Reg. 22,176 (2004)).

114. *Hewitt*, 15 F.4th at 307-08 (Jones, J., dissenting).

115. *Id.* at 305.

116. *Id*.

117. *Id.* at 310.

118. *Hewitt*, 15 F.4th at 298.

not only affects workers who are in the field, but also those who are supervisors and executives. This decision allows overtime pay for executives whose compensation is calculated on a daily-rate and who are not guaranteed a weekly minimum regardless of whether or not they make over the threshold amount. *Hewitt* also has the potential to force Congress to enact regulations or amend the FLSA to prevent these highly compensated employees from receiving overtime. Oil and gas companies seeing this result will be advocating for Congress to change this. This split may also lead to companies relocating to areas where the highly compensated employee is exempt from overtime compensation.

The court's reading and interpretation of these regulations is what lead to the *Scott* and *Hewitt* distinction. *Scott* stood for the view that the regulations should be interpreted based on common sense and how Congress intended the FLSA exemptions to be applied.[119] *Hewitt* stood for the idea that the regulations did not need to be viewed in light of common sense, but rather strictly through the lens of the text.[120]

The dissent in *Hewitt* felt relying heavily on the plain text was not the correct interpretive method to decide the case.[121] The dissent explained that common sense and congressional intent are the only things the court should consider.[122] They felt that overtime was intended exclusively for hands-on laborers who do not earn as much as executives and management.[123] The dissent also felt that even if the court were to make this decision based solely on a textual approach, the majority failed to follow the correct textual interpretation.[124]

The majority rejected the dissent's argument. A major factor the majority relied on to distinguish the case at hand from the *Scott, Litz, and Anani* cases is that employees truly received a guaranteed minimum weekly amount.[125] Even though Hewitt did receive an amount greater than the threshold requirement, it was not a guaranteed weekly amount. The *Hewitt* court recognized that paying the employee a weekly minimum guarantee

119. *Scott*, 540 F.Supp.3d at 1047 (quoting *Hewitt v. Helix Energy Sols. Grp., Inc.*, 983 F.3d 789, 803 (5th Cir. 2020) (Weiner, J., dissenting)).

120. *Hewitt*, 15 4.th at 293.

121. *Id.* at 305 (Jones, J., dissenting).

122. *Id.* at 318 (Wiener, J., dissenting).

123. *Id.*

124. *Id.* at 310 (Jones, J., dissenting).

125. *Hewitt*, 15 4.th at 297.

could have allowed the parties to avoid this entire lawsuit.[126] This is a potential decision that employers will be contemplating to avoid overtime.

IX. Reasons to Follow Hewitt

The benefits of the *Hewitt* decision are that examines the issue on a case-by-case basis. The court simply looked at the text, looked at the case's facts, and based their decision on those factors. There was no issue with how one judge interprets what Congress meant against another's; it was strictly what the words say. This eliminates potential ambiguity problems. It also eliminates certain courts not applying part of the prongs in the salary-based test is required by the text. Another benefit of this decision is that the court does not attempt to put itself in Congress's shoes. If Congress wants to change the requirements, it can do that by amending the regulations. As LOGA stated, they want Congress to enact special provisions for the industry.[127] This decision also allows employees to get paid for their work that is in excess of 40 hours.

Some disadvantages in following the *Anani* and *Scott* decisions are that the courts are guessing what Congress intended. Instead of following the strict text, they interpret the ruling how they want. Courts will pick which regulation they believe should be followed and ignore other regulations because they believe they should not apply. This can keep the split alive as certain judges interpret it in different ways and can prolong not having a definitive answer. Following the *Hewitt* decision can also lead to a guessing game. This way of interpreting the regulations also hurts employees who work more than the 40 hour a week threshold and are not paid for their efforts because they make a high salary. It disincentivizes employees from working more.

X. Reasons for Rejecting Hewitt

The benefits of rejecting *Hewitt* and following the *Anani* and *Scott* decision are that highly compensated employees will not receive large overtime checks, which save employers money. Courts will not have to worry about the two-pronged approach either, as an employer only needs to satisfy the highly compensated employee requirement. This also plays into the commonsense approach that many other circuits are applying. Even the

126. *Id*. at 302 (Ho, J., concurring).

127. Mike Moncla, *LOGA Releases Statement on Hewitt v. Helix Energy Solutions Decision*, Louisiana Oil & Gas Association (Sept. 20, 2021), https://www.loga.la/news-and-articles/loga-releases-statement-on-hewitt-v-helix-energy-solutions-decision.

dissent in the Hewitt opinion mentions why common sense should rule in this case and agreed with the rulings in *Anani* and *Litz.* Common sense shows that Hewitt was very highly compensated and that there was no reason to look at § 541.604. They agreed with Helix that overtime protections were not intended for the type of employee Hewitt was or the position he occupied. Overtime pay has excluded supervisors and highly paid employees for years. Even though the FLSA did not categorically ban certain classes of employees from overtime, it did expressly mention executives and supervisors were on that list that could be exempt. Just because there was no guaranteed weekly minimum salary that was paid regardless of how many hours an employee worked does not mean that employees making over $100,000 annually should be entitled to overtime pay. Hewitt was paid over $200,000 a year, so it may not seem like he really should be entitled to overtime. Employers are very much hoping other courts follow the *Scott* ruling as this decision significantly favors the employers in this industry.

The disadvantages of the *Hewitt* decision are that it might change the entire way the industry operates. Whether that be payment structure or amount of employees, things may change. Depending on who you ask, that may be good or bad, but it is a change. This decision also lets individuals who earn a massive amount of money to earn more because of how their payment structure is set up. Courts would have to pay highly skilled and compensated employees high overtime wages because there was no weekly minimum guarantee.

Mike Moncla, president of the Louisiana Oil & Gas Association, released a statement following the result of this case. The association was disappointed in the result and stated it "not only goes against [the] historical practice but it was also directly contrary to decisions rendered by the federal First and Second Circuit courts when confronted with facts similar to this particular case."[128] Mr. Moncla believes that this lawsuit will hurt the economy in Louisiana by driving out employers. His position is that courts should not have to decide this issue. Rather, Mr. Moncla believes Congress should address this issue and create special overtime provisions for the oil and gas industry.[129] As he mentioned, employers may decide to leave states where their Circuit Court follows *Hewitt*. That can lead to less economic

128. Mike Moncla, *LOGA Releases Statement on Hewitt v. Helix Energy Solutions Decision*, Louisiana Oil & Gas Association (Sept. 20, 2021), https://www.loga.la/news-and-articles/loga-releases-statement-on-hewitt-v-helix-energy-solutions-decision.

129. *Id.*

development and has the potential to lead to higher rates of unemployment. For reference, the oil and natural gas industry "provided $73 billion to the state [of Louisiana] GDP and supported 249,800 jobs in 2019."[130] If companies decide to leave the state because of this decision, it has the potential to cripple Louisiana. This statement is a good look at how the oil companies are thinking. Their goal is to cut costs as much as they can. They want to perform the work with as little expenses as possible. There is a chance that he is telling the truth about employers leaving states that follow *Hewitt*. There is also the possibility that he is bluffing to try and get the result he desires.

XI. Why Hewitt *Is Correct*

Based on this decision, employers can either pay these types of employees' overtime or give them a weekly minimum guaranteed wage. If they decide not to do either, they will open themselves up to lawsuits, like Helix did. This also can potentially change the way oil companies decide to employ independent contractors. A daily-rate without a weekly minimum is how independent contractors are usually paid. Highly paid independent contractors and highly paid consultants will be most affected. This may cause the employers to change the pay structure or avoid using them.

This is an interesting decision, but the *Hewitt* court was likely correct in their decision. They were right in looking at what the text said and not trying to use a commonsense approach to make their decision. Different people have a different idea on who overtime was intended for. It should not be up to the courts to try and make that decision. The logic that if Congress wanted to exempt certain individuals categorically, they would do so through the regulations is also the correct view. This ruling also does not completely rule out highly compensated employees from being exempt from overtime. There are still ways discussed earlier on ways employers can protect themselves from paying. Companies can simply offer a weekly minimum guarantee and they will be able to avoid this entire scenario. This just causes employers to have to do a little more work to avoid paying overtime to the highly compensated employees.

If this decision leads to companies leaving states that follow *Hewitt,* Congress likely will have to amend the regulation or create some special provisions for the oil and gas industry. Too many jobs are at stake. This does not mean that Congress has to bend over backward to appease the

130. *Id*.

industry, but it does mean they should give some guidance and structure for how the regulations should be interpreted.

If employers establish that § 541.601 is met, the First and Second Circuits do not require employers to meet the elements in § 541.604. The Fifth Circuit here found no conflict because those Circuits were focused on cases that actually had a guaranteed weekly minimum, not daily-rate basis computed pay. By narrowly construing the FLSA regulations, the Fifth Circuit has indicated to employers that they must take additional steps to avoid paying overtime. This decision will lead companies to look to their attorneys to ensure compliance with the regulations to avoid the possibility of being forced to pay overtime.

XII. Conclusion

There is a circuit split based on overtime compensation for employees. The issue is whether employees based on a day-rate basis are considered salaried employees. Some circuits have argued that overtime exemptions apply to highly compensated daily-rate employees while others have not. The Supreme Court has not yet heard a case on this, but there is a chance one does rise up to that level based on the ambiguity arising. Helix Energy Solutions has filed a writ of certiorari with the United States Supreme Court and that writ has been docketed. That petition has recently been approved.

Oil and gas companies are hoping these highly compensated employees are not allowed overtime, while these employees are hoping more courts follow the Fifth Circuit and allow the overtime. If the Supreme Court does grant certiorari and decide on *Hewitt*, it will make clearer how the FLSA regulations are to be interpreted. The decision will also show whether the majority's textual approach was correct or if the dissent was correct in viewing § 541.601 as separate from § 541.604. Employers around the country are waiting to see what will happen. These employers have their attorneys ready to change up their employment contracts if this decision stands. This will impact all employers and employees, not just those in the oil and gas industry.