



FLSA2007-9

May 14, 2007

Dear **Name***:

This is in response to your request for an opinion regarding the use of compensatory time off as payment for non-overtime hours under the Fair Labor Standards Act (FLSA). It is our opinion that, in a non-overtime workweek, public agencies may compensate part-time employees with compensatory time off only if the employees' regular rate of pay is no less than the federal minimum wage for all hours worked.

You represent a state university that employs several part-time employees whose terms and conditions of employment are governed by the State Administrative Code. These part-time civil service employees are assigned a full-time equivalent (FTE) number of hours to work each week. For example, an employee with a .5 FTE would be expected to work 20 hours per week. The employees receive a fixed amount of compensation on a semi-monthly basis. If the part-time employees work more than their FTE in a workweek, the state code requires that they be paid an additional amount, which is typically paid at varying hourly rates depending upon the number of hours worked in that particular pay period. If a part-time employee works more than 40 hours a workweek, the employee is paid one and one half times the regular rate of pay for the hours worked beyond 40 or is given an equivalent amount of compensatory time off. If the employee is absent during the pay period and does not have sufficient vacation and/or sick leave to cover the absence, the absence is deducted from the employee's compensation.

You ask the following questions:

1. Are the part-time employees considered to be paid on a salaried or hourly basis?
2. Must the part-time employees be compensated in cash for hours worked in excess of their FTE, but less than 40 hours per week, or may they be compensated with an equivalent amount of time off to be used in the future?
3. If they may be given compensatory time off instead of cash, may the university use this method of compensation if the net effect would be to reduce an employee's regular rate of pay to below the FLSA minimum wage of \$5.15 an hour?

Your inquiry is limited to workweeks in which the employee works more than the designated FTE hours but less than 40 hours and, thus, our response is limited to situations in which overtime would not be required under the FLSA.

In answer to your first question, employers must generally pay employees at least the minimum wage of \$5.15 for every hour worked through 40 in a workweek. *See* 29 U.S.C. § 206(a).¹ Under the FLSA, whether an employee is paid on an hourly or salary basis is immaterial so long as the employee's regular rate of pay is at least equal to the federal minimum wage for all hours worked in non-overtime weeks. *See* Field Operations Handbook § 30b02. To determine the hourly wage for an employee paid a fixed semi-monthly wage, the equivalent weekly wage is determined by multiplying the semi-monthly payment by 24 and then dividing by 52. The resulting weekly wage is then divided by the number of hours worked by the employee during the workweek, yielding the hourly regular rate of pay.

As to your second question, FLSA § 7(o) authorizes the use of compensatory time off in lieu of cash overtime payments for employees of public agencies but does not apply to employees working less than 40 hours per week. *See* 29 C.F.R. §§ 553.20-.28; Wage and Hour Opinion Letter [FLSA2004-10](#) In a non-overtime workweek, however, the FLSA does not preclude an employer from providing an employee of a public agency with compensatory time off for non-overtime hours previously worked so long as the employee's regular rate of pay is at least the federal minimum wage for all hours worked. *See* Wage and Hour Opinion Letter FLSA2004-10; *see also* 29 C.F.R. § 553.28. That is, the employee must receive at least \$5.15 per hour in wages for each hour worked.

In answer to your last question, in non-overtime workweeks, an employer fulfills the requirements of the FLSA if the employee's regular rate of pay is at least \$5.15 per hour. *See* 29 U.S.C. § 206(a). Therefore, part-time state university employees may be given compensatory time off in lieu of additional cash payments for hours worked in excess of their FTE, but less than 40 hours, as long as the employees' regular rate of pay is at least the federal minimum wage for all hours worked.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from 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.

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

We trust that this letter is responsive to your inquiry.

Sincerely,

Paul DeCamp
Administrator

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