

COMP TIME WON'T DO FOR EMPLOYER'S TALL ORDER

QUESTION: Recently we received a huge order that we have to deliver by the end of the month. We are going to need employees to put in more hours than usual in order to meet the deadline we promised to the customer. Unfortunately, we did not include in the budget the increased labor cost of paying overtime resulting from the longer hours employees will have to work.

Is it acceptable to compensate employees for the extra hours they'll have to put in by giving them time off next month? We expect things to be slower by then because we don't have any more large pending orders due until this summer. What if we let them take time off equal to time-and-a-half the extra hours they'll be working?

Also, we are thinking of capturing the major points of the "time off game plan" in a written agreement and getting all of our employees to sign that they agree to be paid in time off instead of money.

There's only one snag in the plan - several employees have commented to me that they are not willing to work overtime hours. Can we require them to do so if the work demands it?

ANSWER: In most cases it is not legal to compensate employees with time off in lieu of pay for overtime hours worked - frequently referred to as "comp time." The general rule that compensatory time is impermissible applies even if the employer offers the accrual of time off at a time-and-a-half rate.

Employees must be paid at an overtime rate of time and a half for all hours worked over 40 in a workweek. "Workweek" is a specifically defined 7-day period determined by the employer, which remains the same from week to week, for example, starting Sunday morning at midnight and running through the next Saturday at midnight. The overtime requirement applies to all employees except those expressly exempt by state or federal law.

Employers may, of course, allow employees to flex work hours within a workweek, for example, work four/ten-hour days instead of

five/eight-hour days, without incurring an obligation to pay overtime.

Further, the law does not preclude employers from offering time off in exchange for an employee to put in overtime hours, say, as an incentive to employees. However, employers would still be required to pay employees at the overtime rate for any hours an employee works over 40 in a workweek. In other words, an employer would do both: pay the employee the overtime rate in the workweek the overtime hours are worked, and provide future time off.

An employer may require employees to work overtime hours when necessitated by the amount or nature of the work. This is the only part of your plan to keep labor costs down that is not a “snag.”

Although it is always a good idea to have compensation agreements between employers and employees reduced to writing, any terms that are not compatible with wage and hour laws will not be enforceable so as to protect employees from inadvertently waiving the benefits and protections the law provides them.

Although most private employers may not legally offer time off in a different workweek in lieu of paying overtime for time worked during a separate workweek, public sector (or government) employers, as well as a handful of employers excluded from wage and hour laws, may have the option of compensating employees with comp time in future workweeks in lieu of paying overtime.

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