

The Ins and Outs of Comp Time

By Karen Sutherland

Karen Sutherland is the Chair of Ogden Murphy Wallace, P.L.L.C.'s Employment Law Practice Group. She represents employers on workplace issues. Her employment law experience includes (among other things) investigating harassment and discrimination claims, sexual harassment training, employee handbooks, defending cities, counties and private employers regarding state and federal sex, age and disability discrimination law, breach of employment contract claims, Trade Secrets Act claims, tortious interference and defamation. Ms. Sutherland is licensed to practice law in Washington State only. This article is based on Washington State and Federal law.

Legal Background

As noted in the preceding section, the minimum wage laws, which include the Fair Labor Standards Act (“FLSA”) and its state law equivalents, such as Washington’s Minimum Wage Act (“MWA”) are full of traps for unwary employers. One such trap is the concept of compensatory time off, or “comp time.”

Comp time is a concept that employers use to allow employees who work overtime in one workweek to take time off as compensation in some other workweek. It has been used where employers wish to compensate an employee for overtime with time off, or where an employee wishes to build up some time so that the employee can have paid time off, such as in anticipation of a medical procedure or vacation where the employee has run out of sick leave or vacation time. Many employers and employees find the use of comp time to be mutually beneficial, and would willingly sign an agreement that included comp time as an element because of the flexibility it allows.

The problem with this scenario is that, under many circumstances, it is illegal under federal law (the FLSA) to allow or require employees to use comp time. There are, for example, some exceptions for certain public sector employees. Bills have been submitted to Congress to legalize comp time for the private sector several times, but so far, no changes to the law have been passed. In case you are interested in a brief history of the law and of the attempts to change the law, I have enclosed a copy of an article prepared by the Congressional Research Service for Congress that discusses this subject.

Under Washington state law, the MWA allows for comp time if the employee specifically agrees to it. A copy of the state law is attached at the end of this article. However, there is an issue as to whether the FLSA preempts the MWA’s comp time rules. There is a general statement in the MWA to the effect that “[a]ny standards relating to wages, hours, or other working conditions established by any applicable federal, state, or local law or ordinance, or any rule or regulation issued thereunder, *which are more favorable to employees* than the minimum standards applicable under this chapter, or any rule or regulation issued hereunder, shall not be affected by this chapter and such other laws, or rules or regulations, shall be in full force and effect and may be enforced as provided by law.” RCW 49.46.120 (emphasis added). It is unclear whether a court of record would rule that receiving comp time is “more favorable to employees” than getting paid time and a half for working overtime.

Public sector employers have more leeway in the use of comp time, such as for law enforcement officers. There are numerous, detailed state and federal rules and regulations governing the availability and use of comp time in the public sector that are beyond the scope of this article.

If you are an employer who can legally use compensatory time off, you need to be careful in administering it for exempt employees because, if it is not done right, compensatory time off can violate the salary portion of the test for exempt status. In general, exempt employees are supposed to be able to work however many hours they need to work to do their jobs, which means they already have the flexibility to take some hours off here and there if they have been putting in a lot of extra time. Under a recent case, the MWA does allow for exempt employees to have a compensatory time bank, and requiring "make up" from compensatory time does not violate state law. However, there is a catch: This factor is not all that is considered by the courts in determining whether an employee is exempt or not. The court held that, while requiring "make up," absent "docking," does not *automatically* violate the "salary basis" test under state law, it may be considered in the context of the entire employment relationship to determine whether the employment is salaried or hourly. More important, when the court applied its test, the employer lost. The court found that the employer's practices exceeded the permissible boundaries for "make up" and violated state law. *Drinkwitz v. Alliant Techsystems*, 140 Wn.2d 291, 304 (2000).

Practical Guidelines

- Review your comp time policies to see if they are legal under the FLSA and the MWA. If they are illegal under either set of laws, revise your policies accordingly.
- You cannot opt out of the MWA or the FLSA or lessen the protections that they provide to employees by agreement with your employees.
- If you are a public sector employee, you should review the rules and regulations under both the FLSA and the MWA regarding comp time that apply to the position and follow them precisely, as detailed rules applying to a specific position are given more weight than the general rules discussed in this article.
- If you have a policy of using comp time, it should be requested by the employee, preferably in a written document that is signed by the employee. Comp time cannot be unilaterally imposed.
- Be aware that comp time is an unsettled area of the law for most private sector employers who are covered by both the MWA and the FLSA. This, even if you obtain an agreement from your employee that allows for comp time, there is a possibility of preemption, meaning that the agreement may not be valid under the FLSA. This could mean liability for back pay, overtime pay and interest.
- If you have a comp time policy, be sure to track comp time accurately. Know what your "workweek" is, especially if you have employees who work on weekends; i.e. does your workweek start at 12:01 a.m. Monday, or at 12:01 a.m. Saturday? It may matter if you have an employee who was light on hours during the week but worked on the weekend.

- If you use comp time for exempt employees, be aware that how it is used and accrued is a factor in determining whether your employees are truly paid a salary or not. If your comp time policy (in conjunction with other factors in how you treat salaried employees) means that your exempt employees do not meet the salary test, then they are not really exempt, and you will be required to pay them time-and-a-half for working over 40 hours per week. State and federal law are not identical in this area, so meeting the test under the *Drinkwitz* case described in the preceding section does not mean that you have met the salary test under the FLSA. You are more likely to avoid issues under the salary test by not having comp time for nonexempt employees.
- If you have a question about a specific position, contact an attorney who is knowledgeable in this area, as the law is constantly changing.

The above suggestions are broad, general comments only. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such as the employment and labor law practice group of Ogden Murphy Wallace, P.L.L.C. The author, Karen Sutherland, can be reached at (206) 447-7000 or ksutherland@omwlaw.com

STATE LAW REGARDING COMPENSATORY TIME
(Federal laws and regulations are too lengthy to include here)

RCW 49.46.130 Minimum rate of compensation for employment in excess of forty hour work week--Exceptions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW 49.46.010(5). The payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW 49.46.010(5)(c);

(b) *Employees who request compensating time off in lieu of overtime pay;*

(Emphasis added; other exceptions omitted).

The regulation interpreting the above statute states as follows:

Compensating time off in lieu of overtime pay. The provisions of chapter 49.46 RCW requiring one and one-half times the regular rate of pay for hours worked in excess of 40 per

week does [sic] not apply to any person who requests compensating time off in lieu of overtime pay. Therefore, compensating time may be *as agreed upon by the employer and the individual employee at the request of the employee*, but may not be imposed by the employer in lieu of overtime pay upon any employee who has not so requested such compensating time off.

WAC 296-128-560 (emphasis added)