



## Supreme Court: No Raised Standard for Showing a Worker Is Exempt

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Employers do not need to show by clear and convincing evidence that a worker is exempt from the Fair Labor Standards Act's (FLSA's) overtime requirements, the U.S. Supreme Court ruled unanimously Jan. 15. The usual, lesser preponderance-of-the-evidence standard applies—a win for employers.

**“Practically, the court’s decision likely provides HR professionals and employers with a bit more leeway in determining whether or not certain employees are exempt,” said Jason Tremblay, an attorney with Saul Ewing in Chicago. “For example, if HR professionals are evaluating whether or not a group of employees are exempt, they may be in a more comfortable position to conclude such employees are exempt, now that there is clarity on the preponderance-of-the-evidence standard being applied.”**

Similarly, in the event a U.S. Department of Labor (DOL) audit is being conducted regarding whether a group of employees is exempt, this ruling will likely provide clarity and authority for the employer to use in response to any adverse DOL determination and subsequent litigation, he said.

The ruling also means that employers in the 4th U.S. Circuit Court of Appeals, which had erroneously applied a heightened clear-and-convincing standard, will have FLSA exemptions determined by the same standard most courts nationally use: preponderance of the evidence (i.e., 51%, or more likely than not), said Ted Hollis, an attorney with Quarles & Brady in Indianapolis.

Before the Supreme Court’s ruling, employers suing in the 4th Circuit—covering Maryland, North Carolina, South Carolina, Virginia, and West Virginia—had to clear a much higher bar of proof: a clear-and-convincing standard, which “is often referred to as requiring a high probability of truth,” explained Jonathan Clark, an attorney with Sheppard Mullin in Dallas.

During [oral arguments in the case](#), even justices who ordinarily are sympathetic to plaintiffs seemed skeptical that a higher standard applies, Rob Pritchard, an attorney with Littler in Pittsburgh, told SHRM after the arguments. The ruling is a win for employers in the sense that it “reaffirmed the common-sense majority view that FLSA exemptions should be subjected to the well-established preponderance-of-the-evidence standard,” he said.

The decision provides consistency nationwide and makes it easier to establish application of FLSA exemptions, said Keith Kopplin, an attorney with Ogletree Deakins in Milwaukee.

However, “[e]mployers should keep in mind that they still have the burden of proof to show that an employee qualifies as exempt from overtime,” Pritchard said. “While the Supreme Court held that the burden was subject to the well-established preponderance standard, it will still be incumbent on employers to demonstrate that the position meets the requirements of the exemption.”

Hollis agreed. “It will still be very important to be accurate in written job descriptions for exempt employees to make sure the job description matches what the employee is really doing in the job,” he said. “Doing so can help an employer’s chances to prevail on summary judgment, while failing to do so can hinder those chances.”

It’s also important to note that the Supreme Court’s ruling did not change the underlying law of the FLSA or the basic legal test for whether an employee is exempt from the statute’s overtime requirements, Clark said.

### Case Background

In this case (*E.M.D. Sales Inc. v. Carrera*), several sales representatives for E.M.D. Sales Inc., a food distribution company in the Washington, D.C., metropolitan area, filed a lawsuit claiming that the employer failed to pay them the overtime compensation they were due under the FLSA.

The company argued that the FLSA’s outside sales exemption applied, and thus the employees were not entitled to overtime.

Applying the clear-and-convincing-evidence standard, the district court determined that the employer did not satisfy the burden of showing that the outside sales exemption applied. A [4th Circuit panel agreed](#), and the en banc (all judges) 4th Circuit declined the employer’s petition for review.

“The 4th Circuit decision was an outlier,” Pritchard said. At least six other federal courts of appeal have applied the preponderance-of-the-evidence standard when employers are trying to show an exemption applies.

### Unanimous Opinion

In a unanimous opinion, Justice Brett Kavanaugh noted that the dispute concerned the standard of proof an employer must satisfy to show an employee is exempt.

“A more demanding standard, such as clear and convincing evidence, applies only when a statute or the Constitution requires a heightened standard or in certain other rare cases, such as when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual,” he wrote. “None of those exceptions applies to this case.”

There are a wide range of exempt employees, Kavanaugh explained in his writing for the court, and the burden is on the employer to show an exemption applies.

However, the 4th Circuit stood alone in requiring employers to prove the applicability of FLSA exemptions by clear and convincing evidence, the Supreme Court noted. “Every other Court of Appeals to address the issue has held that the preponderance standard applies,” it stated.

Under the preponderance standard, both parties “share the risk of error in roughly equal fashion,” the court said.

The Supreme Court has not used a heightened standard in civil matters, Kavanaugh emphasized in the opinion. He also noted that the Supreme Court has applied the preponderance standard in Title VII of the Civil Rights Act of 1964 cases.

The employees contended that the minimum wage and overtime pay rights conferred by the FLSA were not waivable and that therefore a heightened standard applied. “But the waivability (or lack thereof) of a right does not dictate the applicable standard of proof,” the court stated.

It sent the case back to the lower courts to determine whether the employees qualified as exempt outside salespeople under a preponderance standard. The employees claimed they would prevail under this standard.

### Takeaways

FLSA exemptions are still an affirmative defense, on which the employer bears the preponderance-of-the-evidence burden of proof, Hollis said. “Employers should, as always, be careful in classifying employees as exempt under the FLSA to make sure the employee qualifies for an exemption,” he noted.

Written job descriptions should be accurate and support application of an exemption, Hollis emphasized. Some states may have additional requirements beyond the FLSA for an employee to qualify as exempt from overtime or minimum wage.

This recent decision continues the Supreme Court’s string of favorable opinions addressing the job duties test for exempt status under the FLSA, including *Christopher v. SmithKline Beecham*, which upheld application of the outside sales exemption to pharmaceutical sales representatives, and *Encino Motorcars v. Navarro*, which rejected prior cases applying a narrow construction of FLSA exemptions in favor of a fair reading, Kopplin said.

Coupled with the [invalidation](#) of the DOL’s new overtime rule, “this trend will result in more employees being exempt from overtime under the FLSA,” he said. However, this trend may also result in additional legislative and enforcement efforts at the state and local level to increase the number of individuals who are eligible for overtime, Kopplin added.

Employers should be aware that “[t]he FLSA remains a favorite of employment plaintiffs’ counsel, and this decision won’t deter them,” Hollis said. “Make sure employees are classified correctly as exempt or nonexempt, and periodically audit those classifications to determine whether an employee’s job duties have changed in a way that might change the appropriateness of their exempt/nonexempt classification.”