



Legislative Bulletin.....May 6, 2013

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H.R. 1406 -Working Families Flexibility Act of 2013 (Roby, R-AL)

Order of Business: The legislation is scheduled to be considered on Tuesday, May 7, 2013, under a rule, [H.Res. 198](#). The Rule allows consideration of [H.R. 1406](#) in the Committee of the Whole House for the State of the Union. The Rule provides one hour of debate divided equally between the Chairman and ranking minority member of the Committee on Education and the Workforce. One [amendment](#) offered by Rep. Gibson (R-NY) was made in order by the Committee on Rules. The Rule provides ten minutes of debate divided equally and controlled by the proponent and the opponent of the amendment.

Major Changes Since the Last Time This Legislation Was Before the House: When introduced, H.R. 1406 was identical to [H.R. 1](#), which was passed in the 105th Congress and subsequently reintroduced in the 106th, 107th, 108th, 110th, and 111th Congresses. The Committee on Education and the Workforce made technical changes to the bill before favorably reporting it.

Summary: H.R. 1406 amends the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. 216) to allow private-sector employees the option to receive compensatory time (“comp time”) instead of cash wages for overtime work. The option to choose comp time or cash wages for overtime work has been available to public-sector employees for almost 30 years. H.R. 1406 does *not* alter any comp time provisions in the public-sector, diminish any existing FLSA protections, or change the 40-hour work week. Overtime will still be accrued for any hours worked over 40-hours in a seven-day period. The legislation allows employers to offer employees the option of choosing to be paid at the overtime rate of 1.5 times the regular wage rate or to receive 1.5 hours of comp time for every hour of overtime worked. There are several key protections for employers and employees.

The Compensatory Time Agreement

- **Voluntary Program:** The decision by the employer to offer comp time and the decision by the employee to choose comp time in lieu of overtime wages is completely voluntary. No employer is required to offer comp time and no employee is required to choose comp

time instead of overtime cash wages. Employees who prefer to receive cash wages for overtime work can still do so.

- **Union Representation:** If a union represents employees, the agreement to offer comp time flexibility must be between the union and the employer.
- **Employees Not Represented by a Union:** If a union does not represent employees, the comp time agreement must be entered into voluntarily between the employee and the employer. Acceptance of a comp time agreement may *not* be a condition of employment.
- **Employee Protections:**
 - Any employer that coerces, threatens, or intimidates an employee to choose comp time instead of receiving overtime wages is liable to the employee for double damages.
 - An individual employee may withdraw his or her comp time agreement with the employer at any time and choose to receive cash wages for any additional overtime work.
 - An employer must give 30 days' notice to withdraw a comp time agreement with employees, unless otherwise dictated by the terms of a collective bargaining agreement. Any accrued hours of comp time remain the employees' after the employer withdraws a comp time agreement.
 - Upon termination of employment, voluntary or involuntary, all unused comp time must be cashed out and paid to employee.
 - When accrued comp time is cashed out it will be paid at the employee's regular wage rate or the employee's final wage rate, whichever is higher. For example, an employee who received a pay raise during the course of the year will receive the higher wage rate when cashing out accrued comp time, even for comp time accrued at a lower wage rate.
 - All unused comp time is treated as wage payments due to the employee and guaranteed the same protections as unpaid wages in the event of an employer bankruptcy.

Conditions on Compensatory Time

- **Employee Eligibility Requirements:** Only employees that have worked in excess of 1,000 hours in a 12-month period of continuous employment with the employer are eligible to enter into a comp time agreement.
- **Compensatory Time Accrual Limits:** An employee can only accrue 160 hours of comp time. This differs from the public-sector where most employees can accrue 240 hours of comp time. According to [Committee Report 113-49](#), the accrual limits in the private-sector were “designed to protect both employers and employees against accrual of excessive amounts of compensatory time liability.”
- **Monetary Compensation for Unused Comp Time:** At the end of each calendar year all unused accrued comp time must be cashed out.
 - At any time an employer can give 30 days' notice to an employee in order to cash out unused comp time in excess of 80 hours.
 - At any time an employee can choose to cash out accrued comp time. The employer must pay the employee the cash value of the comp time within 30 days of receiving a written request.

- **Notice to Employees:** The Secretary of Labor is required to change the posting requirements of employers regarding the provisions of FLSA that relate to comp time.
- **Employee Use of Comp Time:** Employees must give the employer “reasonable” notice before using comp time and employers can deny the request if the use of comp time would “unduly disrupt the operations of the employer.” The “unduly disrupt” standard has been in use in the public-sector for almost 30 years. See [Committee Report 113-49 \(pages 19-20\)](#) for an explanation of “unduly disrupt” under Section 7(o) of FLSA and as interpreted in several court cases.
- **Enforcement and Remedies:** All enforcement and protection remedies of FLSA are retained under H.R. 1406. The bill adds employee protections against coercive actions by employers regarding the employee’s use or non-use of comp time.

Sunset Provision

- Five years after enactment, the provisions of the bill would cease to be effective.

Additional Background: The Fair Labor Standards Act of 1938 (FLSA) created the requirement that “non-exempt employees” that work in excess of 40 hours a week be paid at one and one-half times the regular wage rate. Currently, the FLSA requires private-sector employees to be compensated for overtime in cash payments and does not allow employees to earn comp time. A provision of FLSA added in 1985 allows state and local governments to offer comp time at 1.5 hours per overtime hour. Federal employees are also able to earn comp time under the Federal Employees Flexible and Compressed Work Schedules Act of 1978. However, most federal employees earn one hour of comp time for every hour of overtime.

Committee Action: H.R. 1406 was introduced on April 9, 2013, and was referred to the House Education and the Workforce Committee. A [hearing](#) was held in the Subcommittee on Workforce Protections on April 11, 2013. The full committee held a [markup](#) on April 17, 2013. A substitute amendment, which made technical changes, was offered by Rep. Roby and agreed to by a voice vote. Several other amendments were offered that were ruled non-germane or defeated. The Committee then reported the legislation by a [vote](#) of 23-14, as amended. The Rules Committee met on Monday, May 6th, 2013, to consider the bill. One [amendment](#) by Rep. King (R-NY) was considered in order.

Administration Position: On May 6, 2013, the Executive Office of the President issued a [Statement of Administrative Position \(SAP\)](#) in opposition to H.R. 1406.

Cost to Taxpayers: According to the [CBO](#), implementing this bill “would not affect spending subject to appropriation.”

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: According to the [CBO](#), the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Does the Bill Contain Any Federal Encroachment into State or Local Authority in Potential Violation of the 10th Amendment?: No.

Does the Bill Delegate Any Legislative Authority to the Executive Branch?: No.

Does the Bill Contain Any Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: The legislation contains no earmarks, limited tax benefits, or limited tariff benefits.

What Is the Constitutional Authority for the Legislation?: According to the sponsor, “Congress has the power to enact this legislation pursuant to the following: Article I, section 8 of the Constitution of the United States.” Rep. Roby’s statement in the Congressional Record can be viewed [here](#).

Outside Organizations In Support of H.R. 1406:

- Associated Builders and Contractors, Inc.
- American Hotel & Lodging Association
- Associated General Contractors
- College and University Professional Association for Human Resources
- Food Marketing Institute
- Independent Electrical Contractors
- International Foodservice Distributors Association
- International Franchise Association
- National Association of Manufacturers
- National Association of Wholesaler-Distributors
- National Council of Chain Restaurants
- National Restaurant Association
- National Federation of Independent Business
- National Retail Federation
- National Roofing Contractors Association
- Printing Industries of America
- Retail Industry Leaders Association
- Society for Human Resource Management
- U.S. Chamber of Commerce
- National Funeral Directors Association
- Concerned Women for America

Outside Organizations in Opposition to H.R. 1406:

- Service Employees International Union (SEIU)
- International Brotherhood of Teamsters
- United Food and Commercial Workers International Union (UFCW)

Amendment to H.R. 1406, As Reported Offered by Rep. Gibson (R-NY)

Gibson (R-NY): The amendment requires the GAO to track comp time use and to provide a report to Congress two years after enactment and every three years after containing:

- Details regarding the degree to which employers offer comp time and the degree to which employees choose comp time;
- Information regarding the number of employee complaints filed with the Secretary of Labor;
- The number of enforcement actions commenced by the Secretary on behalf of employees that filed complaints or filed by the Secretary independently;
- Details regarding the status or final disposition of such complaints;
- Details regarding all damages, unpaid wages, injunctive relief, penalties, or other remedies sought or obtained by the Secretary of Labor.

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