

## Day Rate Satisfies FLSA's Highly Compensated Employee Salary Requirement, Fifth Circuit Rules

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Paying an employee a day rate of \$1,000 per day satisfies the salary basis test for purposes of the overtime exemption applicable to a "highly compensated employee" (HCE) under the Fair Labor Standards Act (FLSA), the U.S. Court of Appeals for the Fifth Circuit has ruled (2-1). *Faludi v. U.S. Shale Solutions, L.L.C.*, No. 17-20808 (Aug. 21, 2019).

The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

### Background

Jeff Faludi, a former attorney, took a consulting job at U.S. Shale Solutions in 2014. The parties signed an agreement in which Faludi agreed to work for the company as an independent contractor at a rate of \$1,000 per day for every day he worked in Houston, and \$1,350 per day for every day he worked outside of Houston. It was undisputed that Faludi was paid at least \$1,000 for every week in which he performed work for U.S. Shale, and he satisfied the duties requirement for the exemption. His annual compensation was approximately \$260,000.

Faludi left U.S. Shale in March 2016. Shortly thereafter, he filed a lawsuit against the company for unpaid overtime wages under the FLSA. He alleged he was misclassified as an independent contractor. The company argued Faludi was properly classified, but even if he was an employee, he was exempt as an HCE. Finding issues of fact with respect to Faludi's status as an independent contractor, the district court nonetheless granted summary judgment to the company, finding Faludi was exempt, and dismissed the case.

### HCE Exemption

The HCE exemption provides that an employee is exempt from FLSA's overtime requirements if the worker:

1. Receives a total annual compensation of at least \$100,000; and
2. Customarily and regularly performs any one or more of the exempt duties of an executive, administrative, or professional employee.

The employee also must be compensated on a "salary basis" at a rate of not less than \$455 per week. An employee meets the "salary basis" requirement if he or she regularly receives each pay period, on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee's compensation.

Faludi argued the HCE exemption did not apply because he was not paid on a salary basis (he was paid at a daily rate and did not receive a guaranteed weekly salary). He also noted that, when he worked for less than one day and he submitted an invoice for less than the full \$1,000, he was paid less than the daily guarantee.

The district court agreed with the company that the HCE exemption applied to Faludi and granted summary to the company. Faludi appealed.

### Fifth Circuit Decision

The Fifth Circuit agreed with the district court and affirmed summary judgment to the company. The Court found the payment of \$1,000 if Faludi worked any amount of time during the week satisfied the required weekly guarantee under the HCE exemption. It held that Faludi's voluntary reduction of his guaranteed payment, by submitting reduced invoices, did not invalidate satisfaction of the salary basis test, because "to hold otherwise would permit employees to preclude reliance on the ... exemption by intentionally reducing their own pay."

Faludi also argued that the "reasonable relationship" test in 29 C.F.R. § 541.604(b) (between the



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guaranteed amount paid and the amount actually earned) applied. The Court held the reasonable relationship test did not apply to the HCE exemption.

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*Faludi* is an important decision to employers in Louisiana, Mississippi, and Texas who charge their customers a day rate for workers staffed on projects, such as in the oilfield services and similar sectors. Employers elsewhere should exercise caution. For example, the U.S. Court of Appeals for the Sixth Circuit (with jurisdiction over Michigan, Ohio, Kentucky, and Tennessee) has reached a conclusion opposite to the Fifth Circuit's.

Please contact a Jackson Lewis attorney with any questions about this decision or any other wage and hour development.

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