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## Coates' Canons Blog: The Mysteries of Comp Time Revealed

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The Fair Labor Standards Act (FLSA) requires all employers to pay employees time-and-one-half their regular rate of pay for all hours over 40 that employees work in a given week, unless an employee satisfies the FLSA's salary basis test and one of either the executive, administrative or professional duties tests. Employees who meet the requirements of these tests are called "exempt employees" (that is, exempt from the FLSA's overtime requirements) and need not be paid overtime if they work in excess of 40 hours in a week (for how to determine whether an employee is exempt or nonexempt under the FLSA, see my article [here](#)).

The FLSA (at **section 207(o)**) allows government employers an alternative way to compensate nonexempt employees for hours worked in excess of 40 that it does not allow private-sector employers: use of compensatory time-off or, as it is more commonly known, comp time. Comp time allows public employers to provide paid time-off in lieu of the cash overtime. When a government employer uses compensatory paid time-off instead of cash overtime, **the time-off must be credited at the rate of one and one-half hours of compensatory time for each hour of overtime work** — just as the cash rate for overtime is calculated at the rate of one and one-half times the regular rate of pay. **It is a violation of the Fair Labor Standards Act for an employer to compensate a nonexempt employee for overtime hours with hour-for-hour comp time.** See [here](#) for the U.S. Department of Labor's comp time regulation.

This post addresses common issues related to the use of comp time by government employers.

### ***Deciding to Use Comp Time***

Public employers may use comp time instead of cash overtime for all employees or for only some employees. Employers may use comp time in lieu of cash for all overtime worked by a given employee or group of employees or only in connection with certain assignments, such as weather emergencies or public festivals. An employer must meet only one pre-requisite before using comp time: before any overtime hours are worked on this basis, it must secure the *agreement* of an employee who is to be compensated with comp time instead of cash overtime.

What agreement means in this context is something less than what we might ordinarily understand. An employer may make receipt of comp time in lieu of cash overtime an express condition of employment at the time of hiring. It may provide either oral or written notice of its decision to use comp time to affected employees and ask for written acknowledgement from each. An employer does not have to ask for written acknowledgement, but may assume lack of objection from the fact that an employee has reported for work and worked assigned overtime hours after notification. Where there is no formal written agreement, the regulations require that "a record of its existence must be kept" nonetheless — presumably through some form of documentation that the employee has been notified or through a provision of the personnel policy.

Although the regulation stresses that an employee's agreement to receive compensatory time-off must be freely and voluntarily made, the reality is that where receipt of comp time is a condition of employment, an employee who is unwilling to receive time-off in lieu of cash has only one option — to find another job. On the agreement between employer and employee to use compensatory time-off, see [here](#), at section (o)(2)(A)(ii), [here](#) and [here](#).

### ***Cap on the Number of Comp Time Hours That May Be Accrued***

The **regulations** specify that employers may allow nonexempt employees to accrue only up to 240 hours of comp time, with the exception of employees working "in a public safety activity, an emergency response activity, or a seasonal activity," who may accrue up to 480 hours. Note that employers may only apply the 480 hour limit to employees engaged in public safety and emergency response activities as a regular part of their work. Thus, law enforcement officers, firefighters, emergency medical personnel, as well as 911 dispatchers and telecommunicators may be subject to the

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higher limit. Employees whose regular work does not involve public safety or emergency response, but who undertake such duties during the course of an emergency remain subject to the lower cap of 240 hours (see **here**). If employees work more than 240 or 480 hours of overtime — as they often do in emergency situations — employers must either begin to payout overtime hours in cash or send employee home to use their paid time-off (although in emergencies, that is not generally an option) (see **here** at section (o)(3)(A)).

For law enforcement officers and firefighters who are scheduled under a section 207(k) 28-day work cycle, the statutory limit to the number of comp time hours that may be accrued is still 480 hours. Employers may use comp time to compensate officers and firefighters at a rate of one and one-half hours paid time-off for every hour worked over 171 and 212 respectively. There is a mistaken belief among some local government employers that they do not need to pay law enforcement officers for the hours between 168 and 171 (sometimes called “gap time hours”) or that the hours between 168 and 171 may be compensated through the use of comp time. Neither practice is lawful under the Fair Labor Standards Act. The hours between 168 and 171 must be compensated by a cash payment at the officer’s regular rate. For the use of comp time for law enforcement officers and firefighters scheduled under the 207(k) 28-day work cycle, see **here** , at subsection (o)(3)(A), **here**, at subsection (b), and **here**.

### ***Using Accrued Comp Time***

Another condition upon a public employer’s use of comp time instead of cash overtime is the requirement that it allow an employee to use his or her accrued paid time-off “within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.” Most employers find this easier said than done. One reason that employees accrue comp time in the first place is because there is generally more work to be done or shifts to be covered than there are people or regularly scheduled hours in which to do the work. Allowing employees to take time-off may only exacerbate the problem. Nevertheless, an employer must allow an employee who has requested the use of accrued comp time to take time-off absent an undue hardship.

One way in which employers can manage accrued comp time is to send employees with accrued comp time home when their departments or sections are experiencing slower work periods. An employee may not object to being sent home since they are not being sent home without pay – comp time is *paid* time-off. Employers may also adopt policies that either allow or require employees to use comp time before they use accrued paid sick or vacation leave. Similarly, either employer or employee may require that accrued comp time run concurrently with FMLA leave, turning unpaid leave into paid leave. Finally, employers can set limits lower than 240 or 480 hours on the amount of comp time employees may accrue. They will necessarily have to pay overtime in cash once the lower limit is reached, but there will be fewer days of time-off that require accommodation. On using accrued comp time, see **here**, at section (o)(5), **here**, and **here**.

### ***Accrued Comp Time That Remains at Separation***

Comp time may only be used in the manner authorized by the statute and the U.S. Department of Labor’s implementing regulations. Because neither the statute nor regulations authorize its use in this way, **accrued FLSA comp time may not be made subject to a “lose it or use it” policy. Nor may it be converted to sick or vacation leave.** Comp times accrues indefinitely until the statutory maximums of 480 hours for public safety employees and 240 hours for all other nonexempt employees is reached. At that point, the accrued hours remain credited to the employee indefinitely until used and any additional overtime hours must be paid out in cash.

The statute is clear that **upon separation from service**, whether because of retirement, a voluntary departure for a position with another employer, or because the employee has been fired, **employers must pay out any accrued comp time** “at a rate of compensation not less than—

(A) The average regular rate received by such employee during the last 3 years of the employee’s employment, or

(B) The final regular rate received by such employee, whichever is higher.”

See **here**, at subsection (o)(4), and **here**.

### ***Overtime or Comp Time for Exempt Employees***

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The **FLSA regulations** expressly allow employers to pay exempt employees additional compensation for hours worked beyond what is expected without jeopardizing an employee's exemption. The rules allow such additional compensation to be paid on any basis, including paid time-off. North Carolina local government employers typically refer to this additional or bonus time-off for exempt employees as a form of "comp time," or compensatory time-off, although they would be wise to give it another name in order to avoid confusion. For this reason, this blog post will refer to additional paid time-off for exempt employees as "bonus time-off."

Although comp time for nonexempt employees must be granted on the basis of one-and-one-half hours off for every hour worked in excess of 40, bonus time-off for exempt employees may be structured in whatever way the local government employer chooses. Bonus time-off may be granted to exempt employees when they have worked in excess of 40 hours, in excess of their scheduled hours, or in excess of a certain number of hours per month. The time-off may be calculated on the basis of one-and-one-half hours off for each extra hour worked, or on an hour-for-hour basis. It may also be calculated on the basis of a half-hour off for each extra hour worked. Because this is a benefit that is not required by law, employers may structure it however they choose.

Unlike comp time for nonexempt employees, which cannot accrue in excess of 240 hours (480 hours for public safety employees), bonus time-off for exempt employees may accrue without limit. Bonus time-off for exempt employees does not have to be cashed out when an employee separates from service. Employers may restrict the carry-over of accrued bonus time-off for exempt employees from year to year, in contrast with comp time for nonexempt employees, which remains on the books indefinitely. There is no requirement that bonus time-off for exempt employees be paid out to employees when they leave or retire from the employer's service.

### **Conclusion**

Here is a brief summary of the rules regarding comp time:

1. Comp time is accrued at the rate of 1 and ½ hours paid time-off for every hour of overtime that is worked.
2. Employee "agreement" is required.
3. When an employer uses comp time instead of cash overtime, it may not allow employees to accrue more than 240 hours of comp time, 480 hours if the employee works in public safety or a seasonal activity. Once an employee accrues 240 or 480 hours, as the case may be, any additional overtime must be paid in cash.
4. Employers must allow employees to use accrued comp time within a reasonable time of their making a request.
5. Employers may send employees home or require them to use comp time before sick or vacation leave.
6. Comp time never goes away. Upon separation, it must be paid out.
7. Employers may award exempt employees who work a greater number of hours than scheduled with paid time-off. In contrast to FLSA comp time for nonexempt employees, exempt employee bonus time-off may be credited at any rate and subject to any conditions the employer chooses.

**For more information on this aspect of the FLSA and on all other FLSA issues, see my publication, *A Comprehensive Guide to the Fair Labor Standards Act for Public Employers*.**

### **Links**

- [sogpubs.unc.edu/electronicversions/pdfs/pelb31.pdf](http://sogpubs.unc.edu/electronicversions/pdfs/pelb31.pdf)
- [www.law.cornell.edu/uscode/text/29/207](http://www.law.cornell.edu/uscode/text/29/207)
- [www.law.cornell.edu/cfr/text/29/553.20](http://www.law.cornell.edu/cfr/text/29/553.20)
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