

4th Circuit: Full-Relief Settlement Offer Does Not Moot FLSA Overtime Claims

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A mortgage company's offer to fully remedy overtime claims brought under the Fair Labor Standards Act (FLSA)—an offer that included full back pay, double damages, attorneys' fees and court costs to each current and potential plaintiff—did not render those claims moot or otherwise warrant dismissal, according to the 4th U.S. Circuit Court of Appeals.

Ma'lissa Simmons worked for United Mortgage as a junior asset manager in Charlotte, N.C. United Mortgage classified Simmons as an exempt employee who was ineligible for overtime pay. The company paid Simmons and other junior asset managers an annual salary regardless of how many hours they worked. The junior asset managers sued United Mortgage under the FLSA and North Carolina law, claiming that the company had misclassified them as exempt. ([The U.S. Department of Labor has said](#) that most low-level employees in the mortgage industry will not satisfy the test for exempt status and should receive overtime pay.)

United Mortgage sought to settle the case. It offered to pay each employee full back pay for all unpaid overtime they could substantiate, including attorneys' fees (as required by the FLSA) and court costs. The company later clarified that its offer included double damages (also required by the FLSA) and covered not only the employees currently involved in the lawsuit, but also any future employees that might join. In exchange, United Mortgage requested a full release and waiver of all claims. The company warned that if the plaintiffs did not accept its settlement offer within five days, the company would request that the trial court dismiss the case as moot.

The trial court granted United Mortgage's motion to dismiss because it believed the company had made a full and complete offer of judgment under Federal Rule of Civil Procedure 68. The trial court also said that United Mortgage's offer rendered the case moot because it no longer contained a live case or controversy. The U.S. Constitution requires that all federal lawsuits must involve an actual dispute—instead of a hypothetical dispute that has not yet occurred or one that already has been resolved such that a court could not award any relief.

On appeal, the 4th Circuit reversed. The appeals court found that United Mortgage did not comply with Rule 68 and that the company's settlement offer did not amount to a true offer of judgment under the rule. Rule 68 requires that the defendant offer a judgment against it under the terms specified and give the plaintiff 10 days to consider it. United Mortgage only offered to settle the case under a settlement agreement (without a judgment) and gave the plaintiffs five days to accept it.

The appeals court also determined that United Mortgage's settlement offer did not moot the lawsuit because a mere promise to pay in a settlement agreement does not carry the same advantages as a judgment. A successful plaintiff can take immediate steps to enforce and collect upon a judgment. With a settlement agreement, however, the plaintiffs

would have to sue on the agreement, prove breach of contract, obtain a judgment and then start the collections process. Therefore, from the plaintiffs' perspective, United Mortgage's offer to settle at full value did not moot the possibility of obtaining a judgment on those terms.

Simmons v. United Mortgage and Loan Investment LLC, 4th Cir., No. 09-2147 (Jan. 21, 2011).

Professional Pointer: Wage and hour litigation—particularly overtime claims—has exploded and shown no signs of slowing down. With the presumption of double damages and mandatory attorney's fees, settling overtime litigation often proves difficult and expensive. An enforceable settlement agreement of FLSA claims before litigation occurs requires the U.S. Department of Labor's approval; after litigation begins, the court can approve the agreement. Private FLSA settlement agreements are not enforceable. And as the *Simmons* case demonstrates, even when an employer offers complete relief, reaching a settlement and ending the litigation is not guaranteed. Therefore, employers should routinely evaluate and monitor FLSA compliance, and reclassify employees when necessary to prevent costly litigation.

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Editor's Note: This article should not be construed as legal advice.

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