

US Supreme Court Clarifies Employer's Burden of Proof for Showing Exempt Status Under the FLSA (US)

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In an increasingly-rare unanimous decision, on January 15 the United States Supreme Court held in [E.M.D. Sales, Inc., et al. v. Carrera](#) that employers must prove that an employee is exempt from the minimum wage and overtime pay provisions of the Fair Labor Standard Act by only a preponderance of the evidence, and not by “clear and convincing” evidence.

The FLSA generally requires employers to pay a minimum wage and overtime compensation (at a rate equal to one-and-a-half times the regular rate of pay) to employees, but it also exempts many categories of employees from these requirements. These categories include employees who are paid on a salary basis that exceeds the FLSA's minimum salary requirements and who perform executive, professional, administrative, outside sales, and certain computer-related duties. When an employee alleges that their employer failed to pay them minimum wage or failed to pay them overtime compensation for hours worked in excess of 40 hours in a workweek in violation of the FLSA, if the employer's defense is that the employee was exempt from those provisions of the FLSA, the law places the burden on the employer to show that an exemption applies. Prior to the Court's ruling in *E.M.D. Sales*, there was a conflict in the federal appellate courts as to what level of proof the employer had to show to prove the exemption: “preponderance of the evidence” – meaning more likely than not – or the more stringent “clear and convincing evidence” standard.

In resolving the circuit split, the Court found the preponderance of the evidence standard applies because it is the “default standard of proof” in civil litigation and none of three bases for requiring a heightened standard of proof applied. The Court explained that the FLSA does not designate a different standard of proof; FLSA claims are not disputes as to which the United States Constitution requires a heightened standard (such as when constitutional claims involving the First Amendment or the Due Process Clause are at issue); and that FLSA cases are not an “uncommon” case in which the government seeks to impose unusual remedies more dramatic than money damages or other conventional relief, such as taking away a person's citizenship.

In reaching its decision, the Court relied heavily on the fact that the preponderance of evidence standard also applies in Title VII employment discrimination cases. And the Court rejected what it referred to as the employees' “policy-laden arguments” that employers should have to establish exempt status by clear and convincing evidence due to the public's interest in guaranteeing fair wages, the fact that FLSA rights are not waivable, and the fact that much of the evidence is under the

employer's control.

Justice Gorsuch and Justice Thomas issued a concurring opinion to note that on occasion, the default standard is a "heightened standard of proof," depending on the legal backdrop against which Congress passed the law. They concluded, however, that the Court's decision in *E.M.D. Sales* was appropriate and consistent with that understanding.

It is important to note that the Court's decision does not change the applicable exemptions under the FLSA. Instead, it only clarifies the evidentiary burden imposed on an employer to prove a FLSA exemption applies. Employers who classify employees as FLSA-exempt should take appropriate steps to ensure they would be able to demonstrate – by a preponderance of evidence – that they properly classified each employee who is not paid minimum wage or overtime compensation by ensuring that they have appropriate and sufficient records of their payment on a salary basis and of the nature of the duties the employee performs.

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National Law Review, Volume XV, Number 15

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