

Supreme Court unanimously rejects heightened burden for employer to prove overtime exemption under FLSA

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In overtime litigation under the Fair Labor Standards Act, the employer has the burden of proving that an employee is exempt. However, the degree of proof required was not decided until the Supreme Court spoke last week.

In [E.M.D. Sales v Faustino Sanchez Carrera](#), the Supreme Court ruled that employers must prove exemption from the overtime requirements of the FLSA by a “preponderance of the evidence” and not by the more demanding standard of “clear and convincing evidence.”

The issue in *E.M.D. Sales* was whether sales representatives of an international food products company met the outside sales exemption from FLSA overtime requirements. After a trial, a federal judge in Maryland applied the “clear and convincing evidence” standard and found that the employer had failed to show that the sales representatives were exempt. The employer appealed to the U.S. Court of Appeals for the [Fourth Circuit](#), arguing that the district court should have applied the less-stringent “preponderance of the evidence” standard. However, the Fourth Circuit [affirmed](#) the district court ruling. The U.S. Supreme Court agreed to hear the case last June.

Last week, in a unanimous opinion written by Justice Brett Kavanaugh, the Supreme Court resolved the issue in favor of the employer. Justice Kavanaugh noted that the Fourth Circuit stood alone in applying the “clear and convincing evidence” standard and that “every other court of appeals to address the issue has held that the preponderance standard applies.”

He also noted that when Congress enacted the FLSA in 1938, the “preponderance” standard was the default in American civil litigation, and remains so today. Although courts have deviated from the preponderance standard in certain circumstances, none of those circumstances applied here:

- If the statute establishes a proof standard, then the courts must follow it. However, the FLSA does not specify a standard of proof.
- If the U.S. Constitution requires a heightened standard, then that standard must be applied. However, this case did not implicate any constitutional rights that might require a heightened standard.

- Ordinarily, “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.”

Finally, Justice Kavanaugh found that the “employees’ policy-laden arguments” for a higher standard were unconvincing: “Their arguments that the FLSA protects the public interest in a fair economy does not necessitate a heightened standard. Other workplace protections like those under Title VII, also serve important public interests but are subject to a preponderance standard.” The sales representatives had also argued that a heightened standard should apply because minimum wage and overtime rights under the FLSA cannot be waived. But, according to Justice Kavanaugh, “the waivability (or lack thereof) of a right does not dictate the applicable standard of proof.”

Significantly, even the U.S. Department of Labor filed an *amicus curiae* (“friend of the court”) brief that recommended applying the “preponderance” standard.

Impact on FLSA collective action certifications?

The Supreme Court decision is likely to have implications beyond the narrow question of the standard of proof for overtime exemptions. In particular, the framework used by the Court to determine the evidentiary standard may have a significant impact on the standard to be used in determining “same or similar” in collective action certifications.

In determining whether to conditionally certify an FLSA collective action, most U.S. Circuit Courts of Appeal apply the New Jersey case of [*Lusardi v. Xerox Corp.*](#), which holds that a proposed collective action will be certified based on a “modest factual showing” that members of the collective are “similarly situated.” This standard is even less demanding than the “preponderance” standard.

Under the analysis applied by the Supreme Court in *E.M.D. Sales*, however, the preponderance standard would apply to the plaintiff’s burden of showing that members of the collective are “similarly situated.” *Lusardi* has already been rejected by the Fifth and Sixth Circuits, and that trend may accelerate after the *E.M.D. Sales* decision.

E.M.D. Sales may affect other FLSA issues, and we will bring them to you as they are litigated.



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