



November 4, 2005

FLSA2005-13NA

Dear *Name\**,

This is in response to your inquiry concerning the application of section 7(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(o), to county employees. You state that the county compensates employees working statutory overtime hours by furnishing compensatory time off ("comp time") pursuant to FLSA § 7(o).

Before addressing your specific questions, it might be helpful to review the prerequisites for the use of comp time in lieu of cash overtime payments. In order to use comp time, an agreement or understanding ("agreement") must be reached prior to the performance of work. 29 U.S.C. § 207(o)(2)(A); 29 C.F.R. § 553.23. For purposes of this response, we assume that County employees do not have a recognized collective bargaining agent or other representative designated by the employees.

Where employees do not have a recognized or otherwise designated representative, the agreement concerning comp time must be between the county and the individual employee and must be reached prior to the performance of work. In this regard, you ask two questions.

Q.1. If the County personnel regulations inform employees that comp time will be furnished in lieu of cash overtime payment and employees are informed of comp time during orientation meetings and at the time of hire, will the "notice" requirements in 29 CFR § 553.23(c) be met?

A.1. Yes. As indicated in § 553.23(c), "an agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay." The county could accomplish its notice requirements by providing employees copies of the county's personnel regulations, by orientation prior to the performance of work, and notification at time of hire. See Opinion Letter dated April 1, 1994 (copy enclosed).

Q.2. Once the employee has been hired and given notice, as stated above, will the "agreement" last for the duration of employment with the County?

A.2. Yes. An "agreement" to provide comp time "may take the form of an express condition of employment provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) . . . In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay." 29 C.F.R. § 553.23(c)(1) (emphasis added). See also Opinion Letter dated April 1, 1994. Such condition could last for the duration of employment unless renegotiated by the parties. See *Smith v. Upson County*, 859 F. Supp. 1504, 1509 (M.D. Ga. 1994).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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.



**U.S. Department of Labor**  
Employment Standards Administration  
Wage and Hour Division  
Washington, D.C. 20210

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We trust that the above is responsive to your inquiry.

Sincerely,

Barbara Relerford  
Office of Enforcement Policy  
Fair Labor Standards Team

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