

OPINION NO. 74-108

Syllabus:

1. A state university may not give the option to take compensatory time off in lieu of pay for each holiday worked to an employee who is classified below pay range 22, step 1.

2. A state university must calculate overtime payments for employees after forty hours in active pay status, in all cases, pursuant to R.C. 124.18.

To: Harry B. Crewson, Pres., Ohio University, Athens, Ohio
By: William J. Brown, Attorney General, December 31, 1974

I have before me your predecessor's request for my opinion, which reads in part as follows:

"Ohio University wishes to request your opinion regarding the proper interpretation to be given Section 124.18 of the Ohio Revised Code, which was recently revised by Amended Substitute House Bill 301. Your opinion is requested on two separate questions raised by Section 124.18. These questions deal with the subjects of holiday pay and overtime pay.

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"1. May Ohio University give an employee an option to take compensatory time off rather than receive pay for work performed on a holiday when the employee who is paid less than pay range 22, step 1, is required to work on a day observed as a holiday?

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"2. Should Ohio University calculate overtime payment after forty hours 'actually worked'?

in a week or after forty hours 'in active pay status', such 'status' to include time off during paid sick leave and vacation leave, for example?"

R.C. 124.18, which was amended by Am. Sub. H.B. No. 301, effective April 8, 1974, reads in part as follows:

"Forty hours shall be the standard work week for all employees whose salary or wage is paid in whole or in part by the state. When any employee is required by an authorized administrative authority to be in an active pay status more than forty hours in any calendar week, he shall be compensated for such time over forty hours, except as otherwise provided in this section, at one and one-half times his regular rate of pay, or at the rate equivalent to pay range 32, step 1, whichever is the lesser, unless the provisions of the 'Fair Labor Standards Act of 1938,' 52 Stat. 1060, 29 U.S.C. 201, as amended, are applicable.

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"* * * When an employee whose rate of pay for a normal biweekly pay period is less than a rate equivalent to pay range 22, step 1, is required by his responsible administrative authority to work on the day observed as a holiday, he shall be entitled to pay for such time worked at one and one-half times his regular rate of pay, or at the rate equivalent to pay range 32, step 1, whichever is the lesser. In addition to his regular pay, payment at such rate shall be excluded in the calculation of hours in active pay status.

"When an employee whose rate of pay for a normal biweekly pay period is equivalent to pay range 22, step 1, or more is required by his responsible administrative superior to work on the day observed as a holiday, he shall be granted compensatory time off at time and one-half within thirty days thereafter."

Your first question is whether a state university may give an employee the option to take compensatory time off or receive pay for work performed on a holiday when such employee is classified below pay range 22, step 1. Prior to the passage of Am. Sub. H.B. No. 301, R.C. 124.19 provided that the employees of state universities could be compensated for each holiday worked by being granted compensatory time off or by being paid, at the option of the employee. However, that language was repealed by Am. Sub. H.B. No. 301, and R.C. 124.18 now provides that those employees who are classified below pay range 22, step 1, are entitled to pay for each holiday worked, while those employees who are classified at or above pay range 22, step 1, shall be granted compensatory time off for each holiday worked. Thus I must conclude that a state university may not give the option to take compensatory time off in lieu of pay for each holiday worked to an employee who is classified below pay range 22, step 1.

Your second question is whether a state university must use the hours "actually worked" or the hours "in active pay status" for purposes of calculating overtime payments pursuant to R.C. 124.18. Prior to the enactment of Am. Sub. H.B. No. 301, employees were required to work more than forty hours in a calendar week to qualify for overtime pay; now, R.C. 124.18, which was amended by that Act, requires only that employees be in active pay status for more than forty hours in a calendar week to qualify for overtime pay. Thus the General Assembly changed the requirement from hours actually worked to hours in active pay status for calculating overtime payments, thereby permitting any type of paid leave to be used in such computation.

While R.C. 124.18 contains a reference to the Fair Labor Standards Act of 1938, this reference has no application to your inquiry. The standard of hours in active pay status prescribed by R.C. 124.18 is more liberal than the requirements of the Fair Labor Standards Act and is not prohibited by the Act. Therefore, I must conclude that R.C. 124.18 requires overtime compensation for all hours in excess of forty hours in active pay status in a calendar week.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. A state university may not give the option to take compensatory time off in lieu of pay for each holiday worked to an employee who is classified below pay range 22, step 1.
2. A state university must calculate overtime payments for employees after forty hours in active pay status, in all cases, pursuant to R.C. 124.18.