Don't Fall into the "Comp Time" Trap: It's Generally Illegal in California

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Many employees request time off instead of pay when they work overtime or are scheduled to work extra days including weekends, and you may be quick to oblige their wishes in an effort to be responsive to their desires. After all, compensatory time off – or "comp time" – seems like a natural fit for workers looking for work-life balance. And with labor shortages leading to increased workloads, overworked employees often want more time off. But even though California public policy has addressed the issue of work-scheduling flexibility in an attempt to address wage-hour issues, a comp time system that trades time for wages essentially runs afoul of federal law, at least in the private sector. This Insight provides California employers with an overview of the issue and some suggested options.

Compensatory Time for Non-Exempt Employees in Private Sector: Nice Try, But Generally Unworkable.

Under Section 204.3 of the California Labor Code, employers are permitted to offer comp time, subject to strict conditions, to non-exempt employees governed by certain state Wage Orders. Among other things, such employees "may receive, in lieu of overtime compensation," comp time "at a rate of not less than one and one-half hours for each hour of employment for which overtime compensation is required by law," or at the employee's regular rate, if higher.

A number of requirements apply, however, in order for the system to pass muster. These include:

- requiring a written request by an employee;
- employers keeping required records that "accurately reflect compensating time earned and used";
- a restriction as to the maximum amount of hours that may be accrued;
- an employee's right to request a cash payment in lieu of the time off; and
- the obligation to pay accrued but unused comp time upon termination.

The kicker is that, in addition to satisfying these various requirements, an employer subject to the Fair Labor Standards Act (FLSA) must also satisfy the federal requirements. In a nutshell, eligible

non-exempt employees who work more than 40 hours per week under the California comp-time statute (available to only some workers) will violate the FLSA.

To address this potential trap, we first look at the general requirements of the FLSA. Essentially, in the private sector, subject to a very narrow exception, the FLSA does not authorize compensatory time off for non-exempt employees instead of payment of wages for overtime work. Only non-exempt employees of a public agency have the liberty of receiving compensatory time off at a rate not less than 1.5 hours for each hour of employment in lieu of overtime compensation.

In addition, many private employers compound the error and increase the liability by giving compensatory time to non-exempt employees on a straight-time basis. For example, if Jane Doe is required to work eight hours on Saturday, bringing the total week's hours to 48, she may request eight hours off on Monday in lieu of the eight hours worked. That would not be permitted even under federal law in the public sector. It also may be viewed as an unlawful deferral of wages due for the work week when actually worked.

In any event, even if permitted, one hour of overtime is always worth 1.5 hours of paid time off. Thus, one hour off in exchange for one hour of overtime worked will never be legal.

An employer faced with employee time-off demands and other labor pressures needs to know both the options and risks associated with time off in lieu of pay. Although comp time is generally illegal for non-exempt workers, a type of "comp time" program may be legally sustainable for salaried-exempt workers, with some important caveats. In addition, a narrowly defined "Time-Off Plan" may be permitted by the FLSA subject to complex rules. Finally, we then can look to alternatives to comp time which may provide some relief and flexibility to non-exempt workers.

Compensatory Time for Salaried-Exempt Employees and Pitfalls

The U.S. Department of Labor (DOL) makes clear, and the Ninth Circuit has affirmed, that extra pay above and beyond the salary does not violate the salary basis for the exemption. Perhaps seeing this as a way to encourage extra pay for such workers working long hours, DOL has recognized that extra pay or extra leave time for extra work is permissible as long as exempt employees receive a guaranteed salary free and clear of any reductions to the salary on the basis of quality or quantity of time worked.

Indeed, 29 C.F.R. § 541.604(a) provides that "An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. 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." This is also found in DOL's Field Operations Handbook, Section 22h08.

Building on this, there may be situations where an employer may be permitted to provide extra compensation to exempt employees who work or engage in paid travel time over a stated minimum number of scheduled hours (45, 50, or whatever) in a week in the form of extra pay or compensatory time o**n a straight-time basis for each additional hour**. Indeed, because some employers have a difficult time attracting and keeping qualified employees, they offer additional pay as an incentive to join and stay with the company.

But employers should be careful because there have been court decisions that have flagged potential problems with awarding *salaried-exempt* employees extra pay or compensatory time off on an hourly basis for hours worked beyond a certain number of minimum hours specified by the employer, or in deducting from compensatory leave banks of such employees in such increments. One example is a court decision holding that extra pay or compensatory time for "overtime" worked by such employees is *inconsistent with the salary basis* for the exemptions.

Private Employers of Non-Exempt Employees – Time-Off Plan

Although clothed as an approved comp-time method, for non-exempt employees the outlook for a "time-off" plan approved by the DOL is not that promising. It may be viewed as merely a clever scheduling artifice. Specifically, there are times when the FLSA recognizes that an employee's time can be scheduled within a work week so that actual hours worked do not exceed 40 hours but an employee is allowed to take off 1.5 hours for every hour worked to reach that result.

It's a complicated arrangement, but it starts with the premise that an employer may provide an informal type of "comp time" during the workweek simply by adjusting the hours worked so that they do not exceed 40 in the week. However, where the employee cannot work more than 40 hours in the work week, such a limitation would not be practical in the real world. In any event, the DOL springs forth with a little-known exception to the general rules on overtime known as the "time off plan."

Buried deep within the Field Operations Handbook at Section 32j16b, this rule states that in the case of a pay period with more than one workweek, no overtime must be paid if:

- the employee works overtime during one week and is given compensatory time off during a subsequent week or weeks within the pay period;
- the total wages for the pay period equal what the pay would be if the overtime were paid; and
- the other workweeks were paid on the basis of actual hours worked.

Because many employers may not be able to readily give time off, and the time-off plan does not apply in the situation of a non-exempt employee paid a fixed salary for fluctuating workweeks, this exception hardly addresses the flexibility demanded by workers, and has been considered practically useless. In short, it's not really what you would expect of a *flexible* comp time plan that employers long for.

California AB60: Make-Up Time and Alternative Work Week Schedules May Fall Short

Interestingly, the California legislature passed AB60 in 1999, called the "Eight Hour Day Restoration and Workplace Flexibility Act," wherein various scheduling issues were addressed. Under that law, California did provide some flexibility allowing employees to limit their total work week to 40 hours while taking time off within a work week to meet personal demands.

One example would be "Make Up Time," which permits employees to make up lost work time in the same work week up to 11 hours each day and 40 hours each week when the time is lost without the payment of overtime. This amounts to a limited waiver of California's daily overtime requirements and is subject to various conditions. In concept, this works as a limited waiver of daily overtime - but not the 40-hour work week (which cannot be waived) – so that lost time can be made up. It does not amount to taking time off in lieu of overtime pay due, but is designed to have the employee avoid working overtime in the first instance.

In addition, under AB60, California permitted "regular and recurring" alternative work schedules up to 40 hours per week. This includes a menu of scheduling options that provide limited exemptions from daily overtime requirements (but again, cannot waive FLSA overtime), whereby employees could work up to 10 hours per day (and in some instances 12 hours) without incurring *daily* overtime. Essentially, schedules that were regularly recurring up to 40 hours in a work week could provide employees with more time off in a regular work week with additional overtime premiums due whenever employees are required to work beyond the fixed schedules, such as an additional day beyond the regularly scheduled days.

These schedules require compliance with strict procedures to be valid, including notice requirements and a secret ballot election which requires the schedule(s) to pass by a 2/3 vote, and rigid scheduling rules, as well. Many lawsuits result from botched elections and implementation. Employers should seek legal advice before attempting to implement such schedules.

Conclusion

Clearly, although there is some flexibility in managing personal time outside of work, none of these options available under AB60 permit employees to directly accumulate overtime and receive time off in lieu thereof. That said, employers may find some workable options under California law without violating federal law.

In short, employers should seek legal counsel in crafting workable answers to employee demands for personal time off in a tight work force. We will continue to monitor developments in this area, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our California offices.

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