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Energy Industry and Wage and Hour Compliance Issues

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On February 22, 2023, the United States Supreme Court issued a ruling, in *Helix Energy Sols. Grp., Inc. v. Hewitt*, No. 21-984, that despite earning in excess of $200,000 annually, an oilfield rig worker was improperly paid and entitled to overtime. The case highlights the struggle of employers to comply with the requirements of the federal Fair Labor Standards Act, despite it having been in effect for 85 years. While this issue regularly appears across numerous industries, it can be of particular concern in the energy sector. Energy companies often pay their workers significant compensation which translates into large overtime liability, if the workers are not properly classified. For example, energy companies often pay their workers on a day rate or classify their regular workers as independent contractors in the mistaken belief that the workers' agreement to be paid in that manner means there is no exposure for overtime. Obviously, the cost savings can be tremendous. However, paying a day rate or labeling a worker as an independent contractor does not make her so. Increasingly both government agencies and private citizens are fighting back against these misclassifications and seeking their back taxes, benefits, and the like. Therefore, employers should use extreme caution when hiring workers solely as contractors.

In *Hewitt*, the employer argued that plaintiff was an exempt executive as he supervised the employees on the rig and qualified for the highly compensated exemption ("HCE") as he earned in excess of $100,000. The parties agreed Plaintiff was paid on a day rate. Plaintiff argued that the first prong of the HCE was not met as he was not paid on a salaried basis. The district court found the exemption applied and granted summary judgment to the employer. The Fifth Circuit reversed that decision finding that to establish the HCE an employer must still pay an employee on a salaried basis. The Supreme Court agreed with that analysis and remanded the case to the district court. The decision distinguished that a day rate is not the same as being paid on a salaried basis, as the worker's compensation was dependent on working on a specific day. This employer will now be obligated to pay this employee (and others similarly situated) overtime for workweeks in which the employees worked more than 40 hours per week.

Bottom line, energy companies cannot simply classify workers as independent contractors and avoid overtime liability. Instead, the amount of direction and control over a worker will determine whether the worker is an employee or a contractor. And, the DOL has a new proposed rule which, if implemented, will make it more difficult to classify a worker as a contractor. Specifically, if put into effect in 2023, the new rule would reclassify workers that are "economically dependent" on a company to be employees instead of contractors, therefore entitling them to more benefits and legal protections. Unlike the 2021 Independent Contractor Rule, this proposed rule considers economic

factors that accumulate in an investment of work, which can include scheduling, supervision, price-setting and the ability to work for other employers. It also considers whether the work is integral to the employer's business.

Wage and hour collective actions like the Hewitt case continue to dominate headlines and create significant problems for companies. The Department of Labor Wage and Hour Division's statistics show they recovered more than $152,000,000 in unpaid wages in fiscal year 2022 – the most up-to-date report available. These statistics are only about the DOL's enforcement efforts – they do not include private litigation settlements and judgments.

And, what cannot be told from those statistics is what percentage of the Department of Labor's cases involve misclassification of workers as independent contractors. Instead, the Department of Labor classifies cases as minimum wage and overtime. The issue of misclassification as an independent contractor would fit within the overtime category. And, more importantly, these statistics fail to show how much money private litigants obtained either through settlement or judgments in claims of misclassifications as contractors.

The Hewitt ruling, DOL enforcement efforts, and FLSA litigation should compel employers in the energy sector to re-evaluate their exemption classifications, methods of paying workers, and use of independent contractors.

Understanding and recognizing the issues involved is essential for any company to avoid significant overtime liability. Companies should audit their own payroll practices now to determine whether they are at risk for misclassification violations. These self-audits should be done in consultation with legal counsel to protect the audit and its results from discovery under the attorney/client privilege. Decisions to reclassify employees as contractors or as exempt should be viewed with skepticism.

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