

Working Overtime In California Without Paying For Overtime



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Employers and hourly employees often want to agree to allow employees to accrue compensatory time off (“comp time”); meaning, if they work overtime hours, they can bank the time instead of being paid immediately for it. California Labor Code Section 204.3 specifically allows for the accumulation of up to 240 hours of comp time at the rate of 1.5 hours for every overtime hour worked.

Remember, however, the broad proposition that California employers are subject to both California and federal law. They must follow the law that most favors the employee. In this case, unfortunately, comp time is one of those rare circumstances in which federal law is more restrictive. Although Congress tried to modify the law a few years ago, federal law still prohibits private employers from allowing employees to accumulate any comp time (public employers, like cities, may do so).

So, no California comp time. What then? Employers have two options.

First, and more simply, when California reinstated daily overtime in 2000 (it disappeared for two years under Governor Wilson), the legislature threw a bone to employers by establishing something called “make up time.” Private employers in California (and to some extent public employers) are subject to the California Wage Orders, found in the California Code of Regulations. Those Orders govern all industries and occupations. The applicable Wage Order must be posted at the job site. Section 3 of each Wage Order contains the details about how employees are to be paid overtime. Subsection 3(J) provides for “make up work time.” There are very specific restrictions on how make up time can be used, however.

An employee may request make up time only for reasons related to their personal needs. The reason cannot relate to business. For example, an employee can say, “I want to work two extra hours on Tuesday so that I can leave two hours early on Thursday to watch my child play soccer.” In that scenario, and with the advance approval of the employer in writing, the employer need not pay overtime for the 9th and 10th hours worked on Tuesday. The time off and the extra work time must be in the same workweek and cannot be saved and cross over to a new workweek. The time taken off and the time worked can be done in any order, as long as it is in the same workweek. In contrast, an employee may say on Monday, “I am going to work really hard on Tuesday and Wednesday (10 hours each) because it is payroll week and I’d like to come in 4 hours late on Friday.” That’s not a personal reason and the overtime would still be owed.

The second way that employers can create a longer workday without overtime is through the “Alternative Workweeks” schedule option, referencing in that same Wage Order section 3, under subsection B. An alternative workweek schedule (AWS) allows the employer to establish a fixed schedule that contains what would otherwise be daily overtime hours. For example, the employer may implement a schedule of a Monday through Thursday workweek, 10 hours a day, for a total of 40 hours. No overtime would be owed for the 9th and 10th hour on each of those days. Similarly, some employers implement what is known as a “9/80” AWS. Under this schedule, hourly employees work 9-hour days on Monday through Thursday, and then 8 hours on every other Friday. The 7-day workweek begins in the middle of the shift on Friday, so that the employees see every other Friday off, with workweeks of 36 and 44, alternating from week-to-week. But because the “workweek” officially starts at noon on Friday, the law sees it as a 40 hour workweek every week, so there is no weekly overtime.

Critically, the employees affected by this change in schedule must vote for it in a secret ballot election. If two thirds approve the schedule, the employer may implement it. There are other rules that apply, but those are the basics. The schedules are very popular with employees, because it gives them extra days off. The employer can also stagger the schedule so that certain crews work Monday through Thursday and other crews work Tuesday through Friday, if manufacturing coverage is needed, for example.

In addition, the AWS can apply only to certain departments. For example, the manufacturing floor could be on 4/10s while the administrative employees remain on a regular 5/8 schedule to maintain continuity over all five week days. The employer can “occasionally” change the 4/10 days to another set of 4 days. For example, if a holiday falls on a Monday, the employer could change the workweek to Tuesday through Friday for that week.

One last critical point about the AWS implementation. Once the successful vote has been taken, the employer is required to send a letter containing the ballot results to the state Labor Commission’s Office of Policy, Research and Legislation. The agency then publishes those results on its website. If that vote is not published, then it can be void and the employer would owe overtime and related penalties.

An AWS can work well in a more rigid schedule such as a manufacturing operation. It does not work well in more fluid operations where the schedule can be variable, such as construction or a medical office. There are other restrictions that apply. For example, if the employee doesn’t receive enough work to fulfill their 10 hour day, but works only 9 hours at the employer’s request, then the employee is entitled to overtime for the ninth hour that day.

Employers have a few limited opportunities to avoid paying overtime to hourly employees. Those options generally are controlled by the employees, however, as noted above. Still, these options are typically very popular with hourly employees and employers may want to consider one or more of these options.