Bloomberg Tax

Tax Management
Compensation Planning Journal™

Post-*Flores v. City of San Gabriel*: What Other Benefits Should Employers Be Wary Of?

By MJ Asensio, Esq., and Greta E. Cowart, Esq.[*]

Flores v. City of San Gabriel altered the way employers consider opt-out payments to employees for not taking health insurance.[1] The U.S. Court of Appeals for the Ninth Circuit determined that opt-out payments were required to be included in the regular rate of pay for purposes of calculating overtime. The Supreme Court denied the *writ of certiorari* in May 2017, allowing the decision to stand.

The case concerned police officers who were allowed to opt out of purchasing medical benefits, assuming they provided proof of alternative medical coverage. Those employees would choose not to use funds from their flexible benefit plan to purchase medical coverage and would receive an opt-out payment as an addition to their paycheck. These payments were designated as ''cash in lieu'' payments.

In 2012, employees brought a lawsuit against the City of San Gabriel, alleging that their opt-out payments must be included in their regular rate of pay for purposes of calculating overtime under the Fair Labor Standards Act (FLSA), because the opt-out payments were compensation, not benefits. The City countered that the cash in lieu payments were excluded from the regular rate under FLSA §207(e)(2) because they were not compensation for an employee's hours of work. The City also argued that the payments were part of a ''bona fide'' benefit plan and were excluded from the regular rate under FLSA §207(e)(4). The U.S. District Court for the Central District of California found that the cash in lieu payments must be included in the calculation of the regular rate of pay for purposes of overtime.

On appeal, the Ninth Circuit held that the payments must be included in the regular rate of pay, rejecting the City's arguments. The Ninth Circuit said that payments not directly related to any particular hours worked but generally understood to be compensation for services are not excluded. Also, the payments were paid directly to the employees, so they were not excludable, the court said. Finally, the court said the benefit plan was not a ''bona fide'' benefits plan because 40% or more of the City's total contributions were paid directly to employees.

''REGULAR RATE OF PAY'' AS DEFINED BY THE FLSA

Under the FLSA, the ''regular rate'' is defined as all remuneration for employment paid to, or on behalf of, an employee subject to certain statutory exclusions.[2]

- §207(e)(1): Exempts sums and payments made as gifts for special occasions or as a reward for service, ''which are not measured by or dependent on the hours worked, production, or efficiency.''

[*] MJ Asensio is a nationally recognized labor relations practitioner at Baker & Hostetler LLP, in Columbus, Ohio, representing clients in the healthcare, aerospace, transportation, manufacturing, and energy industries. He brings 30 years of experience to the table handling negotiations, work stoppages, labor arbitration, employment ligation, executive compensation, and employment counseling. He is a frequent lecturer and commentator on labor matters who has been interviewed by numerous media publications.

Greta E. Cowart is a shareholder with Winstead PC in Dallas. She practices in and has 30 years of experience in the areas of employee benefits, tax, and executive and deferred compensation with a focus on health and welfare and retirement benefits. She is a frequent speaker and author on employee benefits. She was fortunate to be part of a very talented law school class that included Mike Asensio.

[1] 824 F.3d 890 (9th Cir. 2016), *cert. denied* 137 S. Ct. 2117 (2017).

[2] 29 C.F.R. §778.108; *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948) and *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1948).

ISSN 0747-8607

- §207(e)(2): Exempts from the ''regular rate of pay'' items such as vacation pay, reimbursable travel expenses, and ''other similar payments to an employee which are not made as compensation for his hours of employment.''
- §207(e)(4): Excludes from the regular rate of pay ''contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.''

POST-*FLORES* LITIGATION

District courts in the Ninth Circuit have consistently affirmed the *Flores* decision: *Kries v. City of San Diego*, No. 17-cv-1464-GPC-BGS, 2018 BL 255574 (S.D. Cal. July 18, 2018); *Acosta v. TBG Logistics LLC*, No. CV-16-02916-PHX-ROS, 2018 BL 228167 (D. Ariz. June 27, 2018); *Seguin v. County Of Tulare*, No. 1:16-cv-01262-DAD-SAB, 2018 BL 144795 (E.D. Cal. Apr. 23, 2018); *Acosta v. TLC Residential, Inc.*, No. C 15-02776 WHA, 2018 BL 87866 (N.D. Cal. Mar. 14, 2018); *Beidleman v. City of Modesto*, No. 1:16-cv-01100-DAD-SKO, 2018 BL 85566 (E.D. Cal. Mar. 12, 2018), *Alder v. County Of Yolo*, No. 16-cv-01682-VC, 2018 BL 20579 (E.D. Cal. Jan. 22, 2018); *Huyck v. Limitless, LLC*, No. 3:15-CV-01298-BR, 2016 BL 316668 (D. Or. Sept. 26, 2016); *Grewe v. Cobalt Mortg., Inc.*, No. C16-0577-JCC, 2016 BL 242406 (W.D. Wash. July 27, 2016).

The Third Circuit and a District Court in the First Circuit also followed the decision: *Gould v. First Student Mgmt., LLC*, No. 16-cv-359-PB, 2017 BL 303670 (D.N.H. Aug. 29, 2017); *Souryavong v. Lackawanna City*, 872 F.3d 122 (3d Cir. 2017).

Only three cases distinguished *Flores*, however, none of these decisions concerned the Ninth Circuit's ruling that cash in lieu of benefits payments are required to be included in the regular rate of pay calculation: *Souryavong v. Lackawanna City* (distinguished case facts regarding willfulness of FLSA violation with *Flores*); *Seguin v. City of Tulare* (''This arrangement, which the parties refer to as holidays in lieu of health insurance benefits. . ., was not addressed by the Ninth Circuit in *Flores*. . . .''); *Roces v. Reno Housing Authority*, 300 F. Supp. 3d 1172 (D. Nev. 2018) (''In *Flores*, for example, the Ninth Circuit affirmed the district court's findings of willfulness. . . . However, *Flores* is not similar to this case.'')

IMPLICATIONS OF *FLORES* FOR OTHER EMPLOYEE BENEFITS

Flores opened the door for employees seeking additional overtime pay to argue that other benefits should be included in the calculation of their ''regular rate.'' Areas of increasing concern for employers include: educational/tuition reimbursement, employer repayment of student loans, §401k contributions, and employee discounts.

Educational/Tuition Reimbursement

Many employers offer tuition reimbursement to their employees, helping them pay for higher education. Federal courts in Tennessee and California have addressed whether these benefits are excludable from the regular rate.

In *Adoma v. Univ. of Phoenix, Inc.*,[3] employees were provided 100% tuition reimbursement for themselves and 80% tuition reimbursement for their dependents if they took University of Phoenix classes. This reimbursement was not included in the regular rate for overtime calculation. The U.S. District Court for the Eastern District of California considered a 1994 Department of Labor opinion letter that opined that tuition reimbursement should be excluded from the regular rate. However, the district court concluded that the letter held little weight. The district court held that tuition payments for course work that primarily or exclusively benefits employers are excludable; however, if they primarily benefit or convenience the employee, they must be included in the regular rate of pay. Because the tuition reimbursement program was available for any classes taken through the University of Phoenix, the district court held that the tuition reimbursement payments should be included in the regular rate for purposes of calculating overtime.

In *White v. Publix Supermarkets*,[4] employees were given tuition reimbursement if they were engaged in course work that was related to their current job at Publix or of value in their potential career paths with Publix. Publix argued that these reimbursements were excludable from the regular rate of pay under FLSA §207(e)(2), citing a 1994 DOL Opinion Letter that concluded the same. The U.S. District Court for the Middle District of Tennessee agreed with Publix's conclusion that tuition reimbursements, depending on the nuances of how they are structured, may be excluded from the regular rate of pay under FLSA §207(e)(2). The district court believed that based on the requirements imposed by Publix, its tuition reimbursement was for the benefit of the employer, not the employee. In addition, the district court concluded that the tuition reimbursements were not ''wages'' as defined by the FLSA, because they contrasted from tuition reimbursements provided by a college to its

[3] 779 F. Supp. 2d 1126 (E.D. Cal. 2011).

[4] No. 3:14-cv-1189, 2015 BL 267679 (M.D. Tenn. Aug. 19, 2015).

ISSN 0747-8607

employees for classes taken on their premises, which are in fact included in ''wages.''

Although different rulings, the different fact patterns show a similar line of thinking. In *Adoma*, the university provided tuition reimbursement for any course work for the benefit of its employees. In *Publix*, a supermarket provided tuition reimbursement solely for course work that would further the employee's career at *Publix*. This appears to be a critical distinction for employers to keep in mind when designing and implementing tuition reimbursement benefit programs.

Employer Repayment of Student Loans

As the student debt burden piles higher and higher, some employers are offering a payroll integrated student loan repayment benefit for employees. Will this be deemed an exemption from regular rate of pay under the FLSA?

Prior to *Flores*, plaintiffs in *Feustel v. CareerStaff Unlimited* alleged that their employer offered a combination of hourly wage and non-taxable reimbursements for lodging, meals, mobile phone expenses, internet expenses, student loan expenses, and continuing education.[5] For those employees receiving the reimbursement, the employer lowered their hourly rate of pay from $53/hour to $20.40/hour. Employees argued that the reimbursements should be in the regular rate of pay for purposes of calculating overtime pay.

A similar case was filed on May 17, 2018, alleging that ex-employees of the employer were given up to $2000/year for loan re-payments; however, those reimbursements were not included in the regular rate of pay for purposes of calculating overtime pay. Some of the recent cases have been filed in states with state law mini-FLSA laws, some of which include penalties for failure to include certain pay stub disclosures alleging claims under both the FLSA and state statute.

§401(k) Plans

Contributions by employers to profit sharing plan trusts: should they be included in the calculation of the regular rate?

In *Russell v. Gov't Emps. Ins. Co.*, the employer (GEICO) provided an annual bonus to employees through a Profit Sharing Plan (PSP), which GEICO financed through trust contributions.[6] GEICO employees argued that GEICO's contributions should be included in the regular rate of pay. Section 207(e)(4) provides an exemption for contributions made by an employer to a trustee pursuant to a bona fide plan that benefits employees. The U.S. District Court for the Southern District of California held that profit sharing plans have to comply with 29 C.F.R. Part 549 and 29 C.F.R. §778.214 to be exempt under FLSA §207(e)(4); while benefit plans have to comply with 29 C.F.R. §778.214 and 29 C.F.R. §778.215 to be exempt under FLSA §207(e)(4). GEICO's PSP was deemed a benefit plan and complied with the relevant sections. Therefore, the district court agreed with GEICO that its trust contributions were excludable from the regular rate of pay.

Employee Discounts

Employee discount programs are a perk offered to employees to receive products and services in store at a discounted rate. Should the value of the merchandise discount be included when calculating the regular rate of pay?

In *Harris v. Best Buy Stores*, defendant Best Buy provided an employee discount program that was not included in the regular rate of pay.[7] The U.S. District Court for the Nothern District of California held that merchandise discount values are exempt from the regular rate of pay under §207(e)(1). The district court did not limit the section to only those discounts created for special occasions, but rather to discounts provided as gifts in general. The district court also applied the Department of Labor's interpretive guidance that did not regard merchandise discounts as wages. Finally, the district court declined to apply a line of cases that included meal, board and lodging, and tuition allowances to discounts on store merchandise for purposes of calculating the regular rate. The district court held that the employer did not have to include merchandise discounts in their regular rate of pay for overtime calculation.

The Wacky Benefits World in the Cannabis Industry

While the cannabis industry is relatively new, like the tech sector of the 80s and 90s, it has been highly creative in adopting non-traditional benefits for its employees. Examples include yoga, product discounts, daily meals, ''4:20 Fridays,'' paid time off, volunteer time off, and tuition reimbursements.

Although there is no case law regarding some of these unique benefits, any time employers consider

---

[5] No. 1:14-cv-264, 2015 BL 492222 (S.D. Ohio Mar. 26, 2015).

[6] No. 17-CV-672 JLS (WVG), 2018 BL 80423 (S.D. Cal. Mar. 8, 2018).

[7] No. 15-cv-00657-HSG, 2016 BL 248407 (N.D. Cal. Aug. 1, 2016).

ISSN 0747-8607

offering non-traditional benefits and perks special consideration should be given to whether the value of the benefit should be included when calculating the regular rate of pay for purposes of overtime.

EMPLOYER RAMIFICATIONS

With the competitive job market today, employers will have to continue offering new benefits to differentiate themselves in the eyes of prospective employees. However, the FLSA, infrequently modified since its enactment in 1929, may continue to provide hurdles for these employers when calculating regular rate of pay in the face of these new benefits.

Employers may want to review and revise their plans and policies in place regarding employee benefits to determine whether there are current issues or possible future issues regarding regular rate of pay for purposes of calculating overtime. Every new ''benefit'' that is proposed should be considered carefully.

ISSN 0747-8607