Federal Bar Association
Labor and Employment Law Section
Spring 2018

The Labouring Oar

Message from the Chair

By Kathryn M. Knight

With the advent of spring, our Section has reached the mid-point of its work year. In late March, I attended the FBA's Mid-Year Meeting in Pentagon City, Virginia, and was honored to represent our Section at that important event. It was great to interact with other section leaders and to be inspired by National leadership. I'm proud to report to you that our Section, as one of the largest within the National organization, is often acknowledged as one of the most active, thanks to all of the hard work of our committees and Board members. I hope that all of you, our members, are taking full advantage of all that our Section has to offer!

For me, a highlight of the Mid-Year Meeting was the keynote address presented by licensed attorney and law firm coach Nora Riva Bergman. In her address, Ms. Bergman offered simple and easily-implemented tips for lawyers to, as she put it, regain control of their days, minimize unwanted interruptions, reduce stress, build a great team, and love the practice of law again. Who among us would not want these things? I, for one, asked for a copy of her book and have pledged to incorporate some new strategies in managing my work days.

Speaking of work, the Programming and CLE committee has much on the horizon. The Traveling CLE program is pursuing plans to be in Puerto Rico soon (watch your FBA emails for a firm date), with a half-day program addressing advanced topics (with speakers Phillip Kitzer from the employment side, Greg Peters from the labor side, and José Gonzalez from a local perspective). And there are several additional venues across the continental United States being considered for the Traveling CLE. Stay tuned for more details. In addition, the Committee continues to pursue potential collaborative CLEs with the ADR Section, the LGBT Section, and/or the Immigration Section. Finally, the Committee, with tremendous assistance from Section member Donna Currault, submitted a proposal for the Annual Meeting in New York, in collaboration with the Southern District of New York Chapter, entitled "#MeToo: Implementation and Administration of an Effective Anti-Harassment Policy." Obviously, this is a timely, hot-button topic, and we are hopeful our proposal will be selected. Keep your fingers crossed and make plans now to join us in New York, September 13-15, 2018.

The Publications Committee has also been hard at work, not only producing *The Labouring Oar*, our quarterly

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A Look at What's Inside

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newsletter, but also coordinating the monthly Circuit Updates and periodic contributions to *The Federal Lawyer*. I hope that each of you is taking advantage of these publications and the current information they provide—whether it's a recently-decided employment matter in the Circuit where you practice or an article on a hot topic of interest to you. These publications provide a great member benefit, which would not be possible without contributions from you, our Section members. In this newsletter, you will find interesting and informative articles by Heather Bredeson, Jessica Bradley, and Jeffrey Hord, and I offer thanks and appreciation to each of them for taking the time to share their expertise, experience, and insights with all of us.

Spread the word! The Section has implemented a grant program to facilitate and fund FBA and Labor and Employment Section membership for a recipient for a one-year period, for each of four classes of applicants: Government Attorney, Private Attorney, New Attorney (practicing five years or less), and Third Year Law Student. Our objectives in creating this program are to increase FBA and Section membership and to increase participation in our Section activities. New members provide fresh ideas and keep our Section vibrant and strong, so please let eligible friends and colleagues know about this program. Detailed requirements for applicants are available on the FBA website, or those interested may contact me or Joyce Kitchens by email.

As a Section, we strive to provide value to our members through programming, publications, and in-person meetings, and we would love to hear from you. Contact information for officers and Board members is available at the end of this Newsletter. Please contact us with ideas and suggestions for how we as a Section can better serve you, our members.■

A Membership Perk: Monthly Circuit Updates

Don't forget that your membership in the Labor and Employment Section gives you access to the Monthly Circuit Updates! Each month, summaries of all the major labor and employment decisions in each Circuit are provided to all members in an eNewsletter that is also available on the Section's webpage at www.fedbar.org/sections/labor-employment-law-section.aspx. These Updates are an invaluable resource that allows members to stay up-to-date on important developments in each Circuit. Take a deep dive into all the new cases within your Circuit each month, and/or peruse all of the developments around the country to stay abreast of the law for your clients. If you would like to volunteer as a contributor for the Circuit Update, please contact Caitlin Andersen (candersen@seatonlaw.com) or Jack Blum (jblum@paleyrothman.com) for more information.

"Me Too" – How Recent Legislation is Impacting the Way Employers Resolve Sexual Harassment Claims

By Jessica Bradley

For those who thought the "Me Too" movement would fade into the next news cycle, the growing list of powerful individuals accused of sexual misconduct and real-life consequences for businesses have shown that it has no signs of slowing down. Not to be left out of the national conversation are lawmakers in Washington, D.C. and state legislatures across the country. While sexual harassment is already illegal under state and federal law, lawmakers are now taking steps to supplement existing laws to address what appears to be a continuing trend of sexual harassment and discrimination in the workplace.

One approach lawmakers have taken is to focus on the use of non-disclosure agreements in the employment context. A non-disclosure agreement, or NDA, is a provision in a contract in which a person agrees not to discuss a topic or disclose information in exchange for compensation. NDAs are commonly used in the employment context for a variety of reasons, including the protection of trade secrets or to settle an employee's legal claims against their employer. Where discrimination allegations are involved, employers often insist upon an NDA as part of a settlement agreement. For example, the terms of the settlement agreement may require the employee keep confidential all negotiations and terms of the settlement or may prevent the employee from disclosing the existence of the settlement at all. Employees agreeing to these provisions may be obligated to pay the employer in the event of a breach of the agreement. Advocates of the "Me Too" movement have attacked the use of NDAs in sexual harassment settlement agreements, claiming the provisions prevent victims from going public with their accusations, thus enabling harassers and limiting transparency. Lawmakers at the state and federal level who seek to be an advocate for the rights of victims have responded to these criticisms with proposals that limit the use, value, or enforceability of such agreements.

Federal Action Affecting Sexual Harassment Claims.

On December 22, 2017, President Trump signed the Tax Cuts and Jobs Act ("TCJA") which contained an unlikely salute to the "Me Too" movement. A desire to promote transparency in sexual harassment cases is likely the impetus for Section 13307 of the bill, titled "Denial of Deduction for Settlements Subject to Nondisclosure Agreements Paid in Connection With Sexual Harassment or Sexual Abuse." The provision amended section 162 of the tax code, which generally allows businesses to deduct certain ordinary and necessary expenses paid or incurred during the year as part of running the business, to provide the following exclusion:[1]

> PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.
>
> —No deduction shall be allowed under this chapter for—
>
> (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
>
> (2) attorney's fees related to such a settlement or payment.

Additional language in the TCJA further eliminates the deduction for any penalties "at the direction of the government" to any individual. It is uncertain how broadly these provisions will be interpreted, but they may fundamentally change the way employers will approach sexual harassment claims. Moreover, the changes to the tax code are not likely to be the last piece of legislation in this area.

Indeed, additional legislation is currently sitting in the Ways and Means Committee, (HR 4495), that would deny deductions for "any amount paid or incurred on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) . . . originating from . . . a claim or accusation" of criminal sexual abuse or sexual harassment. The bill defines "sexual harassment" to include "unwelcome sexual advances, requests for sexual favors, or other verbal or physical harassment of a sexual nature." It also covers payments made "to require the non-disclosure of or otherwise prevent" claims of sexual misconduct. Overall, the act eliminates deductions for "any amount paid or incurred in connection with negotiating or settling" a harassment claim, whether or not an NDA is involved.

Another bill before the U.S. House of Representatives titled "Ending Secrecy About Workplace Sexual Harassment Act" (HR 4729) would require employers obligated to submit annual Employer Information Report EEO-1 to disclose sexual harassment settlements. Covered employers would be required to disclose on the EEO-1 "the number of settlements reached by the employer with an employee in the resolution of claims pertaining to discrimination on the basis of sex, including verbal and physical sexual harassment." While HR 4495 and 4729 appear to have stalled in the current session, they demonstrate the direction lawmakers are headed and what the future might hold at the federal level.[2]

Looming State Action.

State legislatures are also seizing upon this moment. In California, legislators have introduced "the Stand Together Against Non-Disclosure Act" ("S.B. 820"), which seeks to curtail the use of confidentiality provisions generally in sexual harassment settlement agreements. The bill would prohibit provisions in settlement agreements that restrict

any party from disclosing the facts relating to claims for sexual harassment, sexual assault and sex discrimination – unless a claimant specifically requests the inclusion of a such a provision. The bill has been referred to the Senate Judiciary Committee.

A bill pending before the Pennsylvania Senate (SB 999) focuses more specifically on NDAs in the sexual harassment context. The legislation, should the bill become law, voids contracts executed prior to the effective date, that: (1) prohibit disclosure of the name of anyone accused of sexual misconduct (including stalking); (2) suppress or attempt to suppress information relevant to a sexual harassment investigation; (3) impair or attempt to impair the ability of individuals to report claims; (4) attempt to waive a substantive or procedural right relating to a claim of sexual misconduct; or (5) require someone to expunge relevant information from documents. Similar bills have been introduced in Alaska, Arizona, Kansas, Kentucky, Louisiana, Maryland, Missouri, New York, New Jersey, Pennsylvania, South Carolina, Tennessee, Vermont, and Washington.[3]

Takeaway

The new and proposed legislation regarding NDAs changes the way employers fundamentally approach and evaluate settlement agreements. When preparing to settle a covered dispute, businesses will have to decide whether inclusion is worth losing the tax deduction, and what social or policy statements a business wants to make in the current climate. For example, an employer may see value in reforming its own policies as part of a broader public and/or employee relations initiative before new legislation is enacted. Employers will have to weigh the value of the non-disclosure against the risk that a provision may not be enforceable in the future, or a plaintiff may have the opportunity to void the provision under proposed state legislation and subsequent legislation targeting enforcement of these agreements.

Other considerations may include business performance in the applicable tax year and the type of claims brought in a particular case. Losing a deduction may mean less to a business that is already claiming a loss in that tax year. The changes to the tax code only impact settlement agreements related to sexual harassment and sexual abuse. However, alleged victims of sexual harassment often assert a variety of additional claims—such as gender, race, or familial status discrimination claims—against their employers in a single lawsuit. It remains unclear how employers may reconcile the new and proposed legislation in instances where a single employee has alleged multiple claims. Employers will have to consider if and how they may want to separate and address an employee's multiple claims.

Employers may also consider whether their settlement goals may be accomplished through the use of other contractual provisions. For example, a non-admissions clause formalizes an employer's position that a settlement is not an acknowledgement of guilt or liability. Similarly, non-disparagement clauses allow the employee to discuss the settlement agreement, but would prohibit the employee from disparaging the employer.

As demonstrated in the foregoing, the lasting consequences of the "Me Too" movement are here to stay. While the changes to the tax law are set, there are certainly some gray areas here, and employers should consult counsel to ensure they are aware of their options and the potential ramifications of any settlement agreement. Moreover, employers need to stay in tune with the ever-changing and jurisdiction specific legislation.

Jessica Bradley is a labor and employment attorney at Littler Mendelson, P.C. in Minneapolis, Minnesota, where she advises and represents companies in a variety of employment law matters. Ms. Bradley has experience handling and resolving a broad range of employment issues in state and federal courts, arbitration, and before state and federal agencies. Ms. Bradley is also a member of the Section's Standing Committee on Legislation and Congressional Relations. She may be reached at jbradley@littler.com.

Endnotes:

[1] TCJA also included multiple provisions that impact employers including: an employer tax credit for providing paid family and medical leave, repeal of the Affordable Care Act's (ACA) individual mandate, changes to the to the deduction and exclusion of several popular fringe benefits, and changes to the tax treatment of certain employer-provided fringe benefits, among others.

[2] For example, another proposed bill, the Ending Forced Arbitration of Sexual Harassment Act, would make it illegal for businesses to enforce arbitration agreements that workers must sign upon taking a job if the allegations involve either sexual harassment or gender discrimination under Title VII. Bills are pending in both the House and Senate (H.R. 4570, 4734, S. 2203).

[3] See HB405 & HB2020 (Arizona); HB 2696 (Kansas); HB 500 & BR 1705 (Kentucky); HB 578(Louisiana); HB 1596 & SB 1010 (Maryland); HB 2363 & 2552 (Missouri); AB 1242, SB 1526, SB 3581 (New Jersey); S6972 (New York); HB 4433 (South Carolina); HB 1984, HB 2573, HB 2613, SB2328, & 2450 (Tennessee); HB 707 (Vermont); SB 5996, 6068 & 6313 (Washington).

FBA Annual Meeting and Convention

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September 13–15, 2018

Federal Bar Association

As Use of Service Animals—and "Fake" Service Animals—Rises, Employers Faced with New Questions

By Jeffrey A. Hord

Over the past few years, the United States has seen a dramatic rise in the presence and use of service animals, therapy animals, and emotional-support animals for all manner of medical conditions. More and more people are registering their pets as service animals or support animals, allowing these owners to circumvent pet restrictions in housing, public transportation and aviation, restaurants, and the workplace. While episodes such as a major airline's refusal to allow a passenger to travel with her exotic bird as an "emotional-support animal" may grab all the headlines,[1] the proliferation of service and support animals in general has many employers asking whether they must now welcome these animals into the work environment.

Under Title III of the Americans with Disabilities Act (ADA), a "service" animal is defined as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability."[2] Note that these federal regulations recognize dogs (and in some cases, trained miniature horses) only;[3] other species of animals, "whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition."[4] In order to qualify as a service animal, the work or tasks performed by the dog must be "directly related to the individual's disability."[5]

However, as Loyola Law School Professor Sande Buhai points out, "federal rules governing service animals, ostensibly for the protection of people with disabilities, are confusing, uncoordinated, and often lack anti-abuse mechanisms."[6] For example, the definitions of Title III of the ADA—which regulates all areas of public access—do not necessarily apply to Title I, which regulates employment. Under the provisions of Title I, there is no definition of "service animal," meaning other species of animals, as well as comfort animals with no special training, may be viewed as a "reasonable accommodation."

Adding to the confusion is the fact that the Equal Employment Opportunity Commission ("EEOC"), which enforces the ADA, has not issued regulations on service and support animals, meaning employers lack specific rules to follow if and when employees ask to bring their service animals to work. That said, the EEOC's Interpretive Guidance has been broadly construed to require employers to allow service and support animals as accommodations.[7]

Emotional-support animals in particular pose a unique problem for employers. These animals provide a sense of safety, companionship, and comfort to those with psychiatric or emotional conditions; yet despite these therapeutic benefits, the animals are not individually trained to perform specific tasks for people with disabilities. It can often be difficult, however, to determine whether an animal is "merely" an emotional-support animal, or a psychiatric service animal trained to detect the onset of psychiatric episodes or perform tasks like reminding the employee to take medicine, providing safety checks, interrupting self-mutilation by persons with certain disorders, and so on. While emotional-support animals are technically not guaranteed under the ADA—meaning employers can legally deny employees' requests to accommodate such animals, unlike a blind person's seeing-eye dog—psychiatric service animals **are** covered.[8]

It can often be impossible for employers to truly know whether an employee is indeed suffering from non-physical and subjective impairments like depression, anxiety, PTSD, and so on. Emotional-support animals pose an additional problem, in that the employer may have no way of knowing whether the animal has undergone rigorous training to become a service animal, or whether the animal could misbehave at work, posing a distraction...or even a danger.[9] Indeed, so many pet owners have tried to pass off their pet as an "emotional-support animal" without A) having a real impairment, or B) putting their pet through a service animal training program, that more than 20 states have passed some sort of legislation outlawing the use of fraudulent service animals.[10]

A request from an employee to bring a service or support animal to work can be processed and considered like any other request for reasonable accommodation,[11] meaning the employer may request reasonable documentation that the accommodation is needed because of the employee's disability. The employer also has the right to require that the animal be trained to be in a workplace and capable of functioning appropriately in the work environment.[12]

That being said, employers may wish to exercise caution when asking employees to provide information in support of their accommodation request unless there is some indication that the animal's presence will create a problem. As a general rule, employers should not be involved in an employee's personal medical decisions; the employer should avoid appearing as though it is insisting (or even recommending) that the employee address his or her medical needs in a different way.[13] Employers should also avoid appearing skeptical of the benefits of support animals, even if the proliferation of therapy animals in particular "has raced far ahead of scientific evidence" regarding the efficacy of animal-assisted intervention.[14]

Furthermore, many HR professionals may not be qualified to assess whether the documentation provided by the employee is sufficient. The appropriate documentation may not always be from a health care professional; in the case of an emotional-support or therapy animal, it may come from the provider of a rehabilitation service or a counseling center, or in the case of a service animal, it might be from whoever trained the animal. Also, while requiring proof of rabies vaccination for a service dog may seem like common sense, how is the employer to know what sort of vaccinations to require—and which records are necessary—to ensure the health and safety of more exotic and unusual service animals, like peacocks, horses, or monkeys?

While many, many Americans (including the author of this article!) are unabashed animal lovers, dogs and other animals create a host of potential problems in the workplace, including safety issues, health and allergy concerns, noise pollution and disruptions, space limitations, and more. Employers must balance these considerations with other moral and practical concerns, and must adhere to their legal obligations under the ADA while also asserting their rights when appropriate. Companies are advised to working closely with their employment counsel—preferably one who is familiar with the unique issues posed by service animal accommodation laws—to ensure that their animals-in-the-workplace policies are compliant, effective, and enforceable.■

Jeffrey Hord is a senior associate at Paley Rothman in Bethesda, Maryland, where he is a member of the firm's Litigation and Employment Law practice groups. To date, he has resisted the temptation to register his beloved Australian Shepherd as his "emotional support animal."

Endnotes:

[1]*See, e.g.*, Sweeney, Don, "United bars woman's emotional support peacock from flight," *Chicago Tribune*, January 31, 2018 (available at http://www.chicagotribune.com/business/ct-biz-united-emotional-support-peacock-20180131-story.html).

[2]28 CFR § 36.104.

[3]American Humane estimates there are now more than 20,000 service dogs working in the United States.

[4]SHRM.org, "Disability Accomodations: Must employers allow service animals in the workplace?" HR Q&As, Dec. 3, 2012 (available at https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disabilityaccomodations-mustemployersallowserviceanimalsintheworkplace.aspx) © 2012 Society for Human Resource Management.

[5]28 CFR § 36.104.

[6]Buhai, Sande, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 771, 772 (2016).

[7]*See Service Animals and Emotional Support Animals, ADA Nat'l Network*, 2014 (available at https://adata.org/publication/service-animals-booklet/) .

[8]28 CFR § 36.104

[9]*See* Buhai, supra note 6, at 794-95.

[10]*See* Michigan State University Animal Legal and Historical Center, "Fraudulent Service Dogs," 2018 (available at https://www.animallaw.info/content/fraudulent-service-dogs).

[11]*See* "Service Animals in the Workplace," from the Job Accommodation Network's (JAN) *Accommodation and Compliance Series*, published by the U.S. Department of Labor's Office of Disability Employment Policy (2017).

[12]*Id.* at 5; *see also Arndt v. Ford Motor Co.*, 247 F.Supp.3d 832 (E.D.Mich. 2017) (in awarding summary judgment to employer, district court found that plaintiff could not show that reasonable accommodation was possible, since he had not submitted evidence that his service dog was trained to handle the "unusual workplace" conditions of the manufacturing plant environment).

[13]*Id.* at 4.

[14]Brulliard, Karin, "Therapy animals are everywhere. Proof that they help is not." *The Washington Post*, July 2, 2017 (available at https://www.washingtonpost.com/news/animalia/wp/2017/07/02/therapy-animals-are-everywhere-proof-that-they-help-is-not/?utm_term=.5e1b105ef3b6).

Call For Articles

The Labor and Employment Section is seeking articles suitable for publication in forthcoming editions of its quarterly newsletter, The Labouring Oar. Articles can address any timely topic of importance to the labor and employment practitioner and should provide balanced coverage of the topic. Suggested length is between 1,300 and 2,500 words. Citations should be formatted as endnotes. Additional guidelines for authors are available here: http://www.fedbar.org/resources_1/copy%20of%20accepting-articles-for-publication/writers-guidelines.aspx.

The next submission deadline is June 29, 2018.

Before submitting an article for publication, please contact Caitlin Andersen (candersen@seatonlaw.com) or Jack Blum (jblum@paleyrothman.com).

Offering Cash Payments in Lieu of Benefits May Violate the FLSA

By Heather Bredeson

Employers that offer cash in lieu of benefits may need to reconsider their policies under the reasoning set forth in a recent Ninth Circuit decision interpreting the Fair Labor Standards Act. In *Flores v. City of San Gabriel*, the Ninth Circuit reviewed whether payments made to employees for opting out of health insurance under a flexible benefits plan were required to be included in the employees' regular rate of pay for calculation of overtime pay under the Fair Labor Standards Act (the "FLSA"). The Ninth Circuit held than an employer must include cash payments made in lieu of benefits when calculating an employee's overtime pay. The Supreme Court denied the City of San Gabriel's petition for *certiorari* on May 15, 2017.[1]

Under the FLSA, employees are required to be paid one and one-half times their regular rate of payment for any hours worked in excess of forty hours in a seven-day work week. The "regular rate" is defined as "all remuneration for employment paid to, or on behalf of, the employee," subject to a number of exclusions set forth in the Act.[2]

The *Flores* plaintiffs were City of San Gabriel ("City") police officers covered by a flexible benefits/cafeteria plan where the employees each received a designated amount of money to purchase medical, vision, and dental benefits. All employees were required to purchase vision and dental benefits using these funds. However, employees could choose not to purchase medical benefits upon proof that the employee had alternative medical coverage. In that case, the employee could receive the unused portion of the designated funds as a cash payment added to their regular paycheck. The payment for unused medical insurance funds was listed as a separate line item on the employee's paycheck and was subject to applicable taxes. In the three years leading up to the litigation, an employee who elected not to purchase medical insurance received between $1,036.75 and $1,304.95 per month as a cash-in-lieu of medical benefits payment. During the same period, the City was paying between forty-two and forty-six percent of total Flexible Benefits Plan contributions to employees for unused benefits. These cash-in-lieu of benefits payments were excluded from the City's calculation of the officers' regular rate of pay for the purposes of calculating the officers' overtime rates.[3]

In 2012, the officers brought suit against the City, alleging the cash-in-lieu payments were compensation, not benefits, and had to be included in their regular rate of pay for the calculation of overtime under the FLSA. The officers alleged that the City's exclusion of these payments from their overtime rate was a willful violation of the FLSA, which would entitle them to liquidated damages in addition to three years of back pay. The City argued that the cash-in-lieu payments were properly excluded from the regular rate under section 207(e)(2) of the FLSA because it was not compensation for an employee's hours of work. The City also argued that the payments were made pursuant to a bona fide plan and excluded from the regular rate of pay calculation under the FLSA section 207(e)(4).[4] Section 207(e)(2) excludes payments such as vacation pay, sick pay, reimbursable travel expenses, and "other similar payments to an employee which are not made as compensation for his hours of employment" from the regular rate of payment.[5] Section 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."[6]

The District Court granted summary judgment to the plaintiffs, finding that the cash-in-lieu payments had to be included in the calculation of the regular rate of pay for purposes of overtime. Conversely, the District Court denied plaintiffs' summary judgment motion on the issue of willful FLSA violations and liquidated damages and entered summary judgment in favor of the City.[7]

On appeal, the Ninth Circuit held that the City's flexible benefits plan was not a "*bona fide* plan" within the meaning of the FLSA, so the City was not allowed to exclude these payments from the calculation of the officers' regular rate of pay for overtime purposes. The City's opt-out plan was not a "*bona fide*" plan because the payments made to the employees were more than "incidental" so as to be considered a *bona fide* benefits plan under the FLSA regulations. The Court rejected the City's section 207(e)(2) argument and held that while the payments were not attributable to any particular hours worked, the payments were generally understood to be compensation for services, and thus, are not excluded from the "regular rate."[8]

The City's section 207(e)(4) argument was rejected as well. The Court held that the cash-in-lieu payments could not be excluded as a payment made irrevocably to a third party pursuant to a *bona fide* plan for health insurance, retirement, or similar benefits since the payments were made directly to the employees. Additionally, the Ninth Circuit reversed the District Court's ruling concerning liquidated damages and whether the City's violation of the FLSA was willful. The Court found that the City willfully violated the FLSA and failed to demonstrate it had attempted to comply with the Act in good faith.[9]

What does *Flores* mean for employers?

The issue of whether cash-in-lieu of benefits payments may be excluded under section 207(e)(2) for the calculation of non-exempt employees' regular rate of pay was a question of first impression in the Ninth Circuit and other circuits. The Supreme Court denied review without commenting on the Ninth Circuit's analysis. The *Flores* holding is binding within the Ninth Circuit, but other courts analyzing the issue will likely look to the Ninth Circuit's reasoning. Employers across the country should be aware of the implications of the *Flores* decision. A few district courts have issued rulings in accordance with the *Flores* decision.[10] The Tenth Circuit reviewed a related issue in *Sharp v. CGG Land* shortly after *Flores*.

The plaintiffs in Sharp alleged that the employer violated the FLSA by not including in their regular rates of pay reimbursement payments for $35 of daily meal expenses while working away from home. The Tenth Circuit held that such payments were exempt from the regular rate as travel expenses incurred in furtherance of the employer's interest.[11]

After *Flores*, employers must include cash-in-lieu of benefits payments when calculating regular rates of pay and overtime rates. Any payments made directly to an employee for performing work must be included when calculating regular rates of pay or overtime rates, regardless of whether the payment is tied to particular hours of work. Some employers may choose to eliminate the "cash-in-lieu of benefits" option as a financial and risk control measure. The *Flores* case did not address whether other methods of reimbursement for opting out of insurance (such as through a contribution to a retirement plan) would have to be included in the calculation of regular and overtime rates.

Additionally, a benefits plan which pays more than "incidental" cash payments to employees is not a *bona fide* benefits plan under the FLSA. In *Flores*, the Court held that in order to exclude payments made to a benefits plan from the calculation of the regular rate, the benefits plan had to be a *bona fide* plan under the FLSA. The Court found that the City's cash-in-lieu of benefits payments were not "incidental" because they constituted over forty percent of its overall payments under its plan. The Court did not provide firm guidelines as to what percentage of payments would be considered "incidental."

Employers must take affirmative action to assure compliance with the FLSA in order to avoid a finding of willful violation. Under section 255(a), the statute's two-year statute of limitations may be extended to three years if an employer's violation is "willful." The *Flores* court held that an employer's violation of the FLSA is "willful" when it is "on notice of its FLSA requirements, yet [takes] no affirmative action to assure compliance with them." The Court ruled the City's conduct was willful because it put forth no evidence of any actions it took to determine whether its treatment of cash-in-lieu of benefits payments complied with the FLSA.[12]

An employer must also show it took necessary steps to ensure compliance with the FLSA to establish the defense of good faith to avoid liquidated damages. Under section 216(b), an employer that violates the FLSA is liable for liquidated damages totaling the amount of any unpaid wages or overtime compensation unless the employer shows it acted in good faith and had reasonable grounds to believe its actions did not violate the FLSA. In *Flores*, the City presented evidence that its human resources department designed the opt-out payments as excludable, but this was not sufficient because the City did not demonstrate it investigated whether this exclusion was proper.

In light of the Supreme Court's denial of review of the *Flores* decision, employers should assess their plans to determine whether their plan design may complicate calculating the regular rate of pay for overtime for non-exempt employees. A benefits plan for purposes of the Internal Revenue Code or ERISA may not necessarily be treated as a bona fide plan under the FLSA. Employers should examine polices to determine whether they are in compliance with the FLSA so that they can avoid liability for willful violations and liquidated damages.

Heather Bredeson is an associate attorney with Seaton, Peters, & Revnew in Minneapolis, Minnesota, where she represents employers in a wide range of labor and employment law issues. She can be reached at hbredeson@seatonlaw.com.

Endnotes:

[1]*Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016), cert denied sub nom. *City of San Gabriel v. Flores,* 137 S. Ct. 2117 (2017).

[2]29 U.S.C.A. § 207(e) (West 2018).

[3]*Flores*, 824 F.3d at 896–897, 901.

[4]*Id.*

[5]29 U.S.C.A. § 207(e)(2).

[6]29 U.S.C.A. § 207(e)(4).

[7]*Flores*, 824 F.3d at 897.

[8]*Id.* at 898–903.

[9]*Id*. at 901, 907–908.

[10]*See, e.g., Beidleman v. City of Modesto*, No. 1:16-cv-01100, 2018 WL 1305713, at *2 (E.D. Cal. Mar. 13, 2018) (no dispute that defendant is liable for overtime payments under *Flores*, finding the payment of cash in lieu of health insurance benefits must be included in the calculation of the regular rate of pay for overtime payments under the FLSA); *Amador v. City of Ceres*, No. 1:17-cv-00552, 2017 WL 3009186, at *2–3 (E.D. Cal. July 14, 2017) (declining to dismiss the complaint "in light of defendant's ultimate burden to establish that its . . . compensation policy must be exempted from plaintiffs' regular rate of pay."); *Slezack v. City of Palo Alto,* No. 16-CV-03224, 2017 WL 2688224, at *2 (N.D. Cal. June 22, 2017) (finding no dispute that the City of Palo Alto is liable for overtime payments because Flores established that cash in lieu of health insurance benefits must be calculated as part of the regular rate of pay for overtime payments under FLSA).

[11]*Sharp v. CGG Land (U.S.) Inc.*, 840 F.3d 1211 (10th Cir. 2016).

[12]*Flores*, 824 F.3d at 906–907.

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