



September 20, 2004

FLSA2004-10

Dear *Name**,

This is in response to your request for an opinion concerning the application of section 7(o) of the Fair Labor Standards Act (FLSA) to non-exempt public sector employees who work between 37.5 and 40 hours per week.

You indicate that your client pays its non-exempt employees their regular rate of pay for their first 37.5 hours worked each week and pays compensatory time at a rate of one hour for each hour worked from 37.5 to 40 hours per week. Hours worked after 40 hours per week are paid as overtime or one and one-half compensatory hours for each hour worked. Moreover, you state that pursuant to two collective bargaining agreements, all compensatory time not used during the course of the past year is paid each April at the employees' hourly rate. Finally, an employee's compensatory hours do not exceed 240 hours at any time. You ask whether the practice of not paying cash for the hours between 37.5 and 40 per week is permissible.

As you know, the rules for FLSA compensatory time off for public employees who work in excess of the applicable overtime standard are found at 29 CFR §§553.20-.28. Section 7(o) and those regulations authorize the use of compensatory time off in lieu of cash wages only for overtime hours. Section 7(o) has no applicability to employees working fewer than 40 hours per week.

Based on the information provided, we assume that these employees are hourly paid employees and not employees who are paid a salary. It is our opinion that, because the practice utilized by your public sector client does not pertain to overtime hours, it would be acceptable provided the requirements of section 6 of the FLSA are met.

First, in non-overtime workweeks an employee who is subject to the minimum wage requirements (non-exempt) of the Act is considered paid in compliance if his or her overall earnings for the workweek equal or exceed the amount due at the applicable minimum wage for all hours worked including those hours worked for which compensatory time is granted up to 40 hours in the workweek. This is true regardless of whether the employee is paid on the basis of a single hourly rate, different hourly rates, piece rates, commissions, certain bonuses, or some combination of these methods. These principles apply to the proposed plan and such a plan would be in compliance with the minimum wage standard as long as the employee's regular rate of pay equals or exceeds the minimum wage of \$5.15 per hour for workweeks of 40 hours or less. Thus, if total compensation for the 37.5 hours of work meets or exceeds the minimum wage requirement for actual hours worked from 37.5 to 40 hours in a week, the employee has been paid in compliance with section 6. In that situation, an employer may, but is not required to, provide compensatory time for the hours worked between 37.5 and 40, because the FLSA only requires payment equal to the minimum wage for hours worked up to 40.

Second, in order to meet the requirements set forth in section 6 of the Act, payment of the minimum wage due an employee must ordinarily be made at the regular payday. If the factors laid out above are adhered to, it is our opinion that the practice initiated by your client would satisfy the provisions of the Act.

However, in an overtime workweek, an hourly paid employee must be paid the agreed upon hourly rate for all straight time hours worked, as well as the premium due for all overtime hours, before an employer can be said to have paid the overtime compensation due under section 7. This is true whether the overtime compensation due is paid in cash or in compensatory time off. Thus, in a week in which an hourly paid employee works overtime, the employee must be paid in cash for all hours worked up to 40 hours.

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 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.

I trust that the above information is responsive to your request.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy.*