

Working Families Flexibility Act of 2017 Would Authorize Comp Time in the Private Sector

The United States House of Representatives recently passed the Working Families Flexibility Act of 2017 (“Proposed Act”). For the first time in the history of the Fair Labor Standards Act of 1938 (“FLSA”) if the Proposed Act becomes law, a private sector employer would be authorized to enter into an agreement with its nonexempt employees to grant them compensatory time off in lieu of having to pay them time and one-half^{1/2} for every hour worked in excess of 40 during the work week. Currently, the FLSA only authorizes a public sector employer the option of awarding compensatory time off in lieu of paying overtime.

Private sector employers have lamented for years that they are at a disadvantage because they are not able to offer compensatory time off to their employees and that their employees would prefer to have compensatory time off in the future rather than overtime pay. The opportunity to accrue compensatory time is attractive to employees as they can take paid time off in the future when needed and attractive to employers as it helps manage cash flow.

If the Proposed Act becomes law, a private sector employer would be able to offer compensatory time in lieu of overtime pay in the following circumstances provided the employee agrees in advance:

1. Compensatory time is capped at 160 hours.
2. The employee agrees to receive compensatory time in lieu of overtime pay prior to working the overtime.
3. By January 31 of each calendar year, all accrued but unpaid compensatory time is cashed out.
4. Upon termination of employment, the employee’s accrued but unused compensatory time is paid to the employee.

An employee may rescind, at any time, the employee’s prior agreement to take comp time in lieu of payment for overtime.

The act would sunset five years after passage.

Employers should be mindful of the old adage “be careful what you wish for as you just might get it.” While the Proposed Act, if passed, would allow private sector employers to offer compensatory time off in lieu of paying time and one-half, it is important to note that the compensatory time must be given in an amount equivalent to time and one-half. What does that mean? It means that if an employee works 5 hours of overtime, the compensatory time off needs to equal 7½ hours. Accurate record keeping will be both essential and burdensome.

^{1/2} Note that there is an exception to the time and one-half overtime pay requirement that permits half-time. Prior to an employer paying a half-time premium for overtime, the employer should consult with competent legal counsel to ensure the exception applies.

Impact of Raises on Accrued Compensatory Time

If an employee receives a raise, that raise will apply to all accrued but unused compensatory time regardless of the employee's hourly rate when the compensatory time was earned.

A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.

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