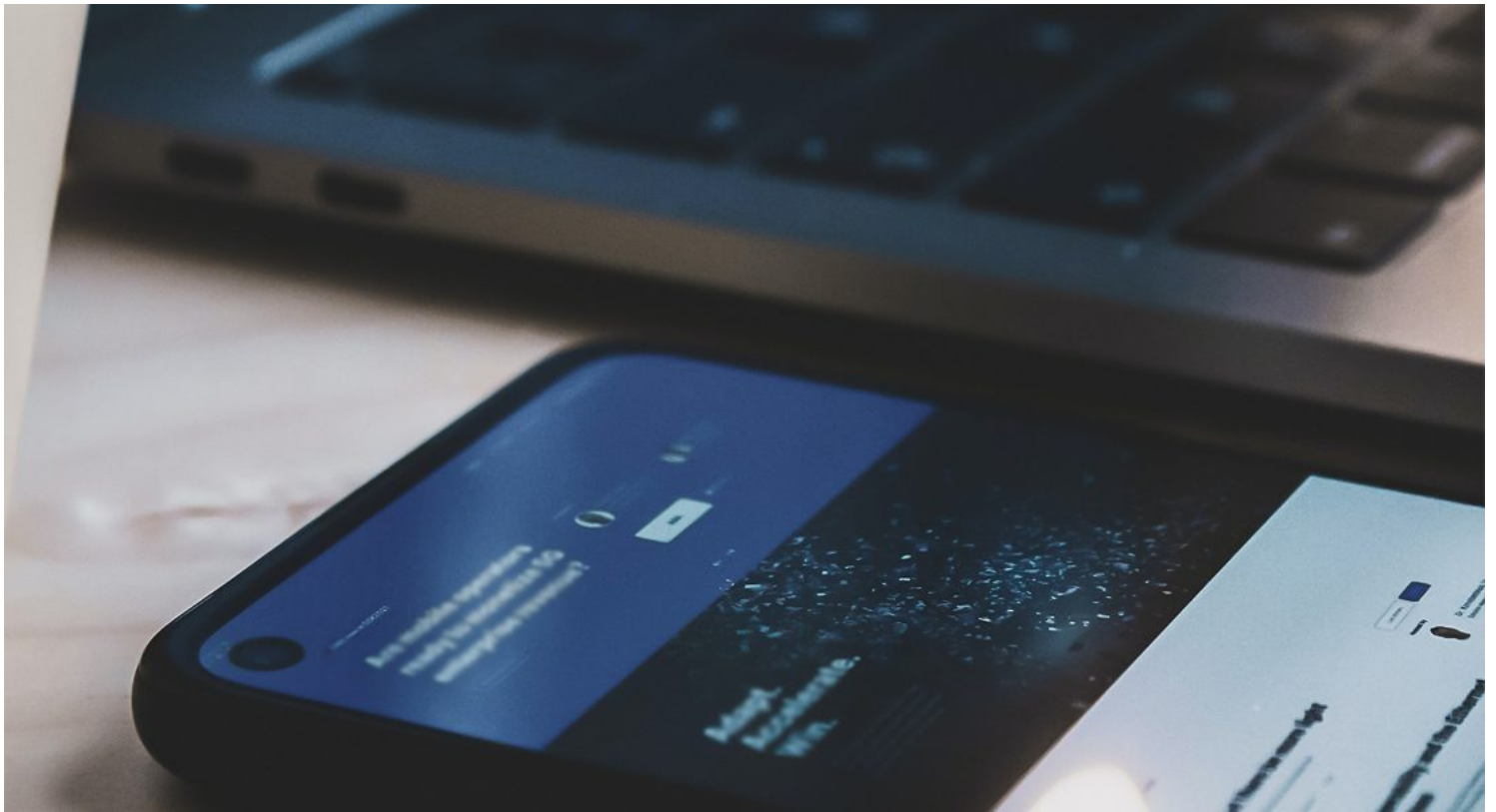


NEWS & INSIGHTS

The House of Representatives Passes The Working Families Flexibility Act To Amend Overtime Pay Rules

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On May 2, 2017, the House of Representatives passed The Working Families Flexibility Act (“WFFA”), H.R. 1180, a bill that proposes to amend the Fair Labor Standards Act (“FLSA”). As many employers are aware, the FLSA mandates employees be paid for hours worked over 40 per workweek at a rate of not less than 1.5 times the regular rate of pay. If signed into law, the WFFA would amend the FLSA’s overtime provision to permit an employer to offer its nonunionized, nonexempt employees a choice to accrue paid time off in lieu of cash wages for overtime hours

worked (“Comp Time”). This significant option, which was previously offered to only government employees, may impact employers’ cash flow and provide greater employee flexibility. However, whether employers should offer this option to their employees – and how the employer must effectuate such an offer – must be given serious consideration. The WFFA provides employees a private right of action for violations.

Even if an employer offers a Comp Time Program, employees who want to receive cash wages would continue to do so. No employee can be forced to take comp time instead of receiving cash wages, and electing comp time in lieu of wages cannot be a condition of employment.

Comp Time under the WFFA is accrued at the same rate that overtime wages are accrued under the FLSA. For example, an employee working 45 hours in a workweek could, instead of receiving overtime pay for the 5 overtime hours paid at time-and-a-half, roll those hours into his or her Comp Time bank for later use. Each hour banked would be at the overtime rate, meaning that the employee in this scenario would be able to roll those 5 overtime hours into 10 banked Comp Time hours.

The WFFA also places limitations on how and to what extent banking can occur. First, this option is only available to an employee who has worked at least 1,000 hours for an employer during a continuous 12-month period. Second, an employer can implement this option only if there is a written agreement between it and the employee. Third, a valid agreement is revocable by the employee at any time, and the employee can, therefore, decide to revert back to the FLSA’s overtime wage provision at his or her option. Fourth, an employer always retains the option to discontinue its Comp Time Program with 30 days’ notice. Fifth, an employee may not accrue more than 160 hours in their Comp Time banks, and an employer must pay out any unused Comp Time after a 12-month period. Sixth, employers also have the option to force payout of any accrued Comp Time exceeding 80 hours, so long as the affected employee is given at least 30 days’ notice.

An employee who opts to receive Comp Time rather than wages may use any available Comp Time within a reasonable period after making a request to the employer so long as the use of available Comp Time does not unduly disrupt the employer’s operations. An employee may also request, at any time, a payout of his or her accrued but unused Comp Time, which the employer must pay within 30 days. Employees are entitled to receive pay for any accrued but unused Comp Time upon termination, whether voluntary or involuntary.

It may be attractive to employers to offer a Comp Time Program because it may defer overtime payments and allow employees to opt for time out of the office rather than cash in their pockets. However, before deciding to offer the Program, an employer should consider several practical impacts. First, there is no bright line rule as to what is considered an undue disruption to an employer’s operations, and what may be needed to legally justify a refusal to use Comp Time is not clear. For this reason, an employer should reasonably anticipate granting a request to use accrued Comp Time, even if it may be inconvenient. Second, the WFFA compensation provision requires a pay out of Comp Time based upon the employee’s regular rate of pay. That is, the rate of pay in effect at either the time the Comp Time was earned or at the employee’s then regular rate, whichever is higher. The compensation provision applies to a pay out of Comp Time whether mandated by the WFFA, such as after 12-months or upon termination, at the employer’s election, such as after 80 hours of time is accrued, or at the employee’s election, which can be made at any time. For this reason, employers should consider payouts before any significant changes in the employee’s compensation rates.

The WFFA passed in the House largely upon party lines. Whether it will pass in the Senate in its current version is yet to be seen. However, the current Administration has voiced its support of the WFFA, as written.

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