



Ohio Legislative Service Commission

Bill Analysis

Samuel K. Benham

H.B. 61

129th General Assembly

(As Reported by H. Economic and Small Business Development)

Reps. Thompson and Martin, Ruhl, Sears, Wachtmann, Baker, Blessing, Derickson, J. Adams, Brenner, Kozlowski, Blair, Snitchler, Stebelton, Slaby, Boose

BILL SUMMARY

- Permits some 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.
- Prohibits private employers from (1) interfering with the employee's rights to request or not request compensatory time off in lieu of monetary payment for overtime, and (2) requiring their employees to accept compensatory time off in lieu of monetary payment for overtime.
- Establishes civil and criminal penalties for violations of the bill's provisions.
- Narrows the class of township employees for whom a township is obligated to provide health care benefits.

TABLE OF CONTENTS

Overtime law	2
Compensatory time off in lieu of monetary overtime compensation	2
Payment of monetary overtime compensation for unused compensatory time off	4
Amount of monetary overtime compensation.....	4
When monetary overtime compensation must be paid for unused compensatory time off.....	4
Prohibition and penalties.....	5
Rulemaking	6
Informational materials provided by the Department of Commerce.....	6
Township employees' health coverage	6
Persons excluded from the Fair Minimum Wage Standards Law	8

CONTENT AND OPERATION

Overtime law

Under Ohio's Fair Minimum Wage Standards 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.¹ (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 third degree misdemeanor.² Additionally, the employee may file a civil action against the employer for the unpaid wages.

Compensatory time off in lieu of monetary overtime compensation

Current law generally requires monetary overtime compensation for each hour an employee works in excess of 40 hours per week.

The bill permits employees, other than certain specified classes of employees, to elect to receive compensatory time off in lieu of monetary overtime compensation at a rate of not less than one hour for each hour of employment for which monetary overtime compensation otherwise is required.³ "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.⁴

¹ R.C. 4111.03.

² R.C. 4111.13(C) and 4111.99(B). The penalties for a third degree misdemeanor include a term of imprisonment of not more than 60 days and maximum \$500 fine, and restitution to the victim (R.C. 2929.24 and 2929.28).

³ The federal Fair Labor Standards Act, which applies to governments, currently 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. § 207(o)).

⁴ R.C. 4111.03(D)(1).

The right to elect compensatory time under the bill does not apply to the following classes of employees: employees of the state, a political subdivision of the state, or any of the state's or political subdivisions' instrumentalities; or individuals employed by a contractor or subcontractor to perform labor or provide services to construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of a structure or improvement.

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

(1) The applicable provisions of a collective bargaining agreement between the employer and the employees' exclusive representative recognized in accordance with the federal National Labor Relations Act (29 U.S.C. 159(a));⁵

(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 Fair Minimum Wage Standards 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.⁶

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.⁷ The bill does not define "reasonable period."

⁵ A "collective bargaining agreement" is an agreement entered into between the representative of an employer and the exclusive representative of employees in an appropriate bargaining unit. (R.C. 4111.03(D)(2).)

⁶ R.C. 4111.031(B). Presumably the 240-hour limit applies to each 12-month period, although the bill does not expressly state that this is the case.

⁷ R.C. 4111.031(I).

Payment of monetary overtime compensation for unused compensatory time off

Amount of monetary overtime compensation

An employer that pays monetary overtime compensation to an employee for accrued but unused compensatory time off under the bill must make that payment based on a rate of compensation that is the regular rate of pay received by the employee when the compensatory time off was earned.⁸ Compensatory time off is deemed to be used in the same order it is earned (first in, first out). The bill specifies that any payment owed to an employee for unused compensatory time off is considered unpaid monetary overtime compensation.⁹

When monetary overtime compensation must be paid for 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.¹⁰

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 written notice of that intent at least 30 days before providing that compensation. Additionally, an employer that has adopted a policy of offering compensatory time off to employees may discontinue that policy upon giving the employees written notice of that intent at least 30 days before the discontinuation.¹¹

⁸ "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 (R.C. 4111.03(D)(7)).

⁹ R.C. 4111.031(G) and (H).

¹⁰ R.C. 4111.031(C).

¹¹ R.C. 4111.031(C)(2) and (D).

The bill permits an employee not represented by a labor organization 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 not represented by a labor organization also may make a written 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.¹²

An employer is required to pay to an employee who has accrued unused compensatory time off the monetary overtime compensation owed, as described above, upon the voluntary or involuntary termination of employment.¹³

Prohibition and penalties

Currently, an employer who fails to pay an employee overtime wages to which the employee is entitled is liable to the employee for the full amount owed, plus costs and reasonable attorney's fees allowed by a court. The employer also is guilty of a fourth degree misdemeanor.¹⁴

The bill prohibits an employer that provides compensatory time off from directly or indirectly intimidating, threatening, or coercing, attempting to intimidate, threaten, or coerce, or terminating or attempting to terminate the employment of, any employee for the purposes of:

- (1) Interfering with the employee's rights to request or not request compensatory time off in lieu of payment of monetary overtime compensation for overtime hours.
- (2) Requiring the employee to use compensatory time off.¹⁵

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, under the bill, is guilty of a third degree misdemeanor and is liable to an employee for a dollar amount equal to the sum of all of the following:

¹² R.C. 4111.031(E).

¹³ R.C. 4111.031(F).

¹⁴ R.C. 4111.10(A) and 4111.99(A).

¹⁵ R.C. 4111.13(D)(1). 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 (R.C. 4111.13(D)(2)(b)).

(1) An amount that is the product of the employee's regular rate of pay at the time the compensatory time off was earned and the number of unused hours of compensatory time off involved in the violation.

(2) As liquidated damages, an amount that is the product of the employee's regular rate of pay and the total hours of compensatory time off involved in the violation.

(3) Costs and reasonable attorney's fees as allowed by the court.¹⁶

Rulemaking

The Director of Commerce currently is required to adopt rules in accordance with the Administrative Procedure Act to carry out the Fair Minimum Wage Standards Law. The bill specifies that these rules may include rules regarding compensatory time off for employees.¹⁷

Informational materials provided by the Department of Commerce

The bill requires the Director, not later than 30 days after the bill's effective date, to revise the printed materials the Director makes available to employers and employees regarding the Ohio Fair Minimum Wage Standards Law to include information on compensatory time off in lieu of monetary overtime compensation.¹⁸

Township employees' health coverage

Under current law, if a township supplies health insurance or other health care benefits to any of its employees, it is required to provide such benefits uniformly to all of its full-time employees.¹⁹ The township may provide the benefits for part-time employees, but is not required to do so. Currently, a full-time employee is defined as an employee who is "hired with the expectation that" the employee will work not more than 1,500 hours per year, an average of about 29 hours per week.

The bill redefines a full-time employee as an employee who is hired with the expectation of working not more than 1,800 hours per year, about 35 hours per week,

¹⁶ R.C. 4111.031(G), 4111.10(B), and 4111.99(B).

¹⁷ R.C. 4111.05.

¹⁸ Section 3 of the bill.

¹⁹ R.C. 505.60(A).

thus reducing the potential number of employees for whom a township is required to provide health care benefits if it chooses to offer such benefits to any employees.²⁰

Under current law, all employers with ten or more employees must offer a cafeteria plan that allows employees to pay for health insurance by a tax-exempt cafeteria plan or similar salary reduction arrangement. The requirement begins to apply in January 2011 for employers with more than 500 employees, in July 2011 for employers with more than 150 employees, and in January 2012 for employers with more than ten employees. The requirement begins to apply later if the Superintendent of Insurance adopts implementing rules after July 1, 2010.²¹ An employee is currently defined as an employee who is expected to work not more than 1,500 hours per year.

The bill redefines township employees as employees hired with the expectation of working not more than 1,800 hours per year, thus reducing the potential number of township employees for whom a township is required to offer health insurance coverage under a cafeteria or other salary reduction arrangement. A township that employs fewer than ten employees who are expected to work 1,800 hours per year each would not have to provide the coverage.²²

COMMENT

Most Ohio employers are required to comply with the federal Fair Labor Standards Act, including most public employers.²³ They can, however, be required instead to comply with Ohio's Fair Minimum Wage Standards 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 and are engaged in commerce or in the production of goods for commerce, or that have employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person.²⁴ Moreover, employees are individually covered by the FLSA during a work week in which they are engaged in interstate commerce or in the

²⁰ R.C. 505.60(G)(1).

²¹ R.C. 4113.11(A).

²² R.C. 4113.11(H)(3).

²³ FLSA; 29 U.S.C. §§ 201 to 219.

²⁴ 29 U.S.C. 203(s).

production of goods for interstate commerce.²⁵ For example, courts and the United States Department of Labor have interpreted the individual employee interstate commerce provision broadly to include the following activities that would cover an employee under the overtime provisions of the FLSA during the week in which the activities occur:

- Contacting an out-of-state vendor by mail, phone, or fax;
- Distributing goods across state lines (including through web site sales to out-of-state consumers);
- Handling laundry and dry cleaning chemicals that have moved in interstate commerce, even if the employee's specific laundromat business activity is local;
- Producing goods that will be sent out of state;
- Doing janitorial work in buildings where goods are produced for shipment outside the state.

Ohio law applies to most employers who have annual gross sales in excess of \$150,000 but less than \$500,000 for purposes of overtime compensation and in excess of \$267,000 but less than \$500,000 for minimum wage compensation. Special, lower minimum wage requirements of Ohio's law apply to employers whose annual gross sales fall below \$267,000.²⁶

To be consistent with both federal and state wage and hour laws, the bill would appear to apply only to those employers who 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 individual employees who are not engaged in interstate commerce or in the production of goods for interstate commerce.

Persons excluded from the Fair Minimum Wage Standards Law

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

- (1) Employees of the United States;

²⁵ 29 U.S.C. 207(a); 29 C.F.R. 776.2.

²⁶ Section 34a of Article II of the Ohio Constitution and R.C. 4111.02 and 4111.03.

- (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 salespersons compensated by commissions;
- (5) Individuals who work or provide uncompensated services of a charitable nature in a hospital or health institution;
- (6) Police officers or fire fighters;
- (7) Students employed on a part-time or seasonal basis by a political subdivision of the state;
- (8) Individuals employed by a camp or recreational area for children under 18 and owned and operated by a nonprofit organization;
- (9) Any individual employed directly by the House of Representatives or the Senate.²⁷

The federal minimum wage law generally exempts the following employees under conditions much more specifically stated in the law 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 and outside salespersons;
- (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;

²⁷ R.C. 4111.03(D)(3).

- (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 in their raw or natural state;
- (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, or farm implements, and salesmen primarily engaged in selling 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) Certain computer analysts, programmers, and software engineers.²⁸

HISTORY

ACTION	DATE
Introduced	01-26-11
Reported, H. Economic & Small Business Development	03-01-11

h0061-rh-129.docx/ks

²⁸ 29 U.S.C. § 213.