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Idaho vs Flsa: Department of Corrections Must Change to Comply with Federal Law

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IDAHO VS FLSA: DEPARTMENT OF CORRECTIONS MUST CHANGE TO COMPLY WITH FEDERAL LAW

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I. INTRODUCTION

Exploitation is a worrisome word. Even more worrisome is when this word is associated with labor practices. When thinking of exploitation within prisons, most people will likely think of incarcerated employees. Unfortunately, exploitative labor practices are not isolated to incarcerated employees; they can affect the people charged with supervising these incarcerated persons, our Correctional Officers.

This article delves into the inner workings of the exploitation of Officers within the Idaho Department of Corrections (IDOC) and will propose a change to the policies that violate the Fair Labor Standards Act (FLSA). The FLSA allows a state to adopt an exemption to the 40-hour workweek, for qualifying fire protection and law enforcement employees.¹ Idaho has adopted this exemption, allowing correctional officers to receive overtime after working 160 hours in a 28-day “work period.”² Unfortunately, IDOC is violating federal law by only paying a maximum of 80 hours per pay period and holding the remaining hours for a potentially indefinite time.³ Prompt payment is required by the FLSA; also required is an agreement between the employee and the employer when using compensatory time off in lieu of cash payment for overtime hours.⁴ IDOC does not have such an agreement with the employee, and if a court determines it does, the agreement does not occur before the employee performs work, which is also required.⁵

Section II analyzes the FLSA’s purpose, overtime provisions, penalties for violating the FLSA, and resources available to employees for avoiding these penalties.⁶ Section III analyzes the corrections department policies of other states, with a purpose to provide a guide to IDOC.⁷ Section IV analyzes the overtime policies set forth and followed by IDOC, including a lack of agreement for comp hours in lieu of cash compensation.⁸ This section will also discuss at length the Regular Hours Held (RHH) policy that violates the FLSA. RHH is a policy that puts hours worked by corrections officers into a holding “bucket” until the hours are either converted into compensatory (“comp”) time or the hours are needed to increase a pay period to 80 hours.⁹ Section V will propose a change to the FLSA to ensure consistency in the states. This section will also propose a change to IDOC’s policies based on what other states are doing. There are many options for changing the policies to ensure compliance

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1. 29 U.S.C. § 207(k) (2015).
 2. IDAHO CODE § 67-5328 (2015).
 3. *See infra* Section IV.
 4. *See infra* Section II.
 5. *See infra* Section IV.
 6. *See infra* Section II.
 7. *See infra* Section III.
 8. *See infra* Section IV.
 9. *See infra* Section IV.

with the FLSA; however the best option is to remove RHH and pay for all hours worked, then immediately convert overtime hours worked into comp time once the employee has reached the overtime threshold.

II. THE FAIR LABOR STANDARDS ACT

A. What is the FLSA?

The Fair Labor Standards Act (FLSA) was enacted in 1938 to bring a solution to “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . in such industries without substantially curtailing employment or earning power.”¹⁰ The FLSA prohibits employers¹¹ from several different acts, such as failing to pay the federal minimum wage,¹² paying different wages based on sex,¹³ failing to pay overtime compensation,¹⁴ failing to “preserve” individual employee work records,¹⁵ discriminating, including discharging an employee for filing a complaint under the FLSA,¹⁶ and oppressive child labor.¹⁷ This article focuses on the requirement to pay overtime compensation to employees.¹⁸

B. Increasing Workers and Decreasing Harsh Work Environments: Exploring the Purpose of the FLSA

“[A] fair day’s pay for a fair day’s work.”¹⁹ To truly understand the FLSA, it is important to understand the reasons for enacting it. The 1930s are well known as the Great Depression. Many people were unemployed,

10. 29 U.S.C. § 202 (2015).

11. FLSA defines an employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.” 29 U.S.C. § 203(d) (2015). An employee is defined as an individual employed by an employer. *Id.* § 203(e)(1).

12. *Id.* § 206. The FLSA requires that employers pay “not less than . . . \$7.25 an hour . . .” *Id.* The FLSA sets the minimum standard in which employers must comply. However states may adopt a higher minimum wage and/or overtime standard. *Id.* § 218. For example, California allows overtime to accrue on a daily basis. 12 Hours worked over eight in a work day qualify for overtime compensation. CAL. LAB. CODE § 510 (2000). In addition, twenty-nine states have adopted a higher minimum wage standard than the federal minimum wage. *State Minimum Wages 2016 Minimum wage by State*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Apr. 14, 2016), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx>. “Five states have not adopted a state minimum wage: Alabama, Louisiana, Mississippi, South Carolina and Tennessee.” *Id.* These states default to the federal minimum wage. *Id.*

13. 29 U.S.C. § 206(d) (2015).

14. *Id.* § 207.

15. *Id.* § 211(c).

16. *Id.* § 215(a)(3).

17. *Id.* § 212.

18. 29 U.S.C. § 207 (2015).

19. 81 Cong. Rec. 4983 (1937) (message of President Roosevelt).

and those that were employed were faced with harsh working conditions. Several authorities have recognized that the primary purpose of the FLSA is “to protect all covered workers from substandard wages and oppressive working hours.”²⁰ The original FLSA was enacted during a time of depression, and employment was scarce.²¹ President Roosevelt stated that the purpose of the overtime provisions of the FLSA was to obtain “a fair day’s pay for a fair day’s work.”²² Congress intended “to spread work and thereby reduce unemployment, by requiring an employer to pay a penalty for using fewer workers to do the same amount of work as would be necessary if each worker worked a shorter week.”²³

Proponents of the bill stressed the need to fulfill the President's promise to correct conditions under which "one-third of the population" were "ill-nourished, ill-clad, and ill-housed." They pointed out that, in industries which produced products for interstate commerce, the bill would end oppressive child labor and "unnecessarily long hours which wear out part of the working population while they keep the rest from having work to do. . . ." and minimum wages would "underpin the whole wage structure...at a point from which collective bargaining could take over."²⁴

There are two main purposes of the overtime provisions of the FLSA, found in section 207. First, the workforce would be increased due to the financial pressures placed on employers through the requirement to pay overtime.²⁵ It would be more cost effective for employers to hire additional workers than to pay one worker at time and a half their regular wages.²⁶ Shortening hours would "create new jobs...for millions of our unskilled [and] unemployed"²⁷ The statutory requirement to pay one and one-half time for overtime hours is similar to a penalty; the penalty is having

20. *Adair v. City of Kirkland*, 185 F.3d 1055, 1059 (9th Cir. 1999) (quoting *Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 739(1981)).

21. *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 283 (2nd Cir. N.Y. 2008).

22. 81 Cong. Rec. 4983 (1937) (message of President Roosevelt).

23. *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (Posner, J.).

24. Jonathan Grossman, *Fair Labor Standards Act of 1938: maximum Struggle for a Minimum Wage*, DEPARTMENT OF LABOR, <http://www.dol.gov/general/aboutdol/history/flsa1938> (last visited May 19, 2016) (citing Record of the Discussion before the U.S. Congress on the FLSA of 1938, I. (U.S. Department of Labor, Bureau of Labor Statistics) (Washington, GAO, 1938), pp. 20–21).

25. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942)). The Court determined that an employer could not avoid paying overtime by splitting the shifts worked and having a lower wage assigned to the overtime hours. The Court stated that the FLSA provides overtime should be paid at one and one half hours of “regular wage.” Assigning a lower wage to certain hours to avoid paying overtime to an employee was in violation of this standard. *Helmerich & Payne, Inc.*, 323 U.S. at 40–41.

26. *Overnight Motor Transp. Co.*, 316 U.S. at 577–78.

27. See Grossman, *supra* note 24.

to pay additional compensation for these excess hours imposed on employees.²⁸ This works to discourage excess hours and spread the work to additional employees.²⁹

The second purpose of section 207 is to compensate employees who “labored in excess of the statutory maximum number of hours for the wear and tear of extra work” performed.³⁰ “So although only one of a thousand works more than forty hours, that one is entitled to statutory excess compensation.”³¹ One court concluded that by protecting the single employee, the entire work force is being protected as a whole.³²

C. Mandatory Overtime Compensation with the FLSA

In line with the second purpose, the FLSA sets the minimum standards for compensating overtime hours worked.³³ The FLSA states:

[N]o employer shall employ any of his employees . . . for a work-week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.³⁴

Thus, courts have held that: “[T]he Fair Labor Standards Act prohibits employment for more than 40 hours a week without overtime compensation to employees”³⁵ Overtime compensation cannot be waived by implicit or explicit agreement between the employer and the employee.³⁶ “An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee’s right to compensation for compensable overtime hours worked.”³⁷ This is because, unless specifically exempted, the FLSA requires premium payments to be made for overtime hours worked.³⁸ Employers are liable for wages when they suffer or permit the employee to work.³⁹

28. *St. John v. Brown*, 38 F.Supp. 385, 390 (N.D. Tex. 1941).

29. *Id.*

30. *Bay Bridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948).

31. *Id.*

32. *Id.*

33. 29 U.S.C. § 207 (2015).

34. *Id.* § 207(a)(1).

35. *Walling v. Patton-Pulley Transp. Co.* 134 F.2d 945, 948 (6th Cir. Ct. App. 1943) (determining that the Eight Hour Law did not repeal the FLSA).

36. *Fact Sheet #23: Overtime Pay Requirements of the FLSA*, U.S. DEPARTMENT OF LABOR, (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs23.pdf>; see also *Barrentine*, 450 U.S. at 740–41.

37. *Id.*

38. 29 U.S.C. § 207 (2015).

39. *Id.* § 203.

In calculating regular hours worked and determining if an employee qualifies for overtime, an employer is not allowed to average the hours over two or more weeks.⁴⁰ “Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40.”⁴¹

The FLSA classifies a workweek as seven consecutive 24-hour periods,⁴² unless an employee qualifies for the overtime compensation plan under the section 207(k) standards.⁴³ Subsection k specifically addresses “[e]mployment by public agency engaged in fire protection or law enforcement activities.”⁴⁴ Under this provision, an employer will not have violated the 40-hour workweek standard so long as the employee is engaged in fire protection or law enforcement activities.⁴⁵ The provision specifically states:

- (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
- (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.⁴⁶

In simple terms, when an employee is engaged in fire protection or law enforcement, the employer is allowed to change the default seven-consecutive day, 40-hour workweek into a work period of no more than 28 days and no more than 216 hours.⁴⁷ “Before a public employer may qualify for the section 207(k) exemption, however, two things must be true: (1) ‘the employees at issue must be engaged in fire protection or law enforcement within the meaning of the statute and (2) the employer must have

40. 29 C.F.R. § 778.104 (2016).

41. *Id.*

42. *Fact Sheet #23, supra* note 36.

43. 29 U.S.C. § 207(k) (2015).

44. *Id.*

45. *Id.*

46. *Id.* § 207(k)(1)–(2).

47. *Id.*

established a qualifying work period.”⁴⁸ An employer can qualify for the section 207(k) exemption by public declaration, or by showing that the employees “actually work a regularly recurring cycle of between 7 and 28 days.”⁴⁹ This determination is usually a question of fact, and the employer has the burden of proving they have established the proper qualifications.⁵⁰ Figure A breaks down the maximum hours allowed for the chosen work period.

Maximum Hours Worked (Rounded) Before Overtime		
CONSECUTIVE DAYS WORK PERIOD	HOURS OF FIRE PROTECTION	HOURS OF LAW ENFORCEMENT
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

Figure A.⁵¹

According to this chart, each work period the employer chooses comes with a maximum amount of hours the employee can work before accruing the overtime premium.⁵² For example, a 15-day work period has a maximum amount of hours of 114 for fire protection, and 92 for law

48. *Rosano v. Twp. of Teaneck*, 754 F.3d 177, 185 (3d Cir. 2014) (citing *Calvao v. Town of Framingham*, 599 F.3d 10, 14 (1st Cir. 2010)).

49. *Spradling v. City of Tulsa*, 95 F.3d 1492, 1505 (10th Cir. 1996) (citing *Birdwell v. City of Gadsden*, 970 F.2d 802, 806 (11th Cir. 1992)).

50. *Id.* at 1504–05.

51. Richard Stokes, *Calculating Overtime for Public Safety Employees*, THE UNIV. OF TENN. INST. FOR PUB. SERV. (Dec. 09, 2015), <https://mtasresource.mtas.tennessee.edu/reference/calculating-overtime-public-safety-employees>.

52. 29 C.F.R. § 553.230 (2016).

enforcement.⁵³ “For those employees engaged in fire protection [and law enforcement] activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under [section 207(k)] until the number of hours worked” exceeds the corresponding number of days.⁵⁴ Employers do not have to choose the same work periods for all employees under this provision.⁵⁵ For example, some employees can work under a 7-day work period and others can work under a 28-day work period, with the employer choosing what works best for each group of employees.

Courts have found several ways in which an employer can establish a section 207(k) exemption. In one case, a federal district court held that an employer had not established a section 207(k) exemption because its employees worked five (5) consecutive days, not seven (7).⁵⁶ The Eleventh Circuit reversed, stating: “Section 7(k) requires a work *period* of a minimum of 7 consecutive days for the exemption to apply. Neither the statute nor the regulations require the employee to work on each day of the work period.”⁵⁷ The Court further stated, “[s]urely the city does not need to require firefighters to work 28 consecutive days in order to adopt a 28 day work period under 7(k).”⁵⁸ In another case, a court held that an employer established a section 207(k) exemption when its employees worked eight-hour days over six consecutive days and had three consecutive days off.⁵⁹ Thus, employers can look towards the courts for different ways to adopt a section 207(k) exemption.

D. Avoid Penalties: The FLSA Requires Prompt Payment

The FLSA does not explicitly state that payment of wages needs to be prompt, but this requirement is found implicitly throughout the Act.⁶⁰ We know this to be true because the FLSA specifies penalties for unpaid wages to include double damages.⁶¹ This penalty would not exist if payment did not need to be prompt. So without explicitly stating the need for prompt payment, the FLSA imposes penalties for not being prompt. The U.S. Labor Department has interpreted the prompt payment requirement as follows:

53. *Id.* This act refers to 29 U.S.C. §7(k), this was repealed and changed to 29 U.S.C. 207(k).

54. 29 C.F.R. § 553.230(a), (b) (2016).

55. *Id.* § 553.224(b).

56. *Birdwell v. City of Gadsden*, 970 F.2d 802, 805 (11th Cir. 1992).

57. *Id.* at 806.

58. *Id.* at 806.

59. *Rosano*, 754 F.3d at 182, 188.

60. *See generally* 29 U.S.C. § 206(b) (2014) (employer does not meet obligation to pay if payday passes without payment being made); *see generally id.* § 216(b) (2014) (liquidated damages for non-payment would be meaningless if prompt payment was not required); *see generally* *Biggs v. Wilson* 1 F.3d 1537 (9th Cir. Cal. 1993) (employer was held in violation of FLSA by paying wages 14 or 15 days late).

61. 29 U.S.C. 216(b) (2014).

There is no explicit payment deadline in the FLSA itself. Nevertheless, the U.S. Labor Department's position has long been that FLSA-mandated sums earned for a workweek must usually be paid on the regular payday for the pay period in which the workweek ends. . . . The Labor Department says of such a situation that: . . . 'Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.'⁶²

So the question becomes, what is reasonable? Almost all states have established pay day requirements, which are laws that specify the minimum frequency for paying employees.⁶³ "Most state pay day laws mandate payment either twice a month (semi-monthly) or every other week (bi-weekly), but some states require weekly or monthly payment."⁶⁴ Idaho requires payments at least monthly.⁶⁵ These state laws are what the courts will be using to determine when payment of wages is reasonable. The general rule for payment of hours worked, regular or overtime, is on the "regular pay for the period in which such workweek ends."⁶⁶ Meaning if an employee works 45 hours one week, and thus accrues 5 hours of overtime, the employer must pay the overtime hours during the same pay period as the regular hours are paid.

Courts have interpreted the FLSA in a manner consistent with the U.S. Labor Department's position that the Act requires prompt payment.⁶⁷ The Supreme Court concluded that "to permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that section 16(b) should have."⁶⁸ Another court concluded the prompt payment requirement was not violated if the employer changes its pay schedule as long as the change was for business purposes, it doesn't result in unreasonable delays, is a permanent change, and does not violate the FLSA.⁶⁹ Another court concluded a payment was not prompt when it was delayed

62. John Thompson, *Timely Payment Of FLSA Wages Is Essential*, CORPORATE COMPLIANCE INSIGHTS, (Oct. 31, 2014), <http://corporatecomplianceinsights.com/timely-payment-flsa-wages-essential/> (quoting 29 C.F.R. 778.106 (2016)).

63. *State Payday Requirements*, FINDLAW.COM, (Mar. 2014), <http://employment.findlaw.com/wages-and-benefits/state-pay-day-requirements.html> [hereinafter *State Payday Requirements*].

64. *Id.*

65. IDAHO CODE § 45-608 (2015); *State Payday Requirements*, *supra* note 63.

66. 29 C.F.R. § 778.106 (2015).

67. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 709–10 (1945); *Rogers v. City of Troy*, 148 F.3d 52, 55 (2d Cir. Ct. App. 1998).

68. *Brooklyn Sav. Bank*, 324 U.S. at 709–10.

69. *Rogers*, 148 F.3d at 60.

for just over two weeks.⁷⁰ That court stated the prompt payment requirement “should not be construed to impose strict liability on an employer for every delay in payment . . . it must be interpreted to require payment which is reasonably prompt under the totality of the circumstances in the individual case.”⁷¹

E. Employers Need Not Coerce: Employees are at the Helm of Compensatory Time

An agreement is required between the employer and the employee before compensatory hours (comp) may be used in lieu of cash compensation for overtime.⁷² Aside from just having an agreement, it must be negotiated between the employer and the employee.⁷³ The employer/employee relationship is not one size fits all, thus the FLSA allows employers to negotiate the use of comp time along with the 207(k) exemption.⁷⁴ “A public agency may provide compensatory time only pursuant to applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees.”⁷⁵ As concluded by one court:

The election to take compensatory time in lieu of overtime pay is made by the individual [employees], and the [employer] has no input in that decision and no opportunity to coerce. . . Any harshness perceived by an individual [employee] can be avoided, however, because this agreement gives the [employee] the right to demand overtime pay instead of compensatory time that the [employee] cannot always use on the exact date demanded.⁷⁶

Aside from being negotiated between the employee and employer, the agreement should cover the “use and preservation of comp hours. . . .”⁷⁷ One court found an employer had violated the FLSA by providing comp time in lieu of cash payment without an oral or written agreement.⁷⁸ Another court found that an implicit agreement, like that found in an employee handbook, is not sufficient for the collective bargaining process.⁷⁹ An important part of the agreement for comp time in lieu of cash payment is that the “agreement or understanding [should be] arrived at

70. See *Biggs v. Wilson*, 828 F.Supp. 777 (E.D. Cal. 1991).

71. *Id.*

72. 29 U.S.C. § 207(o)(2)(A)(i) (2015).

73. *Saunders v. City of New York*, 594 F. Supp.2d 346, 356 (S.D.N.Y. 2008).

74. 29 U.S.C. § 207 (2015).

75. *Id.*

76. *Nutley Policemen’s Benevolent Ass’n Local #33 v. Township of Nutley*, 16 A.3d 453, 461 (N.J. Super. Ct. App. Div. 2011).

77. *Saunders*, 594 F. Supp. 2d at 356.

78. *Id.* at 361.

79. *Nevada Highway Patrol Ass’n v. State of Nev.*, 899 F.2d 1549, 1556 (9th Cir. Ct. App. 1990).

between the employer and employee before the performance of the work.”⁸⁰

The purpose of allowing employers to use comp time, rather than paying cash for overtime hours, was to allow employees the “freedom to receive deserved compensation in the manner they prefer while reducing the compliance cost . . . for public employers.”⁸¹ Specifically as to correctional officers, one labor leader noted:

Correctional facilities . . . throughout the country are understaffed. Thousands of employees in these facilities have long forgotten the luxury of a forty-hour work week. It is not surprising that these employees want and need more time off the job. Their own mental health and physical well being demand it. Unfortunately, because of understaffing, these employees build up incredible amounts of comp time that they never get to use. This is the worst sort of abuse of comp time, the kind of abuse FLSA was designed to prevent.⁸²

Stating that not allowing correctional officers to use comp time is the worst sort of abuse may seem a little harsh, but think about what the employee is missing out on. The officer works in a high stress job that is insufficiently staffed, sometimes to the detriment of safety, and then does not get cash payment or time off for the overtime hours worked.

The FLSA requires that employees “shall be permitted to use [comp time] within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations”⁸³ Courts have found the phrase “unduly disrupt” to be ambiguous.⁸⁴

Instead of obscuring the proper object of the “reasonable period” clause, the “unduly disrupt” clause serves to clarify its obvious meaning. The “reasonable period” clause imposes upon the employer the obligation to facilitate the employee's timely usage of his accrued compensatory time. The “unduly disrupt” clause suggests conditions, however, that would release the public employer from the previously imposed condition. The statute, thus construed, reflects a balance between obligation and exemption.⁸⁵

80. 29 U.S.C. § 207(o)(2)(A)(ii) (2015).

81. 131 Cong. Rec. E4870 (daily ed. Oct. 29, 1985) (statement of Hon. Benjamin A. Gilman).

82. Hearing on the Fair Labor Standards Act, Subcomm. on Labor Standards of the Comm. on Educ. and Labor, 99th Cong. 67 (1985) (statement of Gerald W. McEntee, International President).

83. 29 U.S.C. § 207(O)(5) (2015).

84. *Beck v. City of Cleveland*, 390 F.3d 912, 914 (6th Cir. 2004).

85. *Houston. Police Officers' Union v. City of Hous.*, 330 F.3d 298, 303 (5th Cir. 2003).

This means that an employee must make a timely request to use comp hours, and the employer must grant the request unless it would create too great a burden on the operations.⁸⁶ One court concluded that denying a request solely on financial burdens was not enough to prove the request would unduly disrupt the operations.⁸⁷ “[A]n undue disruption must be more than a ‘mere inconvenience’ and must ‘impose an unreasonable burden on the agency’s ability to provide services of acceptable quality and quantity for the public.’”⁸⁸ In short terms, the employee makes the request and the employer must approve the request unless it would cause undue disruption.

F. Violate the FLSA and Risk Costly Penalties

When a court determines that an employer violated the FLSA, costly penalties are the result. The FLSA sets up the standards for imposed penalties.⁸⁹ Different penalties are imposed depending on which section was violated and if the violation was willful.⁹⁰ “In prosecution of wage and hour violations, the stakes are getting personal . . . the government has penalized company owners and officers for failing to pay overtime – imposing stiff fines and even imprisonment.”⁹¹

Requiring the employer to pay back wages is an obvious penalty for violating the FLSA and failing to pay wages or overtime. But not only are violators liable for the back pay, the violator is also liable for liquidated damages.⁹² Imposing the liquidated damages on top of the back wages is essentially a double penalty. Penalties for violations can be as harsh as imprisonment for willful violations, specifically, of section 215, which prohibits discrimination against an employee that files a complaint under the FLSA.⁹³ Willful violations of section 215 are subject to fines up to \$10,000 or up to six months imprisonment.⁹⁴ This alone should make any employer think twice about violating the FLSA.

Civil penalties are also imposed on repeat violators of section 206⁹⁵, which sets the minimum wage requirements for employers; and section 207,⁹⁶ which sets the standards for compensating employees who work

86. *Id.* at 303–04.

87. *Beck*, 390 F.3d at 914.

88. *Scott v. City of New York*, 592 F.Supp.2d 386, 404 (S.D.N.Y. 2008) (quoting 29 C.F.R. § 553.25(d)).

89. 29 U.S.C. § 216 (2015).

90. *Id.*

91. Richard A. Alaniz, *Employers Paying the Penalty for Wage and Hour Violations*, ACCOUNTINGWEB.COM, (Mar. 8, 2012), <http://www.accountingweb.com/aa/standards/employers-paying-the-penalty-for-wage-and-hour-violations>.

92. 29 U.S.C. § 216(b) (2015). “[S]hall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.” *Id.*

93. *Id.* § 216(a).

94. *Id.*

95. 29 U.S.C. § 206 (2015).

96. *Id.* § 207.

overtime. The penalty for these violations is up to \$1,000. An even larger civil fine is imposed for repeat violators of the child labor and regulations of section 212,⁹⁷ which protects against oppressive child labor; and section 213,⁹⁸ which explains exemptions and requirements of child labor, with penalties set at a whopping \$50,000.⁹⁹

G. Violating the FLSA is Completely Avoidable, Employer Resources Are Available

It is hard to imagine that many employers will have the funds available to pay for the large penalties imposed for violation, and with so much case law giving guidelines to follow, one would think there would not be widespread violations of the FLSA. Unfortunately, this is not the case.¹⁰⁰ The Center for Urban Economic Development released a study, which researched the extent of violations of the FLSA among low-wage industries in Los Angeles, Chicago and New York City.¹⁰¹ Widespread violations of wage and hour laws were found.¹⁰²

The highlights (or lowlights) of this study include:

- 26 percent of workers were paid less than minimum wage;
- 76 percent of those employees who worked overtime were not paid the required overtime rate of pay;
- 30 percent of tipped employees were paid less than minimum wage;
- African-American workers suffered pay violations three times more often than white workers;

97. *Id.* § 212.

98. *Id.* § 213, specifically subsection (c).

99. *Id.* § 216(e)(1)(A)(ii).

100. For an interesting article on the myths of the FLSA, see J. Bradley Medaris, *Wage and Hour Myths: Illuminating the Truth Behind Misconceptions of the Fair Labor Standards Act*, 72 ALA. L. REV. 462 (2011). Some of the myths debunked include, who is covered by the FLSA, salary employees and the requirement to pay overtime, whether all managers are exempt, if overtime payment can be waived, etc. *Id.*

101. Annette Bernhardt, et al., *Broken Laws, Unprotected Workers*, UNPROTECTEDWORKERS.ORG, (2009), http://www.unprotectedworkers.org/index.php/broken_laws/index. This study studied 4,387 low-income workers. Chicago, New York and Los Angeles were the cities chosen because these are the three largest U.S. cities. The statistics included illegal immigrants, and workers paid in cash. This was done to make the statistics as accurate as possible.

102. *Id.* The statistics listed above are only a fraction of what was found. Some other violations include workers comp, illegal payroll deductions, employer retaliation, etc. The full report is available at: Annette Bernhardt, *Broken Laws, Unprotected Workers*, NELP.ORG (2009) <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1>.

- Of those workers sampled, 68 percent had suffered at least one pay-related violation in the previous work week; and
- The study concluded that more than 1.1 million workers in the three cities surveyed suffer at least one pay-related violation each work week and the total wage loss equals more than \$56 million per week.

According to this report, these violations are widespread and can be found in every industry and business, from small restaurants to international corporations. Even law firms have been successfully sued for violations of this law.¹⁰³ This study shows there is still a lot of work to be done across the nation to ensure workers are being treated fairly.

In order to avoid violating the FLSA, it is necessary that each employer carefully determine the responsibilities they have to each employee. This can sometimes seem daunting, but hope is near. Besides relying on the statute, which for some is difficult to understand, an employer has access to many interpretations and handy guides to ensure compliance. One of the easiest ways to avoid violations is to consult an attorney, but of course this comes with costs that the employer may be trying to avoid. However, an attorney's fee is likely less costly than the potential fines for a violation. Avoiding the penalties by following the minimum standards set forth by the FLSA is likely less burdensome for employers than the potential burden of these fines.

Aside from consulting an attorney, an employer can also obtain access to several resources to understand the FLSA and ensure they are in compliance. A simple Google search of "employers guide to FLSA" brings several results including the FLSA Reference Guide,¹⁰⁴ and the essential guide to the Fair Labor Standards Act.¹⁰⁵ A particularly good reference goes over what is required for wage payments, what is not required, such as holiday and sick pay, who is covered under the FLSA, how to handle employees who receive tips, and youth-labor.¹⁰⁶

The FLSA is a very far-reaching, nuanced and complicated act. Many attorneys and even judges struggle with its requirements. However, businesses of all types must have a strong understand-

103. Bernhardt *supra* note 101, at 5, (Women are more likely to experience minimum wage violations, and "foreign-born workers were nearly twice as likely as their U.S.-born counterparts to have a minimum wage violation." Some protection was afforded to those with higher educations, longer tenure, and those who are proficient in English); Medaris, *supra* note 100, at 464.

104. FindLaw, *FLSA Reference Guide*, FINDLAW.COM, file:///C:/Users/Annie/Downloads/employment.findlaw.com_wages-and-benefits_flsa-reference-guide.pdf (last visited Feb. 23, 2016).

105. Dan Wisniewski, *The Essential Guide to the Fair Labor Standards Act*, HRMORNING.COM (MAY 11, 2013), <http://www.hrmorning.com/essential-guide-flsa/>.

106. See U.S. Dep't of Labor, *Handy Reference Guide to the Fair Labor Standards Act*, DOL.GOV, <http://www.dol.gov/whd/regs/compliance/wh1282.pdf> (last visited Feb. 23, 2016).

ing of these laws. Ignoring the FLSA opens a company to potentially severe legal problems. Those employers who are found guilty of violating this law face significant damages: unpaid wages, liquidated (double) damages, attorney's fees and costs... Thus, it is very important that those who advise businesses on payroll matters be extremely familiar with the FLSA.¹⁰⁷

The point in all of this is that there is enough information available to the public that violations of the FLSA should not be occurring as widespread as they are, if at all.

III. FROM MULTIPLE WORK CYCLES TO PRE-HIRING AGREEMENTS, CORRECTIONAL DEPARTMENT POLICIES OF OTHER STATES

Before delving into IDOC's policies, it is important to get perspective on the vast options available to IDOC, while still following the FLSA. Looking to other states is a good way of seeing some of these options.

A. Oregon

Sometimes the grass actually is greener on the other side. An Idaho correctional officer survey conducted in October 1999 had one officer state: "Lack of overtime pay is a major issue along with pay in general. I'd work for Oregon if I were closer."¹⁰⁸ Oregon Department of Corrections relies on unions to come up with overtime compensation agreements.¹⁰⁹ This agreement states that officers start accruing overtime hours after 8 hours per day, or 40 hours per week, and is paid via comp time.¹¹⁰ This policy shows that Oregon has not adopted the 207(k) exemption, and is friendlier to the employees.

107. Medaris, *supra* note 100, at 468.

108. Office of Performance Evaluators, *Employee Morale and Turnover at the Department of Correction*, 62 (Oct. 1999), <https://www.legislature.idaho.gov/ope/publications/reports/r9903.pdf>.

109. Collective Bargaining Agreement between The Department of Corrections and The Association Of Oregon Corrections Employees, 14, (2015-2017), <http://www.oregon.gov/das/HR/CBA/Association%20of%20OR%20Corrections%20Emp.pdf>.

110. *Id.* at 14. Something must be working for Oregon as they had an 8% turnover rate in 2013. ACSA, *Correctional Staff Turnover and Vacancy*, ASCA.NET, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiH1_X7sf_JA-hUB3mMKHV6oBaYQFggcMAA&url=http%3A%2F%2Fwww.asca.net%2Fsystem%2Fassets%2Fattachments%2F7799%2FCorrectional%2520Staff%2520Turnover%2520and%2520Vacancy%2520-%2520Formatted.xlsx&usg=AFQjCNEy3FLGAM-bZHkSyNSdC4dGIpr845g (last visited Feb. 23, 2016) [hereinafter ASCA].

B. Texas

Similar to Oregon, Texas Department of Corrections (TDOC) also uses a work week like unto the 40-hour workweek, but with slight variations.¹¹¹ Texas has three different work cycles; 7 days, 8 days, and 9 days; each of these work periods comes with its own overtime limit, 40, 49, and 55 respectively.¹¹² This allows the TDOC some flexibility which is sometimes necessary with law enforcement type work.

C. Georgia

Like Texas, Georgia Department of Corrections has different work periods, 28 days, 27 days, 24 days, and 7 days.¹¹³ The Following chart shows the amount of hours allowed per FLSA before overtime accrues and how many hours the COs are scheduled:

Standard Work Periods	Scheduled Hours
28 days, 171 hours	165
27 days, 165 hours	148 hrs 30 mins
24 days, 147 hours	144
7 days, 43 hours	41 hrs 15 mins

Figure E¹¹⁴

As shown in Figure E, each work period has scheduled hours less than the maximum before overtime accrues. This would allow flexibility in the case of “emergency” overtime in case a shift needs to be covered last minute, such as when someone calls in sick. Each employee receives cash payment for regular hours worked and comp time for overtime hours worked.

Georgia requires their employees to sign a written agreement “that FLSA compensatory time or monetary payment may be used,”¹¹⁵ and this must be signed on the date of hire.¹¹⁶ Further, “[n]o Appointing Authority

111. Texas Dep’t of Criminal Justice, *Work Cycles and Compensable Hours of Work*, TDCJ.STATE.TX.US 16 (Apr. 1, 2014), <https://www.tdcj.state.tx.us/divisions/hr/hr-policy/pd-91.pdf>. Texas had a turnover rate of 24.6% in 2013, which is still lower than Idaho’s 25% turnover rate. ASCA, *supra* note 110.

112. *Id.*

113. Georgia Dep’t of Corrections Standard Operating Procedures IV008-0001, 6, http://gdcjobs.com/NewHire/pdf/Working_Hours,_Overtime_and_Compensatory_Time_IV008-0001_SOP.pdf (last visited Feb. 23, 2016). The turnover rate of Georgia DOC Officers is high at 28.42% for 2013. ASCA *supra* note 110; for an interesting article on why this may be see Curtis Isele, *Corrections: A Holistic View*, CORRECTIONSONE.COM (May 6, 2014), <http://www.correctionsone.com/column/articles/7155590-Why-correctional-turnover-is-so-high/>.

114. Georgia Department of Corrections Standard Operating Procedures IV008-0001, at 7.

115. *Id.*

116. *Id.*

may assign an employee extra work unless this agreement has been executed.”¹¹⁷ This ensures that Georgia DOC is in compliance with FLSA before the employee starts working. Officers may not get the overtime pay that many in other states receive, but at least they are getting paid for the hours they are working.

D. Ohio

Unlike Georgia’s flexibility, Ohio Correctional Officers do not accrue overtime hours unless they have worked over 80 hours in a pay period, and converts excess hours to comp time.¹¹⁸ This removes the flexibility seen in other states, but likely allows officers a better understanding of what to expect. Keeping policies simple is a win-win for everyone.

E. Tennessee

Tennessee has been hit with some rough times in terms of their Department of Corrections (TDOC). TDOC had an increase in officer turnover when they started implementing their 28-day 160-hour overtime policy.¹¹⁹ There was an estimated 322 officers that quit over a one-year time frame after the policy was implemented.¹²⁰ Tennessee is now faced with being understaffed “as much as a third of total workers.”¹²¹ Even more interesting about Tennessee’s policy change are the survey results from officers giving feedback about this policy:

More than 80 percent of officers surveyed said they were negatively affected by the state’s decision not to pay overtime until

117. *Id.* at 18.

118. OHIO REV. CODE ANN. § 124.18 (West 2015). Ohio had a turnover rate of 7.4% in 2013. ASCA, *supra* note 110.

119. See Andy Sher, *TDOC loses 322 correctional officers amid new overtime pay rules* CORRECTIONSONE.COM (July 30, 2015), <http://www.correctionsonone.com/corrections/articles/8693176-TDOC-loses-322-correctional-officers-amid-new-overtime-pay-rules/>. Tennessee had a turnover rate of 51.64% in 2013. ASCA, *supra* note 110. This number is strikingly high, however Mississippi had the highest turnover rate in 2013 with 55%. *Id.* In contrast, Massachusetts had the lowest turnover rate of 5%. *Id.* Massachusetts DOC is unionized with an agreement for overtime to accrue for any hours over 40 each week. *Collective Bargaining Agreement between the Commonwealth of Mass. and the Mass. Corr. Officers Federated Union: June 1, 2012 – June 30, 2015*, COMMONWEALTH OF MASS. (Apr. 9, 2014), <http://www.mass.gov/anf/docs/hrd/oer/u4-4a/mcofu-cba-july-1-2012-june-30-2015.doc>.

120. Andy Sher, *Correctional Officers Amid New Overtime Pay Rules*, CORRECTIONSONE.COM (July 30, 2015), <http://www.correctionsonone.com/corrections/articles/8693176-TDOC-loses-322-correctional-officers-amid-new-overtime-pay-rules/>.

121. *Id.*; see *Frequently Asked Questions: Twenty-Eight (28) Day Schedule*, DOCUMENTCLOUD.ORG, <https://assets.documentcloud.org/documents/1175549/department-of-corrections-explanation-of-the-new.pdf> (last visited Feb. 28, 2016). After a phone call, it is apparent that TDOC does not list specific policy numbers for reference to this new policy. The new policy has not been updated on other documents as of yet. Interview with a representative of the Human Resources Dep’t. on Nov. 16, 2015.

they had worked more than 171 hours in a month, as opposed to the 160 hours compiled through a traditional 40-hour work week. More than 70 percent don't like the ability to "flex" their overtime, a method of rearranging an employee's work schedule in order to avoid working overtime instead of actually being paid for working overtime.¹²²

A little over half of the respondents stated they preferred 8.5 or 9-hour shifts working 6 days and having 3 days off.¹²³ Because of the survey results, leadership at each prison will determine which work period to implement in order to strike a better balance between the needs of the individual prison and keeping officers paid and happy.¹²⁴

F. Colorado

Colorado came to their senses and removed their 28-day work period. In 2014, Colorado Department of Corrections implemented a 14-day work period, with overtime accruing after 85 hours during that period, or hours worked over 12 in a 24-hour period.¹²⁵ With Tennessee re-thinking the 28-day policy and Colorado removing theirs, we can all hope other states will follow suit.

IV. IDAHO DEPARTMENT OF CORRECTIONS OVERTIME POLICIES.

A. What is the Idaho Department of Corrections?

The Idaho Department of Corrections (IDOC), is an employer of around 2,000 corrections professionals.¹²⁶ These employees are responsible for all aspects of corrections in Idaho, including the supervision of around 22,000 incarcerated felony offenders.¹²⁷ IDOC has an annual budget of \$227.6 million for 2015, with \$102.3 million set aside for the

122. Dave Boucher, *Survey: Tennessee prison officers dislike overtime plan*, THE TENNESSEAN, (Dec. 22, 2015, 8:48 AM), <http://www.tennessean.com/story/news/politics/2015/12/20/survey-tennessee-prison-officers-dislike-overtime-plan/77587244/>. This survey consisted of 836 out of 3060 correctional employees. *Id.*

123. *Id.*

124. *Id.*

125. COLO. DEPT. OF CORR, ADMIN. REG. NO. 1450-14, OVERTIME AND COMPENSATORY TIME FOR DOC EMPLOYEES (2014); COLORADO WINS, *SB 210 passes, ends 28-day work period*, (May 7, 2013), <http://coloradowins.org/2013/05/07/sb-210-passes-ends-28-day-work-period/>. Colorado had a 17% turnover rate in 2013, before the policy change to remove the 28-day work cycle. ASCA, *supra* note 110.

126. Betsy Z. Russell, *Longtime state prisons employee Kevin Kempf names new Corrections director*, THE SPOKESMAN-REVIEW, (Dec. 3, 2014, 1:33 PM), <http://www.spokesman.com/blogs/boise/2014/dec/03/longtime-state-prisons-employee-kevin-kempf-named-new-corrections-director/>.

127. *Id.*

prison system itself.¹²⁸ These statistics show that IDOC is a large employer with a lot of money to work with.

Idaho pays state employees according to their job classification, and each classification has a different standard including, minimum, policy, and maximum pay standard.¹²⁹ Correctional Officers are classified as “T” for pay grade.¹³⁰ This means they receive a minimum of \$13.66 and a maximum of \$24.40 per hour.¹³¹ Although IDOC’s minimum wage standards are not in violation of the FLSA federal minimum wage guidelines, this is good information to have when looking at the repercussions of the

128. Idaho Legislative Services Office, Idaho Fiscal Facts: A Legislator’s Handbook of Facts, Figures, & Trends 57 (2015), <http://www.legislature.idaho.gov/budget/publications/FiscalFacts/current/FF.pdf>.

129. IDAHO DEP’T OF CORR, STANDARD OPERATING PROCEDURE CONTROL NO. 202.07.01.001, COMPENSATION PLAN (2009). Minimum is the pay at which a “person with minimum qualifications for the position will normally be employed or assigned.” *Id.* This would normally be a new employee, or someone just starting out in this position. “Policy is the pay considered by the DHR to be a fully competitive market-based pay rate for an experienced employee who is performing the job in an entirely satisfactory manner.” *Id.* Maximum is the “rate at which the employee would stop receiving merit pay increases, until the pay range is extended.” *Id.* This is usually someone that has exceeded their job requirements. These standards are all based on annual, internal and external surveys of the labor market using benchmark positions for determining the proper standards. *Id.*

130. Idaho Division of Human Resources, *Job Descriptions*, <https://labor.idaho.gov/DHR/ATS/statejobs/jobDescriptions.aspx?letter=C> (last visited Feb. 23, 2016) [hereinafter *Job Descriptions*]; see also Idaho Division of Human Resources, *FY 2016 Compensation Schedule*, <http://dhr.idaho.gov/PDF%20documents/Compensation/FY2016payschedule.pdf> (last visited Feb. 23, 2016) [hereinafter *Compensation Schedule*].

131. *Compensation Schedule*, *supra* note 130. Correctional Officers are listed as Class Code 09201, Pay Grade I, this is current as of 8/4/2011. *Job Descriptions supra* note 130. While this minimum standard is not in violation of FLSA’s federal minimum wage limit, it is below the living wage for Idaho. This report published by the Alliance for a Just Society has determined that the “living wage” of Idahoans is \$14.57 per hour for a single adult. George Prentice, *Families Out of Balance: Idaho Reality Is Nowhere Near Living Wage*, (Aug. 28, 2014, 11:00 AM), <http://www.boiseweekly.com/CityDesk/archives/2014/08/28/families-out-of-balance-idaho-reality-is-nowhere-near-living-wage> [hereinafter *Families Out of Balance*]. The state of Idaho follows the federal minimum wage standard of the FLSA. For a parent with a spouse and 2 children, some counties in Idaho have a wage gap of more than \$14 an hour. Bourree Lam, *The Living Wage Gap: State by State (Boise County, Idaho)*, THE ATL. MONTHLY GRP. (Sept. 15, 2015), <http://www.theatlantic.com/business/archive/2015/09/living-wage-calculator-interactive-minimum-wage/404569/>. The city of Boise has the majority of the state’s prisons, so it is scary to think that our corrections officers are faced with being unable to afford to live off of the pay they receive. Idaho Dep’t of Corrections, *Prison Locations*, <https://www.idoc.idaho.gov/content/locations/prisons> (last visited Feb. 28, 2016) (6 of the 10 prisons are located in Boise). “The living wage for a single adult with two children is \$24.12 per hour.” George Prentice, *Families Out of Balance: Idaho Reality Is Nowhere Near Living Wage*, (Aug. 28, 2014, 11:00 AM), <http://www.boiseweekly.com/CityDesk/archives/2014/08/28/families-out-of-balance-idaho-reality-is-nowhere-near-living-wage>. The “basic needs” contemplated by this study are food, housing, utilities, transportation, healthcare, clothing, savings of 10%, and taxes. *Id.* This is shown through the graph. This means that even though the minimum wage of IDOC corrections officers is in line with FLSA standards, the minimum wage is still well below what is necessary to live.

Regular Hours Held policy. Violating the FLSA provisions results in double damages, payback of wages plus an equal amount as a penalty.

B. Overtime and the 160-Hour/28-Day Cycle for IDOC Officers

IDOC employees are paid overtime based on their classification. IDOC has classified its correctional officers as Law Enforcement (L) for FLSA purposes. Further, correctional officers are classified as nonexempt,¹³² and nonexempt employees “shall be eligible for cash compensation or compensatory time off from duty for overtime work”¹³³

Under this L classification, officers accrue overtime based on a 160-hour per 28-day cycle.¹³⁴ Hours worked over 160 hours are compensated at time-and-a-half.¹³⁵ The employee must work 160 hours in two pay periods in order to get the comp time at the time and a half rate.¹³⁶ Further, employees accrue comp time in lieu of cash payment for overtime hours worked.¹³⁷

Comp time does not continually accrue without a cash payout. The [p]revious 6 months comp time balances will generate a payoff with the last check in December and the last check in June.”¹³⁸ These payouts occur if the comp time has not been used during those 6 month timeframes. Further, in order to avoid large payouts, overtime hours are capped at 480 hours for L employees.¹³⁹ “If the cap is reached, overtime is no longer accrued . . . rather [it is] paid out.”¹⁴⁰ This means that if an employee works 488 hours of overtime, they will receive 480 hours of comp time, and a cash payment for the remaining 8 hours.

Further, IDOC’s lack of an agreement for compensation of overtime in the form of comp hours, also violates the FLSA. As will be seen in the material following, IDOC’s overtime compensation procedures do not meet the requirements of FLSA’s section 207 policy, because of the lack of prompt payment.

C. More Than a Handbook is Necessary for IDOC’s Comp in Lieu of Cash Policy

IDOC’s attempts at an agreement for comp time in lieu of cash payment for overtime falls short of the requirements for a negotiation, and does not occur before the officer commences work.

132. IDAHO CODE § 67-5303(q) (2014); IDOC, *IDOC Payroll*, IDOC.IDAHO.GOV, https://www.idoc.idaho.gov/content/document/idoc_payroll_how_it_works (last visited May 19, 2016) [hereinafter *IDOC Payroll*].

133. IDAHO CODE § 59-1607(6) (2012).

134. *IDOC Payroll*, *supra* note 132, at 8.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *IDOC Payroll*, *supra* note 132, at 9.

140. *Id.*

Idaho Code section 59-1607(6) provides, “[c]ompensatory time off may be provided in lieu of cash compensation at the discretion of the appointing authority after consultation, in advance, with the employee.”¹⁴¹ The statute does not define what a “consultation” is.¹⁴² It is likely not enough that the employee receives a handbook explaining the comp time in lieu of cash payment policies. As seen in one case, it is not enough to have the information in an employee handbook, there needs to be an express agreement.¹⁴³

IDOC officers are required to sign a document that states they are aware that overtime will be compensated via comp time off.¹⁴⁴ This is little more than a notice provided to the employee and does not serve as an agreement; we know this to be true because the document is titled “Notification for Overtime Compensation.”¹⁴⁵ Further, the document states “[t]his notice is to inform you that overtime compensation . . . is by compensatory time off . . . and is not paid in cash”¹⁴⁶

A court will likely conclude that this *notice* is not an agreement. Based on court interpretations, an agreement needs to be more than just a notice of a policy.¹⁴⁷ As discussed above, an agreement must be by the employee and the employer may not attempt to coerce the employee in signing the agreement.¹⁴⁸

Even if the notice is found to be an agreement there is still a timing issue. These agreements must occur before the “performance of work.”¹⁴⁹ IDOC requires the officer to sign this document while in Orientation, which is held in Boise, usually after the employee has already started working.¹⁵⁰ IDOC prisons are not all located in Boise, and for some a large amount of travelling is involved in order to get to orientation.¹⁵¹ This means that employees are performing work before they sign this document, because IDOC counts travel time as hours worked for pay purposes.

141. IDAHO CODE § 59-1607(6) (2012).

142. *See generally* IDAHO CODE § 59-1607.

143. Nevada Highway Patrol Ass’n v. State of Nev., 899 F.2d 1549, 1556 (9th Cir. 1990).

144. This information was obtained via a public records request to the Idaho Department of Corrections. Email from Taryn Ross, HR Specialist, SR., Idaho Dep’t. of Corrections to Christi Disparte, (Dec. 31, 2015, 09:36 PST) (on file with author).

145. Idaho Department of Corrections Form 204 Attmt E, June 2005.

146. *Id.*

147. Nutley Policemen’s Benevolent Ass’n Local #33 v. Township of Nutley, 16 A.3d 453, 461 (N.J. Super. Ct. App. Div. 2011).

148. *Id.*

149. 29 U.S.C. § 207(o)(2)(A)(ii) (2015).

150. This information was obtained via a public records request to the Idaho Department of Corrections. Email from Taryn Ross, HR Specialist, SR., Idaho Dep’t. of Corrections to Christi Disparte, (Dec. 31, 2015, 09:36 PST).

151. *Prison Locations*, IDAHO DEP’T OF CORRECTIONS, <https://www.idoc.idaho.gov/content/locations/prisons> (last visited Feb. 23, 2016) (6 of the 10 prisons are located in Boise).

All of this information supports a finding that IDOC is in violation of not having a proper agreement of comp hours in lieu of cash payment for overtime hours worked. Another problem for IDOC arises in the Regular Hours Held (RHH) policy.

D. Violating the FLSA in Two Steps: Pay 80 Hours, Hold the Rest

Originally RHH was termed EAL, or Earned Administrative Leave and was defined as, “[a] time code used to reflect hours worked that have not yet met the definition of overtime, yet need to be tracked, accrued or compensated.”¹⁵² RHH is described as a “holding bucket for overtime hours and is treated as a leave.”¹⁵³ The following is IDOC’s description of RHH:

Overtime is accrued as RHH for “Law Enforcement” personnel. The overtime goes into the RHH ‘Bucket’ and is held there throughout the 160 hr/28- day cycle

At the end of the 160 hr/28- day cycle the RHH hours earned in that cycle above 160 hours is converted to Comp @ 1.5.

If any pay period is short of the 80 hrs, the computer will use RHH to bring to 80 hours. [An example of this is when an employee works 74 hours in a pay period, 6 hours of RHH will be converted to regular time so that the employee received 80 hours of compensation for that pay period. A more in depth example of this is explained in Figure D and the explanation text following the figure.]

RHH hours that will never be converted are:

- Up to 8 hours of RHH earned during pay period where a holiday was paid out (HOL). (example Scenarios 4 & 5)
- If your total ACT hours for a 160-hour cycle do not reach 160 hours. (example in Scenarios 2 & 3)

If after each end cycle, any RHH is left, it will stay RHH.¹⁵⁴

The following figure puts all of this information into perspective by showing what happens to an employee’s paycheck when they run into RHH.

152. *Attendance and Hours of Work*, IDAHO HR SOP 206.01.01.001, <https://www.idoc.idaho.gov/content/policy/871> (last visited Feb. 23, 2016) (showing RHH was listed as EAL throughout this policy).

153. *IDOC Payroll*, *supra* note 132, at 14.

154. *Id.*

**IDAHO VS FLSA: DEPARTMENT OF
CORRECTIONS MUST CHANGE TO COMPLY
WITH FEDERAL LAW**

		MID-CYCLE								Step 1		
Week 1	Time Code	S	M	T	W	T	F	S	Tot	Mid Cycle ACT	90	
	ACT		10.0	8.0	12.0	9.0	9.0			47.0	Less overtime hours	10
											Total	80
Week 2	Time Code	S	M	T	W	T	F	S	Tot	For Mid Cycle, Pay stub will show		
	ACT		10.0	10.0	8.0	8.0	8.0	6.0	43.0	REG	80	RHH
		END-CYCLE								Step 2		
Week 3	Time Code	S	M	T	W	T	F	S	Tot	Mid-cycle ACT	90	
	ACT		8.0	8.0	8.0	9.0	9.0		32.0	Mid-cycle HWL	0	
Week 4	Time Code	S	M	T	W	T	F	S	Tot	End-cycle ACT	67	
	ACT			9.5	9.0	8.0	3.0	5.5	35.0	End-cycle HWL	0	
	CPT		8.0						8.0	Total	157	
	VAC						5.0		5.0	Since the total was less than 160 hours, any RHH from Mid- or End-cycle will not be converted at 1.5, but will stay in RHH at straight time.		

Step 3

End Cycle ACT	67.0
Less overtime hours above 160	NA
Add Leave	<u>13.0</u>
Total	80.0

If total is less than 80, must take time from a leave (i.e. RHH, COMP, VAC, OCH) to equal 80.

For End Cycle, Pay stub will show

REG	67
CPT	8
VAC	5

Overtime remains in RHH and will not convert to CPT @ 1.5 because the total ACT time is less than 160 hours

Figure B¹⁵⁵

155. IDOC Payroll, *supra* note 132, at 17–18.

Figure B shows this employee worked 90 hours the first pay period. In Step 1 they were paid 80 hours and had 10 hours placed in the RHH bucket. During the next pay period, Step 2, the employee worked 67 hours. In Step 3 the employee is given 13 hours out of the RHH bucket to bring the pay period 2 hours to 80. Thus, the employee is paid 80 hours each pay period.

While IDOC states that RHH is treated like comp time, RHH is not like comp time in a very important way: RHH is not eligible for payment every 6 months like comp hours are.¹⁵⁶ “[T]he State of Idaho’s Office of the State Controller holds all EAL awaiting the end-cycle timesheet hours in order to calculate overtime during the 160 hour period. At the conclusion of the pay period end-cycle, EAL is subject to continual accrual . . .”¹⁵⁷ In fact, RHH is only paid out if an employee terminates, or transfers to another State of Idaho agency.¹⁵⁸ This means that numerous corrections officers potentially have many hours of unpaid worked hours just sitting in the pockets of IDOC.

Figure C shows a slightly different scenario, where more than 160 hours are worked, but still hours are held in RHH, and only a small portion are converted to comp time because the employee took sick leave and vacation time.

156. *Attendance and Hours of Work*, IDAHO HR SOP 206.01.01.001, <https://www.idoc.idaho.gov/content/policy/871> (last visited Feb. 23, 2016) (showing RHH was listed as EAL throughout this policy).

157. *Id.*

158. *Id.*

**IDAHO VS FLSA: DEPARTMENT OF
CORRECTIONS MUST CHANGE TO COMPLY
WITH FEDERAL LAW**

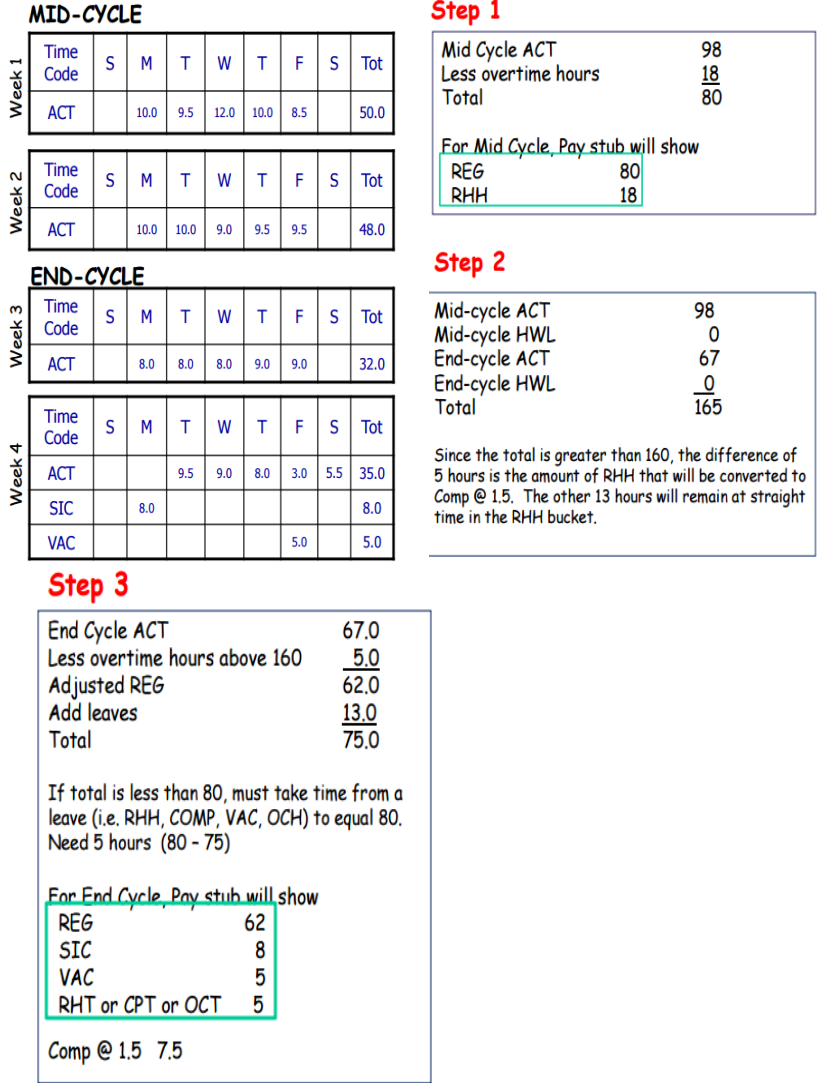


Figure C¹⁵⁹

What is concerning about the above scenario is that the employee worked 98 hours the first half of the work period and worked 35 hours during the second half of the work period.¹⁶⁰ But looking at the section that tells what the pay stub will be it shows for the first pay period, cash

159. *IDOC Payroll*, *supra* note 132, at 17–18. Many more scenarios are given that show similar worked hours being held as RHH.

160. *Id.*

compensation of 80 hours and for the second pay period, cash compensation of 62 hours. This employee *actually* worked 165 hours, and they took 8 hours of sick leave and 5 hours of vacation time for a total of 178 hours. This employee should have gotten cash compensation for 160 hours and 5 hours of comp time, and with the sick leave and vacation time, an additional cash compensation for 173 hours worked, and 5 hours of comp time. However, the employee only received cash compensation for 142 hours without the sick leave and vacation time, and 155 hours with.¹⁶¹ A total of 23 hours were put into the RHH holding bucket. According to the policy information, all hours worked over 160 would be converted to comp hours,¹⁶² which would mean there would be no RHH hours being held at the end of the pay period.

The above employee should have been paid the additional 23 hours that are now being placed in the RHH bucket. This policy of not paying the employee for all of the hours they work is exploitative. It benefits the employer who gets essentially free work, and it is detrimental to the employee who works for free. Aside from being exploitative, this policy violates FLSA's prompt payment requirement.¹⁶³

In addition, the FLSA does not require employers to compensate for hours worked on a holiday.¹⁶⁴ However, IDOC does pay for these hours, but only after the employee has worked 80 hours for the corresponding pay period.¹⁶⁵ These holiday hours are paid out as comp time at time and a half.¹⁶⁶ For example, if an employee works 80 hours for the pay period and has 3 hours of holiday time, the employee will receive 4.5 hours of comp time.¹⁶⁷ What is confusing about this provision is a separate policy that IDOC says it follows concerning holiday pay:

Hours worked on a holiday are overtime and are calculated for pay purposes in accordance with the employee's FLSA eligibility criteria at either straight time or at time and one-half (1/2) for that day. These hours worked are then added to the paid 'holiday hours' granted to each employee as a paid holiday and become the basis for total compensation for that day¹⁶⁸.

Actual hours worked on a holiday will be included in the calculation of actual hours worked that work week (or work cycle) for determining overtime but excludes the paid holiday hours.¹⁶⁹

161. *Id.*

162. *Id.* at 8.

163. See Section II.D, which discusses FLSA's implied prompt payment requirement.

164. U.S. Dep't of Labor, *Wage and Hour Division*, DOL.GOV, <http://www.dol.gov/whd/flsa/faq.htm> (last visited Feb. 23, 2016).

165. *IDOC Payroll*, *supra* note 132, at 10.

166. *Id.*

167. *Id.*

168. Idaho Dep't of Corrections, *Attendance and Hours of Work*, Idaho HR SOP 206.01.01.001 15, <https://www.idoc.idaho.gov/content/policy/871> (last visited May 19, 2016).

169. *Id.*

This policy does not say anything about the employee being required to work 80 hours before hours worked on the holiday are paid.¹⁷⁰ The policy goes on to state that the director of IDOC can decide to pay holiday hours worked as comp-time or cash.¹⁷¹ As previously mentioned, the FLSA does not require an employer to pay for holiday hours, however if an employer specifies that they will pay for holiday hours, they should stick to that and not have contradicting policies about that pay. Employees rely on these policies in determining what they should expect about their pay and how much they should expect to receive.

The current manner in which employees are compensated is so confusing that it takes several math equations to ensure the employee is being paid properly, which they are not. Figure D shows what happens when an employee works on holidays.

Something to keep in mind with this example are the abbreviations. Specifically important to this example are HOL, and HWL. HOL means Holiday Pay – Not Worked, while HWL means hours worked on the holiday.¹⁷²

170. *Id.*

171. *Id.*

172. *IDOC Payroll*, *supra* note 132, at 10–11. This page lists all of the unique pay codes for IDOC and is helpful when trying to determine what an employee is getting paid for.

Week 1	Time Code	S	M	T	W	T	F	S	Tot
	ACT		10.5	9.8	11.0	9.0	8.5		48.8

Week 2	Time Code	S	M	T	W	T	F	S	Tot
	ACT		8.0	8.0	8.0	7.5	8.5		40.0

END-CYCLE

Week 3	Time Code	S	M	T	W	T	F	S	Tot
	ACT		8.0	7.0	8.0	9.0	9.0		41.0

Week 4	Time Code	S	M	T	W	T	F	S	Tot
	ACT			8.0	9.0	8.0	8.0		33.0
	HOL		8.0						8.0
	HWL		8.7						8.7

Step 1

Mid Cycle worked	88.8
Less overtime hours	<u>8.8</u>
Total	80.0

If total is less than 80, must take time from a leave (i.e. RHH, COMP, VAC, OCH) to equal 80.

For Mid Cycle, Pay stub will show

REG	80
RHH	8.8

Step 2

Mid-cycle ACT	88.8
Mid-cycle HWL	0
End-cycle ACT	74.0
End-cycle HWL	<u>8.7</u>
Total	171.5

Since the total is greater than 160, the difference of 11.5 hours is the amount of RHH that will be converted to Comp @ 1.5.

Step 3

End Cycle ACT	74
Less overtime hours above 160	<u>11.5</u>
Adjusted Reg	62.5
Add holiday hours	<u>8.0</u>
Total	70.5

If total is less than 80, must take time from a leave (i.e. RHH, COMP, VAC, OCH) to equal 80. In this case, 9.5 hours will be used from the RHH bucket or CPT. (80 - 70.5 = 9.5)

For End Cycle, Pay stub will show

REG	62.5
HOL	8
RHT or CPT	9.5
HWL	13.1
Comp @ 1.5	17.3

Figure D¹⁷³173. *Id.* at 22–23.

Step 1, the first pay period, shows that the employee worked 88.8 hours total. With 8.8 of those hours being held in RHH, the employee was paid cash for 80 hours. Step 2, the second pay period, shows the employee worked 74 regular hours and worked 8.7 hours on a holiday, for a total of 82.7 hours worked. The employee also received 8 hours of holiday time not worked.

Further, Step 2 shows that the actual hours worked for the entire work period is 171.5 hours. Taking these numbers alone, the employee should have been paid cash for 160 hours and comp hours of 11.5 before being converted to time and a half. However, there is still the non-worked holiday hours to add in. This apparent discrepancy will be discussed below.

Step 3 is where things get confusing. The employee was already deducted 8.8 hours from their worked hours in Step 1; these hours are currently being held in the RHH bucket. Step 3 shows that the employee started with 74 hours worked, and is now being deducted 11.5 hours for overtime according to Step 2. The problem with this is that in Step 2 the employee's hours worked add in the full hours worked from Step 1, 88.8, but 8.8 hours have already been deducted. After deducting the 11.5 hours of overtime the employee is left with 62.5 hours, adding in the non-worked holiday hours, 8, the new total is 70.5. Remember those RHH hours being held? Now IDOC takes these held hours and uses 9.5 of them to increase the employee's pay for the second pay period from 70.5 to 80. The employee is paid cash for 160 hours over the two pay periods.

Continuing with Step 3, the employee was paid 62.5 regular hours for the second pay period, received 8 hours of non-worked holiday pay, and 9.5 hours of RHH used to increase to 80 hours. Adding in the 80 hours paid cash for the first pay period, the employee was paid cash for 160 hours. He also had 13.1 worked holiday hours which have been converted to time and a half, and 17.3 time and a half converted hours to equal 30.4 comp hours. Take 160, add 30.3 to get 190.3 hours that need to be compensated, and this is 2.1 hours short.¹⁷⁴

After that little math lesson, it is unclear how anyone can truly understand what they are getting paid and why. However, what is clear is the fact that worked hours are being held in a bucket, and these hard-working employees are not getting paid properly.

This bucket of wrongfully withheld RHH hours is compensated to the employee in only three ways. 1) RHH converts to comp hours in the event that an employee works more than 160 hours in a 28 day work period, 2) RHH is used to increase an employee's work hours to 80 in the event the employee works less than 80 hours in a pay period, and 3) RHH

174. 88.8 (hours wk. 1) $- 8.8 + 74$ (regular hours worked wk. 2) $+ 8$ (non-worked holiday hours) $+ 30.4$ (time and a half compensated hours. 11.5 for hours worked as overtime, and 8.7 holiday hours worked) $= 192.4$ hours the employee should be compensated.

is paid in cash when the employee terminates or is transferred to another agency.¹⁷⁵

IDOC is violating the FLSA by not paying promptly and instead holding these hours, potentially indefinitely.¹⁷⁶ “The average RHH balance for current correctional officers is 27.5 hours.”¹⁷⁷ IDOC Officers are working sometimes strenuous and dangerous hours that they are not getting paid for. Not being paid for hours you work is a form of exploitation.¹⁷⁸ There is no explanation that can be provided that would explain this exploitation away.

So extreme is the lack of pay that one corrections officer within IDOC currently has 376.5 hours being held in this RHH bucket.¹⁷⁹ If you calculate this based on the IDOC’s salary requirement of \$13.66, this is equal to \$5,142.99 that the employee has not been paid. I believe that figure deserves repeating: \$5,142.99! Remember the double penalties imposed for violating the wage and overtime provisions of the FLSA?¹⁸⁰ This violation could end up costing Idaho a lot more money than just paying the employees their due wages, and this is just one employee.

The FLSA impliedly requires payment of hours worked within a reasonable timeframe.¹⁸¹ The state of Idaho has determined that a “reasonable” amount of time is monthly.¹⁸² This means that an employer needs to pay its employees for hours worked *at least* once a month.

Because IDOC is keeping worked hours in this RHH bucket for a potentially indefinite time, they are not following the prompt payment requirement and are in violation of the FLSA, as well as their own state payment guidelines. Because the general rule is that overtime must be compensated in the same pay period as the time is accrued, a court will likely deem this the “reasonable” time and any hours not paid after a month will be found to be unreasonable.¹⁸³

This lack of prompt payment is likely a factor with the high turnover rates that IDOC has been seeing for the past few years.¹⁸⁴ In 2014, “1 in

175. Attendance and Hours of Work, Idaho HR SOP 206.01.01.001, <https://www.idoc.idaho.gov/content/policy/871> (last visited May 19, 2016).

176. *See supra* Section II.

177. This information was obtained via a public records request to the Idaho State Controller’s Office, Email from Jen Callahan, Office of the State Controller, to Christi Disparte (Nov. 24, 2015, 03:33 PST) (on file with author).

178. The Oxford dictionary defines “exploitation” as the “action or fact of treating someone unfairly in order to benefit from their work.” OXFORDDICTIONARIES.COM, http://www.oxforddictionaries.com/us/definition/american_english/exploitation (last visited Mar. 29, 2016).

179. This information was obtained via a public records request to the Idaho State Controller’s Office, Email from Jen Callahan, Office of the State Controller, to Christi Disparte (Nov. 24, 2015, 01:48 PST) (on file with author).

180. *See supra* Section II.

181. *See supra* Section II.

182. *State Payday Requirements*, FINDLAW.COM, (Mar. 2014), <http://employment.findlaw.com/wages-and-benefits/state-pay-day-requirements.html>.

183. 29 C.F.R. §778.106 (2016).

184. IDOC, IDOC ANNUAL REPORT FY12, IDOC.IDAHO.GOV, (Dec. 2012) https://www.idoc.idaho.gov/content/document/annual_report_fy12 (2012 had an 18% turnover

4 officers left the agency.”¹⁸⁵ Further, [n]early two-thirds of officers in Idaho prisons today have less than two years of experience on the job, creating a security risk.”¹⁸⁶ It is highly plausible that employees are realizing they are working hours they are not getting paid for and then leaving the job. One Correctional Officer worked up to 301.5 hours in a 1 month time-frame.¹⁸⁷ When an employee works this many hours and does not get compensated for all of them, the employee may experience frustration toward their employer, IDOC, and this frustration could weigh in favor of leaving the job. Kevin Kempf, Director of IDOC has stated, “The biggest challenge into the future remains turnover in the security ranks.”¹⁸⁸ Changing the above mentioned exploitative procedures within IDOC may be the first step to ensuring IDOC can keep its staff and avoid unnecessary penalties associated with violating the FLSA.

V. CHANGE SHOULD START WITH THE FLSA, BUT IDOC SHOULD NOT WAIT

A. Reduction of the Maximum Work Period is Key: Why the FLSA Should Remove the 28-day Work Period

The problem of exploiting corrections officers is not exclusive to IDOC, and a deeper look into all corrections departments is needed to ensure these men and women who risk their lives in ensuring the safety of so many others are being compensated properly. A simple search shows that many states are faced with high turnover rates for officers, most of which is blamed on low pay and high stress due to the dangers of the job.¹⁸⁹ Corrections officers are charged with keeping order and peace amongst people that have already shown a propensity towards committing crimes, even if they are not all violent crimes. Moreover, some of

rate); IDOC, IDOC ANNUAL REPORT FY13, IDOC.IDAHO.GOV (Dec. 2013) https://www.idoc.idaho.gov/content/document/annual_report_fy13 (2013 had a 26% turnover rate, which equals 1 in 4); IDOC, IDOC ANNUAL REPORT FY14, IDOC.IDAHO.GOV (Dec. 2014) https://www.idoc.idaho.gov/content/document/annual_report_fy14_0 (1 in 4 officers left).

185. IDOC, IDOC ANNUAL REPORT FY14, IDOC.IDAHO.GOV (Dec. 2014) https://www.idoc.idaho.gov/content/document/annual_report_fy14_0.

186. *Id.*

187. This information was obtained via a public records request to the Idaho State Controller’s Office, Email from Jen Callahan, Office of the State Controller, to Christi Disparte (Nov. 24, 2015, 01:48 PST) (on file with author).

188. *Id.*

189. Eli Hager, *Job Opening: No Training, Low Pay, High Turnover*, THEMARSHALLPROJECT.ORG, (June 5, 2015), <https://www.themarshallproject.org/2015/06/05/job-opening-no-training-low-pay-high-turnover#.HrVkJrJW4>; Michell Eloy, *Low Wages Fuel High Turnover of State Corrections Officers*, WABE.ORG, (Jan. 8, 2014), <http://news.wabe.org/post/low-wages-fuel-high-turnover-state-corrections-officers>; Krystle Callais, *Kentucky increasing pay for corrections officers to fight turnover*, WPSDLOCAL6.COM, (May 21, 2015), <http://www.wpsdlocal6.com/story/29125060/kentucky-increasing-pay-for-corrections-officers-to-fight-turnover>.

these inmates will do anything to free themselves from incarceration, even take the life of an innocent officer.¹⁹⁰

As discussed in Section II, the FLSA is meant to protect employers while creating more jobs for employees.¹⁹¹ This is a delicate balance, because more protections for employers can lead to more exploitation of employees, and vice-versa. The current problem with the FLSA section 207(k) partial exemption is that it allows the states too much flexibility. This flexibility comes in being able to change the work period to anything between 7 and 28 days. Further, states are able to choose regular hours between 43 and 171.¹⁹² Some states have tried implementing the 28-day work period and have seen backlash from its employees.¹⁹³

It is important to try to keep costs low for the states, but these higher work periods are discouraging to the officers that are faced with working 16-hour days due to understaffing. The federal Department of Labor should be looking at these negative repercussions and realize that this exemption, as it stands, is not benefiting anyone. When looking at the corrections departments throughout the nation, it seems the best option is to adjust the section 207(k) exemption to allow a maximum of a 14-day work period and a maximum of 85 hours. This will ensure the balance the FLSA is trying to achieve.

B. Idaho Must Change or Face Penalties

IDOC needs to change its pay policies for officers or be met with potentially devastating penalties. As seen in Section III, there are several examples for IDOC to follow that would not require a huge, drastic change in order to stay in compliance with the FLSA. The biggest issue is that IDOC needs to get rid of the RHH bucket, pay for all hours worked within the work period and immediately convert the overtime hours worked into comp time, similar to Ohio. Officers should not have pay withheld to the benefit of IDOC.

190. Terri Langford, *Rookie Prison Guard Killed Escorting Violent Inmate*, THE TEXAS TRIBUNE, (July 15, 2015), <http://www.texastribune.org/2015/07/15/rookie-tdcj-guard-killed-escorting-violent-inmate/>; Fox News, *30 Arizona Inmates Brutally Beat Prison Guards*, INSIDER.FOXNEWS.COM, (Nov. 5, 2015), <http://insider.foxnews.com/2015/11/05/video-arizona-inmates-attack-prison-guards>; Times News, *Inmate at state prison charged with attempted murder of guard*, TNONLINE.COM, (Nov. 24, 2015), <http://www.tnonline.com/2015/nov/24/inmate-state-prison-charged-attempted-murder-guard>. These examples are a few of the many beatings and killings of guards that occur each year. There were 113 work-related officer fatalities and 125,200 non-fatal injuries between 1999 and 2008. Srinivas Konda, Hope Tiesman, Audrey Reichard and Dan Hartley, *U.S. Correctional Officers Killed or Injured on the Job*, ACA.ORG, http://www.aca.org/ACA_PROD_IMIS/Docs/Corrections%20Today/2013%20Articles/November%20Articles/Research%20Notes.pdf (last visited Mar. 29, 2016). In 2011, “correctional officers experienced 254 work-related injuries per 10,000 [full-time employees] due to assaults and violent acts.” *Id.*

191. *See supra* Section II.

192. 29 C.F.R. § 553.230 (2015).

193. *See supra* Section IV, specifically Tennessee and Colorado.

The first step is to ensure compliance with the FLSA is to pay employees for *all* hours worked and stop the use of the RHH bucket. The purpose of the FLSA is to strike a balance between the need of the employer to keep costs down, and the need to ensure employees are not being exploited and overworked. This balance is not being met by IDOC's RHH bucket. This exploitative practice only benefits IDOC, who gets away with obtaining extra work and not paying for it.

Rather than having a one-size-fits-most work cycle, IDOC could adopt multiple work cycles similar to Georgia's policies as seen in section III. A 7-day work cycle for those that consistently work 8-hours 7-days a week; a 14-day, work cycle for those that consistently work 10-hours 4-days a week, etc. IDOC would make cash payments for the hours the CO works within the regular workweek, and then immediately convert overtime hours to comp time. This would allow IDOC some flexibility to ensure it is not paying excessive amounts of overtime hours, but still ensures COs are being paid properly. This change would also ensure our COs are staying safe and effective since they will not be overworked.

IDOC's problems do not stop with the RHH policies; IDOC needs to have a proper agreement with the employee for comp hours in lieu of cash for overtime worked, and need to ensure this agreement is made before the employee commits to IDOC. This agreement needs to occur before the employee starts any work, again looking at Georgia as a guide, IDOC should be having these negotiations and signing agreements during the hiring of the employee. By requiring a comp time agreement before comp hours occur the FLSA ensures a proper balance by giving the employee leverage.

Of course, the COs could take the extreme route with the adoption of a Correctional Officers Union. However, Idaho is very anti-union, even having an anti-union law that was struck down by the Ninth Circuit as being invalid. But unionizing may be a good option for officers to ensure they are being treated, and paid fairly.¹⁹⁴

Whichever route IDOC chooses, it should choose something quick. As time goes by more and more officers are being added to the already large pile of potential lawsuit candidates.

VI. CONCLUSION

Fair pay and fair wages start with fair laws. The FLSA is meant to protect employees from harsh work environments while keeping costs low for employers. The FLSA attempts to strike a balance between employers and employees by allowing states the right to adopt the 207(k) exemption for law enforcement, and allowing the use of comp time in lieu of cash

194. Idaho Bldg. & Constr. Trades Council v. Inland Pac. Chapter of Associated Builders & Contractors, Inc., 801 F.3d 950 (9th Cir. Ct. App. 2013).

payment for overtime. Employers found violating these provisions will be faced with costly penalties.

IDOC is in violation of the FLSA by not paying its employees all due wages promptly and by not having a properly negotiated and timely agreement for comp time in lieu of cash payment.

Idaho State legislators and IDOC should not need more persuasion to change their current policies to at least comply with federal law. However, mere compliancy should not be sought either. The state legislatures and IDOC should seek to find a balance that reduces the high turnover rate amongst its officers while still ensuring a manageable budget. Further, IDOC should rectify its current position by voluntarily paying officers for the hours being held in the RHH bucket. This should be done before lawsuits are brought which have the potential of imposing double penalties.

A. Christi Disparte