

**Is Your Day Rate Worker Actually a Salaried Employee?**  
**New Case Update: *Faludi v. US Shale Solutions, LLC***  
**By: Rachel Reese & Miranda Caballero**

**Summary**

In a recent 5<sup>th</sup> Circuit Court of Appeals decision, which governs the states of Texas, Louisiana and Mississippi, Jeff Faludi was found to be a salaried employee, subject to the highly compensated employee exemption under the Fair Labor Standards Act (“FLSA”), and therefore not entitled to overtime compensation even though he was employed under an independent contractor agreement that set forth a day rate compensation structure.<sup>1</sup>

**Analysis**

Under the FLSA, a company is required pay overtime compensation to its non-exempt employees, at a minimum of time and one-half of the employees’ regular rate of pay, for each hour of work over the standard 40-hour work week.<sup>2</sup> However, this overtime requirement does not apply if the employee meets the highly compensated employee exemption.<sup>3</sup> Under the highly compensated employee exemption an employee is exempt from the FLSA’s overtime requirements if he or she meets the following three elements: (1) receives an annual compensation of at least \$100,000;<sup>4</sup> (2) customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee;<sup>5</sup> and (3) is compensated on a salary basis at a rate of not less than \$455 per week.<sup>6</sup>

In the current case, Jeff Faludi (“Faludi”), a former practicing attorney, was employed by U.S. Shale Solutions, LLC (“U.S. Shale”) under an independent contractor agreement to act as their consultant.<sup>7</sup> Under the agreement, Faludi was to be paid \$1,000 for each day he worked in Houston and \$1,350 for days that he worked outside of Houston.<sup>8</sup> These day rates applied regardless of how many hours he worked in a day.<sup>9</sup> His annual compensation was approximately \$260,000.<sup>10</sup> After 16 months Faludi left and subsequently filed a lawsuit against U.S. Shale under the FLSA claiming that he was owed overtime pay. In its analysis, the court found that Faludi met elements 1 and 2 based upon the information discussed above.<sup>11</sup> The crux of the case turned on element 3, whether or not his day rate compensation of \$1,000 constituted him being compensated on a “salary basis.”<sup>12</sup>

<sup>1</sup> *Faludi v. U.S. Shale Solutions, L.L.C.*, 936 F.3d 215 (5<sup>th</sup> Cir. 2019).

<sup>2</sup> 29 U.S.C. § 778.

<sup>3</sup> 29 U.S.C. § 213(a)(1); 29 CFR § 541.601 (2020).

<sup>4</sup> 29 C.F.R. § 541.601(a)(This was the minimum at the time *Faludi* was decided. Beginning in January 2020, this minimum will increase to \$107,432).

<sup>5</sup> 29 CFR § 541.

<sup>6</sup> 29 C.F.R. § 541.601(b)(This was the minimum at the time *Faludi* was decided. Beginning in January 2020, this minimum will increase to \$684 per week).

<sup>7</sup> *Faludi*, at 217.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Faludi*, at 219.

<sup>12</sup> *Id.*

Under the FLSA, an employee is considered to be paid on a salary basis if the employee “regularly receives 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 the work performed.”<sup>13</sup> In response, Faludi made two arguments as to why his compensation did not satisfy this salary basis definition.<sup>14</sup> First, Faludi argued that his compensation was calculated daily and therefore did not satisfy the “weekly or less frequent basis” requirement.<sup>15</sup> U.S. Shale responded that Faludi was nonetheless compensated on a salary basis because his day rate guaranteed him \$1,000 for every day he worked putting him well above the \$455 weekly minimum.<sup>16</sup> Moreover, his independent contract agreement required Faludi to submit his invoices twice a month making it less frequent than a weekly basis.<sup>17</sup> Second, Faludi argued that he often did not bill U.S. Shale for his full day rate when he worked less than a day and that U.S. Shale approved and paid his prorated invoices.<sup>18</sup> Faludi argued that his compensation was therefore “subject to reduction because of variations in the ...quantity of the work performed” in contradiction to the salary basis definition.<sup>19</sup>

The Fifth Circuit Court of Appeals decided against Faludi on both arguments. First, the court looked to the actual text of the regulation which states that the employee “receive(s)” a predetermined amount of compensation on a weekly or less frequent basis.<sup>20</sup> The court declined to follow Faludi’s interpretation based upon when his salary was “calculated.”<sup>21</sup> Faludi was required to submit his invoice and received his compensation twice a month, meeting the weekly or less frequent requirement.<sup>22</sup> As to Faludi’s second argument, the court rejected it stating that “Faludi’s voluntary reductions to his own compensation did not render his compensation ‘subject to reduction’ under the regulation.”<sup>23</sup> The court went on to say that, “to hold otherwise would permit employees to preclude reliance on the FLSA’s employee exemption by intentionally reducing their own pay.”<sup>24</sup>

## **Conclusion**

This Fifth Circuit Court of Appeals decision establishes that the requirement to pay overtime to employees or independent contractors may not be based upon the compensation structure, but rather the total amount of compensation being paid. This is a positive outcome for employers in Texas, Louisiana and Mississippi, especially those that often hire day rate employees at exceptionally high rates like many operators in the oil and gas exploration and production industry. If you hire day rate workers and feel you may be wrongly overcompensating them with overtime or want to learn more about the topic discussed in this newsletter, do not hesitate to reach out to RR&A for more information at 832-831-2289 or rreese@rreeselaw.com.

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<sup>13</sup> *Faludi*, at 219 (citing 29 C.F.R. § 541.602(a)).

<sup>14</sup> *Faludi*, at 219.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, at 220.

<sup>18</sup> *Id.*

<sup>19</sup> *Faludi*, at 220 (citing 29 C.F.R. § 541.602(a)).

<sup>20</sup> *Fauldi*, at 220.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*