

**SIDE LETTER AGREEMENT BETWEEN THE CITY OF SAN DIEGO AND  
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,  
AFL-CIO, LOCAL 127  
RELATED TO COMPENSATORY TIME OFF**

Pursuant to the provisions of the Meyers-Miliias-Brown Act (MMBA) and San Diego City Council (Council) Policy 300-06, this Side Letter Agreement (Agreement) is entered into between the City of San Diego (City) and the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (L127) related to Compensatory Time (Comp Time). The City and L127 are collectively referred to as the "Parties."

Background and Overview

This Agreement relates to modifications to the City's program allowing employees the option to receive either compensatory time off ("Comp Time" or "CTO") or pay for overtime hours worked ("Comp Time Program"). This Agreement was reached after a good faith meet and confer process under the MMBA in response to City's determination, based on the advice of tax counsel, that the accrual/cash-out feature of City's Comp Time Program must be modified to comply with Internal Revenue Service (IRS) Regulations.

Under these Regulations, the IRS considers income to be received for tax purposes if the individual actually receives it or has an option to receive it during each tax year. This is known as the constructive receipt doctrine. Several IRS private letter rulings illustrate how the IRS applies this doctrine in an analogous situation when employees are given the option to cash out accumulated paid leave. In these private letter rulings, the IRS has concluded that paid leave accruals must be included in an individual's gross income for the tax year in which these accruals were credited to his or her account if the employee has a cash out option, even if the individual does not elect to cash out the accruals in that tax year. As far as the IRS is concerned, the fact that the individual has an unrestricted right to cash out accumulated paid leave means that he or she is in constructive receipt of this cash and it must be included in the individual's gross income for the tax year even if no election is made during the tax year to cash out the accumulated paid leave.

Application of this constructive receipt doctrine to the City's Comp Time Program would mean that all overtime which an employee designates as CTO would have to be taxed in the payroll period when it would otherwise be paid as cash even though the employee might not take the CTO until weeks or months later. This is because the City's Comp Time Program currently allows the employee an unimpeded option to convert this CTO back into cash rather than take it as actual time off.

However, because the constructive receipt doctrine is concerned with the tax year in which taxable income is actually or constructively received, the City's Comp Time Program allowing an employee to opt for CTO instead of cash can remain in effect so long as all Comp Time the employee accrues during a calendar year is cashed out before the end of the year in which the overtime was worked and allocated to the employee's Comp Time account.

Based on the above, the City has proposed and L127 has agreed to modify the Comp Time Program prospectively to comply with applicable IRS Regulations by ensuring that all Comp Time is either used or cashed out in the tax year in which it is earned so there is no constructive receipt of income as the IRS defines it.

This modification is designed to preserve the employee's ability to (1) opt for CTO instead of cash when overtime is worked; and (2) convert that CTO back into cash instead of taking the actual time-off.

The details related to the accrual and cash-out of Comp Time are set forth below. Unless otherwise noted herein, an employee's right to accrue and cash-out Comp Time as specified in Administrative Regulation 95.01, Personnel Regulation Index Code H-4, and L127's current MOU, remains unchanged.

Terms of Agreement

The Parties agree as follows:

1. The Parties have met and conferred in good faith in accordance with the MMBA on the subject matter and terms of this Agreement.
2. The Parties will submit this Agreement to the City Council for final determination. This Agreement is not binding on the City or L127 unless and until it is approved by a two-thirds vote of the Council in accordance with San Diego Charter section 11.2. This Agreement will take effect upon the date of final passage of a City Council resolution approving this Agreement.
3. Effective immediately, the Comp Time Program will be governed by a calendar year rather than a fiscal year deadline when balances must be used or cashed out not merely reduced. As such, employees will have until December 13, 2019 to use or cash-out any and all accrued Comp Time regardless of the fiscal year when it was added to his or her account balance. If an employee has not used or requested to cash-out accrued Comp Time by December 13, 2019, the City will cash it out without the employee's prior consent so that the cash is included in the employee's final pay check for the 2019 calendar year and the employee's Comp Time account balance is zero.
4. Effective on January 1, 2020, an employee will only be allowed to use or request the cash-out of accrued Comp Time within the same calendar year in which the employee elected Comp Time instead of cash for overtime worked.
5. Local 127 MOU, Article 22 (Annual Leave and Compensatory Time) Paragraphs I and K, will be amended, and stated as follows:

Compensatory Time

1. Overtime will be paid or Compensatory Time Off given at the discretion of the Department Director or designee subject to the availability of funds and workload considerations in an amount not to exceed one-hundred-twenty (120) hours annually.
2. An employee may only use or cash out CTO during the calendar year in which it is earned.
3. All accrued and unused CTO balances will be cashed out on the last pay day of each calendar year so that the employee's CTO account is reduced to a zero balance.

4. Employees may use or cash out CTO accrued at any time during the calendar year, prior to the last pay period of the calendar year. No unused CTO hours may be carried over to a subsequent calendar year. No CTO can be elected for overtime worked during the last pay period of the calendar year.
5. Employees will not have the option to take CTO instead of cash when the Department is reimbursed by another governmental agency for Overtime worked by the employee. Overtime earned in accordance with the FLSA will be paid in the pay period in which it is earned.
6. Since this modification in the City's use and accrual of Comp Time requires a transition from a fiscal-year to a calendar-year platform, the City will also communicate the following information to employees on a date mutually agreed upon by both parties:
  - a. That a change in the use and accrual of Comp Time has been implemented in order to be in compliance with IRS regulations and this change affects Comp Time balances during the current 2019 calendar year;
  - b. That this change requires employees to either use their CTO before December 13, 2019 or request conversion of all remaining Comp Time to cash by December 13, 2019, for payout before the end of the calendar year. Employees will be informed that their failure to use the CTO or to make a timely request to convert it to cash will result in the City automatically cashing it out in full for inclusion in the final paycheck of the year. No CTO can be elected for overtime worked during the last pay period of 2019 (December 14 through December 31, 2019).
7. Administrative Regulation 95.01 - Overtime Compensation will be amended as attached. (Attachment 1)
8. Unless expressly covered in this Agreement, all wages, hours, and other terms and conditions of employment presently enjoyed by L127-represented employees, whether stated in an MOU, Personnel Regulation, Administrative Regulation or in any other enforceable document, remain in full force and effect.
9. Upon approval by the City Council, this Agreement is intended to be read in conjunction with the MOU and where in conflict on the specific issue covered by this Agreement, this Agreement will control.
10. The Parties will incorporate the language set forth in this Agreement into any successor MOU negotiated by the City and L127 which is approved by the City Council, as well as into any applicable Administrative Regulations and Personnel Regulations:

**ATTACHMENTS:**

1. Administrative Regulation 95.01 - Overtime Compensation, dated July 3, 2019.

This Agreement is executed by the following authorized representatives of each party:

Local 127, American Federation of State, County and Municipal Employees, AFL-CIO

City of San Diego

By: [Signature]  
Rodney Fowler, President

By: [Signature]  
Timothy Davis, Lead Negotiator

Date: 9/6/2019

Date: 9/10/19

Director, HR

By: [Signature]  
Abby Jarl-Veltz, Deputy Assistant

Date: 9/10/19

By: [Signature]  
Curt Glaser  
HRO, Human Resources

Date: 9-10-19

Approved as to form this 11<sup>th</sup> day of September, 2019.

MARA W. ELLIOTT, City Attorney

By: [Signature]  
Thomas Brady  
Deputy City Attorney