So You Employees Want A "Flex" Day Instead Of Overtime?

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A group or department of your employees has come to you with a simple request: they would like to take the overtime they are accruing every month and use it as a "flex" day off. Simple, right? Wrong. Your employees request for a flex day each month in lieu of being paid overtime, if granted, would violate California law. Employees can, however, be given either compensatory time off (CTO) for overtime worked or an alternative workweek schedule to accomplish a similar goal.

To effectively implement a CTO arrangement, the employee and employer must enter into a written agreement before the employee works the overtime hours to be counted toward the CTO. In addition, all of the following criteria must be applied:

1. CTO must be available only for daily overtime hours worked. CTO cannot be used for weekly overtime hours worked (in excess of 40 hours per week). Thus, CTO is not available to employees who are not eligible to receive daily overtime.

2. CTO can be taken only during the pay period in which the overtime hours have been worked. It cannot be carried over into the following pay period. (See 1 above: if carried over to the second week of a pay period, the employer must still pay overtime for hours worked in excess of 40 during week one. It is therefore often easier to require that the employee take the CTO in the same week in which it is earned.)

3. CTO must be calculated in accordance with the premium rate at which the overtime hours would be paid (e.g., if the applicable overtime rate would be 1.5 times the hourly rate, then 1.5 hours of CTO will be available for those hours; if the applicable overtime rate would be two times the hourly rate, then two hours of CTO will be available for those hours).

4. If CTO is not used during the pay period in which the overtime hours have been worked, it must be paid out as overtime wages.

5. It is advisable that each employee be required to acknowledge that requesting CTO is not a guarantee that it will be granted, and employees may not rely on its being granted. While an employer may want to accommodate CTO requests, it may not always be possible to grant them in light of business needs. The decision to grant CTO should be reserved for the employer at its sole discretion.

6. CTO can be used in exchange for a maximum of 240 overtime hours per year.

7. An employee's request for CTO can be revoked at any time.

On the other hand, you might consider implementing an alternative workweek schedule for these employees. This would give the employees time off on certain days in exchange for working longer hours on other days pursuant to a regular schedule, and it would allow employees to work more on certain days and less on others within the same workweek. As with CTO, however, you must still comply with the requirement that overtime be paid for any hours over 40 in a workweek. If installed pursuant to the election procedure set forth below, a regularly scheduled alternative workweek schedule of not more than 10 hours per day within a 40-hour workweek can be followed without the payment of overtime compensation. Any adopted alternative workweek agreement cannot include any shift of fewer than four hours. Overtime also must be paid to employees working more than 10 hours in a day and to those who work fewer than the hours scheduled at the request of the employer.

Election procedures for the adoption and repeal of alternative workweek schedules require the following:
1. The proposal for an alternative workweek schedule must be in the form of a written agreement proposed by the employer. The proposed agreement must designate a regularly scheduled alternative work week that specifies the number of workdays and work hours. The employer may propose a single work schedule that would become the standard schedule for workers in the work unit or a menu of work schedule options from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

2. In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds vote of the affected employees in the work unit. The election must be held during regular working hours at the worksite.

3. Prior to the secret ballot vote, any employer who proposes to institute an alternative workweek schedule must make a disclosure in writing to the affected employees of the effects of the proposed arrangement on their wages, hours and benefits. Such a disclosure must include a noticed meeting held at least 14 days prior to voting for the specific purpose of discussing the effects of the alternative workweek schedule. The employer must also provide that disclosure in a non-English language if at least five percent of the affected employees primarily speak that language. The employer must mail the written disclosure to employees who do not attend the meeting.

4. Any type of alternative workweek schedule may be repealed by the affected employees upon a petition of one-

third of the affected employees. The election to repeal the alternative workweek schedule must be held not more than 30 days after the petition is submitted to the employer, except that the election may not be held earlier than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. If the alternative workweek schedule is revoked, the employer must comply within 60 days.

5. The results of any election conducted must be reported by the employer to the Division of Labor Statistics and Research within 30 days after the results are final, and the report of election results must be a public document. The report must include the final tally of the vote, the size of the unit and the nature of the business of the employer.

6. Employees affected by a change in work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least 30 days after the announcement of the final results of the election.

7. Employers cannot intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek. The employer can, however, express its position concerning that alternative workweek to the affected employees. Employees cannot be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal.

Properly implemented, a CTO or alternative work-week schedule agreement can provide substantial benefits to employees at little or no additional cost to the employer. But simply giving time off to an employee in place of overtime in the absence of one of these agreements is risky business and will expose the employer to substantial liability, including fines, interest and attorney fees. So be careful – and when in doubt, contact your friendly neighborhood employment lawyer.