



## **Q & A REGARDING INCREASED COMPENSATION FOR CERTAIN EMPLOYEES DURING COVID-19**

*April 23, 2020*

After roughly four weeks operating under Governor Evers' Safer at Home Order, discrepancies have emerged regarding how the COVID-19 pandemic impacts employees. Specifically, counties are seeing certain positions and departments with increased workload while other operations have slowed.

The Wisconsin Counties Association and its general counsel, von Briesen & Roper, s.c., have received many questions surrounding different methods of providing increased compensation to certain employees that are putting in extraordinary hours or hold positions considered to be "at-risk" in relation to the pandemic. This topic has been a consistent topic of conversation in weekly county briefings with many asking what others are doing and how to best position the county to attract and retain personnel now and long-term in light of the current peculiar needs. Our general counsel has prepared the Q & A below to provide information related to the various options for increased compensation as well as considerations for implementing a policy of increased compensation.

This information should be reviewed carefully with corporation counsel to ensure county compliance with other applicable laws and regulations, including its own board rules, policies and procedures. Additional considerations apply when adjusting compensation for employees with an employment contract, serving under a civil service ordinance, or working under a collective bargaining agreement.

### **Increased Compensation**

**Q: Are counties allowed to increase compensation for certain employees but not others?**

**A:** *Yes. In the absence of an employment agreement or collective bargaining agreement, the county has discretion to adjust employee compensation based on legitimate nondiscriminatory reasons. When selecting the positions for increased compensation, it is important to establish the criteria for increased compensation and apply the criteria equally to all similarly situated employees. For example, a county could select an entire department or job classification for increased compensation. It is recommended that the decision making be centralized in an effort to ensure consistency as opposed to department-by-department discretion.*

**Q: Are counties allowed to temporarily increase compensation and return to the prior rate later?**

**A:** *Yes, but when communicating the increase it is important to clearly indicate it is temporary and subject to change at a later date. Also, the county should clarify which rate of pay will*

*apply for any bonus program or scheduled wage increase that is based on the employee's current rate of pay.*

**Q: What is an example of a temporary wage increase?**

A: *Hourly, non-exempt employees can be provided with an hourly rate increase for all hours worked. It is important to remember the increased hourly rate will be used when calculating overtime compensation. Salaried, exempt employees can be provided with a temporary salary increase.*

**Q: Can counties pay a “premium rate” for certain hours worked?**

A: *Yes. For example, employees can receive a higher hourly rate for all hours worked during a certain time of the day (i.e. after 5:00 p.m.) or for hours worked over eight in a day. Employees could also receive a premium for weekends or call-ins. It is important to remember that premium pay for certain hours will impact the employee's “regular rate” for purposes of calculating overtime.*

**Q: How is overtime calculated when certain hours are paid at a premium rate?**

A: *Generally, overtime compensation is calculated by taking 1.5 times the employee's “regular rate.” When an employee has worked hours at multiple rates, a “blended rate” needs to be calculated based on the total amount of compensation for all hours worked. For example, suppose an employee earning \$15.00/hour is eligible for a premium rate of \$20.00/hour for all hours worked after 5:00 p.m. The employee works 40 hours at \$15.00/hour and 5 hours at \$20.00/hour. The following calculation provides the blended rate: (40 hours x \$15) + (5 hours x \$20) = \$700; \$700/45 total hours = \$15.55 per hour. The employee's blended rate is \$15.55 and the employee's overtime rate for all hours worked over 40 in a week is 1.5 times \$15.55 or \$23.33/hour. In this example, the employee worked 5 overtime hours so the employee's total compensation for the week would be \$716.65 (40 hours x \$15 + 5 hours x 23.33 = \$716.65).*

**Q: Can counties provide a “bonus” rather than a rate increase?**

A: *Yes. For example, employees can be paid a bonus for exceeding a productivity threshold such as hours worked. Employees could also receive a bonus payment in recognition of increased work during the COVID-19 pandemic.*

**Q: Does a bonus payment impact the employee's regular rate when calculating overtime?**

A: *Generally, yes, but certain bonus payments can be excluded from the overtime calculation. A bonus payment that is calculated based on hours worked, productivity, attendance, or any other performance threshold will impact the overtime calculation and a blended rate will need to be calculated. (See Question No. 5 for additional information on “blended rate.”)*

*Discretionary bonuses that are not tied to hours worked or productivity can be excluded from the overtime calculation. A bonus is discretionary if (1) the employer has the sole discretion to determine whether the payment will be made and the amount of the payment; and (2) the payment is not made pursuant to a prior promise or contract. For example, an*

*employer can pay a one-time bonus in recognition of increased effort during the COVID-19 pandemic. It is important to note that whether a bonus is truly discretionary is a fact specific issue that should be evaluated on a case-by-case basis depending on the specific circumstances. If a “recognition bonus” is consistently paid it may be viewed as a productivity payment or a rate increase and no longer excluded from the overtime calculation.*

**Q: Can counties provide employees with perks like free lunch or gift cards without impacting the overtime calculation?**

*A: Yes, as long as the “perks” are discretionary and not calculated based on a performance threshold.*

### **Modifications to Paid Leave**

**Q: Can counties reward an employee who foregoes using accrued leave during the COVID-19 pandemic (because the employee is deemed essential) by agreeing to pay out such accrued leave at the end of the benefit year at a rate higher than the employee’s hourly rate of pay?**

*A: Yes. Counties that implement such a benefit should be sure to implement it through a written policy that clearly identifies the following: (1) which employees are eligible to receive the higher pay out; (2) the cutoff date for when eligible employees must possess the accrued, unused leave subject to the higher pay out (e.g., December 31, 2020) (3) which accrued, unused leave time will be subject to the higher pay out (e.g., only vacation time, all accrued leave time, only leave time accrued prior to the end of Wisconsin’s Safer at Home Order, etc.); (4) the specific rate of pay to be applied to accrued, unused leave subject to the higher pay out; (5) that the higher pay out is to be provided on a one-time basis; (6) when the payout will occur (e.g., first regular payroll following the end of the benefit year); and (7) what happens to the benefit if employment ends before the payout date.*

*Failure to identify the aforementioned parameters may result in unintended consequences, including substantial unbudgeted payouts, wage or other legal claims, administrative issues surrounding payments, etc.*

**Q: Can counties reward an essential employee who is required to work during the COVID-19 pandemic by providing them additional leave for use in 2021?**

*A: Yes. Counties that implement such a benefit should be sure to implement it through a written policy that clearly identifies: (1) which employees are eligible to receive the additional leave for use in 2021; (2) the quantity and type(s) of additional leave to be provided in 2021; (3) the date such additional leave will be provided in 2021; (4) any specific qualifications that must be met to receive the additional leave in 2021 (e.g., must be on the payroll as of January 1, 2021); (5) that the additional leave provided in 2021 constitutes “unaccrued” leave that is not subject to pay out upon separation of employment (whether voluntary or involuntary); (6) any parameters to be placed on the use of such additional leave during 2021; and (7) any other specific elements of the additional leave (e.g., the rate of pay associated with it).*

*Failure to identify the aforementioned parameters may result in unintended consequences, including substantial pay outs not budgeted for, the permanent accrual of additional benefits conferred, the conferral of additional types of leave not anticipated/intended, etc.*

**Q: Can counties provide a public health employee with compensatory time to provide them with additional time off?**

A: *Under the Fair Labor Standards Act (the “FLSA”), counties can provide non-exempt public health employees with two types of compensatory time: (1) FLSA compensatory time; and (2) “other” compensatory time. It is important to note that the requirements surrounding these types of compensatory time differ, requiring counties to pay careful attention to the parameters associated with any compensatory time accrued by non-exempt employees.*

**Q: What is FLSA compensatory time and what requirements are associated with FLSA compensatory time?**

A: *Pursuant to 29 C.F.R. § 553.20–553.27, public employers are permitted to provide non-exempt employees with compensatory time off in lieu of overtime compensation required by the FLSA (i.e., hours worked over 40 in a workweek). However, public employers must comply with certain legal requirements if they opt to provide non-exempt employees with FLSA compensatory time including (without limitation) the following:*

- *All FLSA compensatory time must be earned at a rate of not less than one and one-half (1 ½) hours for each hour of employment for which overtime compensation is required by the FLSA. 29 C.F.R. § 553.21.*
- *FLSA compensatory time can only be provided to non-exempt employees pursuant to: (1) a collective bargaining agreement, memorandum of understanding, or any other agreement between a public employer and representatives of its employees; or (2) if unrepresented employees, an agreement or understanding arrived at between the employer and employee before the performance of the work for which FLSA compensatory time may be awarded. Agreements can be entered into with all employees or only certain employees. 29 C.F.R. § 553.23. Agreements need not be in writing, but all agreements, including verbal, must be memorialized by a written document that is maintained by the employer. 29 C.F.R. § 553.30.*
- *An agreement between an employer and non-exempt employee regarding FLSA compensatory time can: (1) limit the hours during which FLSA compensatory time can be earned (e.g., only the first five hours worked beyond 40 in a workweek, after which all hours work shall be paid at the overtime rate); (2) creatively structure how compensatory time is earned/paid out, as long as the one and one-half (1 ½) hours worked concept is maintained (e.g., for all hours worked over 40 in a workweek, an employee can earn one hour of compensatory time, plus one-half employee’s regular hourly rate of pay); (3) can implement a compensatory time accrual cap (e.g., employees cannot accrue more than 60*

hours of FLSA compensatory time); and (4) can require cashing out of FLSA compensatory time at the employer's discretion, provided the FLSA compensatory time is paid out at the employee's regular rate of pay at the time of pay out. 29 C.F.R. § 553.23.

- *If an employer does not place a lower cap on FLSA compensatory time accrual within its agreement with the employee, by law the employee may accrue up to a maximum of 240 hours of FLSA compensatory time. 29 C.F.R. § 553.21.*
- *When FLSA compensatory time is paid out pursuant to an employee request or at the employer's discretion, the compensatory time must be paid at the employee's regular rate pay at the time such payment is issued, not the employee's regular rate of pay at the time the leave was earned. § 553.21. When FLSA compensatory time is paid out upon an employee's separation of employment, the compensatory time must be paid at the higher of: (1) the employee's regular rate of pay at time of separation; or (2) the employee's average rate of pay received during the last three years of employment. 29 C.F.R. § 553.21.*
- *Employee requests to use FLSA compensatory time must be granted within a "reasonable period" after the request is made, and an employer can only prohibit an employee from using FLSA compensatory time if it would unduly disrupt the employer's operations. 29 C.F.R. § 553.21; 553.25.*

**Q: What is "other" compensatory time and what requirements are associated with "other" compensatory time?**

**A:** *Pursuant to 29 C.F.R. § 553.28, public employers are permitted to provide non-exempt employees with "other" compensatory time when non-exempt employees work in excess of non-statutory thresholds, but less than 40 hours in a workweek. For example, an employer can grant employees "other" compensatory time for all hours worked beyond eight in a workday or for all hours worked beyond 37.5 but below 40 in a workweek. Unlike FLSA compensatory time, there are very few requirements that apply to "other" compensatory time. However, all of the parameters surrounding earning, payout, rate of pay and utilization must be set forth in a written agreement or, if pursuant to a verbal agreement, memorialized in a document and maintained by the employer.*

**Q: What additional information should counties consider before implementing FLSA or "other" compensatory time?**

**A:** *Counties that wish to provide FLSA or "other" compensatory time to non-exempt essential employees for purposes of responding to the pandemic should do so in a policy or agreement. Such policy or agreement should explicitly cutoff the accrual of FLSA and/or "other" compensatory time as of December 1, 2020 and require the pay out of all FLSA and/or "other" compensatory time earned under such policy as of the last payroll of 2020. If counties do not implement these limitations, they could be liable for interest penalties assessed by the Department of Employee Trust Funds upon paying the compensatory time out in a year other than when it was earned. See Wis. Stat. § 40.06(5).*

*If counties wish to end the provision of FLSA or “other” compensatory time at a date certain, such as December 31, 2020, the termination date of the policy or agreement should be explicitly set forth therein. If counties wish to allow for a “floating” policy or agreement terminable at-will, then the policy or agreement should explicitly note it can be terminated at-will by the employer with 15 days’ notice, and upon termination all accrued, unused compensatory time shall be paid out at the rates specified within the applicable policy.*

*Finally, if both FLSA and “other” compensatory time are provided by a county, it is imperative to carefully track the accrual and usage of each compensatory time classification. This is because, as noted above, the requirements surrounding FLSA and “other” compensatory time differ greatly, so it is important to know which type of leave an employee is requesting for purposes of compliance with the applicable requirements. Employees should be required to use all FLSA compensatory time prior to using “other” compensatory time given counties have greater latitude to deny usage of “other” compensatory time and, thus, its usage can be more easily managed than FLSA compensatory time.*

### **Convert Non-Exempt Employees to Salaried Exempt**

**Q: Paying non-exempt employees a higher rate for certain hours seems to create complications when calculating overtime. Can counties convert non-exempt employees to exempt and pay them on a salary basis to avoid the overtime issue?**

**A:** *Possibly. As discussed below, an employee is only considered “exempt” if the employee meets certain tests regarding their job duties and minimum salary requirements. Counties may decide to classify as many employees as possible as exempt because it limits the county’s potential exposure to overtime pay. This way, the county may still provide additional pay to its public health employees while also maintaining certainty as to the actual amount of the additional compensation.*

**Q: What is the difference between an exempt and a non-exempt employee?**

**A:** *Under the FLSA, employees fall into two categories – those who are exempt from minimum wage and overtime pay requirements, and those who are not exempt. Job titles do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements set forth by the Department of Labor. Non-exempt employees enjoy all of the protections provided by the FLSA, and generally are paid on an hourly basis. It is important that counties ensure the proper classification of employees as appropriate classification is the most common form of legal challenges under the FLSA.*

**Q: When is an employee exempt from the FLSA?**

**A:** *Employees are exempt only if they: (1) meet certain tests regarding their job duties; and (2) are paid on a salary basis at not less than \$684 per week.*

**Q: What are the job duties tests to determine if an employee is exempt?**

**A:** *There are several classifications of employees that fall under the FLSA exemptions. The most common exemptions are for employees whose job duties are executive, administrative,*

*professional, and computer-related (i.e., IT/Technology). There are numerous rules and qualifications related to each category that must be consulted prior to classification.*

**Q: How are non-exempt employees compensated?**

A: *Non-exempt employees must be paid for all “hours worked.” “Hours worked” means time suffered or permitted to work. The workweek may begin on any day and may be different for different employees. If the employer knows or has reason to believe that an employee is working, that time is work time. For example, the workweek for employees in the county clerk’s office may begin on Sunday, whereas the workweek for human services employees may begin on Monday.*

**Q: How are exempt employees compensated?**

A: *Exempt employees are not covered by the FLSA, and, therefore are not subject to minimum wage and overtime pay requirements. As such, exempt employees are typically paid a salary and are not compensated per hour actually worked.*

**Q: Our county has a number of non-exempt public health employees that we are considering increasing pay for time worked during the COVID-19 pandemic. Can our county cap the amount of additional compensation paid to such employees?**

A: *No. As mentioned above, non-exempt employees must be paid for all “hours worked.” This means that a non-exempt employee must be paid his or her regular rate for all regular hours worked and at the overtime rate for all overtime hours worked.*