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# Compensatory Time and the Working Families Flexibility Act of 2013

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## Summary

On May 8, 2013, the House passed H.R. 1406, the Working Families Flexibility Act of 2013. If enacted, this bill would amend the Fair Labor Standards Act (FLSA) to allow private sector employers to provide future paid leave (*compensatory time* or *comp time*) in lieu of overtime wages.

Under current law, the FLSA requires employers to pay covered, nonexempt employees one and one-half times their regular hourly wage (“time and a half”) for any hours worked in excess of 40 in a single work week. If enacted, H.R. 1406 would give employers and employees the option to agree to replace overtime wages with one and one-half hours of paid time off for each hour of overtime worked. H.R. 1406 would not affect workers who are not presently covered by, or are exempt from, the overtime provisions of the FLSA such as many executive, administrative, and professional employees.

Under H.R. 1406, the replacement of overtime wages with comp time would be optional for both employers and employees. If an employer and an employee (or the representative of the employee) enter into a comp time agreement, either party may terminate the agreement. If such an agreement is terminated, any unused comp time would be converted to a cash payment to the employee.

Under a comp time agreement, employees would be permitted to accrue up to 160 hours of comp time. Once a year, employers would be required to convert all unused comp time to a monetary payment. Accrued comp time would also be converted to a monetary payment upon the voluntary or involuntary termination of an employee.

If enacted, the comp time provisions of H.R. 1406 would expire five years after enactment.

In October 2013, a Senate version of the Working Families Flexibility Act (S. 1623) was introduced. The bill’s language was identical to the House-passed version of H.R. 1406. S. 1623 was referred to the Senate Committee on Health, Education, Labor, and Pensions but, as of this writing, has seen no further action.

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## Introduction

On May 8, 2013, the U.S. House of Representatives passed H.R. 1406, the Working Families Flexibility Act of 2013. If enacted, the bill would amend the Fair Labor Standards Act (FLSA) to allow private sector employers to provide paid leave in the future (*compensatory time* or *comp time*) in lieu of overtime pay when the overtime is worked.

Under H.R. 1406, compensatory time would be available only when an employer and employee (or representative of the employee) agree to replace overtime wages with paid time off. Compensatory time would be accrued at a rate of not less than one and one-half hours of comp time for each hour of employment for which overtime pay is required.

In October 2013, a Senate version of the Working Families Flexibility Act (S. 1623) was introduced. The bill's language was identical to the House-passed version of H.R. 1406. S. 1623 was referred to the Senate Committee on Health, Education, Labor, and Pensions but, as of this writing, has seen no further action.

This report begins with a brief overview of the weekly hours and overtime provisions of the FLSA. It then describes the existing comp time provisions that cover public sector employees. The report then discusses the changes proposed by H.R. 1406.

## The Fair Labor Standards Act<sup>1</sup>

Initially enacted in 1938, the FLSA regulates weekly hours of work and overtime wages. The act covers most, but not all, private and public sector employees. Exemptions are discussed briefly later in this report.

The hours of work regulations discussed in this section are national minimums. The FLSA allows states to enact shorter maximum work hours.

## Weekly Hours and Overtime Pay

Section 7 of the FLSA (29 U.S.C. §207) specifies that employers must pay covered workers at least one and one-half times their regular hourly wage for hours worked in excess of 40 in a single work week. This “time and a half” wage is often referred to as overtime pay. A work week is characterized as a fixed and regularly recurring period of 168 hours (seven 24-hour periods).<sup>2</sup> Work weeks are determined by the employer and may begin on any day and hour.

Exceeding 40 hours in a work week is the only scheduling circumstance that entitles a private sector worker to overtime wages. An employer may schedule hours of work in any combination

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<sup>1</sup> In addition to overtime wages, the FLSA also regulates minimum wages, child labor, and certain work conditions. This report only discusses the FLSA overtime provisions that relate to comp time. For a complete overview of the FLSA, see CRS Report R42713, *The Fair Labor Standards Act (FLSA): An Overview*, by (name redacted), (name redacted), and (name redacted).

<sup>2</sup> See 29 C.F.R. 778.105.

of hours under 40 for a work week (e.g., three 12-hour days) and not be required to pay overtime wages. If an employer does pay overtime wages, there is no maximum number of hours of work for an employee age 16 or over.

## Exemptions from the Overtime Provisions of the FLSA

Section 13 of the FLSA (29 U.S.C. §213) exempts certain workers from the overtime provisions of the act. The largest group of workers who are exempt are bona fide executive, administrative, and professional employees (the “EAP exemption”). Regulations specify that workers under the EAP exemption must be paid a salary of at least \$455 per week and meet certain job duty requirements.<sup>3</sup>

## Compensatory Time in the Public Sector

The FLSA allows nonexempt state and local government employees to receive comp time in lieu of overtime pay. Under a separate law, both exempt and nonexempt federal employees may receive comp time.

### State and Local Government Employees

When it was enacted in 1938, the FLSA covered private sector employees only. In 1966, FLSA coverage was extended to state and local government employees of hospitals, elementary and secondary schools, institutions of higher education, and local transit systems.<sup>4</sup> In 1974, coverage was extended to most federal, state, and local government employees.<sup>5</sup>

A 1976 U.S. Supreme Court decision (*National League of Cities v. Usery*) held that the 1966 and 1974 amendments to the FLSA that extended coverage to state and local governments were unconstitutional. In February 1985, the U.S. Supreme Court (*Garcia v. San Antonio Metropolitan Transit Authority*) overturned the 1976 decision.

After the 1985 Supreme Court ruling, the Fair Labor Standards Amendments of 1985 (P.L. 99-150) delayed, until April 15, 1986, the requirement that state and local governments pay nonexempt employees time-and-a-half for overtime. The act also allowed employees of state and local governments to receive comp time at a rate of at least one-and-a-half hours for each hour of overtime worked.

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<sup>3</sup> For example, to be exempt as a professional employee, a worker must work in a job “[r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction” or “[r]equiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” See 29 C.F.R. 541.300 for other criteria.

<sup>4</sup> U.S. House of Representatives, *Fair Labor Standards Amendments of 1966, Conference Report to Accompany H.R. 13712*, 89<sup>th</sup> Cong., 2<sup>nd</sup> sess., Report No. 2004, September 6, 1966, p. 2.

<sup>5</sup> The 1974 act also provided a limited exemption from overtime for fire protection and law enforcement employees whose work period was 7 to 28 consecutive days. For employees whose work period is 28 consecutive days, fire protection personnel are due overtime after 212 hours of work. Law enforcement personnel are due overtime after 171 hours of work. U.S. Department of Labor, Wage and Hour Division, *Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA)*, <http://www.dol.gov/whd/regs/compliance/whdfs8.pdf>.

According to House and Senate committee reports on the 1985 amendments, the purpose of delaying the implementation of time-and-a-half for overtime was to allow state and local governments time to adjust to the new standard. The committee reports also noted that, at the time, many state and local governments had comp time arrangements with their employees. These arrangements were often the result of collective bargaining agreements. Thus, a reason for the comp time provision was to accommodate current practices.<sup>6</sup>

## Federal Government Employees

Federal employees may receive overtime pay if they work more than 40 hours in a week or 8 hours in a day. Both FLSA exempt and nonexempt employees are eligible for overtime pay.

Federal employees may request comp time in lieu of overtime pay.<sup>7</sup> However, an agency head may direct an employee whose pay is greater than the maximum pay for a General Schedule (GS) pay grade 10 employee to take comp time instead of receiving overtime pay when overtime is worked. Federal employees are granted one hour of comp time for each hour of overtime worked. An employee must use accrued comp time by the end of the 26<sup>th</sup> pay period after the pay period during which it was earned.<sup>8</sup>

At their discretion, federal agencies may pay employees for unused comp time at the employees' overtime rate of pay.<sup>9</sup> For nonexempt employees, comp time is paid at one-and-a-half times an employee's hourly rate of pay. For exempt employees, if an employee's pay is less than the minimum pay of a GS-10 employee, comp time is paid at one-and-a-half times the employee's hourly rate of pay. If an employee's pay is more than the minimum pay of a GS-10 employee, comp time is paid at the greater of one-and-a-half times the minimum hourly pay of a GS-10 employee or the employee's actual hourly rate of pay.<sup>10</sup>

## H.R. 1406 and Expanding Comp Time to the Private Sector

The 113<sup>th</sup> Congress marks the third time since 1996 that the House has passed a bill to expand comp time to the private sector. In the 104<sup>th</sup> Congress, the House passed H.R. 2391 and in the 105<sup>th</sup> Congress, the House passed H.R. 1. While some details varied, these bills were largely similar to H.R. 1406 in the 113<sup>th</sup> Congress.

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<sup>6</sup> U.S. House, Committee on Education and Labor, *Fair Labor Standards Amendments of 1985*, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess., Report 99-331, October 24, 1985, pp. 5-8, 21, 27. U.S. Senate, Committee on Labor and Human Resources, *Fair Labor Standards Public Employee Overtime Compensation Act*, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess., Report No. 99-159, October 17, 1985, pp. 5-8.

<sup>7</sup> Comp time for federal employees was first provided by the Federal Employees Pay Act of 1956 and is currently codified at Title 5 U.S.C. §5543.

<sup>8</sup> U.S. Office of Personnel Management, *Compensatory Time Off*, <http://www.opm.gov/OCA/pay/html/comp.htm>.

<sup>9</sup> If an agency does not pay an employee for unused comp time, the comp time could be lost. 5 C.F.R. §550.114(d). An employee who leaves federal employment must be paid for unused comp time. 5 C.F.R. §550.114(f)(2).

<sup>10</sup> 5 U.S.C. §5542.

## **Accrual of Comp Time Hours**

H.R. 1406 would amend the FLSA to permit an employee to receive “in lieu of monetary 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[.]” Under the act, an employee would be eligible to accrue a maximum of 160 hours of comp time.

## **Choosing Comp Time versus Cash Wages**

Under H.R. 1406, the use of comp time in lieu of overtime wages would be optional for both the employer and employee. If an employer declines to offer comp time, the changes to the FLSA would have no effect and employees would continue to be eligible for overtime wages. If an employer does choose to offer comp time, eligible employees may accept comp time through a written agreement or decline comp time and continue to be eligible for overtime wages. In cases where employees are covered by a collective bargaining agreement, the employee representative may choose to accept or decline comp time.

The bill would limit eligibility for comp time to employees who have worked at least 1,000 hours for the employer during the prior 12-month period.

H.R. 1406 would allow employees to withdraw from a comp time agreement and return to overtime wages at any time. Employees who withdraw from a comp time agreement may also request to have any unused comp time converted to a cash payment. Employers would be required to comply with this request within 30 days.

Employers would be permitted to discontinue offering comp time with 30 days’ notice, absent a collective bargaining agreement providing otherwise.

## **Prohibited Actions and Remedies**

The legislation states that employers shall not “directly or indirectly intimidate, threaten, or coerce or attempt to intimidate, threaten, or coerce” any employee in relation to the employee’s choice to accept, forego, or use compensatory time. An employer that violates these provisions “shall be liable to the employee affected in the amount of the rate of compensation ... for each hour of compensatory time accrued by the employee and in an additional amount of such rate of compensation for each hour of compensatory time used by such employee.”

## **Use of Comp Time Hours**

H.R. 1406 specifies that an employee who has accrued comp time shall be permitted to use it “within a reasonable period after making the request” if the request “does not unduly disrupt the operations of the employer.” This language is similar to the provisions in current law regulating the use of comp time by state and local government employees.

## **Circumstances and Processes to Convert Accrued Comp Time into Cash Wages**

Comp time may be used as paid time off in place of regular work hours. H.R. 1406, however, also specifies several circumstances in which unused comp time would be converted into a cash payment.

- No later than January 31 of each year, an employer must provide monetary compensation for any unused comp time accrued during the preceding calendar year. An employer may designate another fixed 12-month period as the work year, though payment for unused comp time must be provided no later than 31 days after the end of the specified work year.
- An employee may request unused comp time to be converted to monetary payment at any time. The employer must comply with this request within 30 days.
- An employer, with 30 days' notice, may convert any accrued comp time in excess of 80 hours to a monetary payment.
- If employment is terminated, either voluntarily or involuntarily, unused comp time must be converted to a monetary payment.

Under H.R. 1406, if compensation is paid for accrued comp time, it would be paid at the higher rate of (1) the employee's regular rate of pay when it is earned or (2) the employee's final rate of pay. The act specifies that any payment owed to an employee for unused comp time would be considered unpaid overtime compensation.

## **GAO Reports and Sunset Provisions**

H.R. 1406 would require the Government Accountability Office (GAO) to submit reports to Congress, beginning two years after the date of enactment and each of the three years thereafter. The reports would provide data on the extent to which the comp time provisions are utilized as well as the number of complaints, enforcement actions, and remedies related to comp time.

Under H.R. 1406, the changes to the FLSA made would expire five years after enactment.

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