

EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT COMPENSATORY TIME OFF AND MAKEUP TIME, BUT WERE AFRAID TO ASK

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“Compensatory time off” and “makeup time” are concepts often invoked as convenient methods to address the needs of both the employer and the employee. Indeed, numerous California employers permit compensatory time off and makeup time informally, without having any real understanding of the rules that apply. So what do these terms really mean, and what are employers and employees required to do in order to take advantage of these concepts?

In a nutshell, compensatory time off is time off taken in lieu of overtime pay. California’s rules on compensatory time off are set forth in Labor Code section 204.3. The compensating time off must be at the same rate as the overtime rate that is required by law, which will be one and one-half hours per hour of work or more. There must be a written agreement between the employer and the employee, or the duly authorized representative of the employees, providing for compensatory time off before the work is performed. The employee must request the use of compensatory time off in lieu of overtime compensation in writing. The employee must be regularly scheduled to work no less than 40 hours in a workweek, and the employee cannot accrue more than 240 hours of compensating time. Upon discharge from employment, any unused compensating time must be paid at the employee’s final regular rate of pay, or the average of the employee’s regular rate over the last three years, whichever is higher.

There are additional rules regarding the granting of an employee’s request to use accrued compensating time within a reasonable period after the request is made. In addition, an employee can request that the employer pay the overtime compensation in cash in lieu of compensating time off for any compensating time off that has accrued for at least two pay periods. Employers should note that Labor Code section 204.3 does not apply to industries governed by Industrial Welfare Commission (IWC) Orders Nos. 1, 3, 5, 8, 10, 13, and 14.

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Sounds like a practical and helpful tool for employers and employees, right? Not quite. As California employers are all too aware, if an employment practice has the potential to work well, leave it to the state or federal government to “fix” it. In the case of Labor Code section 204.3, the California Labor Commissioner has issued the following statement regarding compensatory time off:

“The provisions of Section 204.3 are patterned on provisions found in 29 U.S.C. §207(o). It should be noted that these compensatory time provisions are only applicable under the federal law to state and local government employees; the compensating time provisions under federal law are not applicable to employees of private employers. Any employer utilizing the provisions of Section 204.3 should be advised of this caveat as use of the compensating time provisions of the state law may result in violation of the federal law.”

In other words, federal law, which requires payment of overtime if an employee works over 40 hours in a week, effectively erases the benefits of Labor Code section 204.3 for most California employers. As a result, if Labor Code section 204.3 is to be implemented, the compensatory time off must be taken in the same workweek in which it is earned if overtime is to be avoided under federal law.

Which brings us to makeup time. Makeup pertains to the concept of an employee making up time due to some personal commitment without incurring overtime.

California’s rules on makeup time are established by Labor Code section 513, which concisely provides as follows:

“If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that make-up work time, if performed in the same workweek in which the work time was lost, may not be counted towards computing the total number of hours worked in a day for purposes of the overtime requirements specified in Section 510 or 511, except for hours in excess of 11 hours of work in one day or 40 hours in one workweek. An employee shall provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to this section. An employer is prohibited from encouraging or otherwise soliciting an employee to request the employer’s approval to take personal time off and make up the work hours within the same week pursuant to this section.”

The language of Labor Code section 513 is duplicated in each of the IWC Orders, save for Order No. 14, except that the IWC Orders add that “[i]f an employee knows in advance that he or she will be requesting make-up time for a personal obligation that will recur at a fixed time over a succession of weeks, the employee may request to make up work time for up to four (4) weeks in advance; provided, however, that the make-up work must be performed in the same week that the work time was lost.” In addition, the IWC Orders clarify that, while an employer may not encourage or solicit make-up time, an employer may inform an employee of this make-up time option.

So basically, compensatory time off and make-up time can be useful tools for both employees and employers, provided they are used in the same workweek in which the overtime is incurred (in the case of compensatory time off) or the work time is lost (in the case of make-up time) and provided it is done pursuant to a written

agreement between the employer and employee which follows the rules outlined above.

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