



October 15, 2004

FLSA2004-24NA

Dear *Name**,

This is in response to a request from your organization for an opinion concerning the application of section 7(o) of the Fair Labor Standards Act (FLSA) to a compensatory time bank which includes both FLSA and non-FLSA compensatory time.

You indicated that as law enforcement employees, your members work for public sector employers who utilize section 7(k) of the FLSA. Some of your members have collective bargaining agreements which, in addition to meeting the overtime requirements of section 7(k) of the FLSA, may also call for overtime at the rate of time and one-half in other instances, such as when an employee has worked over 8 hours in a day. Often employees can choose to be paid the overtime or to receive it as compensatory time off. In the latter case, many of the employers do not keep separate compensatory time off banks for FLSA and non-FLSA compensatory time, but rather "commingle" the compensatory time off in the same bank. You want to know whether the denial of an employee's request to use the compensatory time would be impermissible since at least some of the time requested might be FLSA compensatory time.

Section 553.28 of 29 CFR 553, copy enclosed, discusses the interaction of FLSA compensatory time and other non-FLSA compensatory time with examples that are similar to what you have cited. It indicates that the requirements of section 7(o) of the FLSA do not apply to "other" compensatory time. However, with regard to FLSA compensatory time, section 7(o)(5) states that an employee who has requested the use of FLSA compensatory time shall be permitted to use it within a reasonable time after the request, as long as it does not unduly disrupt the operations of the agency. A record of the number of FLSA compensatory hours earned and taken must always be maintained by the employer (29 CFR 553.50).

Although there is nothing that prohibits the "commingling" of FLSA and non-FLSA time, the use of FLSA compensatory time must meet the requirements noted above. The employer cannot deny the use of any FLSA compensatory time just because it is "commingled" with non-FLSA compensatory time. The inability to differentiate the time does not relieve the employer from the requirement to allow an employee to use FLSA compensatory time consistent with the standard established in section 7(o)(5). If the employer chose to keep separate FLSA and non-FLSA compensatory time banks, the FLSA compensatory usage requirements would not apply to the non-FLSA compensatory time.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this information is responsive to your inquiry.

Sincerely,

Barbara Relerford
Office of Enforcement Policy
Fair Labor Standards Act Team

Enclosure

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*