TABLE OF APPENDICES

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[DATE STAMP]
FILED
United States Court of
Appeals
Tenth Circuit
September 11, 2023
Christopher M. Wolpert
Clerk of Court

MARK WILSON,
Plaintiff - Appellee,

v.

SCHLUMBERGER TECHNOLOGY
CORPORATION,
Defendant - Appellant.

No. 21-1231

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:17-CV-00281-RBJ)

Robert P. Lombardi (Samuel Zurik III and Kelly D. Reese, with him on the briefs), The Kullman Firm,

P.L.C., New Orleans, Louisiana, for Defendant-Appellant.

J. Derek Braziel, Braziel Dixon, LLP, Dallas, Texas, for Plaintiff-Appellee.

Before **HARTZ**, **TYMKOVICH**, and **McHUGH**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Mark Wilson claims that his former employer, Schlumberger Technology Corporation, violated the Fair Labor Standards Act by classifying him as exempt from overtime pay for hours worked beyond the 40-hour workweek. At trial, the jury agreed with Mr. Wilson and awarded him nearly $40,000 in overtime backpay.

We conclude the district court should not have instructed the jury to determine whether Mr. Wilson's salary was exempt under regulations guiding the application of the FLSA. That was a legal issue for the court to determine. Because the instruction caused the jury to find in Mr. Wilson's favor, we vacate the judgment and remand for a new trial.

I. Background

A. Mr. Wilson's Employment

From 2009 to 2016, Mark Wilson worked as a measurement-while-drilling operator (MWD) for Schlumberger, a company that provides oilfield

services. An MWD operator supports oil-exploration companies that are drilling wells to produce gas and oil, and manages onsite activities during the drilling process. Part of a MWD's duties is to provide "surveys and logs transmitted from 'downhole' sensors." Aplt. Br. at 4. These surveys provide the exact location of the bottom part of the drill string, which is typically "thousands of feet deep in the well." *Id.* The surveys also tell the customers whether the drilling is proceeding according to the preplanned drill path or if it has deviated. "Wilson's job was to review this data, make judgments as to its accuracy by such techniques as comparing results to the plan, trend analysis, and correlation with other data, then mark or correct data, if necessary, and provide it to the customer." *Id.* at 5.

Mr. Wilson was well paid for his work. His compensation consisted of the following: a fixed bi-weekly salary of $924 ($462 per week); for time spent on a drilling rig, a rig-rate bonus of $205 per hour; for time on-call but not physically present on a rig, a standby rate of $102.50 per hour; vehicle and meal allowances; and various other bonuses, including remote ops-crew bonus, reduced crew incentive, a key-tech bonus, and a lead bonus. Mr. Wilson earned over $100,000 per year from 2009 through 2014. Mr. Wilson's rig-rate pay typically made up the largest portion of his earnings. For example, in 2014 (before the price of oil dropped), Mr. Wilson's rig-rate payments totaled $72,150, while his bi-weekly salary payments totaled $28,812.90. From February 2015 to October 2016, Mr. Wilson's pay was less than $100,000 per year due to a decline in oil exploration.

Schlumberger classified MWD operators, including Mr. Wilson, as exempt employees for FLSA purposes. As an exempt employee, Mr. Wilson did not receive overtime pay even though he regularly worked shifts that lasted longer than 12 hours and often worked more than 40 hours a week.

B. Procedural History

In 2017, Mr. Wilson sued Schlumberger on behalf of himself and two other MWD operators, alleging that Schlumberger violated the FLSA by not paying them an overtime rate for hours worked beyond the 40-hour workweek. The case was tried before a jury over five days in October 2020. At the conclusion of the plaintiffs' case, Schlumberger moved for judgment as a matter of law. The court granted the motion on several claims but denied it as to Mr. Wilson's individual overtime claim.

Over Schlumberger's objection, the district court instructed the jury to determine whether the FLSA exemption for salaried employees applied to MWD operators under Schlumberger's compensation scheme. The jury found that Schlumberger failed to prove that it paid Mr. Wilson on a salary basis, and therefore Mr. Wilson did not qualify for FLSA's overtime-pay exemption. Because the jury also found that Mr. Wilson worked more than 40 hours during certain workweeks, the jury awarded him backpay overtime compensation of $39,129.

II. Analysis

Schlumberger challenges the district court's failure to grant judgment as a matter of law on the overtime-compensation claim. It argues the jury instructions wrongly allowed the jury to determine Mr. Wilson's eligibility as an exempt employee.

"We review jury instructions de novo, examining whether as a whole, the instructions accurately informed the jury of the issues and the governing law." *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1221 (10th Cir. 2008). "Failure to properly instruct the jury requires a new trial if the jury might have based its verdict on the erroneously given instruction." *Id.* (internal quotation marks omitted).

A. Legal Framework

The FLSA requires employers to pay employees at a higher rate for hours worked beyond 40 hours in a week unless the employee is exempt. 29 U.S.C. §§ 207, 213. The employer bears the burden of proving an exemption exists, and the Supreme Court has made clear that FLSA "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." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

The Department of Labor has promulgated a number of regulations to flesh-out the application of FLSA exemptions. For our purposes, to qualify as an exempt executive, administrative, or professional employee under the FLSA, the employee must be

"compensated on a *salary basis* at a rate of not less than $455 per week." 29 C.F.R. § 541.600(a) (2004) (emphasis added).[1] The regulations consider an employee to be paid on a salary basis "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." § 541.602(a).

If an employee is paid a predetermined or guaranteed salary but receives additional compensation beyond that salary, the employer must comply with another regulation, § 541.604, to avoid losing the exemption. That provision allows for an employer to pay exempt employees compensation in addition to their base salary, without losing the overtime exemption, if the employee is guaranteed "at least the minimum weekly-required amount paid on a salary basis." § 541.604(a).[2] The additional

---

[1] The 2004 version of the FLSA regulations apply in this case.

[2] Section 541.604(a) provides:

> An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of *at least the minimum weekly-required amount paid on a salary basis*. Thus, for example, an exempt employee guaranteed at least $455 each week paid on a salary basis may also receive additional

compensation covered by subsection (a) "may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis)," including paid time off. *Id.*

In turn, subsection (b) of § 541.604 allows an employer to pay an exempt employee, without losing the exemption, by computing the employee's earnings on an hourly, daily, or shift basis.[3] § 541.604(b). This

---

> compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. *Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off*. (emphasis added)

[3] Section 541.604(b) provides in part:

> An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, *if the employment arrangement also 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 a reasonable relationship exists between the guaranteed amount and the amount*

compensation arrangement must (1) "include[] 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) must meet the reasonable-relationship test. *Id.* This test is "met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." *Id.*

B. Application

The evidence at trial established that Mr. Wilson received a bi-weekly base salary ($923.08) that Schlumberger paid regardless of the number of hours,

---

> *actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek*. Thus, for example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift without violating the salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of $650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary. (emphasis added)

days, or shifts worked. The evidence also established that Mr. Wilson was paid an additional rig-rate bonus for time spent in the field. Because the rig rate was paid at a high hourly rate while Mr. Wilson's base salary was relatively low, the rig-day rate typically accounted for the bulk of his compensation. For example, in 2014 (before the price of oil dropped), Mr. Wilson's rig-rate payments totaled $72,150, while his bi-weekly salary payments totaled $28,812.90. The district court concluded that § 541.604(b) and the reasonable-relationship test applied to Mr. Wilson because "the evidence was that Wilson was primarily compensated on a daily rig rate basis." Order at 4.

Consequently, the district court gave Jury Instruction No. 10:

> STC contends Plaintiff was paid on a "salary basis." Being paid on a "salary basis" means the employee regularly receives (e.g. on a weekly basis) a predetermined amount constituting all or part of the employee's compensation. Employees who are paid on a salary basis and make more than a set amount per week are considered exempt under the FLSA.
>
> An employer may pay a salary basis employee additional compensation without losing the employee's exempt status if the employee's compensation includes a guarantee of at least the minimum weekly required amount paid

> on a salary basis and if the additional *B.* compensation bears a reasonable relationship to the guaranteed amount. If there is *not* a reasonable relationship between the guaranteed salary amount and the total amount earned by the employee, then the employee is *not* being paid on a salary basis. In that situation the employee is no longer exempt. The reasonable relationship test will be met if the weekly salary guarantee is roughly equivalent or proportional to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek.
>
> Plaintiff contends that STC did not pay him on a salary basis. Plaintiff contends that the additional compensation paid to him in the form of bonuses did not bear a reasonable relationship to the guaranteed salary amount such that the overall compensation does not constitute compensation on a "salary basis."

App. 180.

The question then is whether § 541.604(b) applies when an employee receives *additional compensation* on an hourly, daily, or shift basis, or if the regulation only applies when an employee receives his *base compensation* on an hourly, daily, or shift basis. That is, does subsection (a) apply to employees like Mr. Wilson who received a fixed base salary plus

extra compensation paid in any manner, including hourly. Or, in contrast, does subsection (b) apply only to employees whose *base compensation* is computed on an hourly, daily, or shift basis. Mr. Wilson's position is that subsection (a) applies to employees who receive a fixed base salary plus extra compensation paid in any manner *except* for time or shift-based, with subsection (b) applying to employees who receive *any* portion of their compensation on an hourly, daily, or shift basis.

Based on the text, explanatory illustrations in the regulation, and persuasive caselaw, we conclude § 541.604(a) covers employees who received a fixed base salary above the FLSA minimum plus additional compensation that is paid on any basis, including time. Subsection (b) applies only to employees whose base compensation is computed on an hourly, daily, or shift basis.

1. Section 541.604

Section 541.604(a) applies to employees who receive additional compensation above a base salary. The first sentence of § 541.604(a) explains that an employer may pay an employee additional compensation without losing the employee's exempt status. In fact, § 541.604(a) expressly states that "additional compensation may be paid on any basis."

Section 541.604(b), on the other hand, does not refer to additional compensation at all—instead, the subsection makes clear that "[t]he reasonable relationship requirement applies only if the employee's *pay* is computed on an hourly, daily or shift basis." *Id.*

(emphasis added). Elsewhere in the same subsection, the regulation uses the term "earnings" instead of "pay," but nowhere does it reference *additional compensation* that is "computed on an hourly, daily or shift basis." *See id.* Subsection (a) is the only subsection of § 541.604 that even mentions additional compensation.

The examples used in subsections (a) and (b) demonstrate the distinctions between the two subsections. Each example in subsection (a) concerns an employee who receives *additional compensation* in addition to a base salary:

> [F]or example, an exempt employee guaranteed at least $455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek.

§ 541.604(a).

Conversely, the example in subsection (b) does

not involve additional compensation—rather, it describes an employee whose *base* pay is computed on a per-shift basis:

> [F]or example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift without violating the salary basis requirement

§ 541.604(b). These examples support the interpretation that § 541.604(a) applies when an employee receives a base salary and additional compensation, and § 541.604(b) applies when an employee is merely guaranteed a minimum salary, but is typically paid on an hourly, daily, or shift basis. Because Mr. Wilson received a fixed base salary and additional compensation in the form of a rig-rate payment and other bonuses, the examples in § 541.604(a) are more akin to Mr. Wilson's situation.

The Department of Labor's final rule adopting the current version of § 541.604 supports the interpretation that § 541.604(b) only applies to employees who receive their base pay—rather than additional compensation—on an hourly, daily, or shift basis:

> The National Technical Services Association states that it was unclear whether the reasonable relationship requirement applies in all cases to

> employees who receive a salary and additional compensation. We have clarified that this requirement applies only when an employee's *actual pay* is computed on an hourly, daily or shift basis. Thus, for example, if an employee receives a guaranteed salary plus a commission on each sale or a percentage of the employer's profits, the reasonable relationship requirement does not apply. Such an employee's pay will understandably vary widely from one week to the next, and the employee's *actual compensation* is not computed based upon the employee's hours, days or shifts of work.

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122-01, 22183 (Apr. 23, 2004) (emphasis added).

The DOL's explanation uses the terms "actual pay" and "actual compensation" to distinguish employees who receive a base salary and additional compensation from employees who are guaranteed a base salary but are actually paid on an hourly, daily, or shift basis. Because Mr. Wilson fits within the former category, the reasonable-relationship requirement does not apply. Like the employee who "receives a guaranteed salary" plus commissions or profits, Mr. Wilson's pay similarly "var[ied] widely from one week to the next." *Id.* But Mr. Wilson's actual compensation—his salary—was not based upon his

hours, days, or shifts of work. Mr. Wilson was paid the same salary every two weeks. Everything else was additional compensation. This differentiates Mr. Wilson from the employee described in § 541.604(b) whose actual pay varies from week to week based upon how many shifts he works.

In addition, Mr. Wilson's rig-rate bonus fits within § 541.604(a) because the regulation expressly states that "additional compensation may be paid on any basis," including as a "flat sum, bonus payment, straight-time hourly amount, time and one-half *or any other basis*." § 541.604(a) (emphasis added). The evidence at trial showed that Mr. Wilson received a fixed bi-weekly base salary and additional compensation, some of which was paid on an hourly rate basis.

Because § 541.604(a) expressly allows for additional compensation to be paid on any basis, Schlumberger's day-rate bonus system fits squarely within § 541.604(a).

2. Other Authority

Decisions from other courts support our conclusion that Mr. Wilson's salary and additional compensation fall within the bounds of § 541.604(a).

First, the Supreme Court's recent FLSA decision, *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39 (2023), supports our reading of § 541.604. In that case, the Court considered when a worker paid on a salary basis under either § 541.602(a) or §

541.604(b) qualifies for the highly-compensated employee exemption from the FLSA's overtime requirements. *Id.* at 49. The Court's discussion of § 541.604 makes clear that subsection (b), and its reasonable-relationship requirement, is only appropriate for workers compensated on an hourly, daily, or shift basis, not for workers whose compensation is calculated on a weekly or less frequent basis. *Id.* at 46–47. As the Court explained, *additional* compensation—even if computed on an hourly, daily, or shift basis—that is added to a fixed salary computed on a weekly or less frequent basis would not fall under the aegis of § 541.604(b). The Supreme Court emphasized that under the regulatory scheme, "§ 602(a) and § 604(b) are independent routes for satisfying the [] rule's salary-basis component. So a pay scheme meeting § 602(a) and the [] rule's other requirements does not also have to meet § 604(b) to make a worker exempt." *Id.* at 50 n.3.

In another recent decision, the Third Circuit reached the same result we do. In *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755 (3d Cir. 2023), the court held that the plaintiff—who received a fixed salary not subject to reduction for quality or quantity of work, plus additional compensation in the form of a bonus for exceeding productivity minimums—was exempt under the FLSA and that the additional compensation did not convert the salaried plaintiff to nonexempt status. In reaching this holding, the court emphasized the same distinction that we have highlighted here, that "[t]he regulation requires only that the employee receive a predetermined amount of money each pay period that is *part of* the employee's

compensation." *Id.* at 761 (internal quotation marks omitted). "So long as the employer does not dock that pre-determined part of the employee's compensation, the employer has satisfied the salary basis test." *Id.*

Likewise, the Fifth Circuit's recently decided *Hebert v. FMC Technologies, Inc.*, No. 22-20562, 2023 WL 4105427 (5th Cir. June 21, 2023) (unpublished), supports our interpretation. In *Hebert*, the court addressed whether a salaried employee otherwise exempt from FLSA's overtime requirement can be converted to non-exempt by the payment of additional compensation beyond the guaranteed salary. The Fifth Circuit held that the plaintiff, an oil-and-gas installation engineer who received a guaranteed salary plus additional compensation in the form of a field-service premium for days spent working at an offshore site, was exempt and that his additional compensation did not convert him to non-exempt status. *Id.* at *2.

In reaching this conclusion, the court emphasized that the employee's biweekly salary "plainly satisfies" the salary-basis definition found in § 541.602(a). *Id.* The employee "does not lose his status as an employee paid on a salary basis just because he is also paid a bonus on top of [his guaranteed] salary." *Id.* (citing § 541.604(a)). The court noted that § 604(b)'s reasonable-relationship requirement was only applicable to "employees whose earnings are computed on an hourly, daily, or shift basis." *Id.* at *2 n.5. Consequently, because Hebert was a salaried

employee, he was not covered by § 604(b). *Id.*[4]

---

[4] Another possible interpretation of § 541.604 relies on subsection (a)'s use of the phrase "beyond the normal workweek" to carve out the exemption. *See Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 3:19-CV-00320, 2022 WL 658768, at *5 (S.D. Tex. Mar. 4, 2022) *report and recommendation adopted,* No. 3:19-CV-00320, 2022 WL 889276 (S.D. Tex. Mar. 25, 2022), *aff'd sub nom. Gentry v. Hamilton-Ryker IT Sols., L.L.C.*, No. 22- 40219, 2023 WL 4704115 (5th Cir. July 24, 2023) (applying subsection (a) to employees who receive a fixed base salary and additional compensation for hours worked beyond the 40-hour workweek and subsection (b) to employees who receive any portion of their compensation on an hourly, daily, or shift basis unless the additional compensation above the minimum guaranteed amount is for hours worked beyond the normal workweek).

We do not find *Gentry* persuasive for two reasons. First, it is not clear that § 541.604(a) only applies to "additional compensation *based on hours worked for work beyond the normal workweek*." *Id.* That statement comes as the third of three examples of when additional compensation may be paid without an employee losing the overtime exemption; it does not, by its plain language, exclude other compensation schemes where additional compensation is calculated hourly but not beyond the 40-hour workweek, such as how Schlumberger compensated Mr. Wilson.

Second, *Gentry* is wholly concerned with a compensation scheme where the employee received a guaranteed weekly salary equal to 8 hours of pay in any week in which the employee performed any work—*i.e.*, it was computed on an hourly basis. *Id.* at *2. The employee was paid that same hourly rate for any work performed over 8 hours in a work week, including any hours worked over 40 hours. *Id.* In arriving at its conclusion, *Gentry* relies on authority concerned with pay computed on an hourly basis, *Holladay v. Burch, Oxner, Seale Co., CPA's, PA*, No. CIV.A.407-CV-03804RB, 2009 WL 614783, at *6 (D.S.C. Mar. 6, 2009); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-25, 2018 WL 5925115 (Nov. 8, 2018), or that computes salaried pay based on a

Additionally, in an unpublished decision from 2010, the Eleventh Circuit explained that under § 541.604(a), if an employee receives a guaranteed minimum salary that is not tied to hours, days, or shifts worked, then the employer can pay additional compensation in any manner it chooses, including based on an hourly or daily rate. *See Bell v. Callaway Partners, LLC*, 394 F. App'x 632, 634 (11th Cir. 2010). Similarly, a district court in the Fifth Circuit reached the same conclusion on nearly the same set of facts we have before us. In *Venable v. Schlumberger Ltd.*, No. 6:16-cv-00241, 2022 WL 895447 (W.D. La. Mar. 25, 2022), *appeal filed sub nom. Venable v. Smith Int'l*, No. 22-30227 (5th Cir. Apr. 22, 2022), the court concluded that the reasonable-relationship requirement did not apply to employees who were paid a weekly salary and additional compensation for days spent on an oil rig, even though their day-rate pay accounted for most of their total compensation. *Id.* at *3–5. The court distinguished the pay structure at issue from the one in *Helix*, explaining that § 541.604(b) does not apply when an employee's "pay is calculated 'on a weekly, or less frequent basis' and is not pay 'computed on . . . a daily . . . basis.'" *Id.* at *5 (first quoting § 541.602(a); and then quoting § 541.604(b)).

---

first and then second project, U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-2, 2020 WL 122924 at *3–4 (Jan. 7, 2020).

Given the stark contrast in fact patterns our respective courts are concerned with, we are hard-pressed to say that the logic of *Gentry* bears on this case.

* * *

In sum, Mr. Wilson met the exemption criteria of § 541.604(a) and the jury should not have been instructed to apply the reasonable-relationship test of § 541.604(b).

C. Remedy

Because the trial court erroneously instructed the jury, we must decide whether to remand for a new trial. Schlumberger contends it is entitled to judgment as a matter of law. Specifically, it asserts the overwhelming evidence at trial demonstrates that Mr. Wilson meets the requirements of the administrative exemption, which covers any employee

> (1) [c]ompensated on a salary or fee basis above $455 per week [. . .]; (2) [w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) [w]hose *C.* primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

§ 541.200.

The first prong of the exemption is met in Mr. Wilson's case. The other two prongs, however, may be subject to a factual dispute. At trial, the parties presented conflicting evidence about Mr. Wilson's

duties, whether his duties are directly related to Schlumberger's business operations, and whether his job required the exercise of discretion and independent judgment.

Judgment as a matter of law is appropriate "only if the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion." *J.I. Case Credit Corp. v. Crites*, 851 F.2d 309, 311 (10th Cir. 1988). Although the evidence may weigh in favor of Schlumberger—which the district court acknowledged at trial outside of the jury's presence—we leave it to the district court on remand to sort out whether the other prongs of the administrative-employee exemption are satisfied in Mr. Wilson's case.

III. Conclusion

We vacate the district court's judgment and remand for a new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[DATE STAMP]
FILED
United States Court of Appeals
Tenth Circuit
October 27, 2023
Christopher M. Wolpert
Clerk of Court

MARK WILSON,
Plaintiff - Appellee,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,
Defendant - Appellant.

No. 21-1231
(D.C. No. 1:17-CV-00281-RBJ)
(D. Colo.)

ORDER

Before **HARTZ**, **TYMKOVICH**, and **McHUGH**, Circuit Judges.

This matter is before the court on Appellee's Motion for Leave to File Attachments with Petition for

Rehearing ("The Motion") and Appellee's Petition for Rehearing En Banc. Appellee's Motion is denied. Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 17-cv-00281-RBJ

MARK WILSON, and all others similarly situated under 29 USC § 216(b),
Plaintiff,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,
Defendant.

ORDER ON POST-TRIAL MOTIONS

This matter is before the Court on defendant Schlumberger Technology Corporation's ("STC") motion for judgment as a matter of law, or alternatively, for a new trial, ECF No. 162, and plaintiff's motion to amend the final judgment to include liquidated damages, costs, attorney's fees, and interest, ECF No. 163. For the reasons stated below, defendant's motion is DENIED and plaintiff's motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

STC is a Texas corporation that provides measurement and logging services to oil and gas

companies. ECF No. 1 at 4. Mark Wilson worked for STC as a measurement-while-drilling operator ("MWD"). As such he operated oilfield machinery, collected and relayed drilling data, and reported their daily activities to their field supervisors for analysis. Wilson worked shifts that lasted longer than 12 hours and totaled more than 40 hours a week, sometimes as many as 80 hours. He contended that STC's compensation program for MWD's violated the Fair Labor Standards Act ("FLSA") and the Colorado Wage Claim Act because it failed to pay them for their overtime hours.

The case was tried to a jury October 5-9, 2020.[1] The jury found that Wilson worked more than 40 hours during at least some work weeks and awarded him overtime compensation as damages in the amount of $39,129. ECF No. 138 (jury verdict, names of jurors redacted). On October 13, 2020 the Court entered final judgment in favor of the plaintiff in the amount of the $39,129 plus costs to be taxed by the Clerk. ECF No. 139. On November 10, 2020 the Clerk denied plaintiff's bill of costs as untimely. ECF No. 157.

Neither party is satisfied with the jury's or the Court's resolution of the case. Although the Court denied STC's motion for judgment as a matter of law at the conclusion of plaintiff's case, and again at the conclusion of defendant's case, STC continues to seek

---

[1] Two other former MSD's also asserted claims in this case. However, their claims were dismissed by the Court at the conclusion of plaintiffs' evidence.

dismissal. Plaintiff, on the other hand, asks the Court to beef up his verdict by adding liquidated damages, costs, attorney's fees, and interest. The issues have been fully briefed. Neither party has requested a hearing.

ANALYSIS and CONCLUSIONS

A. Defendant's Motion for Judgment Notwithstanding the Verdict, ECF No. 162.

STC contended at trial that Wilson was exempt from overtime under the "administrative exemption" as defined in Instruction No. 8. ECF No. 130 at 10. One component of the administrative exemption is that plaintiff must have been compensated on a "salary basis." *Id.* The evidence was that Wilson was compensated by a combination of (1) a biweekly base salary that was fixed and consistent from week to week; (2) a rig day rate, sometimes called a rig day bonus or simply a day rate, that varied according to the employee's length of time on the rig; (3) vehicle and meals allowances; and (4) depending upon the situation, a standby rate, a reduced crew incentive and a key tech bonus. The rig day rate could be the largest component of an employee's compensation. For example, in 2014, Wilson's salary payments totaled $28,812.90. However, his rig day rate payments totaled $72,150. *See, e.g.,* ECF No. 141 at 67-71 (trial transcript, testimony of Mark Wilson).

Defendant argued that Wilson was nevertheless paid on a "salary basis." Plaintiff argued that his salary was just one component of his compensation

and not even the primary component. An FLSA regulation, 29 C.F.R. § 604, addresses the issue. However, the parties disagree as to whether subpart 604(a) or 604(b) applies to Wilson's compensation.

Section 604(a) provides:

> An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis.

As examples, the exempt employee could be guaranteed at least $455 (now $684) "paid on a salary basis" plus a one percent commission on sales, or a percentage of the employer's sales or profits, or additional compensation based on hours worked beyond the normal workweek.

Section 604(b) addresses daily rate employees. It provides,

> An exempt employee's earnings may be computed on an hourly, *daily* or shift basis without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid of a salary basis regardless of the number

> of hours days or shifts worked, *and a reasonable relationship exists between the guaranteed amount and the amount actually earned.*

29 U.S.C. § 604(b) (emphasis added).

Section 604(a), taken in isolation, is broad enough to encompass any compensation system that includes a minimum guaranteed fixed amount. But it must be viewed together with section 604(b), which expressly addresses salary plus daily rate systems. There is no interpretive Tenth Circuit law on point, but in a case involving the "executive" and "highly compensated employee" exemptions a panel of the Fifth Circuit discussed compensation of daily rate workers. *Hewitt v. Helix Energy Solutions Group, Inc.,* 983 F.3d 789 (5th Cir. 2020), *vacated and rehearing en banc granted,* 989 F.3d 418 (5th Cir. March 9, 2021). As indicated, the panel's decision has since been vacated, and it would not be binding on this Court in any event. However, I find its reasoning in relevant part to be persuasive. Not only does section 604(b) specifically address daily rate workers, but "the reasonable relationship test ensures that the minimum weekly guarantee is not a charade." *Id.* at 793.

Here, the evidence was that Wilson was primarily compensated on a daily rig rate basis. Plaintiff argued that defendant's payment of a guaranteed salary that constituted a minority of Wilson's compensation plus a daily rate that constituted by far the majority of his compensation

was a ruse to circumvent the overtime law. Plaintiff did not prove that STC intentionally created this compensation program to avoid the overtime laws. The fact remains that there was, at the least, a fact dispute as to whether there was a reasonable relationship between Wilson's guaranteed bi-weekly salary and the amount he actually earned on a daily rate basis.

Accordingly, after considering the parties' respective positions on several occasions, and over defendant's objection, the Court instructed the jury as follows:

JURY INSTRUCTION NO. 10

> STC contends Plaintiff was paid on a "salary basis." Being paid on a "salary basis" means the employee regularly receives (e.g., on a weekly basis) a predetermined amount constituting all or part of the employee's compensation. Employees who are paid on a salary basis and make more than a set amount per week are considered exempt under the FLSA.
>
> An employer may pay a salary basis employee additional compensation without losing the employee's exempt status if the employee's compensation includes a guarantee of at least the minimum weekly required amount paid on a salary basis and if the additional compensation bears a reasonable

> relationship to the guaranteed amount. If there is *not* a reasonable relationship between the guaranteed salary amount and the total amount earned by the employee, then the employee is *not* being paid on a salary basis. In that situation the employee is no longer exempt. The reasonable relationship test will be met if the weekly salary guarantee is roughly equivalent or proportional to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek.
>
> Plaintiff contends that STC did not pay him on a salary basis. Plaintiff contends that the additional compensation paid to him in the form of bonuses did not bear a reasonable relationship to the guaranteed salary amount such that the overall compensation does not constitute compensation on a "salary basis."

ECF No. 130 at 16.

I stand by my view that Instruction No. 10 properly instructed the jury on the meaning of being paid on a "salary basis." The evidence supported the instruction. The jury found that Wilson was not paid on a "salary basis" as defined in the instruction. ECF No. 138 at 1. Therefore, the Court denies the motion for judgment notwithstanding the verdict.

B. Plaintiff's Motion to Alter or Amend, ECF No. 163.

Plaintiff requests four additions to the Final Judgment.

1. Liquidated damages.

Section 216(b) of the FLSA provides that employers who violate the Act's overtime requirement may be assessed an "additional equal amount as liquidated damages." 29 U.S.C. § 216(b). "The only instance where a court may exercise discretion in not awarding liquidated damages is when an employer shows that its action was in good faith and that it had reasonable grounds for believing the failure to pay overtime compensation was not a violation of the FLSA." *Crenshaw v. Quarles Drilling Corp.,* 798 F.2d 1345, 1351 (10th Cir. 1986).

As noted above, plaintiff did not prove that STC intentionally structured its system of compensating MWD's to evade overtime requirements. Thus, at the conclusion of plaintiff's evidence the Court granted defendant's motion for judgment as a matter of law on the issue of willfulness. *See* ECF No 143 at 127-28.[2] Moreover, defendant provided affirmative evidence of its compliance efforts. Mitchell Williamson was defendant's North American Compensation Manager

[2] As a result of the Court's ruling on willfulness, the claims of additional plaintiffs Kurtis Bisnette and Lisa Moss were dismissed on limitations grounds. ECF No. 143 at 128.

from January 2014 through January 2018. ECF No. 143 at 211. He held a Society of Human Resources "certified professional" designation which was based on training in compensation practices. *Id.* at 212. At STC he was in charge of a 19-employee compensation department. *Id.* He and others in his department participated in internal seminars on compensation issues. *See id.* at 218. In addition, the company retained external counsel to "do periodic training through our compliance department to make sure that we were keeping, not only the compensation department, abreast of FLSA issues or potential issues, and making sure that everybody understood what exactly we needed to be cognizant of." *Id.* at 217.

Based on the evidence presented by the defendant in this case, as well as the absence of contrary evidence presented by the plaintiff, the Court finds that the defendant's program, though not in compliance with overtime requirements, was established in good faith and the reasonable belief that the administrative exemption applied. Accordingly, the Court exercises its discretion to deny an award of liquidated damages in this case.

2. Costs.

The Court awarded costs to the plaintiff as the prevailing party, to be taxed by the Clerk pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. ECF No. 139. On November 10, 2020 the Clerk found that plaintiff's bill of costs was not timely filed and denied an award of taxable costs. *See* ECF No. 158. However, due to an extension granted by the Court on

the same day but unknown to the Clerk, the bill of costs was timely filed. *See* ECF Nos. 156, 157, 160. The bill of costs requested an award of $3,690.17. However, plaintiff now requests a total award of $7,708.50, including certain costs actually incurred but not taxable under 28 U.S.C. § 1920.

The FLSA provides that "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, *and costs of the action*." 29 U.S.C. § 216(b) (emphasis added). Defendant objects to only to approximately $800 of hotel expenses and $150 for a printer that can be used again for other matters. Plaintiff's reply does not make any attempt to explain or justify those items. Accordingly, the Court awards plaintiff $6,758.50 in costs.

3. Attorney's Fees.

The statute provides for an award to the plaintiff of a "reasonable attorney's fee." In determining the reasonableness of attorney's fees the Court first determines the "lodestar," meaning the product of hours reasonably expended times a reasonable hourly rate. The lodestar is presumed to a be a reasonable rate, although it is subject to adjustment by the Court. *See Robinson v. City of Edmund,* 160 F.3d 1275, 1281 (10th Cir. 1998). In determining the reasonableness of the hours and rates, courts often apply the factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir.

1974].[3] The Colorado Rules of Professional Conduct provide a similar list of relevant factors.[4]

Plaintiff presents a lodestar of $164,099.00. ECF No. 163 at 7. This is for 437.93 hours billed for four timekeepers at hourly rates ranging from $550 to $150 per hour. *Id.* Plaintiff represents that certain time entries (including small amounts of time for three additional timekeepers) were eliminated as a matter of billing judgment. *Id.* Plaintiff also eliminate 45.35 hours which were attributed to the dismissed claims of plaintiffs Bisnette and Moss. *Id.* at 8. Plaintiff provides the declaration of lead counsel Derek Braziel, chronicling his education and extensive FLSA

---

[3] *Johnson* lists 12 factors for courts to consider in determining reasonableness: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required; (4) preclusion of other employment; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney's; (10) the undesirability of the case; (11) the nature and relationship of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717-19.

[4] The Colorado Rules of Professional Conduct are found as an Appendix to Chapters 18 to 20, COLORADO COURT RULES – STATE (2018). These factors identified in Rule 1.5 are (1) time and labor required, (2) likelihood of preclusion of other employment, (3) fee customarily charged in the locality, (4) amount involved and results obtained, (5) time limitations imposed by the client or circumstances, (6) nature and length of the professional relationship, (7) experience, reputation, and ability of the lawyer(s), and (8) whether the fee is fixed or contingent.

experience and that of the two junior lawyers and one law clerk who billed hours included in the proposed lodestar. ECF No. 163-1.

Defendant objects to the lodestar amount on multiple grounds:

- The fee request includes more than $19,000 for "unsuccessful motions and claims," i.e., defendant's motion to dismiss Schlumberger Ltd; plaintiff's motion to certify a class; defendant's motion to dismiss opt-in plaintiff Cooper; defendant's motion to sever; discovery motions. ECF No. 172 at 9-11.

- Lead counsel Braziel's hourly rate of $550 is excessive for the Denver market. Defendant suggests $390 for Mr. Braziel and $275 for the principal junior lawyer, Travis Gaspar who was billed at $350. *Id.* at 11-12.

- Plaintiff's "limited success." Plaintiff's amended initial disclosures sought $461,659.97, but the verdict was only $39,129.

Based on these factors defendant suggests that the Court divide the requested amount in half, i.e., to $72,183,50. Defendant then turns to the "*Johnson* factors" for consideration of further reductions. Defendant does not dispute the hours listed. However, counsel suggests that the questions presented were neither novel nor difficult -- a "run of the mill case" for experienced counsel. *Id.* at 13. It reiterates its comments on the result obtained. Notably, however,

defendant does not inform the Court of the hourly rates, the hours, or the total billings that defense counsel billed STC for this case.

In reply plaintiff does not respond to any of defendant's points. Rather, plaintiff states that he agrees with some of defendant's statements and disagrees with others, but rather than "try the Court's patience" with another motion, plaintiff "rests on its initial brief" with respect to attorney's fees. ECF No. 180 at 3.

I began by putting this case in the context of other litigation between STC and its employees. *See* ECF No. 31. Wilson was one of numerous similarly situated employees who were potentially included in an FLSA collective action against STC in Louisiana (the "*Boudreaux* case"). However, long before that *Boudreaux* case was settled, Wilson exercised his right to opt out. Instead, Wilson attempted, unsuccessfully, to opt into another collective action in Texas (the *Gilchrist* case). STC opposed that attempt. Then Wilson tried to opt back into the *Boudreaux* case, but STC opposed a reopening of the opt-in period. That left Wilson with the choice of filing an individual action or letting it go, and he filed the present action. Thus, while there appears to have been some tactical maneuvering on both sides, this case exists because STC successfully kept Wilson out of the Louisiana and Texas cases.

With respect to defendant's specific objections to the lodestar, I am not inclined to single out each motion or claim where a plaintiff does not succeed and

disallow fees related to that item. In every case there are successes and failures. I do agree, however, that given plaintiff counsel's history of litigation with STC, it should not have been necessary for Schlumberger Ltd. to move to dismiss for lack of personal jurisdiction. Plaintiff voluntarily dismissed the claim after the motion to dismiss was filed. I have no reason to question defendant's allocation of $2,044.50 of fee application to that matter, particularly since plaintiff offered no reply to defendant's objection. I also will exclude the $4,359.00 defendant ascribes to plaintiff's motion to conditionally certify a collective action. I indicated before that motion was filed that I would not certify any collective or class action on behalf of persons who were already members of a collection or class in the *Boudreaux* or *Gilchrist* cases. *See* ECF No. 31. Moreover, the point of this case was Wilson's need to proceed individually because he was frozen out of those cases. I also agree to reduce the billing for travel time by $6,600. *See Wyrtz v. Kansas Farm Bureau Serv. Ins.,* 355 F. Supp. 2d 1190, 1199 (D. Kan. 2005) (reducing travel time to no more than 50% of the hourly rate deemed by the court to be appropriate).

Those deductions reduce the fee request to $151,095.50.

As for billing rates, I do not in the abstract have a problem with $550 per hour for a senior partner with extensive experience and success in FLSA collective action litigation or $350 per hour for a junior partner. Both parties note that Magistrate Judge Tafoya approved $430 per hour in 2013. *See Jankovic v. Exelis, Inc.,* No. 12-cv-01430-WJM-KMT (April 17,

2013) (alleged discrimination in violation of the Americans with Disabilities Act). Neither party provided information about what rates were used during the timeframe in question by the most experienced and highly reputed employment lawyers in Denver. Nor, as I have noted, did defense counsel reveal the rates that were billed to the defendant in this case.

However, I find that the advocacy provided by plaintiff's counsel in this case failed to justify the rates they were charging in one significant respect. They provided the jury essentially no help or guidance in how to determine the amount of overtime due. Instead, they just offered numerous time stubs into evidence and left it to the jurors to try to figure out from the morass of documents what amount to award. There was no expert testimony to guide their calculations. I questioned how the jury would calculate damages if they got to damages. ECF No. 143 at 130- 32. Counsel responded that he thought the Court would calculate the amounts, not the jury. *Id.* at 132. He provided no authorities or analysis as to why, in a jury trial, the amount of damages would be calculated by the Court.

Nor, in any event, was there any clear path for the Court, much less the jury, to sort thought the voluminous records and come up with the right number. At one point the junior partner who recorded by far the most time in the case advised that Court that plaintiff would be asking for $60,000 in unliquidated damages. ECF No. 144 at 4. But in his closing argument lead counsel did not ask for $30,000 or $40,000 or $60,000 or any other amount, and he

made no meaningful effort to explain how the jury could get to a number from the documents in evidence. He talked about one pay stub, went through a host of questionable calculations based on that pay stub, and that was it. ECF No. 144 at 48-52.

Astonishingly, defense counsel suggested in his closing that plaintiff was asking for $120,000. *Id.* at 73. But plaintiff's counsel never asked for $120,000. In his rebuttal plaintiff's counsel doubled down:

> I don't think I've ever given the jury any calculation. I want you to come up with what those numbers are. I don't want you to accuse me of baking something in. I want you all to look at the numbers and do that kind of calculation. You didn't hear from me that were seeking $120,000. If it comes out to that, then it does, but that's not something I've ever said. Mr. Wilson just wants to be paid fairly.

Id. at 79.

It is not unusual for a plaintiff's lawyer to leave it to the jury to come up with fair compensation for non-economic damages. But here the issue was not non-economic damages. It was for an amount of overtime which presumably could be precisely calculated from defendant's records. In my judgment, an experienced FLSA lawyer would either have an accounting expert make and explain the calculation based on the documents in evidence or, at least, would

make a calculation himself and explain it during his closing argument. It is remarkable, and a tribute to the jurors, that they came up with a number. The number was within ranges that were mentioned outside the presence of the jury when the possibility of settlement was mentioned.

Thus, while I do not question the experience and ability of plaintiff's counsel in FLSA cases generally, or that the rates used for this fee application might be reasonable in other contexts, in this case I find that the rates claimed in this case were not reasonable. Defendant proposes $390 per hour, and plaintiff has not responded to that proposal. Therefore, I accept it. That reduces plaintiff's fee application by $13,312 (83.2 hours times $160 per hour). The time spent by the principal junior partner on the case, Mr. Gaspar, was listed at $350 per hour. For the same reasons I find that that this rate was unreasonable for this case. The defendant proposes $275 per hour for him. Plaintiff has not responded, and I will accept that number. This reduces the amount of the request by $21,183.75 (282.45 times $75 per hour).

I realize that plaintiff's counsel were working on a contingent fee basis, although the specific agreement was not revealed. Thus, if the verdict had been for the defendant, they would have recovered nothing. That can be a factor supporting a larger fee award. Here, however, the fee awarded will be multiples of whatever the contingent fee would have been. I remain satisfied that, despite the risks plaintiff's counsel took in taking the case on a contingent basis and the importance of incentivizing lawyers to take potentially small but

meritorious FLSA cases, the rates of $390 and $275 for Mr. Braziel and Mr. Gaspar were reasonable in this instance.

The result of these modifications is to reduce the amount requested to $116,599.75. I find that this is a reasonable attorney's fee and order STC to pay it.

D. Interest.

Prejudgment interest may be awarded as a matter of discretion. *Pabst v. Oklahoma Gas &: Elec. Co.,* 228 F.3d 1128, 1136 (10th Cir. 2000). If awarded, it runs from the time of the loss to the payment of the judgment. *Id.* The Court must determine whether the award of prejudgment interest will serve to compensate the injured party and, if so, whether the equities would preclude an award. *See Caldwell v. Life Ins. Co. of North America,* 287 F.3d 1276, 1286 (10th Cir. 2002). The rate need not be the same as the rate for post-judgment interest under 28 U.S.C. § 1961. *Id.* at 1287. Rather, it rests within the sound discretion of the district court. *Id.*

I find that prejudgment interest would compensate Wilson for the loss of use of overtime payments that should have been made. There are no equities that would preclude an award. Just as Wilson has lost the use of the money that should have been paid, STC has had the use of money that should not have been withheld. Neither party suggests an appropriate rate. In the absence of any suggestion or analysis from the parties, the Court in its discretion will use the Colorado prejudgment interest rate: eight

percent per annum compounded annually from the date that the payments became due. *See* Colo. Rev. Stat. § 5-12-102(2).

As noted above, plaintiff's counsel elected to place in evidence a number of pay stubs and leave it to the jury to figure out overtime without the assistance of an expert witness or even a chart showing dates and amounts of overtime due but not paid. The Court does not know which pay stubs contributed which amounts to the ultimate verdict. Accordingly, the Court orders that prejudgment interest will run from the date of Wilson's last pay stub until the date of this Amended Final Judgment. Post-judgment interest will run at the federal rate in place at the date of this Amended Final Judgment per 28 U.S.C. § 1961.

ORDER

For the reasons stated above,

1. Defendant's motion for judgment as a matter of law, or alternatively, for a new trial, ECF No. 162, is DENIED.

2. Plaintiff's motion to alter or amend the judgment, ECF No. 163, is GRANTED IN PART AND DENIED IN PART. The Court directs that an Amended Final Judgment be entered that includes in the award in favor of the plaintiff and against the defendant the following: $6,758.50 in costs; $116,599.75 in attorney's fees; prejudgment interest on the total of verdict amount plus costs and attorney's fees at eight percent per annum compounded annually

from the date of plaintiff's last pay stub to the date of the Amended Final Judgment; and post-judgment interest on the total award at the applicable federal post-judgment rate pursuant to 28 U.S.C. § 1961 from the date of the Amended Final Judgment to the date the judgment is satisfied.

DATED this 7th day of June, 2021.

BY THE COURT:

/s/
R. Brooke Jackson
United States District Judge

APPENDIX D

No. 22-40219

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Terry Gentry, on behalf of himself and all others similarly situated,
Plaintiff – Appellee,

v.

Hamilton-Ryker IT Solutions, L.L.C.,
Defendant – Appellant.

On Appeal from the United States District Court
for the Southern District of Texas
(No. 3:19-CV-320, Honorable Jeffrey Vincent Brown)

SECRETARY OF LABOR'S BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

SEEMA NANDA
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

RACHEL GOLDBERG

Counsel for Appellate Litigation

ERIN M. MOHAN
Senior Attorney

ANNE W. KING
Attorney
Fair Labor Standards Division
U.S. Department of Labor
200 Constitution Ave. N.W.
Room N-2716
Washington, DC 20210
(202) 693-5783
Mohan.Erin.M@dol.gov

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to the persons and entities identified by Appellants and Appellee. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Seema Nanda, Solicitor of Labor, U.S. Department of Labor

2. Jennifer Brand, Associate Solicitor, U.S. Department of Labor

3. Rachel Goldberg, Counsel for Appellate Litigation, U.S. Department of Labor

4. Erin M. Mohan, Senior Attorney, U.S. Department of Labor

5. Anne W. King, Attorney, U.S. Department of Labor

6. Sarah Karchunas, Attorney, U.S. Department of Labor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Dockets and Filings

Statutes

Regulations

Administrative and Regulatory Materials

Federal Register

Opinion Letters

Miscellaneous

Dictionaries

No. 22-40219

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Terry Gentry, on behalf of himself and all others similarly situated,
Plaintiff – Appellee,

v.

Hamilton-Ryker IT Solutions, L.L.C.,
Defendant – Appellant.

On Appeal from the United States District Court
for the Southern District of Texas
(No. 3:19-CV-320, Honorable Jeffrey Vincent Brown)

SECRETARY OF LABOR'S BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

Pursuant to Federal Rule of Appellate Procedure 29(a), the Acting Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiff-Appellee Terry Gentry and similarly situated Marc Taylor, who worked as senior engineers (collectively "Engineers") for Defendant-Appellant Hamilton-Ryker IT Solutions, LLC ("Hamilton-Ryker"). The Secretary asks this Court to affirm the district court's decision. As the Supreme Court recently explained in *Helix Energy v. Hewitt*,

143 S. Ct. 677 (2023), the Department of Labor's ("Department") regulations provide two routes to pay employees on a salary basis, and thereby satisfy one of the requirements to demonstrate that they are employed in a "bona fide executive, administrative, or professional capacity," and exempt from the Fair Labor Standards Act's ("FLSA") minimum wage and overtime protections. *See* 29 U.S.C. 213(a)(1).[1] First, the employer may pay the employee a predetermined amount that is no less than the employee's full salary for a week, month, year, or more, without regard to the amount of time the employee actually works. The employer may pay the employee, on top of this full salary, additional hourly compensation for hours worked *beyond* their normal workweek, but may not pay them hourly compensation for hours worked *within* their normal workweek. Alternatively, the employer may compute the employee's pay on an hourly (or daily or shift) basis for hours within the normal workweek and still satisfy the salary basis requirement, but only if the employer provides a guarantee resembling a full salary—one roughly equivalent to pay for the employee's normal workweek. Either route ensures that employees exempt from the FLSA's overtime protections have a stable and predictable salary, which the Department has long considered a hallmark of exempt employment. Because Hamilton-Ryker paid its Engineers on an hourly basis for most of their normal workweek, thus failing to pay them a true salary, and also failed to pay them a salary-like guarantee roughly equivalent to their pay

[1] This case concerns only overtime compensation.

for their normal workweek, the district court correctly held that Hamilton-Ryker could not use the FLSA's executive, administrative, and professional ("EAP") exemption, and the Engineers were entitled to an overtime premium whenever they worked more than 40 hours in a workweek.

STATEMENT OF INTEREST

The Secretary has a significant interest in this case because she is responsible for administering and enforcing the FLSA, 29 U.S.C. 204, 211(a), 216(c), 217, has promulgated the salary basis regulations at issue, and has a substantial interest in ensuring that these regulations are construed properly.

ISSUES PRESENTED

1. Whether the Engineers were paid on a "salary basis"—and therefore exempt from the FLSA's overtime pay requirements under the EAP exemption— where their compensation for workweeks of 40 or more hours consisted of (1) hourly pay and (2) a weekly guarantee equivalent to their wages for the first eight hours worked.

2. Whether Hamilton-Ryker has shown extraordinary circumstances necessary to warrant this Court considering its never-before-raised argument that the Department exceeded its statutory authority in promulgating a salary basis requirement.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Congress enacted the FLSA to protect employees from "the evil of overwork" as well as "underpay," by requiring employers to pay employees an overtime premium for work over 40 hours in a workweek. *Barrentine v. Arkansas- Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); *see also* 29 U.S.C. 206(a)(1), 207(a)(1). "[T]he FLSA's breadth" reflects this goal "of deterring overwork and spreading employment." *Helix*, 143 S. Ct. at 691 (internal brackets omitted). Workers are not "deprived of the benefits of the [FLSA] simply because they are well paid." *Id.* (internal quotation marks omitted).

Section 13(a)(1) of the FLSA establishes an exemption from the FLSA's overtime protections for "any employee 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." 29 U.S.C. 213(a)(1). For over 80 years, the Department's regulations have used three criteria to define and delimit this exemption: (1) an exempt employee must be paid on a salary basis (the salary basis test); (2) that salary must be at least a minimum specified amount, which is currently $684 per week, but was $455 per week when this case arose (the salary level test); and (3) the employee must perform work that primarily involves executive, administrative, or professional duties as defined by the regulations (the duties tests). 29 C.F.R. Part 541. Each criterion is distinct and must be satisfied for an employee to be exempt. This case concerns only the salary basis requirement.

The Department promulgated the salary basis test to ensure that "[the] exemption applies only to salaried employees" and to exclude from exemption employees "paid on an hourly basis." Stein Rpt. 23.[2] The salary basis requirement "reflects the widely-held understanding that employees with the requisite status to be bona fide executives, administrators or professionals have discretion to manage their time" and "are not paid by the hour or task, but for the general value of services performed." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122-01, 22,177 (April 23, 2004); *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560-01, 15,572 (Mar. 31, 2003) (describing the trade-off whereby exempt employees are not paid overtime for working over 40 hours in a week but receive a "guaranteed salary that cannot be reduced when an employee works less than 40 hours").

Multiple provisions in 29 C.F.R. Part 541 "give content to the salary-basis test," *Helix*, 143 S. Ct. at 683, including, most relevant to this case, 541.602(a), 541.604(a), and 541.604(b). To be paid on a salary basis under 541.602(a), the "main salary-basis provision," *id.*, an employee must "regularly receive[]

---

[2] The Department's Wage and Hour Division ("Wage and Hour") issued reports accompanying its update to the Part 541 regulations in 1940 (the "Stein Report") (Addendum A) and 1949 (the "Weiss Report") (Addendum B).

each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.602(a). Subject to certain exceptions not at issue here, an employee must therefore "receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." 29 C.F.R. 541.602(a)(1). The regulation further provides that "[a]n employee is not paid on a salary basis" if their employer makes "deductions from the employee's predetermined compensation ... for absences occasioned by the employer or by the operating requirements of the business." 29 C.F.R. 541.602(a)(2). "If the employee is ready, willing and able to work," the employee must be paid their salary even if "work is not available." *Id.* And an employer may not reduce an exempt employee's pay if the employee takes a few hours off for personal reasons, for example, 29 C.F.R. 541.602(b)(1), because such deductions may negate "the exemption ... even for highly paid employees." 68 Fed. Reg. at 15,572.

Section 541.604(a) addresses when employers can provide "additional compensation" on top of a salary without "violating the salary basis requirement." 29 C.F.R. 541.604(a). Such compensation includes, for example, a "commission," "a percentage of the sales or profits," or "additional compensation based on hours worked for work beyond the normal workweek." *Id.* Unlike an employee's salary, the employer may reduce this "additional compensation" without losing the exemption. *See, e.g.*,

Opinion Letter FLSA2006-24, 2006 WL 2792438 (July 6, 2006).

Section 541.604(b) addresses instances when an employee's compensation is "'computed on an hourly, a daily or a shift basis,' rather than a weekly or less frequent one," as required by 541.602(a). *Helix*, 143 S. Ct. at 684 (citing 29 C.F.R. 541.604(b)). This provision "lays out a second path—apart from § 602(a)—enabling a compensation scheme to meet the salary-basis requirement." *Helix*, 143 S. Ct. at 688–89. Specifically, 541.604(b) allows an employer to satisfy the salary basis test notwithstanding that it pays workers an hourly (or day or shift) rate, but only if two "conditions" are met. *Id.* at 684. An employee paid by the hour may be exempt only if: (1) the employer pays "a guarantee of at least the minimum weekly required amount ... 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." 29 C.F.R. 541.604(b).

Section 541.604(b)'s "reasonable relationship" condition "will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." *Id.* The regulation in place at the time relevant to this case provided an example of a reasonable relationship: a weekly guarantee of $500 for an employee who normally works four to five shifts a week and is paid $150 per shift (i.e., the $500 guarantee is reasonably related to the usual weekly earnings of $600–$750). 69 Fed. Reg. at 22,184. The reasonable relationship

requirement ensures that the "guaranteed amount" is sufficiently analogous to a full weekly salary so that it is "a meaningful guarantee rather than a mere illusion." *Id.* The requirement prevents employers from "circumvent[ing] the prohibition against docking for absences due to a lack of work" or other reasons, for workers earning a high hourly, daily, or shift rate, as "[s]uch a pay system would be inconsistent with the salary basis concept." *Id.*

Before 2004, the Department's regulations did not provide an express path for an employer to satisfy the salary basis test either for employees paid on an hourly basis for their normal workweek or for employees who received additional hourly payments for hours worked beyond their normal workweek.[3] In 2004, the Department expressly addressed hourly pay in the salary basis regulations in two ways. First, the Department added language in 541.604(a) allowing an employer to pay "additional compensation based on hours worked for work beyond the normal workweek." 29 C.F.R. 541.604(a). The regulation allowed employers to pay this compensation on "any basis," including an hourly basis. *Id.* Second, the Department promulgated 541.604(b), providing, for the first time,

---

[3] Before 2004, the Department had provided a regulatory path to satisfy the salary basis test for employees paid on a day or shift basis who received a weekly guarantee, provided that the employee's compensation was not "divided into two parts"—a guaranteed minimum and an "additional" amount subject to reduction— that could have permitted "circumventing" the requirement that the employer pay the full salary in any week in which any work was performed. 29 C.F.R. 541.118(b) (2004).

a regulatory "tolerance" that allowed employers to compute an employee's "actual pay" on an hourly basis and still satisfy the salary basis test. 69 Fed. Reg. at 22,184. In addition, the Department provided that for *all* workers paid on less than a weekly basis—hourly, day, or shift workers—such a compensation plan could satisfy the salary basis test only if the employer provided a weekly guarantee that was "reasonably related" to the amount the employee earned for their normal workweek. *Id.* In response to multiple commenters' concerns that 541.604(b) was "inconsistent with the general requirement that exempt employees must be paid on a salary basis," and would result in employees who lacked both overtime protections and the stability of a salary, the Department explained that the reasonable relationship test would ensure that the guarantee paid to these employees functioned like a salary and was not an "illusion." *Id.*

B. Factual and Procedural Background

Hamilton-Ryker employed the Engineers on a project involving the construction and commissioning of a natural gas facility. ROA.1259. Before June 2017, Hamilton-Ryker paid "hourly contract personnel," including Gentry, an hourly rate for any hours they worked and did not pay an overtime premium when they worked more than 40 hours in a workweek. *Id.* In June 2017, Hamilton- Ryker adopted a new pay policy

for employees it deemed highly compensated.[4] Hamilton-Ryker continued to pay an hourly rate without any overtime premium. However, in any week that those employees performed any work, Hamilton-Ryker guaranteed them compensation equal to eight hours of pay, which it called a "salary." ROA.1259-60.

Gentry and Taylor, who typically worked 40 or more hours a week, were guaranteed $984 and $1,200 per week, respectively, and their hourly rates were $123 and $150 per hour. ROA.1259-60. Thus, Gentry would earn $4,920 and Taylor would earn $6,000 when they worked a 40-hour week, and both would earn additional pay at their respective hourly rate when they (very frequently) worked hours over 40 in a workweek. If the Engineers worked less than their normal schedule, they received less than their normal full weekly earnings, with the decrease corresponding to the hours that they did not work. When Gentry, for example, left early one day because he was sick, he was not paid for hours not worked. ROA.339.

In September 2019, Gentry filed suit alleging that Hamilton-Ryker violated the FLSA, 29 U.S.C. 207(a)(1), by failing to pay him an overtime premium. ROA.13-14. Taylor later joined as an opt-in plaintiff. ROA.204-07. On March 22, 2022, the district court granted summary judgment to the Engineers, holding that Hamilton-Ryker's pay scheme did not satisfy the salary basis test and, therefore, the EAP exemption

---

[4] Taylor began employment with Hamilton-Ryker in August 2017. ROA.1260.

did not apply to the Engineers. ROA.1328-30. Accordingly, the district court held that Hamilton-Ryker violated the FLSA by failing to pay the Engineers an overtime premium when they worked more than 40 hours per week. *Id.* Hamilton-Ryker appealed the district court's ruling to this Court on May 2, 2022. ROA.1331.32. Shortly thereafter, this Court stayed the appeal until the Supreme Court issued a decision in *Helix*.

ARGUMENT

I. The Text and Structure of the Department's Regulations, Along with *Helix*, Show that Hamilton-Ryker Did Not Pay the Engineers on a Salary Basis.

Helix provides the framework for the proper interpretation of the Department's regulations and analysis of this case. There, the Supreme Court explained that 541.602(a) and 541.604(b) "offer non-overlapping paths to satisfy the salary-basis requirement, with" 541.604(b) "taking over where" 541.602(a) "leaves off." *Helix*, 143 S. Ct. at 689. Section 541.602(a), the "main salary basis provision," requires that, "[w]henever an employee works at all in a week, he must get his full salary for that week." *Id.* at 683, 686 (internal quotation marks and brackets omitted). Section 541.604(b), by contrast, "speaks directly to" the narrow circumstances under which "hourly rates are consistent with the salary basis concept," and "by doing so, the provision reinforces the exclusion of those shorter rates from" 541.602(a)'s "domain." *Id.* at 689 (internal brackets omitted). And although 541.604(a)

was not at issue in *Helix*, that provision reinforces the Supreme Court's understanding of 541.602(a) and 541.604(b) by permitting hourly compensation in addition to the employee's full salary for time worked, but only for hours "beyond the normal workweek." 29 C.F.R. 541.604(a).

Thus, *Helix* teaches that there are only "two ways" that an employer can comply with the salary basis requirement. 143 S. Ct. at 691. The employer can pay the employee "a straight weekly salary for time" the employee "spends" working in a full workweek, thereby satisfying 541.602(a). *Id.* Or, if the employer pays the employee on an hourly, day, or shift basis, it can pay a weekly guarantee that satisfies 541.604(b)'s conditions, including a reasonable relationship between the weekly guarantee and the employee's pay for the normally scheduled workweek. *Id.* Both paths ensure that employees who are exempt from the FLSA's overtime protections receive the stable and predictable pay that accompanies that status. Hamilton-Ryker's pay scheme for the Engineers complies with neither option.

A. The Hourly Engineers' Pay Did Not Satisfy 541.602(a).

To satisfy 541.602(a), Hamilton-Ryker was required to pay the Engineers a "predetermined amount" equal to their "*full salary*" for the week in any week they worked "without regard to the number of days or hours worked." 29 C.F.R. 541.602(a)-(a)(1) (emphasis added); *see also* Weiss Rpt. 26 (explaining that the "predetermined amount" passage was adopted

to implement the "full salary" requirement). As *Helix* explained, 541.602(a) "embodies the standard meaning of the word 'salary.'" 143 S. Ct. at 686. To be "paid on 'a salary basis'" under 541.602, an employee must get "what ordinary people think of as a salary." *Id.* at 688 n.5. "A worker paid by the day or hour—docked for time he takes off and uncompensated for time he is not needed—is usually understood as a daily or hourly wage earner, not a salaried employee." *Id.* at 686. A salary, in contrast, is "linked" to "paycheck security"; "[t]ake away that kind of paycheck security and the idea of a salary ... dissolves." *Id.*

The Engineers did not receive their "full salary" for each week as required by 541.602(a) under the ordinary meaning of that term. Instead, they were guaranteed their first eight hours pay, and then paid with "regard to the number of … hours worked" for the remainder of the week. 29 C.F.R. 541.602(a)(1). If the Engineers left early due to illness, they were not paid for hours not worked. ROA.339; *cf. Helix*, 143 S. Ct. at 686 (a worker who usually works seven days per week but works only one day in a week due to illness and is paid for only the one day is paid "precisely *with* regard to" the number of days worked and therefore is not paid on a salary basis under 541.602(a)) (emphasis in original).

To characterize the Engineers' eight-hour weekly guarantee as a "salary," when most of their pay for each workweek was for the remainder of their normal workweek and was subject to reduction, is untenable. *See Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 184 (3d Cir. 1988) (rejecting as

"fundamentally incoherent" an argument similar to Hamilton-Ryker's, that the employer satisfied the salary basis requirement by paying a guaranteed weekly amount, which a supervisor earned after working twelve and one-half hours, and paying hourly pay for all subsequent hours). Hamilton-Ryker's assertion that "a minimum payment unrelated to an employee's income is that employee's 'salary' stretches the common understanding of the term out of proportion." *Id.* at 185.

B. Section 541.604(a) Does Not Provide a Means for Hamilton-Ryker to Satisfy the Salary Basis Test, But Instead Reinforces 541.602(a)'s "Full Salary" Requirement.

Section 541.604(a) reinforces that the "predetermined amount" required by 541.602(a) must be the employee's "full salary" for the week. Section 541.602(a) provides that the "predetermined amount" may constitute "all or *part* of the employee's compensation," and 541.604(a) illustrates the types of "additional compensation" that an employer can pay, on top of the 541.602(a) "part" that is a salary, without losing the exemption. *See also* Weiss Rpt. 26 (explaining that the Department originally drafted the phrase "all or part of [the employee's] compensation" for the purpose of "mak[ing] it clear that additional compensation *besides the salary* is not inconsistent with the salary basis of payment").

Section 541.604(a) makes clear that any "additional compensation based on hours worked," must be for time worked "*beyond* the normal

workweek." 29 C.F.R. 541.604(a) (emphasis added); see 69 Fed. Reg. at 22,183 (explaining that 541.604(a) permits "additional compensation for extra hours worked *beyond the regular workweek*") (emphasis added). In other words, when an employer pays an employee on an hourly basis for hours *within* their normal workweek, that employee does not receive their "full salary" on a weekly or less frequent basis as required by 541.602(a).

Hamilton-Ryker maintains that the hourly wages it paid the Engineers for the bulk of their normal workweek were "additional compensation," Opening Br. 26, notwithstanding that 541.604(a) expressly limits additional hourly compensation to pay for time worked "beyond the normal workweek." To circumvent this obvious problem, Hamilton-Ryker offers two alternative theories. Neither holds water.

First, Hamilton-Ryker proposes, without support, that the term "normal workweek" in 541.604(a) does not bear its ordinary meaning, but rather is "just another way to refer to the time period" that an employee's weekly guarantee is "intended" to "cover." Opening Br. 30. But if the "normal workweek" is merely whatever an employer decides it to be, irrespective of the amount of time an employee actually works, this would render 541.604(a)'s regulatory language nearly meaningless. The far more sensible reading is that the Department's use of the term "normal workweek" is consistent with authority that predated the promulgation of 541.604(a) in 2004, which had interpreted the Department's regulations in place at the time to permit an employer to pay "an

hourly rate for each hour worked *beyond the regular schedule*" without defeating the exemption. *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *see also Fife v. Harmon*, 171 F.3d 1173, 1175 (8th Cir.1999) (same); *Boykin v. Boeing Co.*, 128 F.3d 1279, 1282 (9th Cir. 1997) (same); Wage and Hour Opinion Letter, 1995 WL 1032482 (April 6, 1995) ("[A]dditional compensation besides the required minimum salary guarantee may be paid to exempt employees for hours worked *beyond their standard workweek* without affecting the salary basis of pay.") (emphasis added). This is also consistent with 541.604(b), which requires a weekly guarantee "roughly equivalent to the employee's usual earnings" for "the employee's normal scheduled workweek." *Id.* (providing example of employee "who normally works four or five shifts each week" as a "normal scheduled workweek").

Hamilton-Ryker alternatively argues that hourly pay for an employee's normal workweek can be "additional compensation" under 541.604(a), because 541.604(a)'s language limiting additional time-based pay to "work beyond the normal workweek" is not "proscriptive." Opening Br. 27. According to Hamilton-Ryker, because the "normal workweek" language limits "one of several examples" of additional compensation, the language has no limiting effect on the exact type of additional compensation it limits. *Id.* at 27-28. But although "'extra' compensation for hours worked beyond the normal workweek is not the only form of additional payment contemplated by" 541.604(a), additional *hourly* pay qualifies under that section "only" if the payment "concerns time worked

beyond the normal ... workweek." *Rindfleisch v. Gentiva Health Servs.*, 24 F. Supp. 3d 1234, 1237-38 (N.D. Ga. 2013) (emphasis in original). By stating that additional compensation in the form of hourly pay does not foreclose the exemption *when the hourly pay is based on hours worked for work beyond the normal workweek,* 541.604(a)'s text makes clear that the regulation does not contemplate as "additional pay" for a salaried worker hourly pay for hours within the normal workweek. It would be nonsensical for the Department to qualify the example of additional pay for hours worked—limiting it to time "*beyond* the normal workweek"—if pay for all or most of an employee's hours *within* the normal workweek could also constitute "additional compensation" under 541.604(a).[5]

---

[5] Hamilton-Ryker's contention that the Department has endorsed a broad reading of 541.604(a) that includes compensation based on hours worked within the normal workweek, Opening Br. 29, is similarly unsupported. To the contrary, the 2019 preamble language to which Hamilton-Ryker points merely restates what 541.604(a) makes clear: that once the salary basis (and salary level) test are satisfied, permissible additional compensation can be paid on any basis. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230-01, 51,249 (Sept. 27, 2019); 29 C.F.R. 541.604(a). Similarly, while Hamilton-Ryker makes much of the use of the word "may" in a 2020 Wage and Hour Opinion Letter stating that an employer "may provide additional compensation," which "may be paid for hours worked for work beyond the normal work week," Opening Br. 29, this language simply reflects the fact that employers are not *required* to pay such additional compensation. Wage and Hour Opinion Letter FLSA2020-2, 2020 WL 122924 at *3 (Jan. 7, 2020).

Moreover, the authority cited by Hamilton-Ryker does not hold that limiting language in a specific example has no limiting effect, even with respect to instances of that specific example. Instead, these cases establish the unremarkable principle that an illustrative list of examples is usually not exhaustive. *See* Opening Br. 28-29 (citing *Hollis v. Lynch,* 827 F.3d 436, 443 (5th Cir. 2016), and *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 162 (2012)). No one contests that proposition as applied to this case: To be sure, some types of pay not listed in 541.604(a)—for example, a holiday bonus—could potentially fall within 541.604(a). But as courts addressing the issue explain, *hourly* pay qualifies under 541.604(a) "only" for "hours worked beyond the normal workweek." *Vaughn v. Wingo Serv. Co.*, 2022 WL 4280665, at *3 (S.D. Tex. Aug. 4, 2022), report and recommendation adopted, 2022 WL 4277299 (S.D. Tex. Sept. 15, 2022); *see, e.g., Park v. FDM Grp. Inc.*, 2019 WL 2205715, at *4 (S.D.N.Y. Sept. 22, 2019) (collecting cases); *Rindfleisch*, 24 F. Supp. 3d at 1237-38.

C. 541.604(b) Provides the Only Path to Pay Hourly Employees on a Salary Basis, But Hamilton-Ryker Fails to Satisfy Its Requirements.

In contrast to 541.604(a)—which works together with 541.602(a) to permit an employer to pay, on top of the full salary, additional hourly compensation for hours *beyond* the normal workweek—541.604(b) is the only available path for an employer to pay an employee on an hourly basis for hours *within* their normal

workweek and still satisfy the salary basis requirement. As explained above, however, to take advantage of 541.604(b)'s allowance for treating an employee paid on an hourly basis as exempt from overtime, the employer must pay such employee a weekly guarantee that is at least the salary level amount and is roughly equivalent to their earnings for their normal workweek. 29 C.F.R. 541.604(b). This "reasonable relationship" requirement ensures that any guarantee functions like a true salary—so that it is "meaningful" rather than an "illusion." 69 Fed. Reg. at 22,184; *see also Helix*, 143 S. Ct. at 684. Thus, whether an employer complies with 541.602(a) by paying the employee's "full salary" for the normal workweek and paying by-the-hour only for time "beyond the normal workweek," 541.604(a), or with 541.604(b) by guaranteeing the employee an amount that roughly covers their normal workweek, the employee receives stable, predictable pay for their normal workweek that is consistent with exempt status. *Cf. Helix*, 142 S. Ct. at 688 ("All that regulatory language—each phrase adding onto and reinforcing the others—reflects the standard meaning of a 'salary,' which connotes a steady and predictable stream of pay, week after week after week.").

Although Hamilton-Ryker's compensation scheme for the Engineers is precisely the type addressed by 541.604(b)—hourly pay accompanied by a weekly guarantee—it nonetheless fails to satisfy 541.604(b)'s requirements. Hamilton- Ryker did not provide its Engineers with a guarantee roughly equivalent to their earnings for their normal workweek so that the guarantee functions like a true

salary. Instead, Hamilton-Ryker paid the Engineers by the hour, and provided a guarantee equivalent to the first eight hours of work, which was dwarfed by their earnings in their normal workweek. While Hamilton-Ryker may prefer to avoid paying the Engineers "a true salary" under 541.602(a) or a salary-like guarantee under 541.604(b), *and* avoid paying them overtime, the "whole point of the salary-basis requirement," as the Supreme Court explained in *Helix*, is to take that "option off the table." *Id.* at 691.

D. Hamilton-Ryker's Interpretation Would Nullify 541.604(b)'s "Reasonable Relationship" Requirement, Adversely Impacting Many Lower-Paid Employees.

Hamilton-Ryker's reading of 541.602(a) and 541.604(a), and its assertion that it complies with those regulations and therefore need not comply with 541.604(b), is not only contrary to the plain text of those regulations, but cannot be correct, because this would effectively nullify 541.604(b). *Cf. Dodd v. United States*, 545 U.S. 353, 371 (2005) ("[Courts should not] interpret a congressional statute in such a manner as to effectively nullify an entire section."). Hamilton-Ryker contends that an employer satisfies 541.602(a) merely by paying an hourly worker a weekly guarantee greater than the salary level (even if it pays the worker by the hour for most of the normal workweek). *See* Opening Br. 16 (arguing that "since" the Engineers "received a weekly guaranteed salary over $684, they met 602(a) and are not required to meet 604(b)'s reasonable relationship test"). If Hamilton-Ryker's position were correct, no employer

would *ever* need to resort to 541.604(b)'s "second path" to "meet the salary-basis requirement." *Helix*, 143 S. Ct. at 688-89.

As described above, 541.604(b) imposes "two conditions" on an employer that seeks to satisfy the salary basis test notwithstanding that it pays employees an hourly rate. *Helix*, 143 S. Ct. at 684. But under Hamilton-Ryker's interpretation, if an employer satisfies the first condition—a guarantee equal to at least the salary level—this automatically satisfies 541.602(a), and thus relieves the employer of having to satisfy 541.604(b)'s second condition—a guarantee that functions like a salary with predictable pay approximately equivalent to the amount the employee actually earns in a normal week. *Id.* at 689 ("Were § 602(a) also to cover daily and hourly-rate employees, it would subvert § 604(b)'s strict conditions on when their pay counts as a 'salary.'") Such a result would deprive those employees of the important protection that 541.604(b)'s second condition provides in exchange for permitting an employer to treat an hourly or daily rate employee as exempt from overtime pay, namely "a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week." *Helix*, 143 S. Ct. at 684. It would allow an employer "*neither* to pay employees a true salary *nor* to pay them overtime," an outcome which the Supreme Court in *Helix* judged inconsistent with the salary basis test. *Id.* at 691 (emphasis in original).

Indeed, effectively eliminating the "reasonable relationship" requirement in 541.604(b) by reading 541.602(a) and 541.604(a) as Hamilton-Ryker urges

could imperil overtime protections for many employees paid considerably less than the Engineers. *See Helix*, 143 S. Ct. at 691 (explaining that the employer's position in that case could have "disturbing consequences" even for "workers at the heartland of the FLSA's protection"). Consider, for instance, a registered nurse who meets the duties test and is paid $43 an hour—far less than Gentry's or Taylor's hourly rate. Under Hamilton-Ryker's position, an employer could structure the nurse's compensation to avoid paying an overtime premium merely by guaranteeing payment for 16 hours ($688, which exceeds the current weekly salary level) in any week when the registered nurse works—even if the nurse is normally scheduled for far more hours in a week. As a result, if the registered nurse already worked overtime hours, the nurse would see a reduction in compensation due to lost overtime premiums. And if the registered nurse did not already work overtime, Hamilton-Ryker's interpretation would lower the cost of increasing the registered nurse's hours—because the employer would no longer need to pay an overtime premium—thereby undermining the FLSA's purpose of protecting employees from overwork. *See Helix*, 143 S. Ct. at 692 (explaining that many "employers would assure" their employees a guarantee equal to the salary level "in a heartbeat if doing so eliminated the need to pay overtime").

Adopting Hamilton-Ryker's position could also harm employees who currently receive a true salary above the salary level and are exempt from overtime protection, including certified public accountants, human resource managers, and construction

superintendents, to name a few.[6] Employers would be incentivized to guarantee such employees a reduced weekly amount (equal to no more than $684 per week, which is $35,568 annually) and to pay them the remainder of their normal weekly compensation by the hour, even when it constitutes the bulk of their earnings. An employer could then dock this previously predictable pay when an employee arrives late one morning, attends a doctor's appointment, or even for "absences occasioned by the employer or by the operating requirements of the business." 29 C.F.R. 541.602(a)(2). And, under Hamilton-Ryker's view, because the employee would still be exempt, the employee would not be entitled to an overtime premium when they work more than 40 hours in a week.

E. The Department's Interpretation of the Salary Basis Regulations Is the Best Reading and Is Entitled to Deference.

The interpretation of 541.602(a), 541.604(a) and 541.604(b) outlined above reflects the best interpretation of the salary basis regulations in light of their text and structure, as well as the Supreme Court's decision in *Helix*. Even if the regulations were ambiguous, however, the Department's interpretation of them is entitled to deference because it is, at the very least, a reasonable reading and reflects the

---

[6] *See* Wage and Hour Field Operations Handbook 22j02; 22j08; 22j29, available at https://www.dol.gov/agencies/whd/field-operations-handbook.

agency's fair and considered expert judgment. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408, 2414-18 (2019); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (deferring to the Department's interpretation of the salary basis test articulated in an amicus brief before the Supreme Court).

II. The Court Should Not Address Hamilton-Ryker's Forfeited Argument that the Department Lacks Statutory Authority for the Salary Basis Test.

Hamilton-Ryker forfeited its argument regarding the Department's statutory authority by not raising this challenge in the district court, and it has not met its burden to show extraordinary circumstances warranting this Court's consideration of the issue now. *Rolls ex rel. A.R. v. Packaging Corp. of Am.*, 34 F.4th 431, 437 (5th Cir. 2022) (citing *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009)). Extraordinary circumstances "exist *only* 'when the issue involved is a pure question of law *and* a miscarriage of justice would result from [the Court's] failure to consider it.'" *Id.* (quoting *Veigel*, 564 F.3d at 700) (emphases added). Although Hamilton-Ryker characterizes the issue as a pure question of law, it has failed to show—indeed, has failed to even mention—how a miscarriage of justice would result if the Court declined to consider the issue. *See Rabe v. Wells Fargo Bank, N.A.*, 616 F. App'x 729, 734 (5th Cir. 2015) (deeming an argument waived where, even though the issue was a pure question of law, proponents "ma[de] no effort to argue that [the Court's] failure to address it would work a miscarriage

of justice" and "neglect[ed] even to brief this standard").

Even if Hamilton-Ryker had attempted to meet its burden of demonstrating extraordinary circumstances, this Court should decline in its discretion to hear this issue. A case challenging the Department's authority with respect to a related portion of the EAP exemption, the salary level requirement, is currently pending in a district court within the Fifth Circuit. See *Mayfield v. U.S. Department of Labor*, No. 1:22-cv-00792-RP (W.D. Tex.). Hamilton-Ryker and the Mayfield employer raise analogous arguments respecting the Department's statutory authority. *Compare* Opening Br. 39 *with* Pls' Mot. Summ. J. at 12-17, *Mayfield*, (W.D. Tex. Jan. 20, 2023). This Court would benefit from having those issues fully aired and decided in that forum first. And unlike the present case, the Secretary is a party in *Mayfield*, and would accordingly be entitled to full briefing in any appeal.

If the Court is nonetheless inclined to address whether the salary basis regulations are an appropriate exercise of the Department's delegated authority, the Secretary respectfully requests the opportunity to file a supplemental brief to address this important issue more completely. As a brief introduction, Congress *explicitly* granted the Department "broad authority to 'defin[e] and delimit[]'" what it means to be "employed in a bona fide executive, administrative, or professional capacity," and therefore exempt from the FLSA's protections. *Auer*, 519 U.S. at 456 (quoting 29 U.S.C.

213(a)(1)). The term "capacity" means "position," which in turn means "[r]elative place, situation, or standing; specif[ically], social or official rank or status." Capacity, 2 The Oxford English Dictionary 89 (1933); Position, Webster's Dictionary 774 (5th ed.1942). And the term "bona fide" denotes "good faith," "sincerity," or "genuine[ness]." Bona fide, 1 The Oxford English Dictionary 980 (1933). Therefore, the EAP exemption regulations contemplate that an employee's *status*—and whether that status is "genuine"—are relevant to defining and delimiting the exemption.

Accordingly, for over 80 years, the Department's regulations have reflected the commonsense notion that an employee's status and the genuineness of their executive, administrative, or professional role is demonstrated in part through the fact that an employee is salaried.[7] As the Department explained in 1949, "[c]ompensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term 'bona fide' executive." Weiss Rpt. 24; *see also id.* at 25-26 (deductions that reduce "payment [to]

---

[7] Hamilton-Ryker's argument, based on the 2019 preamble, that the purpose of the salary basis test is "screening out" employees "who receive 'low levels of compensation,'" Opening Br. 17 (quoting 84 Fed. Reg. at 51237-38), is wholly incorrect. That preamble was discussing the salary *level* test, a function of which is to screen out from the exemption employees who do not earn a sufficient amount. *See, e.g.*, 84 Fed. Reg. at 51237. But the salary level requirement is distinct from the salary basis requirement. The purpose of the salary basis requirement, as noted above, is to screen out employees *who are not salaried* and therefore lack the requisite status for exemption.

anything less than the full salary … seem[] to cast doubt upon the bona fide character of the employee's [EAP] status").

This plain text reading of "employed in a bona fide . . . capacity" addresses why the employee's salaried status is "relevant" for "assessing executive status." Opening Br. 42 (quoting *Helix*, 143 S. Ct. at 695 (Kavanaugh, J., dissenting)). Of course, the phrase "executive, administrative, and professional capacity" *also* relates to an employee's duties. But as the Supreme Court and this Court have recognized, the Department reasonably interprets the statutory text to encompass salary basis and salary level tests, as well as a duties test. *See Auer*, 519 U.S. at 456-57 (rejecting a challenge to the salary basis test's application and explaining that the Department's approach was "based on a permissible construction of the statute"); *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603, 608 (5th Cir. 1996) (upholding the Department's salary level test, affirming that the Department may appropriately rely on factors in addition to employee duties in "defining and delimiting" the EAP exemption). Congress, moreover, ratified the salary-basis requirement in the FLSA's 1949 amendments. Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920 (ratifying "[a]ny order, regulation, or interpretation" then in effect under the FLSA); *see also Mitchell v. Ky. Fin Co.*, 359 U.S. 290, 292 (1959).

Finally, just as the Department has the authority to establish a salary basis test, it has the authority to provide guidelines for what it means to be paid on a salary basis. Section 541.604(b)'s reasonable

relationship test reasonably ensures that an hourly paid worker exempted from the FLSA's overtime protections is paid a weekly guarantee that functions like a true salary and, thus, the worker receives the benefit of stable and predictable pay, similar to a typical salaried employee's pay.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully,

SEEMA NANDA.
Solicitor of Labor

/s/ Erin Mohan
ERIN M. MOHAN
Senior Attorney

JENNIFER S. BRAND
Associate Solicitor

RACHEL GOLDBERG
Counsel for Appellate Litigation
ANNE W. KING
Attorney
Fair Labor Standards Division
U.S. Department of Labor
200 Constitution Ave. N.W.
Room N-2716
Washington, DC 20210
(202) 693-5783
Mohan.Erin.M@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 23, 2023:

/s/ Erin Mohan
Erin Mohan
Senior Attorney
Fair Labor Standards Division
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave, NW, N-2716
Washington, DC 20210
(202) 693-5783
mohan.erin@dol.gov

Counsel for Amicus Curiae
Secretary of Labor

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed R. App. P. 32(f), this brief contains 6,487 words.

This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type-style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Office 365 using plain roman style, with exceptions for case names and emphasis, and using Times New Roman 14-point font, which is a proportionately spaced font, including serifs.

Date: June 23, 2023

/s/ Erin Mohan
Erin Mohan
Senior Attorney
Fair Labor Standards Division
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave, NW, N-2716
Washington, DC 20210
(202) 693-5783
mohan.erin@dol.gov

Counsel for Amicus Curiae
Secretary of Labor

Addendum A

Excerpts of Stein Report (1940)

ADDENDA

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
WASHINGTON, D.C.

+

"Executive, Administrative,
Professional ... Outside
Salesman" Redefined

+

Effective October 24, 1940

Report and Recommendations of the
Presiding Officer
at Hearings Preliminary to Redefinition

[DEPARTMENT OF LABOR SEAL]

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1940

TABLE OF CONTENTS

STATEMENT OF THE ADMINISTRATOR

The construction of Regulations, Part 541, as amended, which the Wage and Hour Division will follow in enforcing the act thereunder (unless and until the regulations are set aside in whole or in part by amendment or by authoritative decisions of the courts) will be found in this Report and Recommendations.

Philip B. Fleming,
Administrator.

* * *

at least at the present time, of data to show that the present $80 requirement has proved unsatisfactory, it would seem the part of wisdom to retain that figure. If future investigations show the desirability of an upward shift, the alteration can be made at that time.

EXEMPTION APPLIES ONLY TO SALARIED EMPLOYEES

It is hardly necessary to restate what has always been the position of the Wage and Hour Division, namely, that the $30 for a workweek can be translated into equivalent terms for longer periods. Thus the requirement is fulfilled if the worker is paid $130 for a month or a comparable amount for any other pay period. However, the requirement is not fulfilled by the earnings of a person who is paid on an hourly basis. The shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period and hourly paid employees should not be entitled to the exemption. The executive status in and of itself connotes at least the tenure implied by a weekly pay period as the very minimum. Accordingly, it is recommended that this clause in the definition read: "Who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities)." One final explanation may be made. In some instances

persons who would otherwise qualify as executive employees, particularly sales managers and branch sales managers, are paid in part or in full by method of compensation which include commissions, drawing accounts, and other items. In such instances the salary requirement will be met if the employee is guaranteed a net compensation of not less than $30 a week "free and clear." Similarly, if board and lodging are involved, there should be a "free and clear" payment of $30 each week in cash.

It was also suggested that the phrase should read "at not less than the rate of $30 * * * for a workweek."[79] It was explained that this proviso was to take care of certain executives who are hired on a part-time basis. This would seem quite unnecessary, however, for a person earning at such a rate for part-time work would clearly fulfill the minimum wage requirements of the act and, if his work were only part-time, would not be subject to over-time payments. The modification therefore seems unnecessary.

Section VII. ADMINISTRATIVE EMPLOYEES

RECOMMENDED DEFINITION

Section 541.2. Administrative.

The term "employee employed in a bone fide * * * administrative * * * capacity" in Section 13 (a) (1)

---

[79] Statement of Noel Sargent, National Association of Manufacturers, record June 3-5, hearing, vol. III, p. 374.

of the act shall mean any employee–

(A) Who is compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities), and

(B) (1) Who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) Who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business opera-

* * *

Addendum B

Excerpts of Weiss Report (1949)

UNITED STATES DEPARTMENT OF LABOR
Maurice J. Tobin, Secretary

Wage and Hour Public Contracts Divisions
Wm. R. McComb, *Administrator*
WASHINGTON, D.C.

REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541

Defining the Terms

"Executive" "Administrative" "Professional"
"Local Retailing Capacity" "Outside Salesman"

... as contained in Section 13(a)(1) of the Fair Labor Standards Act of 1938, providing exemptions from the wage and hour provisions of the act.

June 1949

[DEPARTMENT OF LABOR SEAL]

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1949

TABLE OF CONTENTS

LETTER OF TRANSMITTAL

U.S. Department of Labor
Wage and Hour Public Contracts Divisions.

To Mr. Wm. R. McComb, *Administrator*.

In accordance with your instructions, and following a public hearing on the subject, I am transmitting herewith my report and recommendations on proposed revisions of Regulations, Part 541.

Harry Weiss
Presiding Office.

Washington, D.C., *June 30, 1949.*

* * *

tative requirements indicated above. I therefore recommend that the regulations be amended to include such provisos. Appropriate language to accomplish this purpose is included in the section of this report containing the complete text of the recommended regulations.

"On a Salary * * * Basis"

The notice of hearing invited evidence on the need for revision or definition of the term "on a salary * * * basis." In response to this notice a number of proposals relating to the "salary basis" requirements in the regulations were made in the course of the hearing. One of these was that the requirement of payment "on a salary * * * basis" be eliminated and that "average compensation" be used instead;[90] another, that employees be permitted to qualify for exemption even if paid an hourly wage.[91] Some witnesses suggested that the term "salary basis" be defined to mean payment of a fixed or guaranteed sum.[92] The evidence at the hearing showed clearly that bona fide executive,

---

[90] National Association of Motor Bus Operators, transcript, p. 1792.

[91] Lennox Furnace Co., S.L. No. 9.

[92] Office Employees International Union, AFL, transcript, p. 2784; National Coal Association, transcript, p. 1473; and Central Pennsylvania Coal Producers' Association, transcript, p. 1581.

administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive.[93] Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executive, administrative or professional status.

A number of questions have arisen in the past in connection with the interpretation of the phrase "on a salary * * * basis" particularly with respect to the effect of deductions on the salaried status of an employee. The problem became of some importance during the war when the practice of making such deductions was adopted by some companies engaged in war production as a disciplinary measure to discourage absenteeism among executive and administrative employees.[94] This practice raised serious questions as to whether any employees to whom it was applied were actually employed "on a salary * * * basis" in accordance with the provisions of the regulations. Investigation by the Divisions indicated that this

---

[93] See for example, transcript pp. 99-100, 184-185, 399, 707, 771-772, 999-1000, 1431-1452. The argument was also made, however, that the requirement of payment on a salary basis is illegal. See Exhibit No. 15.

[94] Transcript. pp. 28, 1258-1254.

changed practice had become sufficiently widespread to warrant the conclusion that the war- time industrial practice differed from the pre-war practice and that such disciplinary deductions were no longer inconsistent with payment "on a salary * * * basis." In an effort to meet the wartime problems and to clarify the meaning of the term "on a salary * * * basis" the Divisions issued a restatement of position, the pertinent portion of which follows:

> An employee will be considered to be paid on a "salary basis" within the meaning of sections 541.1, 541.2, or 541.3 of regulations, Part 541, if under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semimonthly, monthly, or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period. However, the fact that less than this amount is paid or a particular pay period because disciplinary deductions are made or unreasonable absences would not in itself prove that the employee is not employed on a salary basis. On the other hand, since it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at

> work, an employee will not he regarded as being paid on a salary basis if deductions are made for those types of absences ordinarily allowed such employees. For example, an employee is not being paid on a salary basis, if the employer makes deductions from his salary for an afternoon when he goes home early or when he occasionally takes a day off, unless, under the circumstances of a particular case, such absences must be considered unreasonable.[95]

As a result of this statement of position the problems created by the peculiar wartime conditions in many plants were solved but as an incident thereof, numerous administrative difficulties were encountered. For example, employers as well as the Divisions were faced with the need for determining in particular cases whether absences were reasonable or unreasonable and whether unreasonable absences included absences for longer periods than were allowed under established company plans for sick leave and "annual" leave. Since the answer to this latter question was determined to depend upon the reasonableness of the particular leave plan, employers had to decide for themselves and the Divisions in many instances were compelled to rule on specific leave plans to determine whether the leave plans were "reasonable" in nature. Employers were

---

[95] Release A-9 dated August 24, 2944, "Payment on 'Salary Basis' for Executive, Administrative and Professional Employees Clarified."

thus subject to considerable uncertainty prior to obtaining the opinion of the Divisions and the Divisions were faced with an undesirable administrative burden in giving such opinions. In my opinion, moreover, the building of such an elaborate structure of interpretation upon the simple phrase "on a salary * * * basis" should be avoided if possible in the interests of good administration.

The testimony at the hearings indicated that the practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries had been a wartime phenomenon, resulting from rapid upgrading, the pressure of long ours, and other temporary conditions. Such deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary.[96] There appears to be no present need for a definition of "salary basis" as difficult to apply as the one now followed by the Divisions, particularly since it is not consistent with the common understanding of the phrase as it applies to bona fide executive, administrative, and professional employees.[97] In view of the changed conditions, payment of anything less than the full salary seems to cast doubt upon the bona fide character of the employee's executive, administrative, or professional

---

[96] See, for example, transcript, pp. 23, 134-135, 399, 630-632, 1001, 1336-1337, 2759.

[97] Some representative of employers urged that provision for deductions be retained. For example, see transcript, p. 1359.

status.

I recommend that the official explanation of the regulations[98] make it clear that the term "on a salary * * * basis" requires that the employee receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.[99] This recommendation may be accomplished by defining the term in the following language:

> An employee will be considered to be paid on a salary basis within the meaning of these regulations, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the work-week or in the quality or quantity of the work performed.

The question may be raised in connection with the above recommendation whether the proposed definition of "salary basis" in all cases excludes employment on a commission basis, hourly rate,

---

[98] Later in this report the recommendation is made to issue an explanatory bulletin together with the revised regulations.

[99] This recommendation is not intended to affect the Divisions' general position under the act that payment is not required in any week in which no work is performed.

percentage of profit, or similar methods of payment resulting in varying amounts of weekly earnings. It should be noted that the language "a predetermined amount constituting all or part of his compensation" is used in the proposed definition. t is the purpose of this phrase to make it clear that additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $75 or more per week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in any week in which he performs any work.[100] The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement that the full salary must be paid in any week in which any work is performed. For example, a salary of $100 a week may not arbitrarily be divided into a guaranteed minimum of $75 paid in each week in which any work is performed, and an

---

[100] A representative of the coal industry testified that section foreman who are paid on a daily basis plus a minimum weekly guarantee enjoy all the privileges of salaried employees. Transcript, pp. 1522-1524.

additional $25 which is made subject to deductions.

Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

Payment on a "Fee Basis"

The notice of hearing invited testimony on the need for revision or definition of the phrase "fee basis."[101] In the recommended regulations as in the present regulations, the requirements for exemption as an administrative or professional employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis.

Little or no difficulty arises in determining whether a particular employment arrangement is on a

---

[101] See appendix L.

fee basis. Such arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion. These payments in a sense resemble piecework payments with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis. The type of payment contemplated in the regulations is thus readily recognized.

In the discussion of the term "on a salary basis" I have recommended that translation of the salary test into equivalent amounts for periods shorter than a week should not be permitted. Under this recommendation, an employee on a salary basis receives his full salary for each week in which he performs any work. This is in accord with the testimony that such employees receive their salaries in weeks in which they work less than 40 hours as well as in weeks in which they work more than 40 hours. Payments on a fee basis, on the other hand, are frequently made for work accomplished in less than a week or for work done in relatively short periods of time in each of several weeks. Moreover, an employee who is employed on a fee basis is not paid a predetermined amount regularly over a relatively long period of employment as is an employee on a salary basis. Obviously, therefore, a different rule is required for fee basis payments.

The adequacy of a fee payment–whether it amounts to payment at a rate of not less than $25 per week –can ordinarily be determined only after the time worked on the job has been determined. In my opinion, the only administratively feasible way of determining whether payment is at the rate specified in the regulations is by reference to a standard workweek. I believe that a 40-hour standard is the most practicable for this purpose. I therefore recommend that the determination of whether payments on a fee basis are at a rate of not less than $75 per week be related to the standard 40-hour week. Thus, compliance will be tested in each case of a fee payment by determining whether the payment made is at a rate which would amount to at least $75 if 40 hours were worked.

The following examples will illustrate the principle stated above:

> A singer receives $25 for a song on a 15-minute program (no rehears-

* * *