

MEMORANDUM

TO: John Black
FROM: Matt O'Neil
DATE: March 8, 2018
RE: FLSA Restrictions on Compensatory Time for Firefighters

This memo summarizes the Fair Labor Standards Act (“FLSA”) rules governing the accrual of compensatory time that are applicable to public sector emergency response personnel, including firefighters.

Under the FLSA, compensatory time is defined as “hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee’s regular rate.” 29 U.S.C. § 207(o)(7)(B). Public sector employers are permitted, if authorized by a collective bargaining agreement, to offer employees compensatory time in lieu of monetary compensation for overtime worked. 29 U.S.C. § 207(o). However, compensatory time must be offered “at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.” 29 U.S.C. § 207(o)(1). Employees who have accrued compensatory time and have requested to use their compensatory time, shall be permitted to use such compensatory time within a reasonable period after making the request, so long as the use of compensatory time does not “unduly disrupt” the employer’s operations. 29 U.S.C. § 207(o)(5).

With respect to employees engaged in a “public safety activity, an emergency response activity, or a seasonal activity,” such employees “may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986.” 29 U.S.C. § 207(o)(3)(A). Accordingly, where a firefighter has accrued 480 hours of compensatory time—based on 320

hours of overtime hours worked—then the firefighter is entitled to monetary payment for any additional overtime at a rate of at least time-and-a-half.

When a firefighter’s employment is terminated, the firefighter is entitled to be paid for any “unused compensatory time at a rate of compensation not less than--(A) the average regular rate received by such employee during the last 3 years of the employee’s employment, or (B) the final regular rate received by such employee, whichever is higher.” 29 U.S.C. § 207(o)(4)(B).

While employees must agree to the use of compensatory time through a collective bargaining agreement, they cannot agree to an arrangement for compensatory that is not compliant with the rules above. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981); Rogers v. City of Troy, N.Y., 148 F.3d 52, 62 (2d Cir. 1998); Torres v. Gristede’s Operating Corp., 628 F. Supp. 2d 447, 464 (S.D.N.Y. 2008) (“As a matter of law, the CBAs cannot waive Plaintiffs’ FLSA rights.”).

Notably, FLSA requirements do not apply to compensatory time that is earned or accrued for work that is not overtime within the meaning of FLSA. 29 C.F.R. § 553.28. This type of compensatory time is known as “other compensatory time.” Id. For example, employees could agree through a CBA to accrue compensatory time for work that is overtime under state law, but not under FLSA, and such compensatory time would be “other compensatory time.” 29 C.F.R. § 553.28(b). Similarly, employees could agree to earn compensatory through the performance of tasks that are in excess of an established personnel policy or practice of the employer, and such compensatory time would also be “other compensatory time.” 29 C.F.R. § 553.28(c). To be FLSA compliant, employers do not have to award “other compensatory time” at a time-and-a-half rate. 29 C.F.R. § 553.28(d).