

MAY 10, 2017 | REGULATORY & GOVERNMENT OVERSIGHT

# House Passes Amendment to Fair Labor Standards Act Permitting Private Sector Comp Time



On May 2, 2017, the U.S. House of Representatives passed the [Working Family Flexibility Act of 2017](#) – a bill that would amend the Fair Labor Standards Act (FLSA) to permit private employees to take paid time off instead of receiving monetary overtime compensation when working more than 40 hours per week. While uncertainty looms over the fate of the bill as it moves to the Senate, if the bill is passed and becomes law, it would be a major amendment to the FLSA.

Private sector employers must be vigilant of this bill as it progresses through Congress and be prepared to implement procedures to offer comp time instead of overtime wages, and establish a system to keep track of the amount of comp time employees accrue.

## Comp Time Rules for the Public Sector

Section 7 of the FLSA (29 U.S.C. §207) specifies that employers must pay covered workers at least one and one-half times their regular hourly wage for hours worked in excess of 40 in a single work week. Indeed, exceeding 40 hours in a work week is the only scheduling circumstance that entitles a non-exempt employee to overtime wages under the FLSA. While the FLSA overtime rules appear rigid, there are separate provisions and other laws that exempt federal, state, and local governments from the FLSA overtime rules to pay employees one and one-half times their regular hourly wage for all hours worked in excess of 40 in a single work week.

For example, Section 207(o) of the FLSA allows public employers at the federal, state, or local level to compensate non-exempt employees for hours worked in excess of 40 with comp time instead of overtime wages. The only prerequisite for public employers is that the non-exempt public employee agree beforehand to be compensated with comp time instead of overtime wages either in a collective bargaining agreement, memorandum of understanding, or some other agreement or understanding between the employer and employee prior to work being performed.

Additionally, under 5 U.S.C. § 5543, both exempt and nonexempt federal employees may receive comp time. Regulations permit an agency head may direct an employee whose pay is greater than the maximum pay for a GS-10 employee to take comp time instead of receiving overtime pay when overtime is worked. Federal employees are provided one hour of comp time for each hour of overtime worked.

## Comp Time in the Private Sector

The FLSA actually permits *private* sector employers to offer comp time as well, but only to *exempt* employees. Section 541.604 of the FLSA regulations expressly allows employers, public and private, to pay their *exempt* employees “additional compensation” under certain circumstances.

The regulations provide that additional compensation paid to exempt employees does not destroy the salary basis and the FLSA exemption from overtime as long as the “employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis.” Specifically, 29 C.F.R. 541.604 provides that employers do not lose the exemption by providing additional compensation based on hours worked for work performed beyond the normal workweek:

***Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.***

Unlike comp time for public sector non-exempt employees, however, comp time for exempt employees can be granted in any form the employer chooses. Furthermore, because employers are not obligated to provide their exempt employees with comp time, employers are not required to pay out accrued comp time at termination. However, employers should be wary that such a use it or lose it policy may run afoul of state law depending on how the law defines comp time.

## The Working Families Flexibility Act of 2017

The Working Families Flexibility Act of 2017 would amend the Fair Labor Standards Act to allow employers to offer employees 1.5 hours of comp time for every hour of overtime worked, for up to 160 hours of leave. In practice, employees would be permitted to “bank” overtime hours for later comp time use. For example, a non-exempt employee that works 45 hours in a single week would be paid his or her regular rate of pay for 40 hours worked. Under the proposed amendment, the employee then has the option to bank 7.5 hours of comp time (5 hours of overtime x 1.5 multiplier) or be paid one and one-half times his regular rate for the 5 hours worked in excess of 40 hours.

To be eligible to agree to accrue comp time, employees must work at least 1,000 hours for an employer during a period of continuous employment with the employer in the 12-month period before the date of agreement or receipt of compensatory time off. However, employees are not required to participate in a comp time scheme even if the employer offers it.

The Bill ensures that employees are given the autonomy to choose whether to receive overtime wages or comp time. An employer may provide comp time to an employee only if it is agreed to in a collective bargaining agreement or the employee and employer agree to such an arrangement in writing prior to work being performed. Additionally, employees are not forever bound by an arrangement to receive comp time. Employees can withdraw from the agreement with their employer at any time.

Indeed, employees may opt-out of a comp time agreement and request payment, in writing, for all accrued comp

time that has not yet been used. Within 30 days of receiving the written request, the employer must provide the employee the monetary compensation due. The Bill also permits employers to force payout of any accrued comp time that exceeds 80 hours, so long as they give the affected employee at least 30 days' notice.

Unless otherwise limited by the employer, employees can only accrue up to 160 hours. The Bill provides a mandatory yearly payout to employees to prevent comp time from being carried over. No later than January 31<sup>st</sup> of each year or 31 days after any other chosen twelve-month period, employers would be required to pay out any unused comp time.

The Bill also clarifies that employees would be guaranteed payment for accrued comp time upon termination – but not at a rate of time-and-a-half. The Bill favors employers in this regard because employers do not have to pay the typical overtime wages when employees receive payment for comp time that they have banked. Employees that are paid for accrued compensatory time off – either at termination, upon their request, or at the employer's option – would be paid for the unused compensatory time at their "regular rate of pay" (at the time the comp time was earned or at the current regular rate of pay, whichever is higher).

### **Will the 20-Year Battle Pay Off?**

While exempt employees may be granted comp time under the current FLSA regulations, the long-standing battle to permit employers to offer comp time in lieu of overtime wages for non-exempt employees has been on the Republican agenda for over two decades. Republicans have introduced similar bills a number of times, dating as far back as 1996, but have been unable to get the rule passed in the Senate. Most recently, Republicans attempted to introduce an analogous bill titled the Working Families Flexibility Act of 2013. That bill was passed by the House by a narrow margin but later died in the Senate.

With a new, more business-friendly administration, this Bill may garner enough support to become law. The current bill passed in the House largely along party lines by a count of 229-197, but a party-line vote in the Senate would present a problem for Republicans. Republicans, who hold 52 seats in the Senate, would need eight Democrats to vote in favor of the legislation to avoid a filibuster, or the Bill may succumb to the same fate as the bills that came before. Democrats have voiced strong opposition to the bill, stating that it permits businesses to evade their responsibility to pay employees what they have earned and that it strips employees of protections that are already on the books. If the bill does pass in the Senate, however, there is little chance that it is struck down by a veto as President Trump has already indicated his [support](#) for the bill.

### **Going Forward**

Employers should pay close attention to this bill as it makes its way through the Senate. Employers could potentially have a new compensation tool that will help employees strike a better work-life balance and help employers save money in the long run. To ensure they do not run afoul of the potential new provisions, employers will need to implement clear written policies delineating comp time rules and, as well as procedures to request and receive comp time in lieu of overtime wages.

Even before such policies and procedures are developed and implemented, however, employers will need to understand applicable state wage and hour laws. Some state overtime rules are more stringent than the FLSA's overtime requirements. For example, in California, overtime pay of one and one-half times the regular rate is due

for (1) time over eight hours in one day; (2) time over 40 hours in one week; or (3) the first eight hours worked on the seventh consecutive day worked in a single workweek; and double time is due for (1) time over 12 hours in one day and (2) hours worked beyond eight on the seventh consecutive day in a single workweek. The California overtime rules essentially prohibit California employers from offering comp time to employees, unless it is provided as a bonus or reward. Although California has some of the more complicated and expansive overtime protections, other state laws may present similar barriers to implementation of comp time.