



H.B. 138

124th General Assembly
(As Introduced)

Reps. Husted, Cates, Buehrer, Raga, DeWine, Callender, Schuring, Williams, Goodman, Evans, Willamowski, Faber, Setzer, Olman, Flowers, Webster, Allen, Core, Calvert, Schaffer, Seitz, Collier, Flannery, Redfern, Distel, Britton, Jerse, S. Smith, Key, Fessler

BILL SUMMARY

- Permits private employers to award compensatory time off in lieu of monetary overtime compensation to their employees, subject to the consent of the employee and other specified conditions.
- Permits public and private employers to establish biweekly work schedule programs to allow their employees to work 80 hours in any two consecutive work weeks.
- Prohibits private employers from requiring their employees to accept compensatory time off in lieu of monetary payment for overtime and prohibits public and private employers from requiring their employees to work a biweekly work schedule program.
- Establishes civil and criminal penalties for violations of the bill's provisions.

CONTENT AND OPERATION

Overview

Under Ohio's Minimum Wage Law (R.C. Chapter 4111.), an employer is required to pay an employee one and one-half times the employee's hourly rate of pay for each hour that the employee works in excess of 40 hours per week, in the same manner and with the same exceptions as provided in the federal Fair Labor Standards Act (the federal wage and hour law). Special overtime provisions apply to county employees; certain other employees, such as those engaged in agriculture, are exempt from the overtime provisions altogether (sec. 4111.03).

(See **COMMENT.**) Each week or portion of a week for which the employer fails to pay overtime wages is a separate violation of the law. An employer who pays or agrees to pay wages at less than the overtime rate is guilty of a misdemeanor of the third degree (secs. 4111.13(C) and 4111.99(B)).¹ Additionally, the employee may file a civil action against the employer for the unpaid wages.

Compensatory time off in lieu of monetary overtime compensation

The bill permits an employee, other than an employee of the state, a political subdivision of the state, or any of the state's or political subdivisions' instrumentalities, to receive compensatory time off in lieu of monetary overtime compensation at a rate of not less than one and one-half hours for each hour of employment for which monetary overtime compensation otherwise is required.² Current law generally requires monetary overtime compensation for each hour an employee works in excess of 40 hours per week. "Compensatory time off" means the hours during which an employee is not working that are counted as hours worked during the applicable work week or other work period for purposes of overtime compensation and for which the employer compensates the employee at the employee's regular rate of pay. (Sec. 4111.01(G).)

Compensatory time off only may be paid to employees in accordance with the following conditions:

(1) The applicable provisions of a collective bargaining agreement between the employer and the employees' representative recognized in accordance with the federal National Labor Relations Act;³

¹ A misdemeanor of the third degree carries a term of imprisonment of not more than 60 days and maximum \$500 fine, plus restitution to the victim (sec. 2929.21).

² The federal Fair Labor Standards Act, which applies to governments, currently contains a provision that permits public employees of a state or a political subdivision to receive compensatory time off in lieu of monetary overtime compensation at a rate not less than one and one-half hours for each hour of employment for which overtime compensation otherwise is required (29 U.S.C.A. § 207(o)).

³ A "collective bargaining agreement" is an agreement entered into as a result of employees bargaining collectively with an employer. To "bargain collectively" means the performance of the mutual obligation of the representative of an employer and the exclusive representative of employees in an appropriate bargaining unit to meet at a reasonable time and to consult and bargain in good faith to reach agreement with respect to the conditions of employment affecting the employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement

(2) In the case of employees who are not represented by a labor organization, an agreement or understanding between the employer and employee before the performance of the work involved, as long as the agreement or understanding is knowingly and voluntarily entered into by and at the initiation and request of the employee and is not a condition of employment;

(3) The employee has affirmed in a written or otherwise verifiable statement that is made, kept, and preserved in accordance with an employer's record keeping requirements under the Minimum Wage Law, that the employee has initiated a request to receive compensatory time off in lieu of monetary overtime compensation;

(4) The employee has not accrued more than 240 hours of compensatory time off. (Sec. 4111.03(E)(1), (2), and (3)(a).)

Employers are required to permit an employee who has accrued compensatory time off and who has requested the use of that time off, to use it within a reasonable period after the employee makes the request if the use does not unduly disrupt the operations of the employer. (Sec. 4111.03(E)(8).)

Payment of monetary overtime compensation for accrued compensatory time off

Amount of monetary overtime compensation. An employer that pays monetary overtime compensation to an employee for accrued unused compensatory time off under the bill must make that payment based on a rate of compensation that is the higher of (1) the regular rate of pay received by the employee when the compensatory time off was earned or (2) the final regular rate of pay received by the employee.⁴ The bill specifies that any payment owed to an employee for unused compensatory time off is considered unpaid monetary overtime compensation. (Sec. 4111.03(E)(7).)

reached, but the obligation does not compel either party to agree to a proposal or to make a concession. (Sec. 4111.01(H) and (I).)

⁴ "Regular rate" includes all remuneration for employment paid to or on behalf of an employee except for gifts on special occasions, vacation and holiday pay or payment for occasional absences, reimbursement for travel expenses, discretionary bonuses, talent fees, irrevocable contributions to benefits plans, and premium payments for hourly or weekly, overtime, for weekend and holiday work, and for work done outside the normal hours pursuant to an employment contract or collective bargaining agreement (sec. 4111.01(L)).

When must monetary overtime compensation be paid for accrued unused compensatory time off

The bill generally requires an employer, not later than January 31 of each year, to provide monetary overtime compensation for any unused compensatory time off accrued during the preceding calendar year that was not used by December 31 of that year. An employer may designate and communicate to its employees an alternative 12-month period other than a calendar year, in which case the monetary overtime compensation must be paid not later than 31 days after the end of the alternative 12-month period. (Sec. 4111.03(E)(3)(b).)

An employer may provide monetary overtime compensation for an employee's unused compensatory time off in excess of 80 hours at any time after giving employees at least 30 days' written notice. Additionally, an employer that has adopted a policy of offering compensatory time off to employees may discontinue that policy upon giving the employees 30 days' written notice. (Sec. 4111.03(E)(3)(c) and (4).)

The bill permits an employee to withdraw an agreement or understanding between the employer and employee to receive compensatory time off in lieu of monetary overtime compensation at any time. An employee also may request that monetary overtime compensation be provided, at any time, for all unused compensatory time off accrued by the employee. Within 30 days after receipt of the written request, the employer must pay to the employee the monetary overtime compensation owed. (Sec. 4111.03(E)(5).)

An employer is required to pay to an employee who has not used his accrued compensatory time off the monetary overtime compensation owed, as described above, upon the voluntary or involuntary termination of employment. (Sec. 4111.03(E)(6).)

Biweekly work schedule programs

The bill permits both public and private employers, notwithstanding any other provision in the Minimum Wage Law, to establish biweekly work schedule programs that permit employees to elect to work a biweekly schedule consisting of a "basic work requirement" of not more than 80 hours over a period of two consecutive work weeks and in which more than 40 hours of the basic work requirement may occur in a single week of the biweekly period.⁵ Any hours

⁵ "Basic work requirement" means the number of hours, excluding overtime hours, that an employee is required to work or for which the employee is required to account by leave or otherwise (sec. 4111.01(J)).

worked in excess of the basic work requirement of the biweekly work schedule that are requested in advance by the employer are considered overtime hours. The bill specifies that employees retain the right to elect whether or not to agree to work a biweekly work schedule established by the employee's employer. (Sec. 4111.03(F)(1) and (2).)

An employer is required to compensate employees in a biweekly work schedule program for overtime hours either: (1) at a rate that is not less than one and one-half times the regular rate at which the employee is employed, or (2) by awarding compensatory time off in accordance with the Fair Labor Standards Act for employees of the state, its political subdivisions, or their instrumentalities, or as described above for employees of private employers. Employers are required to compensate their employees for each hour worked in a biweekly work schedule program at a rate that is not less than the regular rate at which the employee is employed. (Sec. 4111.03(F)(3) and (4).)

Employees in bargaining units

In the case of employees in a unit represented by an exclusive representative, any biweekly work program schedule and the establishment and termination of that program are subject to the terms of a collective bargaining agreement between the employer and the exclusive representative.⁶ Employees within such a unit may not be included within a biweekly work schedule program except to the extent expressly required or permitted under the collective bargaining agreement.

The bill specifies that nothing permitting compensatory time off in lieu of monetary payment for overtime and the establishment and use of biweekly work schedule programs may be construed as diminishing the obligation of an employer to comply with any collective bargaining agreement or any employment benefits program or plan that provides lesser or greater rights to employees than those established in the bill. (Sec. 4111.03(F)(5).)

Prohibition and penalties

Currently, an employer that fails to pay an employee overtime wages to which the employee is entitled is liable to the employee for the full amount owed,

⁶ An "exclusive representative" is any labor or employee organization that is certified as the exclusive representative of employees by means of the National Labor Relations Act, the Ohio Public Employees Collective Bargaining Law, or, immediately before the effective date of the bill, recognized by an employer as the exclusive representative of employees in an appropriate unit on the basis of an election or otherwise, and that continues to be so recognized (sec. 4111.01(L)).

plus reasonable attorney's fees and costs, less any amount of overtime compensation actually paid to the employee. The employer also is guilty of a misdemeanor of the third degree. (Secs. 4111.10(A) and 4111.99(A).)

The bill prohibits an employer that provides compensatory time off or a biweekly work schedule program from directly or indirectly intimidating, threatening, or coercing any employee for the purposes of:

(1) Interfering with the rights of the employee to request or not request compensatory time off in lieu of payment of overtime compensation for overtime hours or to elect to work or not to work a biweekly work schedule.

(2) Requiring the employee to use compensatory time off.⁷ (Sec. 4111.13(D)(1).)

In addition to any other civil and criminal penalties that may be imposed upon an employer for failure to pay overtime wages, an employer who violates (1) or (2), above, is guilty of a misdemeanor of the third degree and is liable to an employee for a dollar amount equal to all of the following:

(1) An amount that is the product of the rate of compensation, which is the higher of the employee's regular rate of pay at the time the compensatory time off was earned or the employee's final regular rate of pay, and the number of hours of compensatory time off involved in the violation that was initially accrued minus the number of compensatory time off hours used by the employee.

(2) As liquidated damages, an amount that is the product of the rate of compensation and the number of hours of compensatory time off initially accrued that was involved in the violation.

(3) Costs and reasonable attorney's fees as allowed by the court. (Secs. 4111.03(E)(7)(a), 4111.10(B), and 4111.99(B).)

Rulemaking

The Administrator of the Bureau of Employment Services currently is required to adopt rules in accordance with the Administrative Procedure Act to carry out the Minimum Wage Law. The bill specifies that these rules may include

⁷ The bill defines "intimidate, threaten, or coerce" to include promising to confer or conferring any benefit including appointment, promotion, or compensation, or effecting or threatening to effect any reprisal, including deprivation of appointment, promotion, or compensation (sec. 4111.13(D)(2)).

rules regarding compensatory time off and biweekly work schedule programs for employees. (Sec. 4111.05.)

Informational materials provided by the Bureau of Employment Services

The bill requires the Administrator, not later than 30 days after the bill's effective date, to revise the printed materials the Administrator makes available to employers and employees regarding the Ohio Minimum Wage Law to include information on compensatory time off in lieu of monetary overtime compensation and biweekly work schedule programs (Section 3).

COMMENT

Most Ohio employers are required to comply with the federal Fair Labor Standards Act (29 U.S.C.A. §§ 201 to 219). They can, however, be required instead to comply with Ohio's Minimum Wage Law's provisions relating to a maximum work week or a minimum wage rate if those particular provisions are more favorable to employees than the provisions of federal law. Federal law prescribes minimum wage and maximum hour (i.e., overtime) provisions for most employers that have annual gross sales in excess of \$500,000 (29 U.S.C.A. § 203(s)). Moreover, employees are individually covered by the FLSA if they are engaged in interstate commerce or in the production of goods for intrastate commerce (29 C.F.R. § 776.2). Additionally, most public employers are subject to the federal law. Ohio law applies to most employers that have annual gross sales in excess of \$150,000. The minimum wage requirements of Ohio's law also apply to employers whose annual gross sales fall below \$150,000. (Secs. 4111.01 and 4111.02(E)).

To be consistent with both federal and state wage and hour laws, the bill would appear to apply only to those employers that are not otherwise totally exempt from coverage under both laws and that have annual gross sales between \$150,000 (the state threshold) and \$500,000 (the federal threshold). Additionally, the bill would appear to apply only to employees who are not engaged in interstate commerce or in the production of goods for intrastate commerce.

Persons excluded from the Minimum Wage Law

Ohio law excludes from the definition of "employee," and hence from coverage under the Minimum Wage Law for the payment of overtime, the following individuals:

- (1) Employees of the United States;

- (2) Individuals employed as baby-sitters or live-in companions for the sick or elderly if the companion's principal duties do not include housekeeping;
- (3) Individuals who deliver newspapers to the consumer;
- (4) Outside salesmen compensated by commissions;
- (5) Executive, administrative, or professional employees;
- (6) Individuals who work or provide services of a charitable nature in a hospital or health institution;
- (7) Police officers or fire fighters;
- (8) Students employed on a part-time or seasonal basis by a political subdivision of the state;
- (9) Individuals employed by a camp or recreational area for children under 18 and owned and operated by a nonprofit organization. (Sec. 4111.01(D).)

The federal minimum wage law generally exempts the following employees from the maximum hour provisions, and, consequently, these employees are exempt from the overtime provisions in Ohio law as well:

- (1) Executive, administrative, or professional employees;
- (2) Employees employed in amusement parks, recreational establishments, organized camps, or religious or non-profit educational conference centers;
- (3) Employees engaged in fishing operations;
- (4) Most employees engaged in agriculture;
- (5) Employees exempted by the United States Secretary of Labor (i.e., students; messengers, learners, and apprentices; and handicapped workers);
- (6) Employees employed in publishing newspapers of less than 4,000 circulation;
- (7) Switchboard operators of certain public telephone companies;
- (8) Seamen on a vessel other than an American vessel;
- (9) Employees employed on a casual basis as domestic service employees as caregivers or baby-sitters;

- (10) Certain criminal investigators;
- (11) Employees subject to the authority of the United States Secretary of Transportation to establish maximum hours for those employees;
- (12) Employees engaged in the operation of a rail carrier;
- (13) Employees of a carrier by air;
- (14) Individuals employed as outside buyers of poultry, eggs, cream, or milk;
- (15) Seamen;
- (16) Announcers, news editors, or chief engineers of certain radio or television stations;
- (17) Salesmen, partsmen, or mechanics engaged in selling or servicing automobiles, trucks, farm implements, trailers, boats, or aircraft;
- (18) Drivers or drivers' helpers who make local deliveries;
- (19) Agricultural employees in connection with the operation of certain ditches, canals, reservoirs, or waterways;
- (20) Agricultural employees employed by farmers;
- (21) Employees employed by an establishment commonly recognized as a country elevator;
- (22) Employees engaged in processing of maple syrup into sugar or syrup;
- (23) Employees who transport fruits or vegetables from the farm to the place of first processing or first marketing within the same state;
- (24) Taxicab drivers;
- (25) Fire protection, law enforcement, and correctional institution personnel if less than five such persons are employed during the work week;
- (26) Live-in domestic servants;
- (27) Employees employed with his or her spouse by a non-profit educational institution to serve as parents of certain children;
- (28) Employees who work in motion picture theaters;

(29) Employees engaged in forestry or lumbering operations;

(30) Employees of amusement or recreational centers located in national parks or national forests;

(31) Individuals who deliver newspapers to the consumer;

(32) Homeworkers who make wreaths composed of natural evergreens;

(33) Employees who perform services during the work week in a foreign country;

(34) Employees engaged in the ginning of cotton or other cotton processing. (29 U.S.C.A. § 213.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-28-01	p. 200

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