

As Congress Considers Changes to the Comp Time Rules – Is Your Business in Compliance Today?

By Jessica Summers

Summary: The U.S. House of Representative will vote this week on a bill that would legalize the use of compensatory (comp) time by private employers. While it is unclear whether the bill will have sufficient support to pass the Senate, the renewed discussion on this issue is a good reminder for private employers that, for now, providing comp time to non-exempt employees in lieu of overtime is generally prohibited under the Fair Labor Standards Act (FLSA).

The underlying concept behind comp time is that, in return for overtime hours worked, instead of receiving pay during that pay period, an employee accrues paid time off that he or she can use at some future date. Under the FLSA, comp time is permitted for public-sector employees but as a whole is prohibited for private employees. Rather, private employers must pay non-exempt employees for overtime hours worked at the same time that they are paid for all regular hours worked in that same pay period.

While comp time is prohibited, the Department of Labor (DOL) has made clear that private employers may use “time-off plans.” Leave provided under a time-off plan is functionally comp time that can only be used in the same pay period that it is earned. Under a time-off plan, private employers can provide employees with one and a half hours of paid leave time for each overtime hour worked as long as the employee takes that leave time in the same pay period in which it was accrued. For example, if an employer’s pay period is two weeks long, and an employee works 45 hours in Week 1 (i.e. 5 hours of overtime), the employer can provide that employee with 7.5 hours (5 hours x 1.5) of paid leave that he or she can use in Week 2. In the end, the employee’s paycheck for that pay period will be the same as it would have been if he or she was paid for 5 hours of overtime in Week 1 and then took 7.5 hours of unpaid leave in Week 2. What a paid time off plan does is give employers, who may not want to allow employees to take unpaid time off, another way to give employees some control and flexibility as to their work hours within a single pay period. Since “compensatory time” is a defined term under the FLSA (referring to comp time provided to public employees that may be used outside of the pay period), to avoid any confusion or perceived legal violation, employers who adopt time-off plans should be careful not to refer to the leave as “compensatory time” or “comp time” (some employers instead call additional paid leave “flex time”).

When it comes to exempt employees, the concept of comp time doesn’t really apply as such employees are paid a set salary for all hours worked and are not entitled to overtime under the FLSA. That said, some employers do want to provide exempt employees with extra paid time if they work hours above and beyond what is usually expected of them. This is perfectly fine. However, employers should generally avoid a system of providing employees with one hour of leave for every one hour worked over a certain threshold. In order to be exempt from the FLSA overtime requirements the employee, among other things, must be paid a predetermined salary regardless of how few or how many hours he or she works in a week. Thus, for example, providing an exempt employee with an hour of leave for every hour worked over 40 hours in a week, could suggest that the employee is not, in fact, being paid a flat salary for all hours worked but is rather receiving a salary for all hours worked up to 40 hours and then additional compensation (in the form of paid leave time) for hours worked beyond that. As with time-off plans for non-exempt employees, when providing additional leave to exempt employees, employers should also avoid referring to it as comp time.

The bill that is currently under consideration in both the House and Senate (titled the Working Families Flexibility Act of 2017 (H.R.1180/S.801)) would allow private employers to give employees the option to elect to receive 1.5 hours of comp time for every overtime hour worked rather than cash. The bill would limit the total number of comp hours an employee may accrue, allow employees to cash out any unused comp time and require employers to pay out accrued but unused comp time at the end of the year. The bill should have enough votes to pass the House this week. However, it does not currently have any Democratic co-sponsors in the Senate, where it will need at least eight Democrats and/or Independents to

support it in order to avoid a filibuster.

While there is a (relatively slim) chance that changes to the law may be forthcoming, private employers should review their existing policies to make sure that they are in compliance with the existing law.

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