

# Cash-in-Lieu of Benefits May be Subject to Overtime

## Labor & Employment Law Update

By Kelly Haab-Tallitsch on August 25, 2016

Compensation to employees who opt out of health insurance or other benefits, known as a “cash-in-lieu” program, can be an attractive option for both employers looking to manage skyrocketing health care costs and employees looking for a little extra cash. But a recent ruling by the Ninth Circuit Court of Appeals highlights a significant risk to employers of such programs.

In *Flores v. City of San Gabriel*, 2016 WL 3090782 (June 2, 2016), the first case of its kind, the court held that under the Fair Labor Standards Act (FLSA) cash payments made to an employee in lieu of benefits must be included in the employee’s regular rate of pay for the purpose of calculating overtime.

The employer in *Flores*, the City of San Gabriel, sponsored a flexible benefit plan that provided employees with a certain monetary allowance to purchase health insurance and other benefits. Employees who opted out of some or all of the benefits received a cash payment for the amount of their remaining allowance. The employer did not include these cash-in-lieu of benefits payments in the employees’ regular rates of pay when it calculated overtime. A group of employees sued, alleging that the exclusion of the cash-in-lieu payments from overtime calculations was a violation of the Fair Labor Standards Act and they had been underpaid for the overtime hours they worked.

The court in *Flores* agreed, ruling that the employer’s cash-in-lieu-of benefits payments were “compensation for services” (similar to other types of bonuses) that must be included in the regular rate of pay for overtime purposes. The court also held that the employer’s actions were a *willful* violation because it did not do enough to determine if it was complying with the law. As a result the employer was liable for double the amount of unpaid overtime compensation for the three year period before the complaint was filed.

Cash-in-lieu of benefits programs were already dealt a blow in late 2015 when Treasury Department guidance indicated that most cash-in-lieu payments will be included in the determination of a health plan’s “affordability” for purposes of the Affordable Care Act’s (ACA) employer mandate.

### **What Does This Mean for Employers?**

The City of San Gabriel has asked the Ninth Circuit to reconsider its decision, but until and unless the decision is actually overturned, employers operating in the Ninth Circuit should review their cash-in-lieu of benefit programs and payroll practices to ensure compliance with the FLSA.

The court's ruling in *Flores* is a groundbreaking decision and it's too early to tell whether courts outside of the Ninth Circuit will rule similarly. Employers outside of the Ninth Circuit who offer (or are considering) cash payments to employees who opt out of health benefits should consult with counsel to assess the impact of legal developments in this area.

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