

Credit for Paid Comp Time Towards FLSA Overtime Obligations

It is not uncommon for employers to furnish compensatory time off to their putative exempt workers. Since the workers are exempt from the Fair Labor Standards Act (“FLSA”) overtime requirements, there is nothing wrong about providing extra time off in lieu of overtime premium pay to such workers. However, sometimes the reliance on the exemption is misplaced and the workers turn out to really be nonexempt. In that failed exemption situation, the Department of Labor or the plaintiff’s bar have often sought additional time and one-half premium pay on top of the comp leave already enjoyed by the worker. The question posed by this white paper is whether that is appropriate.

The better answer is that a double recovery by the worker is likely to be inappropriate. Ordinarily, the employer should receive a credit for compensatory time paid to or banked on behalf of the covered employees. Employers are responsible only for unpaid portions of back wages and will be credited for any portions already paid, the theory being that compensatory damages are intended to make the employee whole, not to provide them with a windfall. *See Roman v. Maietta Construction, Inc.*, 147 F.3d 71, 76-77 (1st Cir. 1998) (affirming trial court’s calculation of back pay that was offset by compensatory time already paid to employee at regular rate); *see also Lupien v. City of Marlborough*, 387 F. 3d 83, 89 (1st Cir. 2004) (affirming the offset of the defendant’s liability under FLSA for used compensatory time); *Dunlop v. State of New Jersey*, 522 F. 2d 504, 517 n.23 (3rd Cir. 1975); *D’Camera v. District of Columbia*, 722 F. Supp. 799, 803 (D.D.C. 1989).

Therefore, because the employer has been providing compensatory time at the regular rate for hours worked over 40 hours in a workweek, it should only be responsible to cash out any unused compensatory time and to otherwise reimburse employees for the unpaid half-time premium for those hours. 29 U.S.C. §207(o); *see also* 29 C.F.R. §553.28 (detailing the use of “other” or “non-FLSA” compensatory time). Comp time credits towards overtime pay, at least in the situation where employees have used their leave, and received straight-time compensation for that time off, should be an allowable credit and reduce any overtime premium pay due the workers.