

New House Bill Proposes to Amend the FLSA by Making Comp Time Arrangements Legal in the Private Sector

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On April 9, 2013, Alabama Representative, Martha Roby, introduced the Working Families Flexibility Act, which, if passed, will amend the Fair Labor Standards Act ("FLSA") and allow private sector employers the option of providing compensatory time off in lieu of overtime pay to non-exempt employees. After receiving approval by the House Committee on Education and the Workforce, the bill passed the House of Representatives on May 8, 2013, by a narrow vote margin of 223 to 204. The bill was sent to the Senate, and currently is under review by the Senate Committee on Health, Education, Labor and Pensions. Apparently, the President has already threatened to veto the bill should it pass the Senate, which seems unlikely given the political makeup of the Senate at this time.

Constituents who oppose the bill argue that it undercuts the protections afforded to employees by the FLSA and provides employers with an easy avenue to avoid properly paying employees overtime compensation. On the other hand, bill supporters see the bill as providing flexibility to employers and employees, alike. Notably, if the bill is signed into law, employers will be given the option of offering employees compensatory time off instead of overtime pay. Conversely, Employees are then entitled to decide whether to (1) take advantage of their employer's comp time program, or (2) forgo participating in the comp time arrangement, electing instead to continue receiving overtime payments.

Other aspects of the bill include a provision which mandates compensatory time be awarded at 1.5 hours for each hour of overtime worked. The bill's language further prohibits employers from coercing, intimidating or forcing employees to opt in the comp time program. Additionally, even if employees opt into the comp time program for a given year, the employee is not bound to stay in the arrangement for any given time period, but instead may opt out of the program and elect to receive monetary payments for any comp time the employee has stored up in his or her paid time off reserve. Finally, at the end of the year, employers must make cash payments to their employees for any unused comp time.

Regardless of the bill's fate before the Senate and/or President Obama, its introduction should serve as a reminder, or a wake-up call for some, that presently it is an illegal employment practice for private sector employers to provide their employees compensatory time off in lieu of overtime compensation. In accordance with the FLSA, private sector employers must pay their non-exempt employees overtime, at one and one half times the employee's regular rate of pay, for all hours worked in excess of forty (40) hours in a workweek.

Although the practice of offering compensatory time off in lieu of overtime payments is permissible in the public sector, and has been for many years now, the same practice would be lawful in the private sector only if the Working Families Flexibility Act is signed into law.

The moral of the story: If you are an employer in the private sector, you **MUST** not offer compensatory time off

to your employees in lieu of paying them overtime. Even if the employee approaches you and expresses a sincere desire to enter such an agreement, don't do it! Regardless of whether the employer's intent is innocuous or devious, comp time arrangements are strictly prohibited in the private sector. Nevertheless, H.R. 1406 could change the current landscape by allowing employers and employees the freedom to mutually agree upon a comp time off arrangement. Until that time, do not stray from these lessons learned.

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