



October 8, 2004

FLSA2004-14

Dear *Name\**,

This is in response to your request concerning the applicability of the Fair Labor Standards Act (FLSA), enclosed, to your client, an Indiana government employer (the "Employer"). Specifically, you have questions regarding the Employer's scheduling of employee hours and the handling of overtime pay and compensatory time off.

As you know, Section 7(o) of the FLSA allows employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency to receive, in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required.

You state that the Employer defines a "full-time employee" as an employee who averages at least 35 work hours a week on an annual basis. The hours between 35 and 40 per week are referred to as "gap time." Employees are scheduled to work at least 70 hours during a two-week pay period. The actual schedule of hours is flexible, however, and is pre-determined based on supervisory approval. Until the supervisor revises such a flex-time schedule, the employee must adhere to those scheduled flex-time hours.

The Employer understands that any hours worked between 35 and 40 per week (gap time) are not overtime hours under the FLSA. Nevertheless, the Employer's written personnel manual states that the department head or supervisor "...may authorize and schedule the employee to take time off ('compensatory time') at the rate of 1 hour of compensatory time for every hour of gap time worked." Although time off for gap time is supposed to be taken within 30 calendar days, in actual practice that policy has been ignored and currently there are employees with several hundred such hours accrued but not used.

You state that unless a supervisor has authorized overtime pay in advance, compensatory time is given for all overtime. Although you do not say so specifically in your letter, I am assuming that these employees are hourly paid employees and not employees who are paid a salary, and that all hours in excess of 40 per week are compensated at one and one-half hours of compensatory time for each hour worked. You mention that multiple individual work scenarios have developed over the years and that, for example, the schedules of some employees have been increased to 37.5 or even 40 hours a week, and in some instances the pay of these employees has remained the same although their work hours are greater. I will restate your specific questions regarding these practices and answer them below. These answers presume that the employees do not qualify for the Section 7(k) exemption of the FLSA.

**1. Does the Employer's policy, which delegates authority to supervisors to allow or deny employees compensatory time off for gap time hours, meet the qualifications of the Fair Labor Standards Act?**

Because the gap time hours are not hours for which overtime compensation is due under the FLSA, the FLSA does not require compensatory time off when they are worked, provided minimum wage requirements are met. As long as overall earnings for the workweek (exclusive of gap time pay) equal or exceed the amount due at minimum wage for all hours worked, including gap time hours, there is no violation of the FLSA in a non-overtime workweek. However, in an overtime workweek, an hourly 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 the FLSA. This is true whether the overtime compensation due is paid in cash or in compensatory time off. Thus, in a week in which an employee works overtime, the employee must be paid in cash for all hours worked up to 40 hours. You may wish to refer to section 553.28 in the enclosed copy of 29 CFR Regulations Part 553, *Application of the Fair Labor Standards Act to Employees of State and Local Governments*.



**2. In your opinion, does the accrued compensatory time off for gap time hours, as well as hours worked in excess of 40, constitute an accrued liability for the Employer?**

When an employee's additional hours worked are in excess of 40 per week, the FLSA requires the employer to pay time and one-half the employee's regular rate of pay in cash or grant compensatory time off at one and one-half hour for each hour worked. This liability exists regardless of whether the time has been correctly recorded in the employee's service record. As long as the overall earnings for the non-overtime workweek in which the gap time hours were worked equal or exceeded the amount due at the FLSA minimum wage for all hours worked in that week, including gap time hours, there would be no liability under the FLSA for the gap time pay.

**3. Once an employee has been granted compensatory time for gap time hours worked and this compensatory time is recorded in their service records kept by the Comptroller, does this compensatory time become an accrued liability for the Employer such that the employee must be granted such compensatory time or the employee must be paid in cash?**

See Answer to #2 above.

**4. Can the municipality invoke the gap time and overtime agreement and remove compensatory time for gap time and overtime from the employee's service record after 30 calendar days?**

As a staff member mentioned in several telephone messages to your staff, this office did not receive the "Attachment 1" which your letter mentions. This means that we have not reviewed the agreement you are referring to and cannot comment upon it. However, an employer may *not* remove FLSA compensatory time from an employee's service record if the time represents hours worked in excess of 40 per week. Moreover, State employees whose work is *not* a public safety activity, an emergency response activity, or a seasonal activity may accrue no more than 240 hours of compensatory time. Any overtime hours in excess of 240 hours of accrued compensatory time must be paid as cash overtime compensation. You may wish to refer to section 553.22 in the enclosed copy of Regulation 553.

Removal of compensatory time other than that regulated by the FLSA, such as gap time hours for work done in non-FLSA-overtime work weeks, does not violate the FLSA.

**5. Finally, does the municipality's long standing practice of ignoring the gap time and overtime agreement, for both gap time and overtime, negate application of the agreement?**

We will not take a position on how the Employer handles the gap time issue and, as stated above, we have not seen the terms of the Employer's agreement ("Attachment 1") on overtime. However, as you must be aware, any agreement that limits an employee's right to receive overtime compensation due under the FLSA is invalid.

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.



Sincerely,

Alfred B. Robinson, Jr.  
Acting Administrator

Enclosure

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