

No. 16-911

IN THE
Supreme Court of the United States

CITY OF SAN GABRIEL ,

Petitioner ,

v.

DANNY FLORES, ET AL .,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief of Amici Curiae International Municipal
Lawyers Association, International Public
Management Association for Human Resources,
National Public Employer Labor Relations
Association, National School Boards Association,
California State Association of Counties, League of
California Cities, and California Special Districts
Association in Support of Petitioner

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their residents, and to enhancing the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, composed of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California Special Districts Association The California Special Districts Association (CSDA) is a California nonprofit corporation consisting of approximately 1,000 special districts throughout the state. These special districts provide a wide variety of public services to both suburban and rural communities, including water supply, treatment, and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling, and disposal; library; cemetery; mosquito, and vector control; road construction and maintenance; pest control and animal control services; and harbor and

“made as compensation for . . . hours of employment,”
id. § 207(e)(2), to mean “regardless of whether
[payments are] specifically tied to . . . hours” of
employment. Pet. App. 19a (emp basis added). This
led the court to conclude that cash -in-lieu payments
must be included when calculating the regular rate of
pay. Pet. App. 21a. It went on to declare that because
many employees had decided to avail themselves of
the City’s generous offer of cash in lieu of benefits,

make cash-in-

circumstances and motivations that prompted the development of flexible benefit plans offering cash -in-lieu payments. Amici then illustrate the catch -22 in which the Ninth Circuit has placed many public employers. Maintaining their existing cash -in-lieu plans will result in substantial additional liabilities as well as inequitable (and irrational) pay differentials. Not only will employers be forced to pay increased overtime rates, but those rates will vary among employees based solely on whether they have an alternative source of medical coverage. And the

of financial credit to employees with alternative coverage. This was viewed as a way to provide them with all or part of the value of the health benefit received by their colleagues who enroll in employer - provided coverage.

Employers have structured these cash -in-lieu plans in a variety of ways. Some employers, like Petitioner,

benefits survey covering ninety -one cities, counties, and special districts revealed that seventy percent of the surveyed organizations offered cash in lieu of medical benefits. See Keenan & Associates, 2014 Employee Benefits Survey 3 -5, 17 (2014); see also Pet. at 23 n.4 (listing numerous pending lawsuits filed

will be the most heavily penalized —the higher the cash-in-lieu payment, the higher the overtime rates. Likewise, jurisdictions with large numbers of employees forced to work significant amounts of overtime—i.e., jurisdictions already confronting staffing shortages or a high demand for first responders due to wildfires, mudslides, or other emergencies—will see substantially increased costs.

These increased costs go beyond higher overtime rates. Depending on how employers have structured their labor agreements, changes in the regular rate of pay could also impact pension contributions, wage continuation agreements for injured workers, the value of paid time off that is cashed out at resignation/retirement, or other similar programs.

Moreover, insofar as employers offer cash -in-lieu payments as part of “a bona fide plan for providing . . . health insurance or similar benefits for employees,” 29 U.S.C. § 207(e)(4), including such payments in the regular rate will result in unequal overtime compensation, with employees receiving different pay for the same work. Consider two police officers who make \$30 per hour. One has no alternative medical coverage, and therefore participates in his municipality’s health plan. Because the other officer is covered by his spouse’s health plan, he decides to take advantage of his employer’s cash in lieu option. That results in an additional payment of \$300 per week (an amount roughly equivalent to the figure paid by the City of San Gabriel in 2012). Were these two police officers to each work 50 hours over the course of a workweek (i.e., 40 hours of regular work and 10 hours of overtime), the regular rate of pay for the officer who

participates in the city's health plan would remain at \$30 per hour. The regular rate for his colleague who opted out, however, would jump to \$36 per hour.⁴ That means that over and above each officer's hourly wage, the first officer would receive an additional \$15 per hour for his 10 hours of overtime,⁵ while the second officer would receive an extra \$18 per hour for the exact same work.⁶ In other words, employees who are unable to opt out—such as those who need employer-provided coverage for their dependents—will have a lower overtime rate solely because they do not have an alternative coverage option for themselves or their families. There is no basis in law or logic for this disparity.

As the example above illustrates, making the regular rate of pay turn on an individual employee's benefits election also means employers will have to track those elections to properly calculate the regular

⁴ “The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.” 29 C.F.R. § 778.109. For the officer participating in the employer's health plan, that means dividing \$1500 (50 hours at \$30 per hour) by 50. For the officer that opted out, it requires adding the \$300 cash -in-lieu payment to \$1500 (50 hours at \$30 per hour) and dividing that total by 50.

⁵ For the week, he would be paid \$30 an hour (i.e., his regular rate of pay) for the first 40 hours of the week, and then \$45 per hour (i.e., one and half times his regular rate of pay) for his 10 hours of overtime. See 29 C.F.R. § 778.110(a).

⁶ For the week, he would effectively be paid \$36 an hour (i.e., his regular rate of pay) for the first 40 hours of the week, and then \$54 per hour (i.e., one and half times his regular rate of pay) for his 10 hours of overtime. See 29 C.F.R. § 778.110(b).

rates of pay for individual employees. This, in turn, will result in increased administrative costs and budgeting difficulties as employers attempt to discern exactly what their overtime expenditures will be. For example, assume a flexible benefits plan that allots a designated amount of money to employees and allows them to retain whatever portion they do not spend on medical, dental, or vision benefits. Under those circumstances, an employee that selects vision and dental coverage will have a different regular rate of pay than an employee who selects only medical, who, in turn, will have a different rate than an employee that selects only vision. The potential permutations only increase if employers make more options available to their employees (i.e., long-term care, health savings accounts, group-term life insurance), once again penalizing employers for offering additional benefits.

2. Faced with these costs and complexities, many employers may react to the Ninth Circuit's ruling by eliminating their cash-in-lieu programs altogether. Indeed, the panel itself acknowledged that its ruling could "encourage municipalities to discontinue cash-in-lieu of benefits payment programs due to the consequent increase in overtime costs," and that the elimination of such programs would be "to the detriment of municipal employees." Pet. App. 21a; see also Pet. App. 70a-71a (describing this argument as "compelling").

The temptation for employers to simply refuse to offer cash in lieu of benefits is real. Some employers have already modified their plans in light of the

Ninth Circuit's decision, and more will likely follow.⁷ After all, eliminating their cash-in-lieu programs would allow cash-strapped municipalities not only to avoid the increased costs detailed above, but also to recoup whatever amounts their current programs pay out to employees.

And the amount of money at stake is significant. While the size of payments available to employees who opt out varies depending on the cash-in-lieu program at issue, San Gabriel “employees who declined medical coverage received . . . \$1,304.95” per month—\$15,660 per year—in 2012. Pet. App. 8a.⁸

These cuts would have a major impact on affected employees. In 2012, the median pay for full-time, year-round City employees was \$96,976 (excluding benefits).⁹ Thus, if San Gabriel were to eliminate its cash-in-lieu program, an employee receiving the median income who opted out of medical coverage

in-lieu payments in the regular rate resulted in the