

## Comp Time In Lieu of Overtime

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Offering an employee additional time off in lieu of paying overtime wages is something that, for the most part, is currently limited to government employers. While some private sector employers mistakenly offer such a benefit, it is—with a few exceptions—something that is prohibited under the Fair Labor Standards Act.

That could change in the near future now that the U.S. House of Representatives has passed a bill that permits private employers and employees the option of subsequent time off when they work in excess of 40 hours in a workweek. The bill, as currently drafted, provides the following:

- The employer and employee must agree in advance and in writing that the employee will receive an hour-and-a-half of time off for every hour over 40 that the employee works in a workweek.
- An employee can accrue up to 160 hours of comp time and the employee must be able to use the comp time within a reasonable amount of time after requesting the time off, so long as it doesn't unduly disrupt the employer's business operations.
- The employer must pay the employee for any unused comp time at the end of the year and upon termination of employment.
- An employer cannot incentivize or intimidate employees into selecting comp time over overtime payments, and the employee can revoke the agreement and receive payment at any time.

While this has some obvious benefits for employers, it doesn't come without some potential headaches. For starters, it will create extra administrative burdens on employers to keep track of which employees have agreed to receive comp time and how many hours or days of comp time each employee has accumulated. It could also lead to shortages if numerous employees accumulate comp time and elect to use it in the same time frame. Finally, it could expose employers to retaliation claims, with one possibility being that employees allege the employer only gave overtime shifts to employees that selected comp time and therefore "incentivized" employees to elect comp time over overtime.

It remains to be seen whether the legislation will pass in the Senate. The Senate has proposed a similar bill, but it is still in committee discussions. Moreover, the bill is generally favored by Republicans and opposed by Democrats, and the Republican majority is smaller in the Senate compared to the House so a filibuster remains a legitimate possibility.