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## No SCOTUS Review: Benefits Opt-Out Payments Must Be Included in Overtime Calculation

By [Kate McGovern Tornone](#), Editor

The U.S. Supreme Court has left intact a 2016 appeals court ruling addressing how benefits opt-out payments interact with the [Fair Labor Standards Act \(FLSA\)](#).



In a case of first impression, the 9th U.S. Circuit Court of Appeals (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) ruled that when an employer pays an employee cash for opting out of its health insurance, that payment must be considered part of the employee's "regular rate of pay" under the FLSA. This means it must be used in calculating compensation for overtime hours.

The High Court declined to take up the case May 15.

### Background

The city of San Gabriel, California, provided a cash payment to employees who declined its health insurance. The "cash-in-lieu of benefits" payment was provided through workers' regular paychecks. The city, however, did not consider the payment part of employees' regular rate of pay and therefore did not include it when calculating their overtime rates.

A group of officers sued, alleging that the city's actions violated the FLSA. A district court agreed with the officers but found that because the violation was not willful, they only were entitled to recovery for the FLSA's 2-year statute of limitations period. It also determined that the



city's liability was limited because it qualified for a partial overtime exemption available to police and fire departments.

On appeal, the 9th Circuit agreed with the lower court. The FLSA defines “regular rate” as “all remuneration for employment paid to, or on behalf of, the employee,” except for a few exclusions. (For a full discussion of these exclusions, see [Do you have to include benefits opt-out payments when calculating overtime?](#))

## SCOTUS Petition

The city appealed to the Supreme Court and, while it made several legal arguments, it also relied heavily on the potential practical effects of the 9th Circuit's ruling. “Forcing employers to include cash-in-lieu payments in the overtime rate will drive employers—particularly cash-strapped public-sector employers facing substantial overtime obligations—to stop offering such benefit programs altogether,” the city warned.

Moreover, the 9th Circuit's ruling creates “enormous potential overtime liability for employers offering other types of benefits packages that may result in payouts to their employees,” it said. The ruling effectively punishes employers for offering such benefits, it argued.

In their reply, the officers disagreed. “[E]mployers will not automatically be crushed by soaring overtime costs if they continue to offer them,” they said, citing the relatively low damages they recovered in their own case—about \$2,200 to be split among 15 employees. “So the suggestion that employers will be forced to scrap similar plans for less employee friendly options is without support.”

## Employer Takeaway

The 9th Circuit agreed with the city that its ruling may cause employers to discontinue cash-in-lieu of benefits payments, but said its hands were tied. “[S]uch arguments are ‘more appropriately ... made to Congress or to the Department of Labor, rather than to the courts,’” it said. “The potential effect of our ruling on municipal decision-making does not give us license to alter the terms of the FLSA” (*Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016), *cert. denied*, No. 16-911 (2017)).

But until that happens, employers—at least those in the 9th Circuit—must comply with *Flores*. In their Supreme Court filings, the police officers suggested ways to do so that don't involve eliminating the payments altogether. According to them, employers could:

- Maintain their current plans and increase employees' regular rates;
- Adjust their plan to offset potential increased overtime costs;
- Offer employees the value of their health benefits in the form of contributions to qualifying deferred compensation or retirement plans; or
- Address the rate at which contractual overtime is paid through the collective bargaining process, if applicable.



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