State of Wisconsin

OFFICE OF STATE EMPLOYMENT RELATIONS

- COMPENSATION & LABOR RELATIONS BULLETIN -

Date: May 21, 2012

Locator No: OSER-306-CLR/POL

Subject: Application of Policy Related to Compensatory Time Off as Payment for FLSA Overtime.

The purpose of this bulletin is to provide state agencies with guidance on application of the State of Wisconsin's policy related to compensatory time off as payment for Fair Labor Standards Act (FLSA) overtime found in Wisconsin Personnel Manual Chapter 516, published April 6, 1987.

This bulletin replaces OSER bulletin number CC/POL-22/CBB-9 which is now obsolete and should be discarded. This bulletin has been updated to clarify how employees may be paid for FLSA overtime.

COMPENSATORY TIME IN LIEU OF OVERTIME COMPENSATION

The Fair Labor Standards Act gives public employers the option of providing employees with compensatory time off in lieu of cash for overtime compensation if the parties agree to this arrangement under a collective bargaining agreement or some other type of agreement. The collective bargaining agreement covering state Public Safety employees (as defined in Act 10) also contains language which must be adhered to when determining the correct "payment" method for overtime hours worked by these represented employees.

Nonrepresented employees or represented employees whose collective bargaining agreement is limited to only base wages may be credited with compensatory time in lieu of cash for overtime ***if*** such an agreement is reached between the employee(s) and the employer prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept by the agency head or supervisor and must be available for review by the Office of State Employment Relations and the U.S. Department of Labor.

This agreement may be accomplished for new employees by including notification of that practice of crediting compensatory time in lieu of cash for overtime as part of the offer of employment. The notification may also be contained in a prospective employee's appointment letter or in a job announcement. For current employees, the notice should be included in an updated employee handbook or policy regarding compensatory time in lieu of cash. In addition, when agencies post electronic or hard copy signup sheets for overtime work, the signup sheet should include the statement that any overtime work will be compensated with compensatory time off. This would reaffirm that employees agree to receive compensatory time off prior to performing the overtime work.

USE OF COMPENSATORY TIME

The FLSA provides that employees of a public agency may be allowed to take accrued compensatory time off within a reasonable period *after the leave is requested* if the use does not "unduly disrupt" the operations of the public agency. It is ***not*** considered "unduly disruptive" if the use of compensatory time by an employee would create an overtime situation for another employee. *See Debraska v. City of Milwaukee,* 131 F.Supp.2d 1032 (E.D.Wis. 2000)(citing U.S.DOL interpretations).

The FLSA gives public employers the right to decline an employee's request to use compensatory time. For an agency to turn down a request from an employee for use of compensatory time credits requires that it should reasonably and in good faith anticipate that it will not be able to provide services of acceptable quality and quantity for the public during the time requested without use of the employee's services.

LIMITATIONS ON COMPENSATORY TIME ACCRUAL

Accrual of compensatory time credits is limited under the FLSA by the amount of compensatory time off that an employer can realistically and in good faith expect to be able to grant within a reasonable period after the employee makes a request for use of the time. Accrual of compensatory time credits is also subject to the following restrictions of the FLSA:

1. A nonexempt employee engaged in public safety, emergency response, or seasonal activities is allowed to accrue a maximum balance of 480 hours of compensatory time off credits (320 hours of FLSA overtime worked x 1.5 = 480 hours).

    a. "Public safety activity" means law enforcement or fire protection activities.

    b. "Emergency response activity" means rescue work and ambulance services, and the dispatching of emergency vehicles and personnel.

    c. "Seasonal activity" means work during periods of significantly increased demand, which are of a regular and recurring nature. In order for the activity to be considered "seasonal," the projected compensatory time due to overtime hours worked by the affected employee during the period of significantly increased demand must be likely to result in the accumulation of more than 240 hours of compensatory time off credits.

2. All other nonexempt employees may accrue a maximum balance of 240 hours of compensatory time credits (160 hours of FLSA overtime worked x 1.5 = 240 hours).

3. A nonexempt employee who has accrued the maximum amount of compensatory time credits *must be* ***paid*** at the premium rate for any additional overtime hours worked.

Accrual of compensatory time credits for contractual overtime which is not "FLSA overtime" is subject only to the pertinent provisions in labor agreements and is *not* subject to the FLSA accrual limits. Any compensatory time credits granted for non-FLSA overtime under the labor agreement (e.g., for all hours in pay status rather than for hours worked in a workweek) need not be counted when determining whether a person has accrued the maximum balance of compensatory time off credits.

In accordance with Section A, 4.03(2)(c) of the State of Wisconsin Compensation Plan covering nonrepresented employees, time off earned in lieu of cash payment for overtime hours which cannot be scheduled by the appointing authority within 12 months after the end of the calendar year in which the time is earned shall be paid in cash. Please refer to the Wisconsin Law Enforcement (WLEA) collective bargaining agreement for relevant provisions covering represented Public Safety employees.

Questions regarding the information included in this bulletin should be directed to Wil Mickelson by phone at (608) 267-5169 or via e-mail at wil.mickelson@wisconsin.gov, or Jim Underhill by phone at (608) 266-9564 or via e-mail at jim.underhill@wisconsin.gov.

Kathy Kopp, Administrator
Division of Compensation and Labor Relations