

Wage and Hour Division, Labor

§ 553.28

provides that the regular rate shall not be deemed to include

. . . payments made for occasional periods when no work is performed due to vacation, holiday, . . . or other similar cause.

As explained in 29 CFR 778.218(d), the term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, illness, and so forth. Payments made to an employee for periods of absence due to the use of accrued compensatory time are considered to be the type of payments in this "other similar cause" category.

§ 553.27 Payments for unused compensatory time.

(a) Payments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(b) Upon termination of employment, an employee shall be paid for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than—

(1) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(2) The final regular rate received by such employee, whichever is higher.

(c) The phrase *last 3 years of employment* means the 3-year period immediately prior to termination. Where an employee's last 3 years of employment are not continuous because of a break in service, the period of employment after the break in service will be treated as new employment. However, such a break in service must have been intended to be permanent and any accrued compensatory time earned after April 14, 1986, must have been cashed out at the time of initial separation. Where the final period of employment is less than 3 years, the average rate still must be calculated based on the rate(s) in effect during such period.

(d) The term "regular rate" is defined in 29 CFR 778.108. As indicated in § 778.109, the regular rate is an hourly rate, although the FLSA does not re-

quire employers to compensate employees on an hourly basis.

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§ 553.28 Other compensatory time.

(a) Compensatory time which is earned and accrued by an employee for employment in excess of a nonstatutory (that is, non-FLSA) requirement is considered "other" compensatory time. The term "other" compensatory time off means hours during which an employee is not working and which are not counted as hours worked during the period when used. For example, a collective bargaining agreement may provide that compensatory time be granted to employees for hours worked in excess of 8 in a day, or for working on a scheduled day off in a non-overtime workweek. The FLSA does not require compensatory time to be granted in such situations.

(b) Compensatory time which is earned and accrued by an employee working hours which are "overtime" hours under State or local law, ordinance, or other provisions, but which are not overtime hours under section 7 of the FLSA is also considered "other" compensatory time. For example, a local law or ordinance may provide that compensatory time be granted to employees for hours worked in excess of 35 in a workweek. Under section 7(a) of the FLSA, only hours worked in excess of 40 in a workweek are overtime hours which must be compensated at one and one-half times the regular rate of pay.

(c) Similarly, compensatory time earned or accrued by an employee for employment in excess of a standard established by the personnel policy or practice of an employer, or by custom, which does not result from the FLSA provision, is another example of "other" compensatory time.

(d) The FLSA does not require that the rate at which "other" compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment. The rate at which "other" compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself.

(e) The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to “other” compensatory time as described above.

OTHER EXEMPTIONS

§ 553.30 Occasional or sporadic employment-section 7(p)(2).

(a) Section 7(p)(2) of the FLSA provides that where State or local government employees, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purpose of determining overtime liability under the Act.

(b) *Occasional or sporadic.* (1) The term *occasional or sporadic* means infrequent, irregular, or occurring in scattered instances. There may be an occasional need for additional resources in the delivery of certain types of public services which is at times best met by the part-time employment of an individual who is already a public employee. Where employees freely and solely at their own option enter into such activity, the total hours worked will not be combined for purposes of determining any overtime compensation due on the regular, primary job. However, in order to prevent overtime abuse, such hours worked are to be excluded from computing overtime compensation due only where the occasional or sporadic assignments are not within the same general occupational category as the employee’s regular work.

(2) In order for an employee’s occasional or sporadic work on a part-time basis to qualify for exemption under section 7(p)(2), the employee’s decision to work in a different capacity must be made freely and without coercion, implicit or explicit, by the employer. An employer may suggest that an employee undertake another kind of work for the same unit of government when the need for assistance arises, but the employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.

(3) Typically, public recreation and park facilities, and stadiums or auditoriums utilize employees in occasional or sporadic work. Some of these employment activities are the taking of tickets, providing security for special events (e.g., concerts, sports events, and lectures), officiating at youth or other recreation and sports events, or engaging in food or beverage sales at special events, such as a county fair. Employment in such activity may be considered occasional or sporadic for regular employees of State or local government agencies even where the need can be anticipated because it recurs seasonally (e.g., a holiday concert at a city college, a program of scheduled sports events, or assistance by a city payroll clerk in processing returns at tax filing time). An activity does not fail to be occasional merely because it is recurring. In contrast, for example, if a parks department clerk, in addition to his or her regular job, also regularly works additional hours on a part-time basis (e.g., every week or every other week) at a public park food and beverage sales center operated by that agency, the additional work does not constitute intermittent and irregular employment and, therefore, the hours worked would be combined in computing any overtime compensation due.

(c) *Different capacity.* (1) In order for employment in these occasional or sporadic activities not to be considered subject to the overtime requirements of section 7 of the FLSA, the regular government employment of the individual performing them must also be in a different capacity, i.e., it must not fall within the same general occupational category.

(2) In general, the Administrator will consider the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles* (except in the case of public safety employees as discussed below in section (3)), as well as all the facts and circumstances in a particular case, in determining whether employment in a second capacity is substantially different from the regular employment.