

The Ultimate Backup

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COMPENSATORY TIME OFF RULES REVISITED

By Alison Berry Wilkinson

New rules have emerged on granting compensatory time off pursuant to the Fair Labor Standards Act. Although my original article on this subject was published over three years ago, the topic of comp-time requests remains a hot issue, and many reprints of that article have been published. But, recent changes in the compensatory time off rules require an update.

The constantly asked question is: When can a public agency employer deny an employee's request to take earned comp-time off?

The old rule that an employer could not deny a comp-time request due to inconvenience or because the employer would have to replace the employee on an overtime basis is no longer the standard.

The source of all the comp-time controversy begins with the language in the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, which provides that, "[a]n employee of a public agency . . . who has requested [comp-time off] shall be permitted by the employee's employer to use such time within a reasonable period after making the

request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5)(B) The courts originally interpreted § 207(o)(5) to "specifically [give] the employee the right of access to and control of the use of [comp-time] subject only to the employer's right to deny requested uses by the employee that would unduly disrupt the employer's operation." *Heaton v. Moore*, 43 F.3d 1176, 1180 (8th Cir. 1994).

In 2000, the *Heaton* rule was abrogated by the United States Supreme Court in *Christenson v. Harris County*, 529 U.S. 576 (2000). *Christenson* stated that, "§ 207(o)(5) is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it." *Id.* at 583. The Court went on to state that the section is better read "as setting up a safeguard to ensure that an employee will receive timely compensation for working overtime" and as a "restriction on an employer's ability to *prohibit* the use of compensatory time". *Id.* at 583-585.

Notably, in *Christiansen*, the Supreme Court held that public entities can compel an

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employee to use compensatory time off and that the employer can choose the specific dates that an employee must use forced CTO.

The ability of employees to control when they take compensatory time off rights was further restricted in the decision in *Houston Police Officers Union v. City of Houston* (5th Cir. 2003) 330 F.3d 298. In *Houston*, the Police Department administered comp-time usage by referring to a “Red Book.” Each unit was assigned a specific Red Book that listed all the officers in the unit who were scheduled to be off-duty on any given day. Each unit had a predetermined limit on the number of officers who could be off on a particular day. An officer wishing to use his accrued comp-time had to sign up in the unit’s Red Book for the CTO day(s) requested. If the Red Book’s limit for the requested day had not been reached, the officer received the requested comp-time.

The *Houston* system sometimes frustrated an officer’s ability to use comp-time by essentially forcing the officer to use comp-time based on the department’s convenience rather than the convenience of the officer. The court ruled in favor of the City of Houston and upheld the Red Book system.

The Houston Police Officers’ Union contended, consistent with the old rule, that “when an employee makes a reasonably timely request for a specific period of comp-time leave, the employer must grant it unless doing so would unduly disrupt the agency’s operation for each such request.” The *Houston* court rejected that rule.

The ability of employees to chose when he or she uses compensatory time off was irreparably damaged and further undermined in a 2004 case entitled: *Mortensen v. County of Sacramento* (9th Cir. 2004) 368 F.3d 1082. In that case, an officer asked for compensatory time off on a particular date, but the request was denied because all available leave slots for that day were taken.

In *Mortensen*, the employee contended that the county was required to allow him to use accrued comp time on the day he specifically requested unless the employer could show that to do so would result in an undue disruption.

The employer responded that the FLSA does not allow an employee the unfettered discretion in scheduling his comp time off. The employer had implemented a time off system, where the supervisor maintained a leave book showing the number of employees who were scheduled to be off on a particular day. The leave book had a predetermined number of available leave slots that were used to schedule all future requests for time off, including comp time. Typically, there were three leave slots available on weekdays, and four leave slots available on weekends. The number of available leave slots was set to comply with the department’s minimum staffing requirements. Deputies were allowed to request comp time based only on the slots available. Once the leave slots for a particular day were full, the county denied all further requests for discretionary leave, including CTO, to avoid the shift from being under-staffed.

The *Mortensen* court held that an employee does not have the right to force the employer to pay another employee overtime so that the employee could use his comp time off on the specific date that the employee chose. Rather, the court found that the employer's obligation was simply to grant compensatory time off within a "reasonable period" after the employee made the request. The court noted that the definition of reasonable period "depends upon the customary work practices of the employer." Because what is considered to be a "reasonable period" can be defined in a collective bargaining agreement or a policy, the *Mortensen* court found that the County would not violate the FLSA unless it failed to follow its leave book policy or refused to grant the use of comp time off within one year of a request as required by the applicable collective bargaining agreement.

Conclusion

These decisions all denote a trend toward expanding the employer's right to deny compensatory time off requests. As a result, public safety labor organizations should negotiate well-defined policies and procedures regarding comp-time usage. Included in these negotiations should be the specific criteria that the employer is to use in deciding whether to deny or grant the officer's request. That way, the employees will be given some definite guidelines that can be relied upon when making comp-time off requests.

Author's Note: *Alison Berry Wilkinson is the managing partner of Rains, Lucia & Wilkinson LLP, a law firm that almost exclusively represents public safety employees in collective bargaining, as well as administrative discipline, criminal and civil litigation. Alison has extensive experience resolving and/or litigating Fair Labor Standards Act claims against public agencies throughout California.*

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