

FLSA Exemptions and Burdens of Proof: *E.M.D. Sales, Inc. v. Carrera*

October 31, 2024

On November 5, 2024, the U.S. Supreme Court is scheduled to hear oral argument in *E.M.D. Sales, Inc. v. Carrera*, a case involving an employer's burden of proof when it asserts that an employee is exempt from the Fair Labor Standards Act's (FLSA) overtime pay requirement. In *Carrera*, the U.S. Court of Appeals for the Fourth Circuit determined that three sales representatives were not exempt outside salespeople because their employer failed to establish by clear and convincing evidence that they satisfied the exemption's criteria. The Fourth Circuit's use of the clear and convincing evidence standard is in conflict with a more lenient preponderance of the evidence standard applied by six other federal appellate courts. On appeal, the Supreme Court is to consider whether the burden of proof that must be satisfied to demonstrate the applicability of an FLSA exemption is clear and convincing evidence or preponderance of the evidence. If the Court were to determine that the latter standard should be used, it seems possible that more employees could be deemed exempt from the FLSA's overtime pay requirement.

The Fair Labor Standards Act

The FLSA establishes a federal minimum wage for most private and public sector employees and generally requires overtime compensation at a rate of one and one-half times an employee's regular hourly rate for hours worked beyond a forty-hour workweek. While broadly providing these employment protections, the FLSA also includes exemptions from its requirements for specified employees. For example, section 13(a) and (b) of the FLSA, codified at 29 U.S.C. § 213(a) and (b), identifies 34 exemptions from the Act's overtime pay requirement. These exemptions encompass a variety of employees, including bona fide executive, administrative, and professional employees, certain individuals employed by amusement or recreational establishments, and salespeople who customarily and regularly work away from their employer's place of business (so-called "outside salespeople").

An exemption from the FLSA's overtime pay requirement is asserted as an affirmative defense to an employee's claim for unpaid overtime compensation. While the Supreme Court has previously indicated that an employer has the burden of proving that the exemption applies, it has not addressed the evidentiary standard that should be used. In civil cases, the burden of proof to establish an element of a claim or an affirmative defense is generally met by a preponderance of the evidence. This standard involves evidence that is sufficient to establish that the fact at issue is more likely true than not true.

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The U.S. Courts of Appeals for the [Fifth](#), [Sixth](#), [Seventh](#), [Ninth](#), [Tenth](#), and [Eleventh](#) Circuits require employers to prove the applicability of an FLSA exemption by a preponderance of the evidence. In some instances, these courts have not only articulated the use of this standard, but have indicated that a more stringent standard should not be used. For example, in *Lederman v. Frontier Fire Protection, Inc.*, the Tenth Circuit reversed a jury decision awarding overtime pay on the grounds that the court improperly instructed the jury that the employer had to satisfy a heightened evidentiary standard to establish the applicability of an FLSA exemption. The jury in *Lederman* was told that the employer had to prove that the employee fit “plainly and unmistakably within the terms of the claimed exemption.” While the Tenth Circuit acknowledged its prior use of the phrase “plainly and unmistakably” in opinions involving the FLSA’s exemptions, it emphasized that the phrase refers to legal rather than factual issues:

[O]ur cases stand for the proposition that in considering an FLSA exemption, a court must find that the claimed exemption falls “plainly and unmistakably” within the terms of the statute—not for the proposition that an employer need prove such an exemption by anything more than a preponderance of the evidence. Once a court finds the employer is eligible to claim the exemption, the factfinder reviews the disputed facts to determine if the exemption is met.

The Tenth Circuit maintained that the preponderance of the evidence standard controls a jury’s evaluation of whether the facts establish an exemption from the FLSA. Accordingly, the court in *Lederman* concluded that the jury should have been instructed only to consider the evidence under that standard.

Unlike the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, the Fourth Circuit requires employers asserting an FLSA exemption as an affirmative defense to establish the exemption by clear and convincing evidence. This standard generally involves evidence that the fact at issue is highly probable or reasonably certain. It appears that a heightened evidentiary standard was first required in the Fourth Circuit in 1986. In *Clark v. J.M. Benson, Inc.*, a Fourth Circuit panel indicated that an employer asserting an FLSA exemption has the burden of establishing its requirements by “clear and affirmative evidence.” The court in *Clark* did not explain the use of this standard over a preponderance of the evidence standard. In 1993, the Fourth Circuit cited *Clark* in another [case](#) involving the FLSA’s exemption for executive, administrative, and professional employees, stating simply that “[e]mployers must prove by clear and convincing evidence that an employee qualifies for exemption.” The Fourth Circuit has continued to require clear and convincing evidence to establish the applicability of an FLSA exemption. In *Carerra*, the Fourth Circuit rejected E.M.D. Sales’ argument that the preponderance of the evidence standard should be applied, stating that it was “bound . . . by ‘longstanding Fourth Circuit precedent[.]’”

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On appeal to the Supreme Court, E.M.D. Sales [argues](#) that the Fourth Circuit’s clear and convincing evidence standard is “clearly incorrect” and encourages [forum shopping](#) by employees asserting FLSA claims against employers with any presence in the circuit. The food distribution company also contends that the preponderance of the evidence standard is more consistent with *Encino Motorcars, LLC v. Navarro*, the Supreme Court’s 2018 decision involving the FLSA’s exemption for salespeople primarily engaged in selling or servicing automobiles. Although the Court in *Encino Motorcars* did not expressly address the standard of proof, it rejected the principle that the FLSA’s exemptions should be construed narrowly to promote the statute’s remedial purpose. The Court indicated that the exemptions are entitled to nothing more than a “fair reading” because the FLSA “gives no ‘textual indication’ that its exemptions should be construed narrowly . . .” Applying the ordinary meanings for the terms used in the relevant exemption, the Court concluded that the exemption applied to Encino Motorcars’ service advisors and they were not entitled to overtime pay.

In *Encino Motorcars*, the Court also emphasized that the FLSA’s numerous exemptions “are as much a part of the FLSA’s purpose as the overtime-pay requirement,” and that the statute’s remedial purpose should not be pursued at all costs. In light of the Court’s repudiation of a narrow construction of the

exemptions, *E.M.D. Sales* contends that “[w]hatever basis existed for the clear and convincing evidence standard is gone” and the FLSA “nowhere mentions a burden of proof, much less a uniquely onerous one.”

The sales representatives in *Carrera* argue that the clear and convincing evidence standard is necessary to carry out the FLSA’s explicit public purpose “to correct and as rapidly as practicable to eliminate” unfair labor conditions. The employees also contend that the heightened standard is appropriate where one party is more susceptible to erroneous findings of fact—stating that “[a]n intermediate evidentiary standard—clear-and-convincing evidence—applies when the risk of harm flowing from an erroneous factual determination in one party’s favor is ‘more substantial than mere loss of money,’ [. . .] but less than total deprivation of individual liberty.” According to the employees, in an FLSA case, an erroneous finding in an employee’s favor will result only in the payment of unpaid compensation. In contrast, an erroneous finding in an employer’s favor has social costs, such as harming the public interest in eliminating substandard labor conditions. The employees argue that this kind of “asymmetrical risk” directs courts to require clear and convincing evidence “when the party better situated to bear the risk disputes a fact.”

The sales representatives further contend that requiring an employer to produce clear and convincing evidence better allocates risk between the parties. For example, they maintain that the heightened standard responds to the risk of factfinders making decisional errors based on an employer’s control of employment records and the possible manipulation of those records.

Considerations for Congress

Any decision in *E.M.D. Sales, Inc. v. Carrera* that resolves the circuit split and adopts a single standard for determining the applicability of an FLSA exemption would likely provide more uniformity for enforcing the statute and eliminate forum shopping that has resulted from the different standards being applied by lower courts. Although the judiciary typically identifies the degree of proof required to resolve factual disputes, should the Court adopt the preponderance of the evidence standard in *Carrera*, it seems possible that those who support applying a heightened standard in FLSA factual determinations could amend the FLSA to statutorily require it.

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