which the employee is actually paid. 
(See 29 CFR 778.107.)

(c) In a workweek or work period 
during which an employee works hours 
which are overtime hours under FLSA 
and for which cash overtime payment 
will be made, and the employee also 
takes compensatory time off, the pay-
ment for such time off may be excluded 
from the regular rate of pay under sec-
tion 7(e)(2) of the Act. Section 7(e)(2) 
provides that the regular rate shall not 
be deemed to include

. . . payments made for occasional periods 
when no work is performed due to vacation, 
holiday . . . or other similar cause.

As explained in 29 CFR 778.218(d), the 
term “other similar cause” refers to 
payments made for periods of absence 
due to factors like holidays, vacations, 
ilness, and so forth. Payments made to 
an employee for periods of absence due 
to the use of accrued compensatory 
time are considered to be the type of 
payments in this “other similar cause” 
category.

§ 553.27 Payments for unused com-
pen-satory time.

(a) Payments for accrued compens-
atory time earned after April 14, 1986, 
may be made at any time and shall be 
paid at the regular rate earned by the 
employee at the time the employee re-
ceives such payment.

(b) Upon termination of employment, 
an employee shall be paid for unused 
compensatory time earned after April 
14, 1986, at a rate of compensation not 
less than—

(1) The average regular rate received 
by such employee during the last 3 
years of the employee’s employment, 
or

(2) The final regular rate received by 
such employee, whichever is higher.

(c) The phrase last 3 years of employ-
ment means the 3-year period imme-
diately prior to termination. Where an 
employee’s last 3 years of employment 
are not continuous because of a break 
in service, the period of employment 
after the break in service will be treat-
ed as new employment. However, such 
a break in service must have been in-
tended to be permanent and any ac-
crued compensatory time earned after 
April 14, 1986, must have been cashed 
out at the time of initial separation. 
Where the final period of employment 
is less than 3 years, the average rate 
still must be calculated based on the 
rate(s) in effect during such period.

(d) The term “regular rate” is de-
finite in 29 CFR 778.108. As indicated in 
§778.109, the regular rate is an hourly 
rate, although the FLSA does not re-
quire employers to compensate em-
ployees on an hourly basis.

[52 FR 2032, Jan. 16, 1987; 52 FR 2648, Jan. 23, 
1987]

§ 553.28 Other compensatory time.

(a) Compensatory time which is 
earned and accrued by an employee for 
employment in excess of a nonstatu-
tory (that is, non-FLSA) requirement 
is considered “other” compensatory 
time. The term “other” compensatory 
time off means hours during which an 
employee is not working and which are 
not counted as hours worked during 
the period when used. For example, a 
collective bargaining agreement may 
provide that compensatory time be 
granted to employees for hours worked 
in excess of 8 in a day, or for working 
on a scheduled day off in a non-
overtime workweek. The FLSA does 
not require compensatory time to be 
granted in such situations.

(b) Compensatory time which is 
earned and accrued by an employee 
working hours which are “overtime” 
hours under State or local law, ordi-
nance, or other provisions, but which 
are not overtime hours under section 7 
of the FLSA is also considered “other” 
compensatory time. For example, a 
local law or ordinance may provide 
that compensatory time be granted to 
employees for hours worked in excess 
of 35 in a workweek. Under section 7(a) 
of the FLSA, only hours worked in ex-
cess of 40 in a workweek are overtime 
hours which must be compensated at 
one and one-half times the regular rate 
of pay.

(c) Similarly, compensatory time 
earned or accrued by an employee for 
employment in excess of a standard es-
established by the personnel policy or 
practice of an employer, or by custom, 
which does not result from the FLSA 
provision, is another example of 
“other” compensatory time.
(d) The FLSA does not require that the rate at which “other” compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment. The rate at which “other” compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself.

(e) The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to “other” compensatory time as described above.

OTHER EXEMPTIONS

§ 553.30 Occasional or sporadic employment—section 7(p)(2).

(a) Section 7(p)(2) of the FLSA provides that where State or local government employees, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purpose of determining overtime liability under the Act.

(b) Occasional or sporadic. (1) The term occasional or sporadic means infrequent, irregular, or occurring in scattered instances. There may be an occasional need for additional resources in the delivery of certain types of public services which is at times best met by the part-time employment of an individual who is already a public employee. Where employees freely and solely at their own option enter into such activity, the total hours worked will not be combined for purposes of determining any overtime compensation due on the regular, primary job. However, in order to prevent overtime abuse, such hours worked are to be excluded from computing any overtime compensation due on a part-time basis (e.g., every week or every other week) at a public park food and beverage sales center operated by that agency, the additional work does not constitute intermittent and irregular employment and, therefore, the hours worked would be combined in computing any overtime compensation due.

(c) Different capacity. (1) In order for employment in these occasional or sporadic activities not to be considered subject to the overtime requirements of section 7 of the FLSA, the regular government employment of the individual performing them must also be in a different capacity, i.e., it must not fall within the same general occupational category.

(2) In general, the Administrator will consider the duties and other factors contained in the definitions of the 3-digit categories of occupations in the Dictionary of Occupational Titles (except...