

NLWJC- Kagan

Counsel - Box 005 - Folder 012

Comp time

Marvin 5-16-96

Baloney bill -
allow choice btw OTime
+ comp time

comp time -

ent probs in low-wage inds,
where EEs can't really make
voluntary decision.

Unions don't like.

Amends to Ball - Admin agree?

Or - take offensive radical propos -

ERs can't just decide to have someone else
2 (cumulatively)

Don't spend time -

Not coming up as issue.

THE WHITE HOUSE
WASHINGTON

cc: Elena

Elena

Over to you for handling.

Travels

Marvin - 219-7675

FYI

To: JQ - assigned to Elena

THE WHITE HOUSE
WASHINGTON

KW
/

JACK —————

COMP TIME VS. OVERTIME



ISSUE THAT MAY BE
COMING UP — MARWIN
THOUGHT HE SHOULD GIVE
WH COUNSEL "HEADS-UP".
WHOMEVER IS DEALING
W/ MINIMUM WAGE WOULD
BE BEST PERSON.

MARWIN HAPPY TO BRING
THAT PERSON UP TO DATE. SLL



IMMEDIATE OFFICE OF THE SOLICITOR

FAX TRANSMITTAL SHEET

TO: Sheri Avesten

FROM: Marvin Krieger

DATE: 5/13/96

PAGE NUMBER ONE OF 14 PAGES

COMMENTS: For Jack Quinn,
per our conversation
Thank You

**IF YOU HAVE ANY QUESTIONS REGARDING THIS
FAX, PLEASE CALL: 202/219-7675**

DRAFT**FAIR LABOR STANDARDS ACT OVERVIEW**

The Fair Labor Standards Act (FLSA) sets minimum wage, overtime pay, child labor standards, and recordkeeping requirements. It requires payment of the Federal minimum wage (\$4.25 per hour), and time-and-one-half overtime premium pay, based on the regular rate of pay, for hours worked over 40 per week, to all covered employees, unless a particular exemption applies.

COVERAGE

Not every business or employee is covered; those not covered do not have to meet FLSA's terms. Coverage is based on the nature of the business and the employee's duties. Employees engaged in interstate commerce or in producing goods for interstate commerce, and all employees in certain enterprises so engaged, including public agencies (Federal, State and local governments), are covered. Interstate commerce is broadly defined to include working in communications or transportation; regular use of the mails, telephones and other interstate communications; documenting records of interstate transactions (including interstate credit card transactions); handling, shipping or receiving goods that are moving in interstate commerce; crossing State lines during the normal course of employment; and working for independent contractors that do clerical, custodial or maintenance, or other work for businesses engaged in interstate commerce or in producing goods for interstate commerce. Many enterprises with annual gross sales or business less than \$500,000 do not meet FLSA's "enterprise coverage" test.

EXEMPTIONS

FLSA's exemptions mean some covered employers do not have to pay minimum wage or overtime to certain employees. Some exemptions are based on the type of business while others depend on the work of individual employees. An employee may be exempt from FLSA's minimum wage or overtime standards, or could be exempt from both. FLSA also has partial exemptions from overtime (e.g., firefighters receive overtime after 53 hours per week under §7(k) of FLSA). FLSA currently provides nine complete exemptions from both minimum wage and overtime in §13(a), and 22 full or partial exemptions from overtime in §13(b).

MAXIMUM HOURS

There is no limit on the maximum number of hours in a day or days in a week that an employee may be required to work if the employee is at least 16 years old and if the employer pays proper overtime to covered, nonexempt employees who work over 40 hours per week. Compliance with FLSA does not excuse an employer from obligations to meet any higher standards required by State or local laws or collective bargaining agreements.

OVERTIME PAY REQUIREMENTS

All covered, nonexempt employees must be paid overtime pay, based on time-and-one-half their "regular rate of pay," for all hours worked over 40 per week. FLSA's overtime rules were intended to discourage employees working excessively long hours by increasing the cost through time-and-one-half premium pay on the hours worked over 40 per week, and to encourage employers to spread available work to more employees. To make it effective, Congress required that all remuneration paid to, or on behalf of, an employee (except for a few specific exclusions) be included in the "regular rate" for computing the time-and-one-half overtime premium rate.

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COMPTIME

PRIVATE SECTOR

The Fair Labor Standards Act (FLSA) does not allow employers in the private sector to grant compensatory time off ("comp time") in lieu of monetary payment for overtime hours worked. FLSA requires that all covered, nonexempt employees in the private sector receive time-and-one-half overtime premium pay on the next regular payday after the work is performed for all hours worked beyond 40 per week.

PUBLIC SECTOR

State and local governments are allowed, under the 1985 FLSA Amendments, to substitute paid time off as "comp time" in lieu of overtime pay under certain conditions. The comp time must accrue at 1½ hours for each hour of overtime worked. The law limits how many comp time hours may be accumulated (480 hours in fire protection or law enforcement; 240 hours elsewhere). Use of comp time is only allowed pursuant to an agreement or understanding between the employer and the employee (or representative) reached before the work is performed. A public employee must be allowed to use accumulated comp time within a reasonable period after requesting it if taking it would not unduly disrupt the employer's operations. When an employee is terminated, any unused comp time must be paid at the average regular rate over the last three years or the final regular rate, whichever is higher.

The legislative history to the 1985 FLSA Amendments reflects that Congress wanted to respond to concerns of State and local governments over the financial impact of FLSA's overtime provisions by accommodating existing pay practices that had been worked out voluntarily between many State and local governments and their employees. Such arrangements included providing comp time off instead of premium pay for overtime hours, which "... reflect[ed] mutually satisfactory solutions that [were] both fiscally and socially responsible. To the extent practicable, [Congress sought] to accommodate such arrangements". S. Rep. No. 159, 99th Cong., 1st Sess. 8 (1985).

FEDERAL GOVERNMENT SECTOR

Title 5 of the U.S. Code governs Federal employees' pay entitlements, *in addition to* FLSA's provisions. Title 5 allows Federal employees to be granted comp time off, hour-for-hour, for irregular or occasional overtime hours worked under conventional or fixed schedules or for any overtime worked under an "alternative" work schedule. Employees not exempt under FLSA may *elect*, but may not be *required* to accept, comp time instead of overtime pay. Accumulated comp time is limited to 64 hours carryover from one year to the next. A separating employee is paid for unused comp time at the rate in effect when the comp time was earned.

"Alternative" work schedules began as a three-year experiment in the Federal government in 1978, were extended in 1982, and made permanent in 1985. Federal employees on alternative, compressed, or flexible schedules may accumulate up to 24 "credit hours" without payment of overtime. "Credit hours" are voluntarily worked by an employee beyond the basic 40-hour per week work schedule requirement which may later be used as paid time off.

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Ballenger Comp Time Bill

Cons (against comp time)

- FLSA's overtime provisions were intended to discourage long work hours and spread available employment opportunities to more workers. Easing the overtime penalties for employers by making comp time an available option for delaying over-time payments is inconsistent with one of FLSA's fundamental purposes.
- Low-wage workers and those that have little leverage in the workplace can never really be assured of a "free choice" if they wish to receive cash for overtime premium pay.
- For unscrupulous employers, this will provide one more opportunity to exploit workers – and it will be difficult to prove they have done so.
- Enforcement of FLSA's overtime provisions will be even more difficult.

Cons (against Ballenger bill)

- There is no way to guarantee that a private sector employee would eventually receive payment for accrued overtime obligations in the comp time bank if a company folds or declares bankruptcy.
- There can be up to a 30 day delay after an employee requests a payout of accrued comp time.
- Employees' exercise of free choice should not place their jobs in jeopardy or disadvantage their ability to advance, or otherwise result in discrimination (e.g., slower promotions; less favorable work assignments; whether overtime hours would be made available by the employer if the employee chooses cash instead of comp time, etc.)
- The provisions that are intended to ensure choice are insufficient or are easily circumvented by the unscrupulous employers:
 - only willful violations of the coercion provision are penalized;
 - there is no requirement that the employer/employee agreement be in writing;
 - there is no provision for how to handle a change in the employer/employee agreement;
 - no notice of employee rights is required;

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2

- an employer could offer the option of comp time to only selected employees.
- Employers will actually increase their control over employees' worklife:
 - an employer could deny the use of banked comp merely by stating that the employee's absence would "unduly disrupt the operations of the employer;"
 - an employer could decide at any time to pay an employee for banked comp time – even if the employee has plans for using the comp time (vacation, family and medical leave, etc).
- There is no recordkeeping requirement, so employees would have to keep track of their own accrued hours.
- Employees should be able to choose whether to even work the overtime in the first place.
- Penalties for willful violations of the anti-coercion provision are only available to those who sue privately.
- There will be a competitive advantage for those firms that can avoid the overtime premium pay penalty by paying comp time.

Pros (for comp time)

- According to some polls, a majority of employees would like the option of receiving comp time (in lieu of overtime pay) so that they have more time off to spend with their family, pursue other interests, go to school, etc.
- State, local and federal employees already have this option and it seems to work well for them.

Pros (for Ballenger bill)

- Some of the provisions actually provide greater benefits or protections for private employees than is currently provided for state and local government employees (e.g., coercion clause and penalty for a willful violation of that clause).

DRAFT

May 10, 1996

Ballenger Comp Time Bill (H.R. 2391)

Differences – Comp Time for State and Local Governments Vs. Private Sector

The bill proposes comp time provisions for the private sector that differ from those for State and local governments in the following respects:

- ▶ For employees in the private sector, the agreement or understanding for comp time may not be a "condition of employment."
- ▶ Private sector employers may not intimidate, threaten or coerce (or attempt to, directly or indirectly) employees into requesting or not requesting comp time in lieu of overtime pay, or require any employee to use comp time. The public sector has no comparable provisions.
- ▶ Private sector employees may accrue no more than 240 hours of comp time in a bank without cash payment. Public sector employees in public safety, emergency response, or seasonal activities may accrue up to 480 hours of comp time; all others, 240.
- ▶ For private sector employers, at the end of every year, any unused comp time (in the "bank") must be cashed out at the employee's regular rate at time of payment. No comparable provisions apply to the public sector.
- ▶ Private sector employers must cash out accrued comp time within 30 days of employees' written requests. No comparable provisions apply to the public sector.
- ▶ Upon termination of employment, private sector employees are paid for unused comp time at the average rate during the period it accrued (for public sector, over the last three years of employment) or the final rate, whichever is higher.
- ▶ Private sector employers that willfully violate the anti-intimidation/anti-coercion provisions would be liable in private litigation to affected employees for the amount of each hour of comp time accrued, plus an equal amount in liquidated damages (less each hour of comp time that was used). No comparable provisions apply to the public sector.

DRAFT**Ballenger Comp Time Bill, The "Working Families Flexibility Act" (H.R. 2391)**

H.R. 2391 would extend current FLSA comp time provisions now available only for State and local governments to the private sector, with certain changes. Supporters of the bill promote it as a "flexibility" and "family-friendly" issue for employees.

Basic Provisions:

- ▶ Comp time hours accrue at 1½ times the number of overtime hours worked.
- ▶ Comp time is available only if there is a collective bargaining or other agreement or understanding "knowingly and voluntarily" agreed to by employees before the overtime work is performed.
- ▶ The agreement or understanding may not be a "condition of employment."
- ▶ Employers may not intimidate, threaten or coerce (or attempt to, directly or indirectly) employees into requesting or not requesting comp time in lieu of overtime pay, or require any employee to use comp time.
- ▶ Private sector employees may accrue no more than 240 hours of comp time in a bank without cash payment.
- ▶ At the end of every year, any unused comp time (in the "bank") must be cashed out at the employee's regular rate at time of payment.
- ▶ Employees may also, at any time, request in writing that they be paid in cash for accrued comp time; employer has 30 days to comply. Such payments are at the higher of their average pay rate in effect during the period it accrued or the final rate.
- ▶ Employer retains the right to cash out any unused comp time at any time.
- ▶ Terminated employees are paid for unused comp time at the higher of their average pay rate in effect during the period it accrued or the final rate, which can be collected through private lawsuits as unpaid overtime compensation if necessary.
- ▶ Employees would be allowed to schedule and use their comp time as paid time off within a reasonable time after requesting it, if the time away from work does not unduly disrupt the employer's operations.
- ▶ Private sector employers that willfully violate the anti-intimidation/anti-coercion provisions would be liable in private litigation to affected employees for damages, computed as the amount of each hour of comp time accrued in violation, plus an equal amount in liquidated damages, less each hour of comp time that the employee used during the period.

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H.L.C.

To: Rich Fiest

**AMENDMENT TO H.R. 2391
OFFERED BY MR. BALLENGER**

DRAFT

Strike the text of the amendment and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Working Families
3 Flexibility Act".

4 SEC. 2. COMPENSATORY TIME.

5 Section 7(o) of the Fair Labor Standards Act of 1938
6 (29 U.S.C. 207(o)) is amended to read as follows:

7 "(n)(1) An employee may receive, in accordance with
8 this subsection and in lieu of monetary overtime com-
9 pensation, compensatory time off at a rate not less than
10 one and one-half hours for each hour of employment for
11 which overtime compensation is required by this section.

12 "(2) An employer may provide compensatory time
13 under paragraph (1) only—

14 "(A) pursuant to—

15 "(i) applicable provisions of a collective
16 bargaining agreement, memorandum of under-
17 standing, or any other agreement between the
18 employer and representative of such employees,
19 or

SENT BY:

5- 9-96 : 8:12PM : OPPORTUNITIES CNT-

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H.L.C.

1 “(ii) in the case of employees who are not
 2 represented by a collective bargaining agent or
 3 other representative designated by the em-
 4 ployee, an agreement or understanding arrived
 5 at between the employer and employee before
 6 the performance of the work if such agreement
 7 or understanding was entered into knowingly
 8 and voluntarily by such employee; and

*no
 written
 agreement*

9 “(B) if the employee has not accrued compen-
 10 satory time in excess of the limit applicable to the
 11 employee prescribed by paragraph (5).

12 In the case of employees described in subparagraph (A)(ii)
 13 who are employees of a public agency and who were hired
 14 before April 15, 1986, the regular practice in effect on
 15 such date with respect to compensatory time off for such
 16 employees in lieu of the receipt of overtime compensation,
 17 shall constitute an agreement or understanding described
 18 in such subparagraph. Except as provided in the preceding
 19 sentence, the provision of compensatory time off to em-
 20 ployees of a public agency for hours worked after April
 21 14, 1986, shall be in accordance with this subsection. An
 22 employer may provide compensatory time under para-
 23 graph (1) to an employee who is not an employee of a
 24 public agency only if such agreement or understanding
 25 was not a condition of employment.

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H.L.C.

1 “(3) An employer which is not a public agency and
 2 which provides compensatory time under paragraph (1) to
 3 employees shall not directly or indirectly intimidate,
 4 threaten, or coerce or attempt to intimidate, threaten, or
 5 coerce any employee for the purpose of—

6 “(A) interfering with such employee's rights
 7 under this subsection to request or not request com-
 8 pensatory time off in lieu of payment of overtime
 9 compensation for overtime hours; or

10 “(B) requiring any employee to use such com-
 11 pensatory time.

12 “(4) An employee, who is not an employee of a public
 13 agency, may accrue not more than 240 hours of compen-
 14 satory time. Not later than January 31 of each calendar
 15 year, the employee's employer shall provide monetary com-
 16 pensation for any compensatory time off accrued during
 17 the preceding calendar year which was not used prior to
 18 December 31 of the preceding year at a rate not less than
 19 the regular rate earned by the employee at the time the
 20 employee receives such payment. An employer may des-
 21 ignate and communicate to the employer's employees a 12-
 22 month period other than the calendar year, in which case
 23 such compensation shall be provided not later than 91
 24 days after the end of such 12-month period. An employee
 25 may also, at any time, request in writing that monetary

*Employer
 can cut
 employees
 salary*

1 compensation be provided for all compensatory time ac-
 2 crued which has not yet been used. Within 30 days of re-
 3 ceiving the written request, the employer shall provide the
 4 employee the monetary compensation due in accordance
 5 with paragraph (6). The employer retains the right to cash
 6 out the unused compensatory time at any time.

7 “(5)(A) If the work of an employee of a public agency
 8 for which compensatory time may be provided included
 9 work in a public safety activity, an emergency response
 10 activity, or a seasonal activity, the employee engaged in
 11 such work may accrue not more than 480 hours of com-
 12 pensatory time for hours worked after April 15, 1986. If
 13 such work was any other work, the employee engaged in
 14 such work may accrue not more than 240 hours of com-
 15 pensatory time for hours worked after April 15, 1986. Any
 16 such employee who, after April 15, 1986, has accrued 480
 17 or 240 hours, as the case may be, of compensatory time
 18 off shall, for additional overtime hours of work, be paid
 19 overtime compensation.

20 “(B) If compensation is paid to an employee de-
 21 scribed in subparagraph (A) for accrued compensatory
 22 time off, such compensation shall be paid at the regular
 23 rate earned by the employee at the time the employee re-
 24 ceives such payment.

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5-8-88 8:13PM : OPPORTUNITIES UNIT

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H.L.C.

1 “(6)(A) An employee of an employer which is not a
2 public agency who has accrued compensatory time off au-
3 thorized to be provided under paragraph (1) shall, upon
4 the voluntary or involuntary termination of employment,
5 be paid for the unused compensatory time at a rate of
6 compensation not less than—

7 “(i) the average regular rate received by such
8 employee during the period during which the com-
9 pensatory time was accrued, or

10 “(ii) the final regular rate received by such em-
11 ployee,

12 whichever is higher. Any payment owed to an employee
13 under this paragraph for unused compensatory time shall,
14 for purposes of section 16(b), be considered unpaid over-
15 time compensation.

16 “(B) An employee of an employer which is a public
17 agency who has accrued compensatory time off authorized
18 to be provided under paragraph (1) shall, upon the vol-
19 untary or involuntary termination of employment, be paid
20 for the unused compensatory time at a rate of compensa-
21 tion not less than—

22 “(i) the average regular rate received by such
23 employee during the last 3 years of the employee's
24 employment, or

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H.L.C.

1 “(ii) the final regular rate received by such em-
 2 ployee,
 3 whichever is higher. Any payment owed to an employee
 4 under this paragraph for unused compensatory time shall,
 5 for purposes of section 16(b), be considered unpaid over-
 6 time compensation.

7 “(7) An employee—

8 “(A) who has accrued compensatory time off
 9 authorized to be provided under paragraph (1), and

10 “(B) who has requested the use of such com-
 11 pensatory time,

12 shall be permitted by the employee's employer to use such
 13 time within a reasonable period after making the request
 14 if the use of the compensatory time does not unduly dis-
 15 rupt the operations of the employer.

*employee is
 be denied
 use of
 comp time
 for FMLA
 leave*

16 “(8) For purposes of this subsection—

17 “(A) the term 'overtime compensation' means
 18 the compensation required by subsection (a), and

19 “(B) the terms 'compensatory time' and 'com-
 20 pensatory time off' mean hours during which an em-
 21 ployee is not working, which are not counted as
 22 hours worked during the applicable workweek or
 23 other work period for purposes of overtime com-
 24 ensation, and for which the employee is com-
 25 pensated at the employee's regular rate.”.

*employer can
 require emp to
 work over
 to make up
 comp time*

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5- 8-86 ; 8:13PM ; OPPORTUNITIES UNIT

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H.L.C.

1 SEC. 3. REMEDIES.

2 Section 16 of the Fair Labor Standards Act of 1938
3 (29 U.S.C. 216) is amended—

4 (1) in subsection (b), by striking "(b) Any em-
5 ployer" and inserting "(b) Except as provided in
6 subsection (f), any employer"; and

7 (2) by adding at the end the following:

8 "(f) An employer which is not a public agency and
9 which willfully violates section 7(o)(3) shall be liable to
10 the employee affected in the amount of the rate of com-
11 pensation (determined in accordance with section
12 7(o)(6)(A)) for each hour of compensatory time accrued
13 by the employee and in an additional equal amount as liq-
14 uidated damages reduced by the amount of such rate of
15 compensation for each hour of compensatory time used by
16 such employee."