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DIVERSITY, EQUITY & INCLUSION HIGHLIGHT

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The Court rejected the company's argument that, if an employee was paid on a weekly (or less frequent) basis according to some predetermined rate that exceeded the required weekly amount, the salary basis was met.

Any employer who pays its employees via a day rate but does not pay them for overtime hours should carefully review its pay practices and exempt classifications.

Protective Measures Energy Companies Should Consider After Supreme Court Opens Door For Overtime Wage Lawsuits

Brooks A. Richardson and Chris S. Thrutchley, GableGotwals

The U.S. Supreme Court's decision in *Helix Energy Solutions Group, Inc. v. Hewitt* (No. 21-984) will likely impact companies within the oil and gas industry. The Court held that highly compensated supervisors who typically would be exempt from the overtime compensation provisions of the Fair Labor Standards Act ("FLSA") are entitled to time-and-a half pay for hours worked over 40 hours in a workweek because they receive a daily rate rather than a fixed annual salary.

Make no mistake: the next wave of wage and hour litigation is coming, and it will be costly. Many companies in the oil and gas industry pay their employees and subcontractors based on daily rates or have master service contracts with other companies that do so. The following are some of the steps that companies can take to minimize their risks and prepare:

1. Take stock of potential direct liability: If some employees are paid based on a day rate, re-examine the exempt / non-exempt categories immediately.

2. Consider insurance for potential defense costs: Most employment practice liability coverage excludes wage and hour liability. An endorsement for wage and hour coverage may be available for purchase, although such coverage usually only covers defense costs (not liability) and has a lower sublimit. However, some risk transfer may be better than no risk transfer.

3. Consider lowering potential litigation exposure, particularly to class actions: Employees may be required to sign a mutual agreement to arbitrate certain employment-related disputes (not all),which can include a class action waiver. Contractors may also be required to agree to arbitration and class action waivers. This will greatly reduce potential litigation exposure.

4. Shore up indirect litigation risks from third-party contractors:

- Revise master service agreements to include indemnification for wage and hour claims by a vendor's employees and subcontractors;
- Require vendors to enter into mutual arbitration agreements with their employees and subcontractors that would inure to the benefit of their customers; and
- Consider high-grading existing vendor contracts by spend and vendor type to identify higher risk exposures before approaching vendors about re-negotiating agreements to include the above provisions.

DC Circuit Delivers Valentine To Solar-Battery Hybrids

Eric Christensen and Brook Detterman, Beveridge & Diamond

On February 14, 2023, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion in *Solar Energy Industries Association v. Federal Energy Regulatory Commission* (___ F.4 ___, 2023 WL 1975079), providing a clear path for hybrid solar-battery and wind-battery projects to qualify for benefits under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The decision upholds the Federal Energy Regulatory Commission's "send-out" approach to PURPA's 80-megawatt ("MW") capacity limit, which measures the capacity of a generator based on the nameplate capacity of the total project to inject alternating current ("AC") power onto the grid, rather than the capacity of individual generating units that are components of a generating project.

PURPA provides substantial benefits to "qualifying small power production facilities" or "Qualifying Facilities," which are renewable energy generators with capacity of 80 MW or less. Chief among these benefits is PURPA's "must-offer" requirement, which guarantees that Qualifying Facilities can sell their power to incumbent utilities at the purchasing utility's "avoided cost" rate. The question addressed in the DC Circuit's decision was whether Broadview Solar, a solar-storage hybrid facility in Montana, is a "Qualifying Facility."

The Broadview Solaris facility has a 160-MW direct current ("DC") solar array, a 50-MW DC battery, and an inverter with 80 MW of AC output capacity. Initially, FERC ruled that Broadview is a Qualifying Facility based on its long-held view that PURPA's capacity limitation should be determined by how much power the facility can "send out" to the grid. Because Broadview's inverter allows no more than 80 MW of AC power to be delivered to the grid, the facility's "send out" capacity meets PURPA's 80 MW limit.