

Might New “Comp Time” Bill Actually Pass This Time?

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A new “comp time” bill that could dramatically change when and how overtime is paid to private sector employees in many, if not most, jurisdictions has passed the House of Representatives. And unlike similar bills that have been considered over the years, this one might actually have a chance of passing. If it can get past an expected Democratic filibuster in the Senate, that is.

“Comp time” – short for “compensatory time” is generally defined as paid time off that is earned and accrued by an employee instead of immediate cash payment for working overtime hours.

Generally speaking, public sector employers may provide “comp time” to employees.

However, putting aside various nuances and state law differences, it has long been the case that the Fair Labor Standards Act (“FLSA”) requires private sector employers to pay non-exempt employees time-and-a-half for all work performed beyond 40 hours in a workweek. “Comp time” generally is not permissible in the private sector.

(If you want to gain a better understanding of the various nuances and state law differences, we invite you to [download our free wage-hour app](#), available on Apple and Android devices.)

This long-standing law could change under the new bill, known as the Working Families Flexibility Act (“the Act”). (Although its title references “working families,” it does not appear that the proposed limitation would be limited to persons with families. It would apply to single persons, too.)

Although its title does not reference the FLSA or overtime, the Act would amend the FLSA to allow private sector employers to offer non-exempt employees the choice between being paid in cash for hours they work beyond 40 in a work week or accruing an hour and one-half of paid time off. More specifically, employees could accrue up to 160 hours of “comp time” for hours worked beyond 40 in a week – again, at a rate of an hour and one-half for each overtime hour worked.

The Act has been presented as a potential benefit to employers and employees alike – employers might be able to improve cash flow by postponing payments, and employees would have greater flexibility in scheduling their work around their personal lives.

As written, the Act would not apply to all employees. Instead, it would only apply to those employees who have worked at least 1,000 hours in a 12-month period before they agree to the employer's proposed "comp time" arrangement. In most circumstances, it would not apply to new hires, and it would not apply to many part-timers.

As written, eligible employees would have to agree in writing to the "comp time" arrangement. Their agreement would have to be voluntary, and they would reserve the right to revoke their agreement at any time and receive cash for their unused "comp time." At the same time, employers could revoke the "comp time" arrangement by giving their employees 30 days' notice of the change in the employer's policy.

Like much legislation, the Act leaves some questions unanswered and could lead to significant litigation if passed, including collective actions. On first glance, the most significant grounds for potential litigation would be the requirement that any acceptance of a "comp time" arrangement be entirely "voluntary." Employees may well claim that they were pressured into accepting "comp time" by management, particularly those in seasonal businesses.

But the most significant unanswered question remains the most important – will the bill get past an expected filibuster?

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