

## Day Rates May Satisfy Highly Compensated Exemption from FLSA Overtime

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The Fair Labor Standards Act generally requires employers to pay employees overtime compensation, unless an exception applies. For instance, an employer is exempt from the requirements of the FLSA where the employee satisfies the "highly compensated employee" exemption. Judicial interpretations of this exemption and others are shifting, as reflected by a recent Fifth Circuit case, *Faludi v. U.S. Shale Solutions, L.L.C.*, No. 17-20808 (2019).

In *Faludi*, plaintiff Jeff Faludi worked as a consultant for an oil and gas services company, defendant U.S. Shale Solutions, L.L.C. Under the employment agreement, U.S. Shale paid Faludi \$1,000 per day for every day he worked in Houston and \$1,350 per day for every day he worked outside of Houston. Also under the agreement, Faludi was required to submit invoices to U.S. Shale twice a month for payment.

After leaving U.S. Shale in 2016, Faludi sued for unpaid overtime that he alleged was owed under the FLSA. U.S. Shale argued that it was exempt from the overtime requirements of the FLSA, partly because Faludi qualified as a highly compensated employee. Under the regulations in effect at the time of Faludi's employment, this exemption generally applied to employees who made \$100,000 or more per year, customarily and regularly performed certain exempt duties, and received at least \$455 of compensation per week on a salary basis. The district court agreed with U.S. Shale that Faludi satisfied the highly compensated employee exemption and granted it summary judgment.

On appeal, the parties agreed that Faludi received the requisite annual compensation and that he performed the requisite duties. Thus, the sole issue was whether Faludi was compensated on a salary basis of not less than \$455 per week. Faludi argued that he was not paid on a "salary basis," defined in the regulation as "regularly receiv[ing] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed." Because Faludi's payment was calculated per day, rather than on a "weekly, or less frequent basis," Faludi contended that he could not be exempt.

The Fifth Circuit disagreed, holding that Faludi's daily rates satisfied the highly compensated employee exemption. The court reasoned that the regulation did not explicitly require compensation to be *calculated* at a weekly or less frequent basis, but only *received* on a weekly or less frequent basis. Because Faludi was paid \$1,000 per day, he received at least \$1,000 per week in any workweek. Thus, Faludi's twice-a-month receipt of at least \$1,000 per week fit the "salary basis" regulation, and, consequently in this case, the highly compensated exemption.

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This facet of the Fifth Circuit's holding is significant for both lawyers and employers alike. Of note to lawyers, it signals a shift in the Fifth Circuit's interpretation of FLSA regulations following *Encino Motorcars, LLC v. Navarro*, No. 16-1362 (2018). The Supreme Court in *Encino Motorcars* abolished the long-standing rule that FLSA exemptions be interpreted narrowly against the employer in favor of a "fair reading." Before *Faludi*, the Fifth Circuit distinguished statutory text from regulatory text, noting that pre-*Encino* cases interpreting FLSA regulations remained good law. See *Amaya v. Noypi Movers, L.L.C.*, No. 17-20635 (2018). But *Faludi*, making clear reference to *Encino Motorcars*, shows the Fifth Circuit engaging in a fair reading of regulatory text. Indeed, *Faludi*'s interpretation of the salary basis regulation contradicts that of the Sixth Circuit in *Hughes v. Gulf Interstate Field Services*, No. 17-3112 (2017), decided before *Encino*. *Faludi* thus demonstrates the limited precedential value of pre-*Encino* cases and invites novel argument for statutory and regulatory interpretation of FLSA exemptions.

*Faludi* also has practical impact to employers that utilize day rate pay schemes. *Faludi* stands for the proposition that a day rate of pay may, in some instances, satisfy the highly compensated employee exemption. But the court's holding examined here is limited to the interpretation of the regulation defining "salary basis," only one of many components of the exemption, and, of course, is limited to the facts of the case. Navigating the requirements of the FLSA is critical for employers, but *Faludi* illustrates the potential value in an employer's creative yet "fair reading" of the statute and regulations. Of course the risk of taking an untested position – as U.S. Shale did in *Faludi* – is that, if unsuccessful, liability for FLSA violations includes payment in damages of any unpaid overtime, reasonable attorney's fees and costs, and, in some cases, liquidated damages.