



You Choose: Time Or Money?

Insights

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According to the U.S. Bureau of Labor Statistics, almost 60% of American workers are paid an hourly wage. Many of these workers are employed by companies who offer little in the way of paid time off such as sick time, vacation time, or family leave. While most workers in the United States are protected by various laws which guarantee unpaid time off in certain circumstances, relatively few are entitled to *paid* time off unless the employer simply chooses to make paid time off available.

While laws requiring paid time off are few and far between, the Federal Fair Labor Standards Act (FLSA) at least guarantees hourly-paid workers overtime pay when they work over 40 hours in a work week. The FLSA generally requires the overtime hours to be paid at time-and-a-half the employee's "regular rate" of pay. Thus, extensive overtime work often significantly supplements an employee's take-home pay. Of course, those long hours mean less time away from work. While all workers, hourly paid or salary paid, typically appreciate an opportunity for a larger paycheck, some workers actually might prefer time off above additional pay.

The Search For Balance

Currently, under the FLSA, employers have no option for compensating hourly-paid employees for "excess" work other than to pay them overtime hours over 40 in a work week. The alternative of time off later, or "comp time," has long been prohibited by the FLSA, at least for employees in the private sector. Previously, Congress has considered whether private employers should be allowed to offer employees comp time, and this year was no exception. On May 8th, the U.S. House of Representatives passed the "Working Families Flexibility Act of 2013" by a narrow margin. Currently, the bill has been received in the Senate and referred to its Committee on Health, Education, Labor and Pension.

Even though ultimate passage of the bill is unlikely, it has triggered a firestorm of discussion about whether it primarily benefits employers or hourly-paid employees. Employee advocacy groups argue that comp time will allow employers to save money by not paying overtime and yet ultimately allow the employer to deny the employee the comp time that the employee may accrue. Employer groups argue that comp time provides an opportunity and the flexibility for employees to choose which is more important: time or money.

As you might expect, neither side is entirely accurate. Before weighing which side might benefit most from the bill, let's consider its basic provision.

As currently drafted, the bill provides that an employee may accrue paid time off at the rate of one and one-half hours for each hour of overtime work rather than to be paid at the rate of one and one-half the regular rate for those same hours worked. An employer may adopt a comp-time program only in accordance with an applicable collective bargaining agreement for unionized employees or in a written or verifiable agreement between the employer and the employee for nonunionized employees.

Such an agreement must be finalized before the work is performed and must clearly indicate that the employer has offered comp time and that the employee has chosen to receive comp time in lieu of monetary overtime payments. It must also be knowing and voluntary by the employee and not a “condition of employment.”

An employee may use accrued comp time on request within a reasonable period of making the request, if the request does not unduly disrupt the operations of the employer. Limitations on any comp time arrangement include:

- A minimum service period before an employee becomes eligible.
- A maximum accrual of 160 hours of comp time.
- An annual payout for unused comp time at the end of an annual or other 12-month period.
- The ability for an employee to request payment for unused comp time at any time and receive such payment within 30 days.
- The ability of an employer to pay out comp time in excess of 80 hours after providing at least thirty days notice to the employee of its intent to do so.

Any monetary payments of comp time are required to be paid at the employee’s “regular rate,” which is a term of art under the FLSA and frequently is a dollar amount higher than the employee’s base hourly wage. This same “regular rate” rule applies to traditional overtime compensation payments. Thus, the value of a comp-time hour and an overtime hour would be identical and equally lucrative.

An employee who opts for time off receives a unique protection for the monetary value of the comp time. Accrued comp time must be paid at the higher of 1) the regular rate in effect at the time the comp time was accrued; or 2) the regular rate in effect at the time it is paid out. Thus, employees who slowly bank comp time may have an opportunity to actually be paid at a rate that is higher than the rate the employee would have received at the time of the additional work.

What’s The Case Against The Bill?

As is typical with pending legislation, the current bill leaves unanswered many questions such as whether the employer and employee could agree that certain overtime work was to be designated as

comp time or would be paid as overtime depending on the current needs of the employee – which would truly create flexibility for an employee.

The least clear aspects of the bill may be the ones that concern employee advocacy groups the most – for an employee who wants to use comp time, what is a “reasonable period of time” and what does it mean to “unduly disrupt operations”? Other arguments made by opponents of the concept include:

Employers will force or coerce employees to choose comp time

A reality of the employment relationship for most employees is that the employer gets to dictate the terms of employment as a condition of continued employment. In this circumstance, the bill actually prohibits such conduct by an employer.

Employers will require more overtime work if they don't have to pay for it

While overtime compensation must be paid in the current pay cycle, comp-time payments can be delayed. The delayed payment is still an accrued liability on the employer's book which will be “paid” at some point when the employee does not come to work or when the employee requests a cash payout of accrued time. Thus, the bill creates no true incentive for an employer to insist on more overtime work from its employees.

Employees will receive less take home pay

Well, this is true but the same result would occur if the employer suddenly had less overtime work available. An employee who “banks” on a set amount of overtime each week has no guarantee that the overtime will continue or stay at the current level. Further, some employees required to work overtime would prefer to know that they had time away from work later rather than more money.

Of course, this final premise – some employees prefer time away from work more than a larger paycheck – is the entire basis for the proposed legislation. The bill changes the current law under which an employee has no choice but to accept overtime and allows the employee to reach an agreement with his or her employer that makes sense for the employee. If the employee works for a company that keeps poor records, is on the verge of bankruptcy, or turns a blind eye to employment law compliance, the smart choice would be to take the overtime pay and not to count on comp time later – but that is a decision for the individual employee depending on his or her individual circumstances.

Looking Ahead

Even if the bill does become law, employers may want to proceed slowly before adopting a comp-time policy. Most significantly, the bill contains an automatic sunset provision which would revoke the authorization for employers to offer comp time after five years. Also, until the Labor Department issued regulations, many elements of the law would be unclear.

Given that FLSA litigation against employers is rampant, adopting a comp-time program without a clear process to follow and strict compliance with the law's requirements would be begging for

trouble. Finally, the recordkeeping aspects of a comp-time program could be a significant burden for an employer: which employees have elected comp time, how much do they have, when will they use it, how do we cover the absence, and so on.

In sum, while employees may be skeptical that an employer would comply with the law and provide the benefits required, employers may be skeptical that the law offers any real benefit to them at all.

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