

October 29, 2013

Ms. Jeanne Jacobson
Acting Deputy Associate Director
Pay and Leave
Employee Services
U.S. Office of Personnel Management
1900 E Street, N.W., Room 7H31
Washington, D.C. 20415-8200

***Re: Proposed Rule on Compensatory Time Off
for Religious Observances (RIM 3206-AL55)***

Dear Ms. Jacobson:

The signatories below comprise a diverse group of national religious and public policy organizations that advocate for religious freedom, including the principle that American workers should be allowed to take time off for religious observance without risking their jobs. Over the decades, our groups have worked to strengthen – in statute and regulation – the fundamental objective of “reasonable accommodation” of an employee’s religious practices.

We submit this document in response to OPM's Proposed Rule with Request for Comments, which was published in the Federal Register on August 30, 2013 and which dealt primarily with "Compensatory Time Off for Religious Observances" for federal employees (2013 Proposal). The "religious compensatory time" (RCT) law is of profound importance to numerous faith-based groups, as it has been widely utilized and has helped many thousands of federal employees observe the dictates of their faith without penalty. Moreover, the implementation and successful operation of this law by our nation’s largest employer – the federal government – has made it a role model and standard-bearer in making “reasonable accommodation” an important principle in both federal and state employment law. We, therefore, have a strong stake in this proposal and are pleased to offer these comments.

As noted in the Supplementary Information, the 2013 Proposal is being issued partly in response to comments OPM received after regulations it proposed in 2005 (2005 Proposal), which were never finalized. As further pointed out by OPM, most comments at the time – including those from several of the organizations below – “focused on the provisions regarding the documentation requirements related to the need for time off and the timeframe limits for earning religious compensatory time off.” With the 2013 Proposal, we believe that OPM has positively addressed these concerns.

Written Documentation – The 2005 Proposal gave federal agencies the latitude to require “acceptable written documentation” from employees requesting RCT. It did not, however, identify the nature of that documentation and what would qualify as

“acceptable.” Presumably, it would be left to each agency or each supervisor to determine what documentation would fulfill this requirement.

Even greater concern was expressed at the time over the fact that the 2005 Proposal’s documentation requirement was intended to ensure that the request was “legitimate” – a determination that goes beyond sincerity of belief. Serious questions were raised about the appropriateness of a government official making a judgment of this kind – essentially one that is religious in nature – and whether putting such discretion regarding religious doctrine or practice in the hands of agency supervisors overstepped First Amendment parameters.

We believe that the 2013 Proposal addresses these two issues in an effective manner. First, Section 550.1004 outlines the specific documentation required of employees. This documentation provides basic, objective information regarding names and dates of holidays, as well as dates and times of scheduled absences and compensatory work. Second, there is no suggestion at all – either in the proposal or in OPM’s analysis – that this documentation will be utilized for the purpose of determining the “legitimacy” of the request or for making any determinations of a religious nature. Indeed, the term has been eliminated. Rather, once an employee makes a request for time off for the observance of a sincerely held religious belief or practice, the agency must determine, as stated in Section 550.1005(b), whether the request would “interfere with the agency’s ability to efficiently carry out its mission.” If it does not, the proposal makes clear that the agency *must* approve the request. (Emphasis added)

These are important amendments to the earlier proposal. We would suggest, however, that simply eliminating mention of an agency’s determination of the “legitimacy” of religious beliefs and practices might not be enough. Indeed, many federal employees complain that such judgments are already being made under the current regulations. We would, therefore, recommend an affirmative statement in the new regulations – one that is contained in OPM Guidelines – that “a supervisor should not make any judgment about the employee’s religious beliefs or his or her affiliation with a religious organization.” (Referenced in GAO-13-96, October 12, 2012, page 5)

Pay Periods – The 2005 Proposal contained a severe time limitation in regard to making up time taken off for religious observances. It established a new requirement that federal employees utilizing RCT would have only three pay periods – 6 weeks – after a particular religious observance to make up the time taken off.

Of course, the number of religious observances varies from faith to faith. But many religious groups found this limitation exceedingly problematic in various ways. For employees of these faiths, the number and timing of religious holidays throughout the year – totaling, in some cases, well over 100 hours – would make it highly impractical, if not impossible, to compensate for that amount of time within a period of 6 weeks. In fact, Jewish federal employees have indicated that it normally takes several months –

sometimes longer – just to pay back time taken for the High Holy Days, Passover and other holidays. Hours and/or days that could not be compensated for under an agency's RCT procedures were charged as annual leave, leave without pay, or other alternatives.

The time limits set forth in the 2013 Proposal represent a significant improvement over the 2005 proposal. Section 550.1005 (c) provides that agencies must provide the employee with the opportunity to earn religious compensatory time off before the end of the 26th pay period – a full year – after the time taken off. Moreover, the Rule as stated in Section 550.1006 would formally and explicitly allow an employee to earn time off for religious observance *prior* to using it up to 26 pay periods in advance. The 2013 Proposal also goes beyond current practice, where the existing regulation's vague "reasonable amount of time" standard has resulted in different policies and has been interpreted by most agencies as a narrow 4-6 pay period window. The 2013 Proposal's 26 pay period standard, we believe, provides ample time to accommodate the religious needs of federal employees and will surely allow them to utilize RCT with greater ease and flexibility.

Overtime – We further believe that there is confusion in RCT terminology. Both statutes and regulations emphasize that religious compensatory time is not overtime and is afforded in lieu of overtime pay. Premium wages are not involved here. Nevertheless, the term used in the proposal to indicate work performed outside of regular hours to make up for time lost due to religious observance is "overtime work."

The use of this "overtime" – even if it modifies "work" and not "pay" – in the RCT context has not only caused confusion, it has had unfortunate consequences. Indeed, a frequent complaint heard from federal employees regarding how agencies administer the program relates to the misuse and improper application of this term. Today, when federal agencies are contending with extremely tight budgets, "overtime" (whether overtime pay or regular compensatory time) is very closely monitored and requires a higher level of approval before it can be authorized. And when approval for actual "overtime pay" is granted it violates the provisions of the statute. In this milieu, the mixed meaning of "overtime" has sometimes worked to the detriment of employees seeking RCT.

Moreover, the Proposed Rule itself points out another problem with the use of the term. In Section 550.1003, the definitional section, the term "overtime work" is "deemed to include work performed by a part-time employee outside of his or her scheduled tour of duty, even if that work is below applicable overtime thresholds" (for example, below 40 hours in a week or 8 hours in a day). The problem of applying "overtime" to part-time situations that have no semblance to "overtime" is obvious.

We would suggest using a different term – one that would eliminate this confusion and would more accurately describe the nature of RCT. Descriptive expressions (with slight variation) such as "rearrangement of core hours," "work outside of scheduled tour of

duty,” “modification in work schedules,” “work performed to earn religious compensatory time off,” and “work performed to make up for absence due to RCT” are all found in the Proposed Rule in its Preamble. They are appropriate to be used here, in the definitional and other sections (with refinement, if necessary). We are confident that this change will go far in lessening any misunderstanding in the future.

Adjustments – Another RCT problem reported by federal employees occurs when adjustments need to be made to the make-up dates and times contained in the original written request. In the majority of cases, employees can, and do, keep to the proposed schedule. There are instances, however, when unforeseen events intervene that make it onerous, if not impossible, to precisely follow the original dates and hours. This is common – perhaps inevitable – in all employment contexts.

Unfortunately, employees sometimes confront inflexibility from supervisors when – in light of changed circumstances – seeking to adjust make-up dates within RCT. There is no rationale to distinguish between RCT and other leave categories (sick leave, annual leave, etc.), where daily revisions can be made to a proposed leave schedule on a pay period by pay period basis.

The rigidity of some supervisors to allow for reasonable revisions specifically in the RCT context has understandably lead to a degree of tension in some federal workplaces. We believe OPM can help alleviate this situation by explicitly providing allowance for adjustments by adding after Section 550.1004(b)(3):

“(b)(3)(i) In the event that an adjustment to the dates and times of overtime work is required, the employee will submit to the supervisor for approval a revised schedule that reflects those changes.”

GAO Report – In October 2012, the Government Accountability Office (GAO) – in response to a request made by the Chairman of the Senate Homeland Security Committee, Senator Joseph I. Lieberman – submitted a report on the RCT policies of selected federal law enforcement and transportation security agencies. Its conclusions are too lengthy and detailed to present here. Suffice it to say that the GAO found that in some respects the administration of agency policies were the same; in other respects the administration of agency policies were different. In at least one area – i.e. the disposition of unused compensatory time off for religious observances – the GAO concluded that differences in agency policy may reflect a lack of clarity in OPM regulations. GAO called on OPM to clarify RCT policies for agencies and recommended that GAO establish a time frame for finalizing proposed revised regulations for the federal law.

Our organizations have experienced a similar reality. During holiday seasons, we receive phone calls from a number of constituents confronting difficulties utilizing RCT. Our experience and research have shown that, while the program has worked well, there is

sometimes a lack of uniformity in how RCT is implemented across the federal system. In these cases, it takes time to sort things out and we find – more often than not – that the confusion comes as a result of a lack of detailed regulatory guidance or from differing understandings and interpretations of what the regulations require.

We congratulate OPM for seeking to address this issue. As noted in the Supplementary Information, this proposal is based partly on the GAO recommendations and the reader can detect specific provisions that respond to some of the issues raised in the report. The goal of uniformity is clearly evident in the proposal. The analysis of Section 550.1006 speaks of providing “rules for scheduling time to earn and use religious compensatory time off to establish a consistent and effective Governmentwide approach” and that “this proposal now provides a common approach, with specific information regarding the details the employee must supply under section 550.1004.”

Other Issues – OPM (in the Preamble and the Proposed Rule) favorably addresses other issues, some of which have been problematic in the past. Such inclusion and explanation will better ensure compliance and consistency. They include:

- Bringing part-time employees and hours worked on legal holidays within the scope of RCT (Section 550.1003);
- Encouraging supervisors “in the spirit of the religious compensatory time off law” to accommodate the religious requirements of those who do not come within the scope of RCT (e.g. intermittent employees or leave-exempt Presidential appointees) (Preamble);
- Allowing agencies to require employee requests to be made either orally or in writing (Section 550.1005), and clarification by OPM that agencies may allow supervisors – even where written requests are required – to “informally” approve such requests (Preamble);
- Allowing, as noted above, RCT to be earned 26 pay periods *before* and *after* a religious observance (Section 550.1006); and
- Allowing unused RCT to be carried over from one religious observance to another – even if the second observance is 26 pay periods after time off was originally earned and allowing new RCT to be earned within a new 26 pay period timeframe if that carryover is insufficient (Section 550.1007).

Conclusion – The importance of the statute allowing for compensatory time off for religious observances cannot be overstated. As noted above, religious organizations have reported that federal employees have generally utilized the RCT system successfully. All would agree that it has been a program that works. All would also agree that the current regulations offer only limited rules and information. OPM’s 2013 Proposal helps establish consistency, clarify responsibilities and provide details in regard to a wide range of RCT areas. This will strengthen the law and the protections it provides.

Our organizations stand ready to work together with OPM in ensuring that the Compensatory Time Off for Religious Observances law, and its implementing regulations, continue to live up to their promise of providing a full measure of religious accommodation in the federal workplace.

Respectfully submitted,

AGUDATH ISRAEL OF AMERICA

AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AAJLJ)

AMERICAN CENTER FOR LAW AND JUSTICE

AMERICAN CIVIL LIBERTIES UNION

AMERICAN ISLAMIC CONGRESS

AMERICAN JEWISH COMMITTEE (AJC)

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

ANTI-DEFAMATION LEAGUE

B'NAI B'RITH INTERNATIONAL

CENTER FOR ISLAMIC PLURALISM

CHRISTIAN LEGAL SOCIETY

HINDU AMERICAN FOUNDATION

INTERFAITH ALLIANCE

NATIONAL ASSOCIATION OF EVANGELICALS

NATIONAL COUNCIL OF JEWISH WOMEN

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (COLPA)

RELIGIOUS ACTION CENTER OF REFORM JUDAISM

SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND (SALDEF).

SIKH COALITION

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