



# No FLSA Overtime Recovery For What Employer "Should Have" Paid

Insights

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Overtime compensation under the federal Fair Labor Standards Act must be based upon an employee's "regular rate" of pay. More and more frequently nowadays, claimants allege that their FLSA overtime compensation should have been (or should be) based upon some rate that would generate more compensation than they really received.

For example, they sometimes assert that they should have been paid at a supposedly agreed-upon higher hourly rate, such that (the argument goes) their FLSA overtime due is greater than the amount derived from the wages they actually got. A recent decision from the 10th Circuit U.S. Court of Appeals (with jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, and Utah) soundly rejected this argument.

## **Actual Pay Matters - Not Alleged Promises**

In *Albers v. Bd. of County Commissioners of Jefferson County*, the plaintiffs argued that their FLSA overtime should have been based upon higher hourly rates posted in the employer's pay schedules - what they called the "Promised Rate". They sought the difference between the overtime they were paid based upon lower rates and that which they would have been paid had the "Promised Rate" been used instead.

The 10th Circuit saw this argument for what it truly was: A breach-of-contract claim disguised as one arising under the FLSA. The court observed among other things that:

- The FLSA is not "an all-purpose vehicle to resolve wage disputes between employers and their employees";
- The FLSA itself refers to the regular rate as being all remuneration for employment "*paid to, or on behalf of,*" an employee (emphasis added);
- The U.S. Supreme Court has said that the FLSA regular rate is the rate "actually paid" for the normal, non-overtime workweek;
- An employee's FLSA regular rate is an "actual fact" that is determined by dividing his or her total straight-time compensation paid for a workweek by the total number of hours worked for which that compensation was paid; and
- FLSA overtime is *not* based upon a rate that was never actually used.

The court ultimately ruled that the plaintiffs' allegations did not state a claim under the FLSA.

### **The Bottom Line**

Of course, on the right set of facts, *other* laws or legal principles might support an employee's claim that the employer should have paid him or her at a higher hourly rate than it did. But *Albers* demonstrates that the FLSA's overtime requirements provide no foundation for any such contention.

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