

Overtime/Comp Time FAQ

Could our union negotiate for overtime compensation if I work more than 40 hours per week? How could a union address the fact that ENRD attorneys work irregular hours?



ENRD attorneys are required to work by court-imposed deadlines—whether due to an emergency motion, a trial, or simply court-imposed deadlines on a complex brief. The demands of litigation often result in irregular and unpredictable hours, and, often enough, attorneys in ENRD work more than 40 hours per week. An ENRD attorney union could help us manage this irregularity.

As with other areas of bargaining, the proposals we make at the bargaining table will be driven by our needs and goals. Our primary goal is to ensure that employees are recognized for their hard work to further ENRD’s mission, often above-and-beyond the ordinary 40-hour workweek. Once we have a certified union representative, we could choose to pursue some or all of these options at the bargaining table: (1) clarifying and standardizing the rules governing the availability of premium pay (i.e., overtime); (2) clarifying and standardizing compensatory time off in lieu of overtime; (3) establishing a credit hours system; and (4) establishing maxi-flex or other flexible schedules that allow attorneys to manage their own time within a pay period. The bottom line is that we will have options at the bargaining table. There are pros and cons to each approach, and union members will have the final say over what we ask for during bargaining.

Clarifying and standardizing premium pay

Professional employees like attorneys are entitled to overtime only when that pay is “officially ordered or approved.” 5 U.S.C. § 5542(a). Based in part on OPM regulations requiring advance written approval, the Federal Circuit held in *Doe v. United States*, a class action on behalf of DOJ lawyers seeking overtime, that DOJ’s expectation that attorneys work more than 40 hours a week did not constitute “officially order[ing] or approv[ing]” hours over 40, so that attorneys were not entitled to overtime under governing law. 372 F.3d 1347, 1358-64 (Fed. Cir. 2004).

We could not bargain over the rates of premium pay or the other limitations on premium pay (i.e., the limitations on overtime for employees at the GS 15 step 10 level). But, if ENRD attorneys are interested, we could seek to bargain over clarifying and standardizing when ENRD management approves overtime. A collective bargaining agreement could, for instance, seek to memorialize situations when managers are expected to determine whether to pre-authorize overtime; for example, ahead of long trials or back-to-back depositions.

Clarifying and standardizing compensatory time off in lieu of pay

Another form of compensation is “compensatory time off in lieu of overtime.” This is like overtime, but instead of monetary payment, the employee receives additional leave hours. We already receive a form of comp time when we travel for work during non-work hours. Under ENRD [policy](#), travel comp time can be earned for travel approved in E2 by a supervisor and requested in WebTA within five business days of returning from a trip. Similar to premium pay, a

collective bargaining agreement could seek to expand this policy by clarifying that this compensatory time is available for non-travel reasons, and could memorialize the situations in which managers are expected to determine whether to pre-authorize compensatory time.

Establishing a credit hour system

Another way to manage irregular litigation schedules is with a “credit hours” system that is tied to a flexible work schedule. Credit hours are hours that an employee works in excess of an employee’s regularly scheduled hours. An employee may apply credit hours to fulfill work hours in a later pay period, subject to some restrictions.

The Civil Rights Division (CRT) has such a system as a matter of policy. In CRT, credit hours are hours earned for working more than 80 hours per pay period. CRT attorneys can earn up to 24 credit hours for work over 80 hours per pay period, and those hours are “banked” and may be carried over from pay period to pay period. While CRT requires pre-approval for credit hours through WebTA, we may be able to negotiate for credit hours without pre-approval (or for a certain number of hours without preapproval), and would at a minimum be able to negotiate the standards for pre-approval (e.g., a pro forma email with an expectation of pre-approval when the attorney is going to trial, attending long depositions, working on emergency matters, etc.).

Establishing Maxi-Flex/Other Flexible Schedules

There are also other ways to help address ENRD attorneys’ irregular work schedules, including by allowing ENRD attorneys to have more control over their own schedules. One way to do this is to allow attorneys more flexibility to work the hours that are tailored to their and their sections’ needs. The union could, for instance, advocate for ENRD to adopt a “maximum flexibility” schedule. With some limitations, maxi-flex allows employees to determine which 80 hours per week they work, so long as they work 80 hours per pay period. For instance, if you have a response to an emergency motion that requires you to work 60 hours the first week of the pay period, a maxi-flex schedule would permit you to work 20 hours the following week. Many agencies already have this—as does at least one litigating component of DOJ. The Civil Rights Division has a “Flex Schedule” option that allows workweek hours to differ week-to-week within an 80-hour pay period, within certain parameters. A collective bargaining agreement could establish a maxi-flex program, or something similar, for ENRD attorneys.

www.nteu.org/enrd

NTEU
The National Treasury Employees Union