THE WORKING FAMILIES FLEXIBILITY ACT OF 2017: WILL CONGRESS BRING COMP TIME TO THE PRIVATE SECTOR?

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Introduction

In the wake of the 2016 presidential and congressional elections, most employers have been focusing on likely changes to the rules affecting the salary basis under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et seq.* However, depending on action in Congress, another change to the FLSA may be looming that is of interest to employer, employees, and employment-law practitioners alike. On February 16, 2017, Representative Martha Roby (R) of Alabama's Second District introduced H.R. 1180, the Working Families Flexibility Act of 2017 ("WFFA"),[2] which would permit private-sector employers to offer compensatory time off to their workers in lieu of cash compensation, similar to what is allowed in the public sector. In congressional testimony, several Alabama residents have argued that such an arrangement may result in benefits to both employers, who could realize short-term savings in weeks where compensatory time is earned, and employees, who would have additional flexibility to choose between overtime compensation and time off to meet unforeseen needs.[3]

The United States House of Representatives passed Rep. Roby's proposed compensatory-time legislation in early May 2017,[4] and the Trump Administration voiced its approval of the measure on the same day.[5] However, the legislation remains pending in the United States Senate, which has been beset by divisions and gridlock in recent months.

This article examines the WFFA and its purpose of amending the FLSA to allow private-sector employers to grant compensatory time to employees in lieu of overtime compensation. This path requires an exploration of the reasons behind the current ban on private-sector compensatory time, along with the policymaking arguments in favor of keeping that ban in place and the curious exception for public-sector employers under the FLSA. While it is clear from the proposed legislation that Congress intends to impose a more rigorous standard on private employers than the FLSA currently requires of public employers, the WFFA nonetheless offers substantial potential benefits to both workers and management. Nevertheless, because this legislation also comes with significant potential risks to employees, the political tenability of the bill is unclear at best. At the very least, employers and practitioners may expect that any FLSA revisions allowing for compensatory time in lieu of overtime compensation will result in both short-term benefits and the potential for frequent litigation in the near future.

The Ban on Compensatory Time

The FLSA does not expressly address compensatory-time arrangements in the private sector. The only mention of compensatory time in either the Department of Labor's regulations or the FLSA itself addresses its use in the public sector, with no mention of the private sector. Nonetheless, private-sector employers are forced to operate as if the FLSA prohibits private employers from offering compensatory time for one simple reason: because the Department of Labor says that it does.

Section 7(a) of the FLSA has always required that employers generally must pay no less than one and one-half times an employee's regular rate of pay for any hours worked over forty in a given workweek.[6] However, it was not until 1968 that the Department's Wage and Hour Division issued its present-day interpretative rules concerning the FLSA's overtime provisions. Among the interpretations published at that time was 29 C.F.R. § 778.106, which interprets Section 7(a) as setting forth a "general rule" that "overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends."[7]

Although § 778.106 does not itself declare that compensatory time is prohibited, its implications for a compensatory time arrangement are clear. An ideal compensatory-time arrangement would allow an employee to save up his compensatory hours for use as paid time off at some later date in lieu of overtime compensation, a process known as "banking." If the general rule of § 778.106 requires that overtime compensation be paid on the regular pay day for the workweek in question, and if compensatory time is offered strictly as an alternative to overtime pay, could compensatory time be banked for use *after* the pay period in which it was earned?

Later in 1968, the Wage and Hour Administrator answered this question in the negative. In an opinion letter that relied in part on § 778.106, the Administrator offered the Department of Labor's first formal guidance

concerning whether private employers could lawfully provide compensatory time to employees as an alternative to overtime wages:

> Section 778.106 indicates that the payment of . . . overtime compensation due an employee must ordinarily be made at the regular payday for the period in which the work was performed. **An employer may not credit an employee with compensatory time (even at a time and one-half rate) for overtime earned which is to be taken at some mutually agreed upon later date . . . .** [8]

It appears that the Administrator's conclusions regarding compensatory time have never been seriously reconsidered. In a 1985 congressional report, House Republicans observed that the Secretary of Labor "customarily" construes the FLSA as precluding the use of compensatory time in lieu of overtime compensation.[9] To this day, the Wage and Hour Division's Field Operations Handbook stands by the position that overtime compensation "must be paid in cash and normally at the time of the regular pay period . . . . It may not be accumulated to be paid at any time subsequent thereto."[10]

It should be noted that the Department of Labor is not alone in this interpretation of the FLSA. As early as 1967, and continuing to this day, courts have generally concluded that it is impermissible for private employers to award employees compensatory time in lieu of overtime compensation, either for the same reasons articulated by the Administrator in 1968 or simply because "the substitution of comp time for cash wages by private-sector employers is not expressly authorized" under the FLSA.[11]

The Department's interpretation of the FLSA does leave room for one permissible form of compensatory time in the private sector. FLSA interpretative rules expressly prohibit employers from averaging hours across two or more weeks in a single pay period in order to avoid paying overtime compensation.[12] Yet, if a non-exempt employee works overtime hours during any week in one pay period, the employer may choose to give the employee paid time off for one and one-half times those overtime hours during some later week in the same pay period in lieu of overtime compensation. For example, if the employee works ten hours of overtime in the first week of a two-week pay period, the employer may properly grant him fifteen hours of paid time off in the following week. This option, known as a "time-off plan," is acceptable to the Department because it is equivalent to paying the employee overtime compensation but giving him unpaid time off the following week. The Administrator endorsed this option in the same 1968 opinion letter that condemned other compensatory time arrangements, and the Department's Field Operations Handbook continues to permit employers to use time-off plans.[13] However, even this option prohibits the banking of paid hours off for use in some future pay period, the quintessential feature of a compensatory-time arrangement.[14]

The Public-Sector Exception

The Department's 1968 decision to interpret the FLSA as banning most compensatory-time schemes coincided with other shifts in the workforce, particularly in the public sector. As the FLSA was originally drafted, state and local public employees were not covered by the overtime protections of Section 7(a).[15] However, in a pair of sweeping amendments passed in 1966 and 1974, Congress expanded its coverage to generally encompass all public agencies at the federal, state, and local government levels.[16]

These FLSA amendments created a significant problem for state and local governments. Of particular relevance here, many agencies looking for creative ways to address budget shortfalls had enacted compensatory-time schemes well before the 1966 and 1974 amendments were contemplated, secure in the knowledge that the FLSA overtime provisions did not apply to them.[17] Suddenly, a popular and efficient practice for public-sector employers was no longer available. In response to this development, multiple cities and states quickly brought suit to prevent the enactment of these FLSA revisions shortly after the 1974 amendments were signed into law.[18]

In 1976, the U.S. Supreme Court held in National League of Cities v. Usery that the FLSA amendments were unconstitutional under the Tenth Amendment.[19] In doing so, the Court specifically cited the city and state governments' concerns "that the [FLSA] will require that the premium compensation for overtime worked must be paid in cash, rather than with compensatory time off."[20] The Court recognized that this outcome was "likely to be highly disruptive of accepted employment practices in many governmental areas."[21] Accordingly, the Court struck down both the 1966 and the 1974 amendments to the FLSA to the extent that they required state and local governments to comply with the FLSA, including the implicit ban on compensatory time.[22]

Relying on this exemption from the FLSA, many city

and state government agencies returned to the practice of providing compensatory time to their employees, even as private employers remained forbidden to do the same under the Department's interpretation of the FLSA.[23] However, this relief for public agencies was short-lived—in the 1985 case of Garcia v. San Antonio Metropolitan Transit Authority, the Supreme Court narrowly overruled National League of Cities, finding it both unworkable and "inconsistent with established principles of federalism."[24] Suddenly, city and state governments were once again subject to the FLSA's implicit ban on compensatory time.[25]

In response to these developments, Congress moved quickly to amend Section 7 to allow state and local entities to continue to offer compensatory time to their employees in lieu of overtime compensation.[26] In late 1985, Congress enacted and President Reagan signed Senate Bill 1570, which added a new Section 7(o) to the FLSA.[27] In brief, Section 7(o) provides that:

> [e]mployees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required . . . .[28]

The remainder of Section 7(o) sets forth restrictions concerning collective bargaining agreements, public safety employees, and maximum hours of compensatory time.[29]

Legislative Attempts to Permit Private-Sector Compensatory Time

In debating Senate Bill 1570, the House and Senate committee reports emphasized the special challenges that a ban on compensatory time would pose for state and local governments. In particular, the House Committee on Education and Labor favorably cited the flexibility that "such systems have provided to the public employer faced with extraordinary demands for public services yet constrained by strict limits on available revenue."[30] Likewise, the counterpart committee in the Senate observed that these compensatory time arrangements were "frequently the result of collective bargaining" in the public sector and that such systems were "both fiscally and socially responsible."[31] Thus, even though the committees lauded "the mutual benefits" that a compensatory time arrangement could provide to state and local employers and employees,[32] it was clear that the state and local budgetary concerns played a significant role in the congressional drive to preserve that option for public employers.

Republican in Congress soon came to the conclusion "that compensatory time off in lieu of overtime pay for hours worked beyond 40 in a week can provide mutually satisfactory solutions in the private sector no less than is the case in the public sector."[33] In 1995, Republicans in the 104th Congress introduced their first attempt at the WFFA, which sought to amend Section 7(o) to permit compensatory time among public and private employers alike.[34] In July 1996, the House comfortably passed the bill by a margin of 225-195.[35] Although President Clinton voiced limited support for an alternative proposal for compensatory time in the private sector,[36] the Senate never took action on the bill.

Amending the FLSA to allow for private-sector compensatory time remained a top priority for Republicans in subsequent Congresses. In an effort to simplify the amendment process, House Republicans in the 105th Congress drafted a revised WFFA providing that an entirely new private-sector compensatory-time provision would appear at the end of Section 7, leaving Section 7(o)'s rules on public-sector compensatory time untouched. [37] This retooled WFFA, the first piece of legislation introduced by House Republicans in the 105th Congress, passed on a vote of 222-210 in early 1997.[38] However, these efforts at amending the FLSA once again met their demise in the Senate, which never acted on the House bill and which saw a companion piece of legislation successfully filibustered twice by Senate Democrats and a handful of Republican allies.[39]

The House Republican bill has remained largely unchanged since 1997. Until recently, the same could be said of its fate. Although House Republicans introduced the WFFA in the 106th, 107th, 108th, 110th, 111th, 113th, and 114th Congresses, those bills rarely made it out of committee.[40] Even when the House again passed the WFFA in essentially its present form in 2013,[41] the bill died in committee in the Senate amid veto threats from the Obama Administration.[42] The Senate's own proposals to allow for private-employer compensatory time have never made it out of committee since 1997.[43]

The passage of the WFFA in May 2017 marks the first time that a sitting President has explicit endorsed a private-sector compensatory time bill that has passed the House.[44] Although it remains to be seen whether the Senate will take action on this proposal, the prospects for compensatory time in the private sector have arguably never been closer to fruition.

The Current Proposed Bill

In short, the bill passed by the House this year allows for an employer in the private sector to provide compensatory time off in lieu of overtime. Compensatory time is accrued at a rate not less than one and one-half hours for each hour of employment for which overtime would otherwise be provided.[45] The bill has no impact on the compensatory time rules in the public sector, which will remain governed by Section 7(o).

Any arrangement for the use of compensatory time in the private sector must be made through an expressly mutual agreement between the employer and the individual employee or, in the case of employees represented by a labor union, between the employer and the union.[46] That agreement must be maintained in accordance with the FLSA's recordkeeping requirements.[47] If the agreement is made with an individual employee, it must be affirmed by a written or otherwise verifiable record, entered into before the performance of the work, demonstrating that the employee has affirmatively chosen to receive compensatory time off in lieu of cash compensation.[48] These requirements are largely consistent with applicable provisions of Section 7(o) for public-sector employees, though the WFFA goes further in explicitly providing that the employee's agreement must be knowing and voluntary.

In addition, the WFFA requires that an employee must have worked at least 1,000 hours for the employer during a period of continuous employment over the twelve-month period prior to his receipt of or agreement to receive compensatory time.[49] This requirement does not appear in Section 7(o) and is therefore unique to the private sector, having been added to address concerns regarding vulnerable employees in the construction industry and migrant workers in other seasonal professions.[50]

Under this bill, an employee with accrued compensatory time must generally be permitted to use the compensatory time within a reasonable period after requesting such time off from his employer. The employer may only deny the use of compensatory time if the use of that time off would unduly disrupt the employer's operations.[51] This provision is essentially identical to the language governing the use of compensatory time in the public sector.[52]

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In order to protect private-sector employers and employees from excessively high amounts of accrued compensatory time, the WFFA sets a maximum of 160 hours for each private-sector employee.[53] This is a legal maximum; nothing in the bill prohibits employers and employees from agreeing to a lower limit for compensatory time accrual.[54] After the employee has accrued the maximum number of compensatory hours, the employer must provide cash compensation for overtime as would normally be required. This limit is far lower than that allowed in the public sector, which is set at 240 hours for most public employee and 480 hours for certain seasonal or emergency workers.[55]

The WFFA also includes three "cash out" provisions. First, at the end of each year, the employer must provide full cash compensation for all accrued and unused compensatory time within thirty-one days.[56] Second, upon thirty days' notice to the employee, an employer has the option of providing monetary compensation to an employee for any of his unused compensatory time in excess of 80 hours.[57] Finally, an employee may demand monetary compensation for any accrued and unused compensatory time, provided that the employee first gives thirty days' notice to the employer.[58] In each case, the compensation must be paid at no less than the regular rate either at the time that the compensatory time was earned or at the time of cash-out.[59] Since compensatory time is earned at a rate of time and a half, payment at the regular rate would still effectively work out to time-and-a-half compensation for each hour of employment for which overtime compensation would be required under the FLSA. These provisions are intended to protect both employers and employees from liability for accrual of excessive amounts of compensatory time.[60] By contrast, regulations under Section 7(o) provide that payments for accrued compensatory time may be made at any time and are paid at the regular rate as of the time of payment to the employee.[61]

Similarly, the WFFA would require that private-sector employers, like public-sector employers, provide monetary compensation for all accrued and unused compensatory time to an employee at the termination of his employment.[62] This compensation must meet or exceed the regular rate earned by the employee either at the time of pay-out or the time that the compensation was earned.[63]

Either the employer or the employee may end a compensatory-time agreement at any time. As long as a collective bargaining agreement does not provide otherwise, the employer may discontinue its compensatory-time policy upon thirty days' notice to its employees.[64] Conversely, once an employee withdraws from the compensatory-time arrangement by written request, the employer must provide monetary compensation within thirty days of receiving that request.[65]

The WFFA also provides private-sector employees with special protections relating to their right to request, not request, or not use compensatory time off. The bill expressly prohibits an employer from directly or indirectly intimidating, threatening, or coercing an employee, or attempting to do so, for the purpose of interfering with the employee's right to request or not request compensatory time off in lieu of overtime payment.[66] The legislation also prohibits an employer from taking those actions for the purpose of requiring an employee to use his accrued compensatory time.[67] An employer who violates these provisions may be held liable to the affected employee in a private right of action, with damages in the amount of the regular rate of pay at the time the compensatory time was accrued. Additionally, the employee is entitled to an equal amount as liquidated damages, reduced by the regular rate (at the time of accrual) for compensatory time that was actually used by the employee.[68] This private right of action concerning compensatory time abuses is unavailable to public-sector employees. These protections are also in addition to the existing safeguards in the FLSA, which make it unlawful to violate any provision of Section 7 and which prohibit an employer from discharging or otherwise discriminating against employees who institute proceedings under the FLSA.[69]

The WFFA also includes two administrative provisions. The first requires that the Secretary of Labor revise his materials sent to employers for purposes of explaining the FLSA to employees, such that those notice materials reflect the bill's amendments.[70] The second requires the Comptroller General to prepare regular reports concerning the impact of the legislation.[71]

Interestingly, the final remaining section is a sunset provision, stating that the WFFA shall cease to be in effect five years after its enactment.[72] House Republicans state that this provision will allow Congress to review the use of compensatory time among private-sector business and make any necessary adjustments in the legislation.[73]

Policy Obstacles to Enacting Compensatory Time

The push for compensatory time has long been undergirded by the philosophy that the workplace has changed dramatically in the 79 years since the FLSA was enacted, requiring new and flexible solutions for

employers and employees.[74] However, opponents of private-sector compensatory time are convinced that the WFFA represents the opening salvo in an effort to "gut[] the protections of the FLSA and undermin[e] living standards to the detriment of workers, the economy, and the country."[75] Although the legislation includes language to counter some of these concerns, the policy arguments of those opposed to compensatory-time options in the private sector continue to stand as significant obstacles to this sort of reform.

Proponents of private-sector compensatory time are correct in pointing out that there is a real desire among both workers and employers for some degree of flexibility in overtime compensation. Employers, especially those in thinly-capitalized industries, could benefit from the opportunity to avoid paying overtime compensation for up to one year after it has been earned, since the deferred compensation effectively constitutes an interest-free loan. Opponents of the measure argue that this arrangement would deprive employees of the opportunity to instead invest their own overtime compensation in an interest-bearing account.[76] However, proponents respond that employees have the voluntary choice to accept compensatory time in lieu of overtime and may freely reject that option in favor of traditional overtime compensation.

Questions exist as to how voluntary this option would end up being, and as to how often and how efficiently abuses in that regard will be or can be litigated. Proponents cite flexibility for employees as the principal benefit of compensatory time. House Republicans have frequently presented testimony over the past two decades from hourly, non-exempt employees who have requested the opportunity to choose between compensatory time and overtime compensation. As one employee said, "there have been times when I would have gladly given up the additional pay [from overtime compensation] to enjoy flexibility in planning my work schedule."[77] Another hourly employee testified, "If I could bank my overtime, I wouldn't have to worry about missing work if my child gets sick on Monday or Tuesday. I also would only be postponing valuable time off with my family when I have a busy work week, because I could always take the time off at a later date."[78]

However, opponents argue that this flexibility is illusory. As an initial matter, opponents point out that an employee does not have free rein to choose when to take her compensatory time. Instead, the employer is only required to grant an employee's request for compensatory time off "within a reasonable period after making the request," and then only if the employer, in its sole discretion, determines that the request "does not unduly disrupt the operations of the employer." Although proponents cite regulations under Section 7(o) holding that "mere inconvenience to the employer" cannot satisfy this standard,[79] opponents justifiably argue that the judicial record on this question is mixed at best. While the Sixth Circuit has concluded that leave in the public sector could not be deemed "unduly disruptive" if it only interfered with budgetary concerns rather than government operations, the court reached this conclusion despite recognizing that "the phrase 'unduly disrupt' is inherently ambiguous."[80] By contrast, the Ninth Circuit held that this standard gives the public-sector employer full discretion to choose exactly when an employee may be allowed to use compensatory time and does not allow the employee to choose a specific date for its use.[81] Whether the public-sector regulations on "undue disruption" would apply to private-sector compensatory-time arrangements, and whether the standard embraced by that regulation would actually give employees flexibility in their use of compensatory time, remains an open question.

Opponents also raise other objections to the flexibility argument. Because the WFFA permits an employer to cash out any earned compensatory time in excess of 80 hours with thirty days' notice, an employer has the power to preemptively "scuttle[e] an employee's planned surgery or parental leave."[82] Unless such a maneuver were found to constitute intimidation, a threat, or coercion, it would be neither prohibited nor actionable under the WFFA as drafted. Additionally, it appears that nothing in the WFFA would prevent an employer from forcing an employee who takes compensatory time off from to work additional overtime in the same week in the same week, without being paid overtime compensation for those additional hours.[83]

House Democrats further argue that the WFFA does not sufficiently prohibit employers from offering overtime hours only to employees who ask for compensatory time in lieu of overtime compensation. In response, proponents argue that the WFFA's prohibition on intimidation, threats, or coercion would prevent that outcome, relying on similar statutory language under the FMLA and the Federal Employees Flexible and Compressed Work Schedules Act.[84] Despite this reassurance, opponents remain concerned that enforcement of this prohibition would be unacceptably costly to employees. They also cite concerns that when some workers are granted time off instead of being paid for overtime in cash wages, an employer's increased reliance on those employees who agree to

take compensatory time will result in less predictable schedules and lower wages for all workers.[85]

Perhaps more compelling is the argument that employers may provide fewer hours of paid leave in other forms if compensatory time is permitted in lieu of overtime. An employer who offers compensatory time as the functional equivalent of vacation, personal, or sick days may realize substantial savings, since compensatory time is payment for work that has already been performed rather than a gratuitous benefit. For an employer that currently offers 80 hours of paid vacation every year to non-exempt employees, nothing in the WFFA would prohibit him from scaling back this benefit to 16 hours of paid vacation for all such employees and pointing to the availability of compensatory time for additional time off, as long as this decision is not deemed to threaten, intimidate, or coerce employees to accept or use compensatory time. Along the same lines, if compensatory time is available, an employee may be less likely to use paid sick leave, resulting in similar benefits to the employer. Of course, opponents of private-sector compensatory time have pointed to these very possibilities as evidence that the legislation is intended to protect employers rather than to offer flexibility to workers.[86]

Opponents also frequently express concerns that the ability to bank compensatory time for up to one year will make it difficult for employees to ensure compliance with existing wage and hour laws. In a system that opponents believe is already too complex to allow for employees to meaningfully track their employers' compliance with the FLSA, the ability to defer payment of accrued hours or overtime for months only adds to that complexity.[87] Additionally, though proponents point out that the WFFA treats all payments in lieu of compensatory time as unpaid overtime compensation, opponents remain concerned that the bill provides insufficient protection of these wages in the event of an employer's bankruptcy.[88]

Although proponents dismiss this parade of horribles by pointing to the success of compensatory time in the public sector, opponents of the WFFA insist that the public-private distinction matters here. The unique needs of state and local governments, which provide public goods on a limited budget, were frequently cited as a basis for allowing compensatory time in the public sector when Congress was considering Section 7(o). By contrast, opponents see a mere profit motive as the driving force behind private-sector reforms of that nature, without any corresponding public benefits. Moreover, opponents argue that public-sector employees already enjoy broader workforce safeguards than their private-sector colleagues, such as paid sick leave and vacation, frequent unionization, and due-process protections. Without any corresponding safeguards in the private sector, opponents assert that private employers will be afforded "the value of their employee's labor without being required to pay for it."[89]

Whether these concerns are valid or overblown is almost beside the point. At this stage, opponents have had some success in casting the WFFA as an attack on the longstanding overtime protections found in the FLSA. Regardless of the potential benefits for employers or employees, proponents of compensatory time in the private sector will continue to face these arguments as the congressional debate over the WFFA continues.

Predictions for the Future

At this point, it remains unclear whether the we can expect private-sector compensatory time to become a reality in the near future. Although the WFFA is closer to passage than has ever been the case in the past, Senate Democrats have been effective at filibustering in the past, and there is no indication that they would not succeed in the current Congress. Still, if congressional Republicans are successful in overcoming these political hurdles, employers may expect a private-sector compensatory-time exception to the FLSA's overtime requirements to yield a variety of short-term and long-term benefits—as well as some risks.

First, it is almost undoubtedly the case that the cost of overtime work would be lessened for employers who succeed in convincing employees to enter into compensatory-time agreements. While this is especially true where the employer would not need to schedule another worker to fill in for an employee using compensatory time, even those employers who need to schedule a replacement may expect to see lower payroll costs where the obligation to pay for overtime compensation is eliminated or at least deferred. Although the overtime premium must be paid in the form of time off or wages at some point in the future, the banking of compensatory time will nonetheless amount to an interest-free loan for employers, freeing up funds for investment in current initiatives or future opportunities.

The availability of compensatory time may also reduce the use of other forms of paid leave off, such as sick leave or vacation days. Further, with respect to employees who need the flexibility to address problems such as extended illness or family issues, the availability of compensatory time may potentially result in

heightened productivity in the form of increased job satisfaction, reduced absenteeism, and lower turnover.

Depending on administrative and judicial interpretations of the WFFA, the availability of compensatory time may yield other benefits to employers. While the legislation unambiguously allows employers to avoid scheduling compensatory time off where an employee's unavailability would "unduly disrupt" the employer's activities, this language may also be interpreted as giving the employer a significant amount of control over the timing of the paid time off. Further, although the WFFA also states that payment due for unused compensatory time must be treated as unpaid overtime compensation, it remains for the courts to decide how this provision is to be interpreted with respect to bankruptcy, unemployment compensation, and other factors that are traditionally tied to wages.

It is this last point that highlights the short-term risks for employers who might be quick to adopt a compensatory-time scheme. Although Section 7(o) does not expressly provide for the same private right of action found in the WFFA, the public-sector compensatory time provisions of the FLSA have been subject to frequent litigation. Even after three decades, there remains significant disagreement among the appellate courts as to how to interpret certain provisions of the FLSA's public-sector compensatory-time provisions, such as the undue-disruption standard. Of course, other language in the WFFA, such as the provisions on an employee's private right of action, has yet to be considered by the courts and is likely ripe for litigation. Still other concerns may be subject to judicial challenge, such as the ability of an employer to force employees to work additional hours in weeks where compensatory time off is taken. An employer on the cutting edge of these developments may run a heightened risk of litigation as these provisions are hashed out in the courts.

For private-sector employees, FLSA revisions that allow for compensatory-time schemes may result in increased flexibility in time off and additional hours of work after the 1,000-hour threshold has been met. For some employees, these will be welcome developments. On the other hand, the burden of monitoring employer compliance with the FLSA's overtime provisions may become more onerous for employees who enter into these agreements as the employer's obligation to pay for overtime work is drawn out over an extended period of time. It would become incumbent upon employees to keep careful track of any compensatory time due to them for up to one year, lest they fall prey to employers with poor recordkeeping or ill intentions. And the untested nature of some of the WFFA's provisions could put heavier burdens on hourly workers, most of whom cannot afford the same degree of access to legal representation as their employers.

For now, though, these questions will remain unresolved. It remains to be seen whether Senate Republicans will push for enactment of the WFFA. Smart employers will want to watch this matter closely and begin strategizing for possible changes.

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[2] H.R. 1180, 115th Cong. (2017).

[3] See H.R. Rep. No. 115-101, at 14, 15 (2017) (presenting 2013 and 2017 testimony from Montgomery-based bookkeeper Karen DeLoach, Huntsville-based HR Director Juanita Phillips, and Huntsville-based CRO Leslie-Jo Boyd Christ).

[4] Cong. Rec. H3049-50 (daily ed. May 2, 2017).

[5] White House Press Office, Statement of Administration Policy: H.R. 1180 – Working Families Flexibility Act of 2017 (Rep. Roby, R-Al, and 17 cosponsors) (May 2, 2017), https://www.whitehouse.gov/the-press-office/2017/05/02/hr-1180-%E2%80%93-working-families-flexibility-act-2017-rep-roby-r-al-and-17.

[6] Pub. L. No. 75-718 § 7(a) 52 Stat. 1063 (1938), *presently codified at* 29 U.S.C. § 207(a)(1).

[7] 29 C.F.R. § 778.106, 38 Fed. Reg. 986, 989 (1968). This language remains in force in the current version of the interpretative rules. See 29 C.F.R. § 778.106 (2017).

[8] See Wage & Hour Op. Letter No. 913, "Compensatory Time" (Dec. 27, 1968) (emphasis added). The Administrator also applied the same rationale to Colorado's public compensatory time program. See Dunlop v. State of N.J., 522 F.2d 504, 509 n.9 (3d Cir. 1975) (citing Wage & Hour Op. Letter No. 868 (Oct. 18, 1968)), *j'ment vacated sub nom.* New Jersey v. Usery, 427 U.S. 909 (1976).

[9] See H.R. Rep. No. 99-331, at 19 (1985).

[10] Wage and Hour Division, Department of Labor, Field Operations Handbook, at 32j16a(b) (rev. Nov. 17, 2016), *available at* https://www.dol.gov/whd/FOH/FOH_Ch32.pdf ("It must also be remembered that overtime compensation due an employee must be paid in cash and normally at the time of the regular pay period . . . . It may not be accumulated to be paid at any time subsequent thereto.").

[11] Ramirez v. Riverbay Corp., 35 F. Supp. 3d 513, 526 (S.D.N.Y. 2014) (citing cases); see also State of Maryland v. Wirtz, 269 F. Supp. 826, 851 (D. Md. 1967) (Thomsen, C.J., concurring in part). For decisions that either explicitly or implicitly rely on the reasoning of the 1968 Opinion Letter, see, e.g., Pippins v. KPMG LLP, 921 F. Supp. 2d 26, 54-55 (S.D.N.Y. 2012) (citing Wage & Hour Op. Letter No. 913); Boyke v. Sup'r Credit Corp., 2006 WL 3833544, at *4 (N.D.N.Y. Dec. 28, 2006) (citing Section 7(a)).

[12] 29 C.F.R. § 778.104.

[13] See Pippins, 921 F. Supp. 2d at 54-55; Dunlop, 522 F.3d at 509 (citing Wage & Hour Op. Letter No. 868); Field Operations Handbook, at 32j16b.

[14] See Wage & Hour Op. Letter No. 868.

[15] Initially, the term "employer" expressly excluded "the United States [and] any State or political subdivision of a State." See Pub. L. No. 75-718 § 3(d), 75 Stat. 1060. Since an "employee" was simply any "individual employed by an employer," a public employee was necessarily excluded from coverage under the FLSA. See id. § 3(e).

[16] See Pub. L. No. 89-601 § 102, 80 Stat. 831-32; Pub. L. No. 93-259 § 6, 88 Stat. 58-62, 64 (1974).

[17] See Dunlop, 522 F.2d at 508-09 & n.7 (describing state-level compensatory-time arrangements since 1951); Nat'l League of Cities v. Brennan, 406 F. Supp. 826, 827 n.3 (D.D.C. 1974) (citing public employment arrangements in California and Salt Lake City, Utah), *rev'd sub nom.* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

[18] See Nat'l League of Cities, 406 F. Supp. at 827.

[19] See Nat'l League of Cities, 426 U.S. 833, *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[20] Id. at 850 (citing Dunlop, 522 F.3d 504).

[21] Id.

[22] See id. at 851.

[23] See S. Rep. No. 99-159, at *7-8 (1985) (noting that legislation reinstating compensatory time for public employees addressed the "financial costs of coming into compliance with the FLSA—particularly the overtime provisions of Section 7"—in the wake of the Supreme Court's decision overturning National League of Cities.).

[24] See Garcia, 469 U.S. at 531.

[25] See H.R. Rep. No. 99-133, at 16-17 (1985).

[26] See id.; see also S. Rep. No. 99-159, at *8.

[27] See Pub. L. 99-150, *codified at* 29 U.S.C. 207(o).

[28] 29 U.S.C. § 207(o)(1).

[29] Id. § 207(o)(2)-(7).

[30] See H.R. Rep. No. 99-133, at 19-20.

[31] See S. Rep. No. 99-159, at 8.

[32] H.R. Rep. No. 99-133, at 19.

[33] H.R. Rep. No. 104-670, at 5 (1996) (internal quotation marks omitted).

[34] Working Families Flexibility Act, H.R. 2391, 104th Cong. (1996).

[35] Cong. Rec. H8791 (daily ed. July 30, 1996).

[36] Cong. Rec. H11469 (daily ed. Sept. 27, 1996). President Clinton's alternative legislation was never considered by either house of Congress. See id.

[37] H.R. 1, 105th Cong. (1997).

[38] Cong. Rec. H1155-56 (daily ed. Mar. 19, 1996).

[39] S. 4, 105th Cong. (1997); Cong. Rec. S4514 (daily ed. May 15, 1997) (first filibuster); Cong. Rec. S5291 (daily ed. June 4, 1997) (second filibuster).

[40] See H.R. 1380, 106th Cog. (1999); H.R. 1982, 107th Cong. (2001); Family Time Flexibility Act, H.R. 1119, 108th Cong. (2003); Family-Friendly Workplace Act, H.R. 6025, 110th Cong. (2008); Family-Friendly Workplace Act, H.R. 933, 111th Cong. (2009); H.R. 1406, 113th Cong. (2013); H.R. 465, 114th Cong. (2015). Note that these measures should not be confused with a bill introduced at one point by the House Democrats as the Working Families Flexibility Act, which did not address compensatory time. See H.R. 1274, 111th Cong. (2009).

[41] Cong. Rec. H2521-22 (daily ed. May 8, 2013).

[42] See, e.g., Marilyn Geewax, "Comp Time or Cold Cash. Which Would You Pick?" NPR, May 13, 2013, http://www.npr.org/2013/05/10/182910609/comp-time-or-cold-cash-which-would-you-pick (quoting the White House Press Office's assurance that the WFFA, if passed, would be vetoed by President Obama).

[43] Family Friendly Workplace Act, S. 1241, 106th Cong. (1999); Family Time and Workplace Flexibility Act, S. 317, 108th Cong. (2003); Working Families Flexibility Act of 2013, S. 1623, 113th Cong. (2013); Working Families Flexibility Act of 2015, S. 233, 114th Cong. (2015). In addition to these bills, Senate Republicans in the 113th Congress unsuccessfully attempted to introduce two amendments on private-sector compensatory time to the Democrats' proposed Paycheck Fairness Act, S. 2199, including one amendment whose language mirrored the House's WFFA. See Cong. Rec. S2242-44, 2284-85 (daily ed. Apr. 8, 2014). Although Senate Democrats also introduced a bill entitled the Working Families Flexibility Act several times from 2007 through 2012, the bill did not address compensatory time. See S. 2419, 110th Cong. (2007); S. 3840, 111th Cong. (2010); S. 2142, 112th Cong. (2012).

[44] See White House Press Office, "Statement of Administration Policy: H.R. 1180 – Working Families Flexibility Act of 2017 (Rep. Roby, R-Al, and 17 cosponsors)," (May 2, 2017), https://www.whitehouse.gov/the-press-office/2017/05/02/hr-1180-%E2%80%93-working-families-flexibility-act-2017-rep-roby-r-al-and-17. Although President Clinton endorsed compensatory time in principle, his proposals were more stringent than those passed by House Republicans. See Cong. Rec. H11469 (daily ed. Sept. 27, 1996).

[45] See H.R. 1180 § 2(s)(1), 115th Cong. (2017); see also id. § 2(s)(8)(A) (defining "employee" to exclude employees of public agencies).

[46] Id. §2(s)(2).

[47] See id.; see also 29 U.S.C. § 211(c).

[48] H.R. 1180 § 2(s)(2)(B).

[49] Id. § 2(s)(2).

[50] Cong. Rec. H1115 (daily ed. Mar. 19, 1997).

[51] H.R. 1180 § 2(s)(7).

[52] See 29 U.S.C. § 207(o)(5).

[53] H.R. 1180 § 2(s)(3)(A).

[54] See H.R. Rep. No. 115-101, at 18 (2017).

[55] See 29 U.S.C. § 207(o)(3)(A).

[56] H.R. 1180 § 2(s)(3)(B).

[57] Id. § 2(s)(3)(C).

[58] Id. § 2(s)(3)(D).

[59] Id. § 2(s)(6).

[60] H.R. Rep. No. 115-101, at 18-19.

[61] 29 C.F.R. § 553.27(a).

[62] H.R. 1180 § 2(s)(5); see also 29 U.S.C. § 207(o)(3)(4).

[63] H.R. 1180 § 2(s)(6).

[64] Id. § 2(s)(D).

[65] Id. § 2(s)(E).

[66] Id. § 2(s)(4)(A).

[67] Id. § 2(s)(4)(B).

[68] Id. § 3(f).

[69] See 29 U.S.C. § 215(a)(2)-(3).

[70] H.R. 1180 § 4.

[71] Id. § 5.

[72] Id. § 6.

[73] H.R. Rep. No. 115-101, at 9.

[74] See H.R. Rep. No. 104-670, at 4 (recognizing that 'the workplace and work force have changed greatly since the 1930's when the private sector provision was written").

[75] Id. at 33.

[76] See H.R. Rep. 115-101, at 57.

[77] See id. at 10-11 (testimony of Arlyce Robinson before the 104th Congress).

[78] See id. at 12 (testimony of Sandie Moneypenny before the 105th Congress).

[79] 29 C.F.R. § 553.25(d).

[80] See Beck v. City of Cleveland, Ohio, 390 F.3d 912, 920 (6th Cir. 2004).

[81] See Mortensen v. County of Sacramento, 368 F.3d 1082, 1087-91 (9th Cir. 2004).

[82] H.R. Rep. 115-101, at 57.

[83] Id. at 60.

[84] Id. at 24 (citations omitted).

[85] Id. at 55, 61-62.

[86] See id. at 60 (quoting President Clinton's objections to the 1997 legislation).

[87] See id. at 56.

[88] Id. at 19, 57.

[89] See id. at 57-58.

Guided by Rodney A. Max, center, and Michael B. Walls, right, our experienced team also comprises Brad Wash, Arthur J. Hanes Jr. and Marty Van Tassel. They assist law firms and their clients in every phase of dispute resolution, settling major litigation in Alabama and nationwide.

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