Temporary "Comp Time" Provision Under Consideration

Insights
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The U.S. House of Representatives is now actively considering the "Working Families Flexibility Act of 2017" (H.R. 1180), which would amend the federal Fair Labor Standards Act to permit private-sector employers to offer compensatory time off in lieu of monetary overtime compensation. It is essentially the same as a measure that passed the House in 2013.

The bill would permit eligible non-union employees to agree "knowingly and voluntarily . . . and not as a condition of employment" to a compensatory-time arrangement "affirmed by a written or otherwise verifiable record". The policy could be implemented for unionized employees via a collective bargaining agreement.

Participating employees would then receive at least 1.5 hours of compensatory time off for each hour worked over 40 in a workweek, up to a maximum of 160 hours off. Management could not so much as "attempt to" require employees to use time-off accrued under the amendment.

The provision would automatically expire five years after its enactment.

Pay Attention To The Details
Compensatory-time has been a long-sought private-sector goal. But this proposal contains a number of impact-diluting, unclear, or complicating provisions, including these:

◊ *Eligibility would be limited to employees who had worked at least 1,000 hours of continuous employment in the twelve months before the agreement date or the receipt of compensatory time off.*

Consequently, such a plan probably would be less-useful with respect to some workforces than others. Also, determining eligibility would necessitate management's monitoring yet-more information than it already does for other purposes.

◊ *No more than 160 hours (the amount earned for about 106 overtime hours) could be accrued at any time.*

An employee who works 10 overtime hours each workweek would exceed that cap in 11 workweeks.

◊ *Employers would have to cash-out unused balances annually;* and *within 30 days of receiving an employee's written cash-out request;* and *when a worker's employment ends.*

These payments would be calculated at the higher of (i) the employee's regular rate at the time the time-off was earned, or (ii) the employee's final regular rate. But the "regular rate" is not necessarily just the employee's stated hourly rate, weekly salary, piece-rate, *etc*. Typically, it also includes things like bonuses, commissions, incentive payments, and compensation of many other kinds.

Figuring the cash-out "regular rate" could therefore be complicated as to employees who receive different or supplemental compensation over a period of time (and in some scenarios might call for a comparison between *alternative* computations). It could also be problematic for workers who are paid other than at an hourly rate.

◊ *With 30 days' notice, an employer could cash-out a worker's accrued balance exceeding 80 hours.*

But this too must be based upon the "regular rate" and entails the same potential difficulties. Maybe as a practical matter the payment would usually be based upon the regular rate when the compensatory time off was earned, unless the alternative "final regular rate" is later interpreted to have some broader meaning.

◊ *Employers would also be required to:*

- *Keep up with when balances must be (and in the right circumstances may be) cashed-out;* and

- *Administer both employees' cash-out requests and any notices that a non-union employee could give "at any time" to opt-out of the policy (including keeping up with who's in and who's out).*

This could end-up creating significant administrative and recordkeeping burdens that might undercut management's interest in establishing a compensatory-time program.

◊ *Employees would be entitled to use comp time "within a reasonable period" after requesting it, unless this would "unduly disrupt" the employer's operations.*

Similar concepts have created difficulties for public-sector employers under the public-agency-specific compensatory-time provisions of the FLSA's Section 7(o).

The Bottom Line
This amendment's enactment would likely result in the U.S. Department of Labor's issuing extensive, related recordkeeping requirements.

Some who implemented a compensatory-time policy might well later find themselves embroiled in USDOL investigations or in litigation over the provision's pitfalls and complexities (possibly even after the amendment itself had expired).

Note also that the provision would not supplant applicable requirements or prohibitions of other

jurisdictions' laws, including those relating to overtime pay, to the point at which wages are "earned", and to when compensation must thereafter be paid.

In the end, employers would have to decide whether such an arrangement might be more trouble than it's worth, especially in light of the amendment's curious five-year "sunset" provision.

Editor's Note: A reportedly-similar measure (S. 801) has been introduced in the U.S. Senate. That bill's text was not available at publication time.