The FLSA's Salary-Basis Test Post-*Loper-Bright*

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Key Takeaways

- Utilize outside counsel to protect wage and hour audits as privileged and confidential;
- Plan ahead for upcoming changes and reclassifications to avoid risk and unanticipated financial impacts;
- Seek legal counsel for other risk mitigation strategies in defending wage and hour class and collective actions.

When the United States Supreme Court junked the 40-year-old *Chevron* doctrine this past term in its *Loper Bright* decision, many in the legal community were wondering what the fallout would look like. *Loper Bright* liberated courts to freshly interpret statutes and eschew deference to agency interpretations, setting the stage for a flood of rulings invalidating regulations across the administrative state. A prime candidate for attack: the Department of Labor's "Minimum Salary Rule."

Under the Fair Labor Standards Act ("FLSA"), employers are guaranteed time-and-a-half pay for labor in excess of the standard, 40-hour work week. But there are exceptions, such as the so-called "White Collar" or "EAP" exemption. The FLSA provides that "employee[s] . . . in . . . bona fide executive, administrative, or professional capacit[ies]" aren't entitled to overtime pay, 29 U.S.C. § 213(a)(1), and the Secretary of Labor "sets out a standard for determining when an employee is a "'bona fide executive.'" *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023). Current DOL regulations set out a three-part test for answering the "bona fide executive" question:

(1) does the employee receive a "predetermined and fixed salary" that does not vary with the amount of work they do in a given day or week (*i.e.* the "salary basis" test);

(2) is their salary above a specified amount? (*i.e.* the "salary level" test); *and*

(3) does the nature of their job responsibilities fall within the DOL's characterization of "executive," exempt work? (*i.e.*, the "duties" test).

Id. at 44–45. In *Helix*, the Court held a highly-compensated, ***daily rate*** employee wasn't paid on a salary basis, and therefore, qualified for overtime, even though his annual compensation totaled more than $200,000. *See id.* at 61–62. In dissent, Justice Kavanaugh questioned whether the DOL's regulations explicating the "bona fide executive" exemption would survive a challenge at all. *See id.* at 67–68 (Kavanaugh, J., dissenting) ("[I]t is questionable whether the Department's regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the [FLSA]. ***It is***

especially dubious for the regulations to focus on how an employee is paid (for example, by salary, wage, commission, or bonus) to determine whether the employee is a bona fide executive. . . . I am hard-pressed to understand why it would matter for assessing executive status whether an employee is paid by salary, wage, commission, bonus, or some combination thereof." (emphasis added)).

Enter the Fifth Circuit (which the Court had affirmed in *Helix*). In a separate case arising from the Western District of Texas, the circuit faced a direct challenge to the DOL's authority to "promulgat[e] ***any rule*** imposing a salary requirement" for the EAP exemption following *Loepr Bright*. *Mayfield v. United States Dep't of Lab.*, --- F.4th ----, 2024 WL 4142760, at *1 (5th Cir. Sept. 11, 2024). In 2019, the DOL updated the Minimum Salary Rule to raise the threshold to qualify for the EAP exemption from $455/week to $684/week.[1] *Id.* The *Mayfield* plaintiff (a small business owner) sued, arguing ***not*** that "DOL lacks the authority to raise the minimum salary, []or . . . that the particular salary level DOL chose [in 2019] is invalid"—but instead arguing the DOL "lacks, and has always lacked, the authority to define the EAP Exemption in terms of salary level." *Id.* at *2.

The circuit denied the challenge and rejected, *inter alia*[2], the plaintiff's *Loper Bright* argument. The circuit pointed out that the FLSA gives the DOL authority to "define" and "delimit" the terms of the EAP exemption. *Id.* at *4. Cracking open the dictionary, **the court read the minimum salary rule as consistent with the DOL's "statutorily conferred authority" in two ways: (1) the Rule "defines, in part, what it means to work in an executive, administrative, or professional capacity (namely, to earn at least a particular amount of money); *and* (2) The Rule "delimits" the scope of the Exemption by "set[ting] a limit on what is otherwise defined by the text of the Exemption." *Id.*** Further, the court took note that the DOL has "consistently issued minimum salary rules for 80 years"—including "immediately after the FLSA was passed"—and while the "specific dollar value required has varied, DOL's position that it has the authority to promulgate such a rule has been consistent." *Id.* at *6. Thus, the Fifth Circuit "join[ed] four of [its] sister circuits in holding that DOL has the statutory authority to promulgate the Minimum Salary Rule." *Id.* at *6.

To be sure, the circuit noted the DOL's power isn't without limits. For instance, "adding an additional characteristic" defining the exemption "is consistent with the power to define and delimit" so long as it bears a "rational relationship to the text and structure of the statute." *Id.* at *5. Characteristics unmoored from the statutory text or "differ[ing] so broadly in scope from the original that it effectively replaces it" would "raise serious questions." *Id.* Likewise, while "[u]sing salary as a proxy for EAP status is a permissible choice because . . . the link between the job duties identified and salary is strong," using a proxy characteristic won't "always be a permissible exercise of the power to define and delimit." *Id.* "If the proxy characteristic frequently yields different results than the characteristic Congress initially chose, then use of the proxy is not so much defining and delimiting the original statutory terms as replacing them." *Id.* But the circuit held the minimum salary rule didn't run afoul of these potential backstops.

The Fifth Circuit's ruling was hardly a foregone conclusion. It's no secret that appeals courts typically view agency action of almost any stripe with a jaundiced eye. What's more, the DOL's authority to promulgate a minimum salary rule was buffered by legal attacks in *Mayfield* from all sides, not just post-*Chevron* statutory analysis. The court, however, rebuffed every one of them.

If any employers awaited making classification or salary adjustments based on a hope that courts would throw out the DOL's salary basis test post-*Chevron*, employers should take immediate action and consult legal counsel to get into compliance.

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[1] DOL is currently considering another update that would raise the salary threshold to $1,059/week. *See id.* at *1.
[2] The circuit also rejected challenges based on the major questions and nondelegation doctrines.

Further, to the extent employers have administrative, executive, or professional employees currently classified as exempt but making less than $58,656.00, employers should engage counsel now to audit the classifications and plan for any reclassifications that will occur when the next increase takes effect on January 1, 2025.

GableGotwals's Labor and Employment Practice Group is experienced in conducting wage and hour audits and assisting clients in mitigating risk while complying with these changing legal obligations.

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