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# Compensatory Time

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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## Compensatory Time

Reference Number: CTAS-993

Public employers are allowed to give an employee compensatory ("comp") time off in lieu of cash payment for overtime worked.<sup>[1]</sup> Comp time accrues at the rate of one and one-half hours for each hour of overtime worked. A county may provide comp time instead of cash for overtime as long as an agreement or understanding with the employee (or a regular practice or policy in place prior to April 15, 1986) has been reached prior to the performance of the work. The FLSA does not require a written agreement with each employee; a notice or written policy can be used.<sup>[2]</sup> Different agreements can be reached with different employees. The agreement may take the form of a condition of employment so long as the employee knowingly and voluntarily agrees to it as a condition of employment. A statement may be placed on the employment application advising applicants that the county gives compensatory time off in lieu of cash payment for overtime worked and stating that acceptance of employment with the county constitutes the employee's agreement to accept comp time.

If a notice or written policy is used, an agreement or understanding will be presumed to exist for any employee who fails to express to the employer an unwillingness to accept comp time off in lieu of overtime pay. However, the employee's decision must be freely made without coercion or pressure. An agreement can restrict the taking of comp time to only certain hours of work and can provide for the use of a combination cash payment and comp time so long as the time and one-half principle is followed. Further provisions concerning preservation, use and cashing out comp time can be included. The regulations governing comp time are found at 29 C.F.R. § 553.21 *et seq.*

Sample Compensatory Time Agreement

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[1] The regulations governing compensatory time are found at 29 C.F.R. § 553.20 *et seq.*

[2] For public employers, state law requires either a written compensatory time policy or a statement that comp time is not allowed. T.C.A. § 5-23-104.

## Accrual of Comp Time

Reference Number: CTAS-994

Compensatory time accrues at the rate of one and one-half hours of compensatory time off for each hour of overtime worked. Employees in public safety, emergency response or seasonal activities may accrue up to 480 hours, which represents 320 hours of actual overtime worked. Other employees may accrue up to 240 hours, which represents 160 hours of actual overtime worked.<sup>[1]</sup> Cash can always be used to compensate for overtime at the employer's option.<sup>[2]</sup>

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[1] 29 C.F.R. §§ 553.21, 553.22, and 553.24.

[2] 29 C.F.R. 553.26.

## Use of Comp Time

Reference Number: CTAS-995

Comp time cannot be used as a means of avoiding statutory overtime pay. An employee has the right to use accrued comp time, and must not be coerced to accept more comp time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of a request for use of such time. An employee must be permitted to use accrued comp time within a reasonable period after making the request, as long as it does not unduly disrupt the workplace.<sup>[1]</sup>

What is a reasonable period will be determined by considering the customary work practices based on case by case facts and circumstances, including:

1. Normal work schedule,
2. Anticipated peak workloads based on past experience,
3. Emergency requirements for staff and services, and
4. Availability of a qualified substitute staff.

To the extent the conditions are contained in an agreement or understanding, such can interpret what

constitutes a “reasonable period.”

Being unduly disruptive means more than mere inconvenience to the employer. The employer, in order to turn down a comp time request made within a reasonable period of time, must reasonably and in good faith anticipate that it would impose an unreasonable burden on the employer’s ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee’s services.

Also, the employer may require employees to use their compensatory time. The U. S. Supreme Court has determined that the FLSA does not prohibit the practice of forcing employees to use accrued comp time.<sup>[2]</sup>

In a workweek or work period during which an employee works overtime hours for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such comp time may be excluded from the employee’s regular rate of pay for overtime purposes.<sup>[3]</sup>

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[1] 29 C.F.R. § 553.25. The Sixth Circuit Court of Appeals has held that having to pay other employees overtime in order to allow someone to take banked comp time does not cause an “undue disruption” unless the parties have entered into an express agreement, such as a collective bargaining agreement, which allows financial considerations to be used to deny the use of comp time. *Beck v. City of Cleveland*, 390 F.3d 912 (6<sup>th</sup> Cir. 2004).

[2] *Christensen v. Harris County*, 529 U. S. 576, 120 S.Ct. 1655 (2000).

[3] 29 C.F.R. § 553.26(c).

## Payment for Accrued Comp Time

Reference Number: CTAS-996

The FLSA permits an employer to “cash out” an employee’s accrued comp time at any time by paying the employee cash for the unused comp time. These payments are to be made at the regular rate of pay the employee was receiving at the time the payment is made.<sup>[1]</sup>

Upon termination of employment, an employee with banked comp time must be paid for the banked comp time at the higher of:

1. The average rate received by the employee during the last three (3) years of employment, or
2. The final regular rate of pay.

The “last three (3) years of employment” means immediately prior to termination. If there is a break in service, the period of employment after the break is treated as a new period of service (so long as it was intended as permanent during the break, and accrued comp time was cashed out). Where the final period of service was less than three (3) years, the rate is calculated based on the rate in effect during the final period of service.<sup>[2]</sup>

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[1] 29 C.F.R. § 553.27(a).

[2] 29 C.F.R. § 553.27(b).

## Non-FLSA Comp Time

Reference Number: CTAS-997

Employers sometimes grant employees compensatory time off under circumstances where it is not required under the FLSA, such as when an employee works on a holiday even though the employee has worked no overtime in the workweek and the employer grants the employee another day off. This is considered “other” compensatory time. As long as this time is recorded separately from FLSA comp time, this “other” comp time is not subject to the requirements applicable to FLSA comp time such as the 240 (or 480) hour limit, or the requirement that it be earned at one and one-half times the regular rate.<sup>[1]</sup>

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[1] See 29 C.F.R. § 553.28.

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