

# PUBLICATION

---

## Setoffs Disallowed in Fifth Circuit FLSA Case

December 21, 2010

Employers commonly react to FLSA lawsuits by trying to think of ways to offset the claims. Oftentimes, in FLSA suits the amount of potential overtime at issue is negligible compared to the cost of litigating a FLSA case and potentially being responsible for the plaintiff's attorneys' fees. We have often received the question, "can't I just apply the bonus that the employee received last year to offset the overtime claim?" or "can't I assert a claim for the damage that the employee caused to the company vehicle to offset the claim?" The Fifth Circuit Court of Appeals' recent decision in *Martin v. PepsiAmericas, Inc.*, --- F.3d --- (5th Cir. 2010) reminds us that set-offs in FLSA claims are only permitted in limited circumstances where the employee has been prepaid wages.

In *Martin*, the employer entered into a severance agreement with the employee, where the employee agreed not to sue the employer in exchange for a severance payment. The employee proceeded to sue the employer for unpaid overtime, and therefore, the company counterclaimed against the employee for the amount of the severance paid to him. The amount of severance that the company was seeking from the employee exceeded the amount of the employee's overtime claim against the company. The District Court dismissed the employee's claim on the rationale that the severance payment more than offset the employee's overtime claim. The Fifth Circuit reversed the trial court and reinstated the lawsuit.

The Fifth Circuit reasoned that the severance payment had nothing to do with the employee's wages, and therefore, it was not a proper setoff under the FLSA. The Fifth Circuit held that only prepaid wages can be offset against FLSA claims.

So, next time you face an FLSA suit, recognize that your efforts to find a setoff may not be successful unless the setoff involves prepaid wages.