

**SIDE LETTER AGREEMENT BETWEEN THE CITY OF SAN DIEGO AND  
SAN DIEGO POLICE OFFICERS ASSOCIATION  
RELATED TO COMPENSATORY TIME OFF**

Pursuant to the provisions of the Meyers-Milias-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 San Diego Police Officers Association (POA) related to Compensatory Time (Comp Time). The City and POA 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 and POA have agreed to two options to modify the Comp Time Program prospectively to comply with applicable IRS Regulations. The POA will conduct membership meetings on September 3, 2019 and September 4, 2019 to discuss these two options. Following these meetings, the POA will conduct a vote on which option to select. The POA will advise the City's team no later than September 10, 2019 which option the membership selected.

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 POA's current MOU, remains unchanged. In addition, employees continue to enjoy the right to make contributions from overtime pay into the City's 457 and 401k plans in accordance with plan documents on file with the City.

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.

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2. The Parties will submit this Agreement to the City Council for final determination. This Agreement is not binding on the City or POA 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. Unless expressly covered in this Agreement, all wages, hours, and other terms and conditions of employment presently enjoyed by POA-represented employees, whether stated in an MOU, Personnel Regulation, Administrative Regulation or in any other enforceable document, remain in full force and effect.
4. 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.
5. The Parties will incorporate the language set forth in this Agreement into any successor MOU negotiated by the City and POA which is approved by the City Council, as well as into any applicable Administrative Regulations and Personnel Regulations.
6. Notwithstanding paragraph 5, the Parties agree that neither side will propose to changes to Article 32 Section, F, G and H of the MOU during the FY21 negotiations. Instead, either party will have the right to request to reopen negotiations on the preferred annual leave portion of option 1 or the 40 hour leave bank in option 2 upon written request to the other during the month of March 2021. If requested by either party, the parties agree to meet and confer in good faith in accordance with the provisions of the MMBA.
7. 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).

Option 1

8. 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.
  - a. Any employee who has 40 or more accrued hours of comp time on December 13, 19 will be permitted to use up to twenty (20) hours of preferred annual leave from December 13<sup>th</sup>

through the end of February 2020 subject to the timeliness in Article 32 Section H of the MOU.

9. 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.
10. POA MOU, Article 32 (Overtime), Paragraphs F and G 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. Compensatory time earned and accrued through overtime work will be banked in a leave bank up to a maximum of eighty (80) hours.
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 full 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.
  - a. Any employee who has 40 or more accrued hours of comp time which is cashed out on the last pay date of the year will be permitted to use to up to twenty (20) hours of preferred annual leave from the date of the last pay date through the end of February in the next calendar year subject to the terms in Article 32 Section H of the MOU.
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.

Option 2

11. POA MOU, Article 32 (Overtime), Paragraphs F and G will be amended, and stated as follows:
12. 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.
13. Employees are eligible to receive create a "comp time leave bank" up to a maximum payment of forty (40) hours per calendar year. This benefit is known as the "comp time leave bank" and is subject to the following rules:

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14. Comp time earned prior to December 13, 2019 is not eligible for the comp time leave bank.
15. Effective immediately, prior to December 1 of each calendar year, an employee may voluntarily and irrevocably elect to receive up to forty (40) hours of overtime expected to be earned in the following calendar year into their comp time leave bank in an amount not to exceed forty (40) hours. If an employee elects to receive a comp time leave bank in the next calendar year, then the City will create a comp time leave bucket accrual account for the overtime ("Comp Bucket"). The Comp Bucket will be credited with the employee's earned overtime until the employee's full election amount is reached. During this period of time, no earned overtime will be paid as cash until the Comp Bucket election amount is complete. Once the Comp Bucket is credited with the full amount for the calendar year, all earned overtime will be paid in cash for the remainder of the calendar year, with no exceptions.
16. All time in the Comp Bucket can only be used for time off subject to the provisions in Article 32 Section H of the MOU. Any unused time in the Comp Bucket will carry over from one calendar year to the next until exhausted. Upon promotion outside of the POA or upon termination, any accrued and unused comp time hours will be paid in cash. The comp time leave hours will be based on the employee's rate of pay at the time of the payout and is taxable income, subject to all applicable withholding amounts and payroll deductions.
17. Irrevocable elections to receive comp time leave must be made on an annual basis. Elections will not carry over from one calendar year to the next calendar year.
18. If the employee does not accrue all requested comp time leave hours in the calendar year, the Comp Bucket will be reduced to the total number of comp time leave hours the employee actually accrues in the calendar year.
19. An employee who does not elect to receive comp time leave by December 1 waives his or her right to do so and all overtime accrued in the next calendar year will be paid in cash.
20. An employee who does elect to receive comp time leave will be paid in cash for all overtime earned after the Comp Bucket is filled to the elected amount.

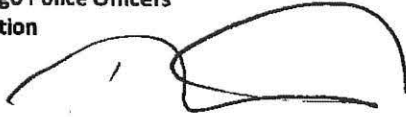
**ATTACHMENTS:**

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

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


San Diego Police Officers  
Association

By:

  
Brad Fields, Lead Negotiator

City of San Diego

By:

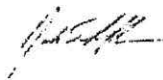
  
Timothy Davis, Lead Negotiator

Date:


9/26/19

Date:

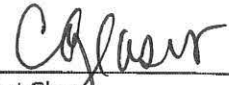
10-4-19

By:   
Jack Schaeffer, President

Date: September 10, 2019

By:   
Abby Jarl-Veltz, Deputy Director, HR  
Assistant

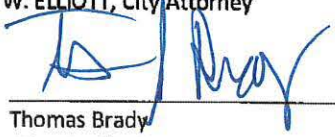
Date: 9/17/19

By:   
Curt Glaser  
HRO, Human Resources

Date: 9-17-19

Approved as to form this 1st day of October, 2019.

MARA W. ELLIOTT, City Attorney

By:   
Thomas Brady  
Deputy City Attorney

21. POA MOU, Article 32 (Overtime), Paragraphs F and G will be amended, and stated as follows: