

CLIENT NEWS BRIEF

High Court Declines to Review Ruling on Cash in Lieu Payments

The United States Supreme Court has denied review of a Ninth Circuit Court of Appeals ruling that cash payments made to employees in lieu of benefits must be included as pay when calculating their overtime pay rate under the Fair Labor Standards Act (FLSA). On May 15, 2017, the Court denied the City of San Gabriel's petition for review of *Flores v. City of San Gabriel* (2016) 824 F.3d 890 (*Flores*), allowing the decision to remain legal precedent.

Flores provides narrow interpretations of exemptions to the FLSA when calculating an employee's "regular rate of pay" and a broad definition of what constitutes an employer's "willful" violation of the FLSA. This ruling also highlights the importance of employers carefully reviewing all payments made to employees to determine if the payments must be included in calculations of the employee's regular rate of pay for purposes of overtime.

In *Flores*, a group of police officers sued the City of San Gabriel (the City) for overtime pay they said they were owed under the FLSA. The City had a flexible benefit plan which allowed employees to forego medical benefits if they had alternative coverage. Employees who made this election received the unused portion of their benefit allotment as a cash payment added to their regular paycheck. The police officers argued that the City should have included these payments when calculating their overtime pay rate. The officers also argued that the City's violation of the FLSA was "willful" and thus triggered an extension of the two-year limit on back pay that could be recovered.

Under the FLSA, an employer must pay its employees overtime compensation of one and one-half times the "regular rate of pay" for any hours worked in excess of 40 hours in a seven-day work week. An employee's "regular rate of pay" must include all remuneration for employment paid to, or on behalf of, the employee, unless the payment is excluded as set forth in the FLSA. The FLSA allows employees to sue for unpaid wages owed to them within a two-year statute of limitations for claims unless an employer's violation of the law was "willful," in which case the statute of limitations is extended to three years.

The Ninth Circuit held that the City's cash-in-lieu of benefits payment may not be excluded as exemptions to the FLSA and therefore must be included in the calculations of the plaintiffs' "regular rate of pay," rejecting the City's argument that the cash-in-lieu benefits were exempt because the payments were not tied to hours worked or amount of services provided by the plaintiffs. The court reasoned that the City's interpretation contradicted a regulation implementing the FLSA which provides that a payment may not be excluded from regular rate of pay if it is generally understood as compensation for work, even though the payment is not directly tied to specific hours worked by an employee. The court further determined that the FLSA exemption did not apply because the unused benefits were paid directly to the employees and not a "trustee or third person."

The court also deemed the City's violation of the FLSA "willful," saying that the

June 2017
Number 28



Dulcinea A. Grantham
Partner and Co-Chair
Labor & Employment Group
Walnut Creek Office
dgrantham@lozanosmith.com



Jayme A. Duque
Associate
Monterey Office
jduque@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

June 2017
Number 28

City did not put forth any evidence of any actions it took to determine whether its treatment of cash-in-lieu of benefits payments complied with the FLSA, despite full awareness of its obligation to do so. (For more details on the decision, see [2016 Client News Brief No. 47.](#))

The court's narrow interpretation of the FLSA exceptions for calculating "regular rate of pay" could have a significant impact on the way agencies pay employees and provide benefits. This interpretation of the FLSA means that employers must be cautious when offering cash-in-lieu of benefits payment programs to employees because of the consequences such offers may have on overtime payment calculations.

The broad interpretation of what constitutes an employer's "willful" violation of the FLSA requires employers to be proactive when even the slightest possibility of violating the FLSA arises. The ruling emphasizes the importance of conducting and documenting regular review of payments made to employees and a determination of whether they must be included in the employee's regular rate of pay for purposes of overtime. Determining whether a specific payment fits into one of these statutory exclusions and is therefore properly excluded from the regular rate of pay involves a highly fact-specific analysis. To that end, case law, regulations and the Department of Labor provide extensive guidance regarding how specific forms of common arrangements are treated under these exclusions, and legal counsel should be consulted as needed during an analysis of whether a particular payment should be included in the regular rate of pay.

For more information on the Flores case or FLSA claims in general, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.