

PBPA Podcast Transcript

Episode: Is Comp Time a Legal Practice in Georgia?

(17:27 minutes)



Sireesha Ghanta 0:00

Hello and welcome to the PBPA podcast. I'm your host Sireesha Ghanta. Today, our guest will be answering questions about compensatory time, or as you probably know it better, comp time. It is a great theory to have employees working when needed and time off when you don't. But is it legal? We'll dive into that in just a bit.

Before I introduce today's guest, I'd like to tell you, our audience a bit about the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. For more information on who is eligible to be a client, or to apply for consideration, visit our website at pbpatl.org. Our website also has tons of resources including articles and webcasts specific to Georgia nonprofits, and their business legal concerns. Please keep in mind that this podcast is general information. It is not specific legal counsel. Please contact your attorney for guidance on your nonprofit's situation.

And now, here to chat with us about comp time is Marquette Bryan. Marquette is an attorney with Nelson Mullins and an amazingly active member of the community. On top of serving on the boards of several nonprofits, she frequently advises nonprofits as a PBPA volunteer attorney! Marquette, we are so happy to have you joining us today.

Marquette Bryan 1:41

Thank you Sireesha. I'm always honored to support the work that Pro Bono Partnership is doing here in Atlanta.

Sireesha Ghanta 1:48

And now let's talk about comp time. Some employers allow their employees to take time off after working extra hours. If for example, a full-time employee worked 50 hours this week, the next week, they can work 30 hours instead. Substituting the extra time off for overtime pay is known as compensatory or comp time. And small organizations love to use this as a benefit to employees for working extra hours. Is this practice of comp time legal in Georgia?

Marquette Bryan 2:23

This is a great topic and a great starter question. In summary in Georgia, as in many other states comp time is allowed only for government employees. So as you stated in the question, comp time is a system where the employee receives paid time off from work in a later work week instead of overtime pay. So under the Fair Labor Standards Act or the "FLSA", public employers may provide comp time off to

certain of their employees (and we'll talk about what that means a little bit later, I hope) in lieu of overtime pay. But this provision generally doesn't allow private employers certain to some exceptions in Georgia, including nonprofits. So I say all that to say this practice is generally illegal for non-governmental employers in Georgia. And what I'll add if it's helpful, just to clarify, who are government employers, the Department of Labor does give us some guidance on that. And those would be employees of a public agency, which is a state, a political subdivision of a state, interstate government agency. So all the agencies that we truly think about in the form of government.

Sireesha Ghanta 3:36

Okay, but does it matter if a nonprofit's employee is exempt or non-exempt?

Marquette Bryan 3:42

Absolutely. You heard me say that comp time was generally available to certain employees with certain exceptions. So absolutely, even where an employer is allowed to utilize comp time with their employee, it is only legally available to certain types of employees. So it's important for me to give a bit of background on that first, the FLSA requires that overtime pay must be paid for certain but not all jobs. So the term "exempt" refers to jobs that are excluded from those overtime requirements. So that means that employees are not entitled to, or exempt, from overtime pay, regardless of how many hours are worked. So the term "non-exempt" refers to jobs that are not exempt from legal overtime requirements.

And so we give some context on how we use those terms and classifications for employees. So what that means is employees in non-exempt jobs are entitled to overtime pay for all of the time that's worked beyond 40 hours in a workweek. And they must record all of their hours worked in addition to their absences and non-exempt employees, as I stated, they must be paid for all hours now. There are, of course, all kinds of ways that the federal laws tell us how to classify a job as exempt or non-exempt. And it's just important for me to just add that, that classification does not solely depend on how the employee or the employee's manager or the nonprofit or the organization *wants* the job classified. So contrary to popular belief also, it's also not determined on whether an employee is salaried or not salaried, but there are certain qualifiers are tests.

So the FLSA permits public employers to provide comp time off to non-exempt employees in lieu of overtime pay. But, as I've stated, this provision generally doesn't apply to private employers, including nonprofits. Now, there is an exception that is probably a bit too much for this podcast today, where private sector employees are legally allowed to offer exempt employees comp time, but I always guide against using the term comp time for that. There are other terms that we can use, such as bonus time off or things like that, but that is under FLSA, section 2070.

But comp time is by no means required for exempt employees. And under the FLSA, exempt employees are not eligible for overtime pay. So any comp time that's offered for hours worked in excess of 40 per week falls at the sole discretion of that employer.

Sireesha Ghanta 6:31

Oh, wow. But it seems like there's this notion of comp time that is pretty popular. So what if an employee specifically requests comp time in lieu of overtime?

Marquetta Bryan 6:45

That happens. As you know, it happens very often, particularly because we have these mischaracterizations of what employers can provide and to what types of employees as we just discussed. So, if an employee is not eligible for comp time under the law, requests comp time from an employer, that employer is not relieved of complying with its obligations under the FLSA, simply because there may be a mutual agreement. Now, the Department of Labor has taken the position that a non-governmental employee who has, employer I'm sorry, who is found to have violated the FLSA, by having an illegal comp time agreement or policy is not entitled to credit the value of that amount of the comp time leave, that the employee actually received against its obligation to pay full overtime compensation, which means if there's a complaint, or if there's an issue or even absent that, that employer is still required to pay by law that overtime pay for that non-exempt employee.

And so I would just add that this means that regardless of whether there's an agreement, and the employee actually utilizes this comp time that the employer and the employee have mutually agreed upon, that employer still must pay that employee what they're owed, which is that time and a half of the employee's applicable regular rate of salary or hourly rate under the FLSA for all overtime worked.

Sireesha Ghanta 8:17

Marquetta, you mentioned before the importance of terminology, and we often hear the terms "comp time" and "flex time" used interchangeably. Are they really the same concept?

Marquetta Bryan 8:30

They are not. Excellent question. Again, "comp time" should not be confused with "flex time" or what we also refer to as a flexible working arrangement. So a flexible arrangement or flex time generally allows employees to work a schedule with varying arrival, departure, lunchtimes. But it's important to remember that flex time or flexible schedule should not cause a non-exempt employee to work overtime, or cause any employee to work on an existing holiday or conflict with any lead allocation practices. So the key takeaway to distinguish those two terms is that "flex time" is the hours over a scheduled day or week that does not exceed 40 hours per week, just some varying schedules. A lot of what we're doing related to the COVID-19 pandemic and having kind of changed our normal workdays and work hours, but still complying with those regulations under the Fair Labor Standards Act. Whereas "comp time" is actual worked hours over 40.

Sireesha Ghanta 9:36

Okay, got it. And how is an employer supposed to track this if they have remote workers like we currently do in this pandemic environment.

Marquetta Bryan 9:46

Employers, as you know, are not relieved from their obligations under monitoring and timekeeping and record compliance. So short of technology, which I won't address now necessarily in this question, I recommend that employers really strengthen their timekeeping practices and guard against that type of off-the-clock work that we were so vigilant about when we were in an in-person environment.

So of course, as you stated with more employees telecommuting, they're working virtually more than before, it's important for employers to revise and revisit their timekeeping practices. reiterate those timekeeping practices. So whoever are the managers and supervisors are those employees of the timekeepers, employers have not already done so, put those practices in writing to all employees with a clear indication that they will be enforced to the same extent as when employees were working in the office. Communicate with managers and supervisors. This is a good time for retraining and caution those managers against communicating with non-exempt employees outside of their set schedules. It's really easy when we're in a home environment or another remote environment to not be so set to the eight to four or nine to five. So employers must ensure that managers and supervisors are demonstrating very clear boundaries in establishing to avoid non-exempt employees working outside of their normal work hours because as we know, that will result in the need for additional pay or worse as we anticipate a claim that the employee was not paid for the time worked.

The other thing that I've recommended to my clients is to come up with a COVID-19 telecommuting policy. What does that look like, expected hours rest and lunch breaks procedures for timekeeping, procedures for communicating with managers and vice versa. Timekeeping practices are probably not something that a lot of employers have visited in a long period before COVID-19. Make sure your current timekeeping systems are up to date. This is a good time to determine: do they need to be updated or revised to account for remote working arrangements? There are various timekeeping systems that can be installed in employee programming that they can access through shared company networks, on employee desktops and just a number of advancements in technology to manage time.

And one of the other things that I recommend is that employers ask employees to certify the time worked. So as a part of that timekeeping process, employees really need to be asked to record their time each day, and certify that the amount recorded is accurate, particularly for those non-exempt employees, because that'll be helpful later, if questions arise regarding overtime. I always add that the employer has the burden of maintaining the records for timekeeping. So this is the time where we really, really need employees to help employers do that. And remember, we always forget those mandated meal and respite breaks. Some employees will say, "Hey, I like to work through I don't want to take a lunch. I like to get up early. I like to work late". We really do have to have some controls over the schedules that employees are working, just so we can be mindful of what overtime looks like and make sure that we are maintaining accurate records.

Sireesha Ghanta 13:20

Okay. And those timekeeping policies, is that something that an attorney should help with? Or is that something that an organization can do on their own?

Marquetta Bryan 13:29

I think it's absolutely something that an organization should retain counsel, or at least some guidance on, if they're making sure that they're covering things. An organization can certainly get that started, but there are nuances, a number of things that are covered, and that should be considered under the Fair Labor Standards Act to make sure an employer is truly in compliance with all of its obligations. So this is definitely one of the areas that an organization would want to seek advice from counsel.

Sireesha Ghanta 13:58

Okay. And our listeners could come to PBPA, for assistance with that, that their client of ours. And so one last question Marquetta this is probably one thing that many listeners are wondering: so what happens if they offer comp time, instead of paying overtime? What are the penalties?

Marquetta Bryan 14:17

So considering the parameters that we've discussed: what may be legal, what may not be, where there are some exceptions, and where they are not? The FLSA penalties for illegal comp time are extremely severe. And the penalties that are available under the Fair Labor Standards Act are actually more severe than some of the other laws where there are violations. So an employee can recover the full amount of overtime which they should have been paid. A court can also order what's called "liquidated damages". And what that means is that the employer must pay double the amount owed. So for instance, if it's determined that an employee is owed \$5,000 in overtime, a court can actually order that the employer pay \$10,000. In addition, unpaid overtime lawsuits may be found as collective actions. And what some of our listeners may recognize that closer is a "class action". But it's not a class action. But there are more, there's more than one person that may bring the claim. And so that means that they can be found on behalf of all employees who are subject to the illegal comp time policy, not just those employees that have been impacted, and not just those employees that are actually bringing the complaint. The other penalties that our listeners certainly want to know about is that they can face violations that include fines of up to \$10,000. The FLSA looks at whether there are willful and not willful violations, back wages, liquidated damages as I discussed, and legal fees for an employee if a lawsuit is prosecuted. And these are very expensive lawsuits Sireesha, so our listeners should really know that.

The other thing that is really important is that an employer can face jail time, and civil money penalties up to \$1,000 per infraction for repeat offenders. Why is that there? Because the legislator looked at this law and recognize that there are some employers that were willfully violating these regulations, and some that continue to do so even after we have all of these explanations and programs like this and a lot of guidance in the statute and regulation. So whether comp time is illegally implemented, implemented or not, the other thing that I add on top of the violations is that if it's illegal, it can ruin employee morale. No employee wants to think that they're not valued, that their employer actually insists on not

complying with the law, and not paying them overtime when it's really due to them. So we've got several implications.

Sireesha Ghanta 16:58

Wow, this is really eye-opening information. Thank you so much, Marquetta, for sharing this insight with us. We really appreciate you sharing this with us and for taking the time to talk to us about this.

And to our audience: thanks for tuning in, and for all the good work you continue to do for our communities. We hope you found this information today to be helpful.