Compensatory Time Legislation Would Enable Employees to Take Paid Time Off In Lieu of Overtime Pay

The Fair Labor Standards Act of 1938 requires private sector employers to pay covered employees cash for all overtime hours worked. However, in 1985, public sector employers were given the option of offering compensatory time off in lieu of overtime pay to certain employees. There has long been support for providing that option to private sector employers and employees to assist workers in juggling work, family and personal responsibilities. The Working Families Flexibility Act of 2013 (H.R. 1406), sponsored by Rep. Martha Roby (R-AL), would permit private sector employers to offer and employees to voluntarily agree to choose compensatory time off in lieu of overtime pay. Under the bill, an employee could voluntarily accrue up to 160 hours of compensatory time (or a lower limit that may be set by the employer), at a rate of time-and-a-half, for overtime hours worked. Any time worked over the 160-hour maximum would have to be paid in cash.

Rigorous Protections  In the past, opponents of the legislation have contended that the bill would allow employers to cut costs by forcing employees to take time off instead of pay. However a close examination of the bill’s restrictions—some of which do not even apply in the public sector—shows that, to the contrary, many employers would take a very cautious approach in deciding whether to offer comp time to their employees and, if they did, would need to ensure strict compliance every step of the way to avoid costly penalties.

Voluntary Written Agreement Required  A compensatory time arrangement could only be implemented by a voluntary written or otherwise verifiable record between the employer and the employee before the performance of the work. This protection does not apply to public sector employees. In the case of employees represented by a union, the arrangement would have to be pursuant to a collective bargaining agreement. Thus, because this is specifically required by the bill, unlike other terms and conditions of employment, an employer who reaches impasse in negotiations with a union would not be able to unilaterally implement a comp time arrangement.

Employer Restrictions  The legislation contains a strong prohibition against an employer attempting to, or “directly or indirectly intimidat[ing], threaten[ing], or coercing[ing]” an employee to request, or not to request, compensatory time instead of monetary compensation or to use the accrued compensatory time. In addition, the bill expressly provides that an employer may not require an employee to choose to bank compensatory time in order to be hired or to continue working. These employer restrictions do not apply to public sector employers.
**Strong Employee Protections**  An employee may not accrue more than 160 hours of compensatory time per year and employers are required to pay out any unused compensatory time on an annual basis or whenever an employee leaves employment. All pay outs are made at an employee’s regular rate of pay when the comp-time was earned, or at their final regular rate of pay, whichever is higher. Any accrued compensatory time must be paid whenever an employee quits or is involuntarily terminated according to the applicable state final paycheck law. In addition, employees could choose to cash out their accrued comp-time at any time, and employers would have 30 days to comply with the request. These employee protections are much stronger than those that apply to public sector employees. For example, some state and local government employees can accrue up to 480 hours of compensatory time and it cannot be cashed out at the request of the employee, nor are state and local governments required to pay out any unused comp-time on an annual basis.

**Use of Compensatory Time**  Employers must allow employees to use their accrued comp-time within a reasonable period after making a request for time off unless it would be “unduly disruptive” to the employer’s operations. Failure to allow the leave could be a violation of the Fair Labor Standards Act. Thus, unlike all other personal leave offered to employees, the bill would create a federal right to use the leave when desired and the amount of flexibility for employers would depend on how the Department of Labor (DOL) defines “reasonable period” in the implementing regulations. If an employer sought to deny the employee the use of the leave within a reasonable period, it would have to be sure it could prove to a DOL investigator or a federal court that the leave would have been “unduly disruptive.”

**Limited Employer Options**  Employers can discontinue the comp-time programs, but only with 30 days notice to employees. Moreover, under such a circumstance, employers could only cash out an employee’s accrued comp time in excess of 80 hours, unless the employee requested otherwise. These employer restrictions do not apply to public sector employers.

**Eligibility**  No employee could receive or agree to receive compensatory time off unless he or she has worked at least 1,000 hours during a period of continuous employment with the employer in the 12-month period before the date of agreement or receipt of compensatory time off. These employee protections do not apply to public sector employees.

**Tough Remedies**  All remedies under current law (including enforcement by the Department of Labor and through individual lawsuits) would apply if an employer failed to provide cash wages to an employee for accrued compensatory time or refused to allow an employee to use accrued compensatory time. Employers that force employees to choose compensatory time instead of overtime wages or use accrued compensatory time are subject to double damages, which would be calculated as the amount of the rate of compensation for each hour of comp-time that could not be used plus and additional equal amount as liquidated damages. Meanwhile, a large employer offering comp-time to its employees could be subject to a class action for violations, which could result in litigation costs and remedies involving millions of dollars.

**Sunset**  The Legislation would expire five years after the date of enactment. There is no sunset provision to the public sector comp-time provisions in the FLSA.