

**OHIO ASSOCIATION OF COUNTY BOARDS
OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES**

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**Compensatory Time for
Overtime Exempt Employees**

Presented by:

STEPHEN P. POSTALAKIS
BLAUGRUND, HERBERT & MARTIN, INCORPORATED
300 W. Wilson Bridge Road, Suite 100
Worthington, Ohio 43085
(614) 764-0681
spp@bhmlaw.com

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ISSUE

Can a county board of MR/DD allow an overtime exempt employee to earn and accrue compensatory time?

DISCUSSION

A. Compensatory time for hourly employees

Generally, under the Fair Labor Standards of 1938 (“FLSA”), 29 U.S.C. §201 *et seq.*, an employer may not require an employee to work over forty (40) hours per week unless the employee receives overtime pay at a rate of at least one and a half (1½) times his or her regular rate of pay for all additional time worked. See 29 U.S.C. §207(a)(1). As an alternative to cash compensation, employees may receive compensatory time (“comp time”) at a rate of one and a half (1½) times the amount of time worked in lieu of overtime pay, so long as the employee agrees to accept it through either a collective bargaining agreement or other agreement or understanding. See 29 U.S.C. §207(o)(1)–(2), (3)(A). Further if comp time is given, when used, it must be paid at the employee’s regular rate of pay at the time used. See 29 U.S.C. §207 (o)(7)(B).

To provide this form of compensation to its employees, the employer must arrive at an agreement or understanding with employees that compensatory time will be granted instead of cash compensation. According to the FLSA’s regulations, such an agreement need not be formally reached and memorialized in writing, but instead can be arrived at informally, such as when an employee works overtime knowing that the employer rewards overtime with compensatory time. 29 C.F.R. §553.23(b)(1) and (c)(1).

The FLSA expressly regulates some aspects of accrual and preservation of compensatory time. For example, the FLSA provides that an employer must honor an employee’s request to use compensatory time within a “reasonable period” of time following the request, so long as the use of the compensatory time by the employee would not “unduly disrupt” the employer’s operations. See 29 U.S.C. §207(o)(5); 29 C.F.R. §553.25. In addition, the FLSA caps the number of compensatory time hours that an employee may accrue at 240 hours (not more than 160 hours of actual overtime worked), unless the employee is engaged in “seasonal” activity (such employees can accrue not more than 480 hours of compensatory time (not more than 320 hours of actual overtime worked)). See 29 U.S.C. §207(o)(3)(A); 29 C.F.R. §553.21. Moreover, the FLSA permits the employer, at any time, to cancel or “cash out” accrued compensatory time hours by paying the employee cash compensation for unused compensatory time. See 29 U.S.C. §207(o)(3)(B); 29 C.F.R. §553.26(a). Finally, the FLSA entitles an employee to a cash payment for any accrued but unused compensatory time held by the employee at the time of termination. See 29 U.S.C. §207(o)(4); 29 C.F.R. §553.27(b) (at the final regular rate or the average regular rate during the last three years, whichever is higher).

B. Compensatory time for exempt employees

All of the foregoing applies to overtime-eligible employees. The FLSA simply permits an employer to provide compensatory time off as merely a substitute for overtime in the form of monetary overtime compensation, at a rate of not less than one and one-half hours of compensatory time for each hour of overtime worked. Of course, exempt employees do not earn overtime. Are they able to receive any benefit for working extra hours? The answer is yes.

The regulation governing the salary basis for exempt employees specifically allows for additional compensation beyond the employee's salary. See 29 C.F.R. §541.604(a) (former 29 C.F.R. §541.118(b)). Further, the Department of Labor ("DOL") has specifically stated that "exempt employees may receive additional compensation in addition to a guaranteed salary without defeating the salary basis in accord with §541.118(b)." Commentary to former 29 C.F.R. §541.5(d) (August 19, 1992).

Thus, an employer may offer its employees compensatory time that is not covered by the FLSA. According to the regulations promulgated under the FLSA, compensatory time that is earned and accrued by an employee for employment in excess of a non-FLSA requirement is considered "other" compensatory time. 29 C.F.R. §553.28. Non-FLSA compensatory time is overtime *not* required by the FLSA. Thus, for exempt employees, who are not entitled to overtime, this type of "compensatory time" can be beneficial.

The FLSA does not govern "other" compensatory time. That is to say, the FLSA places no parameters or restrictions on the award of non-FLSA compensatory time. Therefore, unlike compensatory time covered by the FLSA, such compensatory time need not be earned at one and one-half the employee's regular rate of pay. Moreover, the employee is not entitled to a guaranteed payment of "other" compensatory time. Although both 29 U.S.C. §207(o)(4) and 29 C.F.R. §553.27(b) require an employee to be paid for unused compensatory time upon termination of employment, that requirement is not imposed upon non-FLSA compensatory time. 29 C.F.R. §553.28(e) specifically states:

The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to "other" compensatory time as described above.

This provision means that, because non-FLSA compensatory time is not covered by the FLSA, it can be provided to employees in any manner determined by the employer. Most importantly, there is no requirement that such "other" compensatory time be cashed out to the employee upon his termination of employment as required for compensatory time governed by the FLSA.

CONCLUSION

A true salaried, exempt employee is generally paid higher than overtime-eligible employees. Nevertheless, in exchange for the higher salary, exempt employees are often expected to, and do, work more than forty (40) hours per week, without any further remuneration owed to them. Often, as an award for valued performance, an employer will offer additional time off to exempt employees who have had to work more than forty (40) hours per week.

The FLSA permits an employer to grant comp time to an exempt employee without jeopardizing the exempt employee's exemption. Although the FLSA authorizes such additional compensation in the form of comp time, the provisions of the FLSA do not actually govern such comp time. Thus, "non-FLSA comp time" can be handled differently than comp time for hourly employees covered by the FLSA. Since non-FLSA comp time is not governed by the FLSA, a county board of MR/DD could provide comp time to its exempt employees in the following manner:

- (1) Base comp time on some measure of work other than hours beyond forty (40) hours in a week;
- (2) Limit comp time to a certain amount of hours or allow it to accrue without limit;
- (3) Grant use of comp time by an employee that is consistent with the county board's needs;
- (4) Determine whether to permit an employee to cash out comp time upon separation from the county board.