

That's [Mis]Classified: What Employers Must Prove to Claim an FLSA Overtime Exemption

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By now, everyone has heard about [the Texas court putting the kibosh on the new salary exempt thresholds](#). In other exemption classification news, the United States Supreme Court is set to issue an opinion in early 2025 affecting the standard an employer must meet to prove an employee is exempt from overtime requirements under the Fair Labor Standards Act. The high court's opinion in *E.M.D. Sales v. Carrera* is expected to determine whether an employer must satisfy a preponderance of the evidence standard or a clear and convincing standard in determining an overtime exemption.

Facts and Procedural History

The plaintiffs, Faustino Sanchez Carrera, Jesus David Muro, and Magdaleno Gervacio, worked as commission-based sales representatives for E.M.D. Sales, Inc. and Elda Devarie (E.M.D.). They regularly worked over 40 hours per week and were not paid overtime, leading them to file a lawsuit against E.M.D. for unpaid overtime in the United States District Court in Maryland.

E.M.D. argued that the plaintiffs were outside sales employees, exempt from overtime pay. The district court, however, ruled in favor of the plaintiffs, finding that E.M.D. failed to prove by clear and convincing evidence that the plaintiffs qualified under the outside sales exemption. There was no dispute that the plaintiffs regularly worked outside the office, but the court determined the plaintiffs' primary duty was not to make sales such that the outside sales exemption applied. The court awarded unpaid overtime and liquidated damages (equal to the overtime pay award) but concluded that E.M.D. did not "willfully violate" the FLSA.

E.M.D. appealed to the United States Court of Appeals for the Fourth Circuit, arguing that the district court erred by applying the "clear and convincing evidence" standard, instead of the lower "preponderance of the evidence" standard. The Fourth Circuit affirmed the district court's decision, agreeing that E.M.D. had to prove the exemption by clear and convincing evidence.

E.M.D. then petitioned the U.S. Supreme Court, which granted certiorari on June 17, 2024. The Supreme Court heard oral arguments on November 5, 2024.

The FLSA and Overtime Exemptions

Generally, the FLSA requires that a nonexempt employee who works more than 40 hours per week (overtime) must receive overtime pay for those additional hours — 1.5 times the employee's regular pay rate. However, certain employees qualify for exemptions, whereby employers are not required to pay overtime. The FLSA provides an exemption from both [minimum wage](#) and [overtime pay](#) for employees employed as bona fide executive, administrative, professional and outside sales employees. For an exemption to apply, an employee's (1) specific job duties and (2) salary must meet the requirements of the Department of Labor's regulations.

In this case, E.M.D. classified the plaintiffs as exempt under the "outside sales" exemption. The salary requirements of the regulation do not apply to the outside sales exemption (in contrast to other exemptions), so whether the plaintiffs were exempt from overtime wages hinged on the "primary duty" test. As defined by the [Department of Labor](#), an outside sales employee's primary duty is to make sales for their employer, working mostly away from their employer's place of business. The district court and Fourth Circuit both applied a "clear and convincing" standard to this determination based on [long-standing Fourth Circuit precedent](#).

Why Does the Evidentiary Standard Matter?

E.M.D. argued that it should have had to prove its case by a preponderance of the evidence. The preponderance of the evidence standard requires that either the judge or jury believe that, in a misclassification case, an employer's version of the facts is more probable than not. This is the standard used in most civil cases.

The Maryland district court and the Fourth Circuit applied the clear and convincing standard, which requires a higher degree of certainty than the preponderance standard. The clear and convincing standard requires evidence that is highly and substantially more likely to be true than untrue; the factfinder must be convinced that the employer's contentions are highly probable. If the district court and the Fourth Circuit are right, it will be more difficult for employers to prove that employees are exempt from overtime.

As mentioned above, the Fourth Circuit has long-standing precedent of applying the clear and convincing standard. But the [Tenth Circuit](#) overturned a jury verdict based on the trial court's instruction that "[a]n employer seeking an exemption from the overtime requirements of the FLSA bears the burden of proving that the particular employee fits plainly and unmistakably within the terms of the claimed exemption." The Tenth Circuit explicitly stated that this instruction was "naturally read to require proof beyond a preponderance of the evidence." Other circuits, however, are less clear. The [District of Columbia Circuit](#) has not stated what the proper burden of proof is in this context, but did not disturb a trial court's application of the preponderance of the evidence standard on appeal. Other circuits tend to merely state that the employer bears the burden to establish an exemption without stating the burden of proof.

Takeaways

If SCOTUS affirms the Fourth Circuit's decision, the number of misclassification lawsuits will likely increase because it is difficult to prove anything to a jury or judge by clear and convincing evidence. On the other hand, if the Supreme Court adopts the preponderance of the evidence rule, employers have a better chance of proving an employee is properly classified as exempt. This may discourage

the filing of misclassification lawsuits but would certainly lead to more dismissals on summary judgment.

Either way, the Supreme Court is expected to issue its decision in early 2025 clarifying the overtime exemption standard. Employers are advised to consult with employment counsel regarding these evolving misclassification cases.

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