The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress's Lack of Clarity

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In 1985, the Supreme Court decided the landmark case *Garcia v. San Antonio Metropolitan Transit Authority*¹ and effectively removed the tenth amendment as a substantive barrier to congressional action vis-à-vis the states.² *Garcia* also required states to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA or Act).³ In response to the significant additional costs of applying the FLSA to the states, Congress amended the FLSA in 1985 to allow states and their political subdivisions to grant compensatory time⁴ in lieu of overtime.⁵

After the 1985 amendments, the FLSA requires that state and local governments grant compensatory time only pursuant to agreements with their employees.⁶ Such agreements must be between either the public sector employer and the employees' representative,⁷ or between the public sector employer and individual employees.⁸ The statute, however, does not clearly define when a state or political subdivision must enter into a compensatory time agreement with its employees' representative.⁹ The legislative history and administrative regulations

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2. See infra notes 23-26 and accompanying text.
3. See infra notes 24-26 and accompanying text.
4. Department of Labor Regulations define "compensatory time" as "paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA." 29 C.F.R. § 553.22 (1990).
8. Id. § 207(o)(2)(A)(ii).
9. The text of subclause (ii) provides that it covers all those employees not covered under subclause (i). Id. Subclause (i), however, does not define which employees it covers. Id. § 207(o)(2)(A)(i). It speaks only of an agreement between the employer and the representative of its employees. Id. It does not give any indication concerning when employees have a representa-
concerning the FLSA's agreement requirement are similarly unhelpful.\(^{10}\)

Since the 1985 amendments, courts have struggled with the application of this "agreement with representative" requirement.\(^{11}\) This Note argues that Congress did not intend the 1985 FLSA amendments to change existing state labor relations law with respect to the definition of a collective bargaining representative. Part I examines the text and legislative history of the 1985 amendment and the conditions that influenced its passage. Part I also reviews the various systems of state labor relations present when Congress amended the FLSA. Part II analyzes the cases construing the agreement requirement of the 1985 Act. Part III suggests that courts read the 1985 amendments as requiring an agreement between the state and the employees' representative only when such an agreement would be consistent with the state's existing system of public employee employer relations. This Note therefore proposes that states be allowed to use the compensatory time option pursuant to agreements with individual employees, unless the applicable state labor relations law or practice provides a clearly defined obligation to bargain with the employees' representative, or unless the state or local government has engaged in past, court-approved, collective negotiation.

I. LEGISLATIVE HISTORY AND CONTEXT

A. HISTORICAL BACKGROUND

The Fair Labor Standards Act provides minimum wage and maximum hour protections for approximately three-fourths of people employed in the United States.\(^{12}\) The FLSA forbids

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covered private employers from granting compensatory time to their employees in lieu of cash payments for overtime worked.\textsuperscript{13} As originally enacted, however, the FLSA did not apply to states or their political subdivisions.\textsuperscript{14} Because they were not covered by the FLSA, state and local governments were free to award compensatory time to their employees for overtime worked.\textsuperscript{15}

In 1974, however, Congress amended the FLSA, extending the Act's reach to most state and local employees.\textsuperscript{16} The National League of Cities quickly challenged the 1974 amend-

\begin{quote}
employee receives compensation for his employment in excess of the
hours above specified at a rate not less than one and one half times
the regular rate at which he is employed.
\end{quote}


13. The Secretary of Labor had ruled that compensatory time could not be used in lieu of overtime wages for employers and employees covered by the FLSA. See H.R. Rep. No. 331, supra note 12, at 19. Even if the Secretary would have allowed such use of compensatory time, however, earlier court decisions had effectively outlawed the use of compensatory time for those employees covered by the Act. See Walling v. Harnischfeger Co., 325 U.S. 427 (1945). In Walling, the Court said that the overtime requirements meant that any compensatory time awarded in lieu of overtime pay would have to be taken during the pay period in which the overtime hours were worked. Thus, employees could not "bank" compensatory time for future use. Id. at 435. Because it is unlikely that employees would be able to take time off during a pay period in which they had worked overtime, compensatory time is of little value to those employers whose employees are covered by the FLSA.

14. Initially, state and local government employees were not included in the definition of employees covered by the Act. Furthermore, such agencies were not defined as employers covered by the Act. Moreover, the Act contained a specific exemption from its provisions for state and local government employees. Fair Labor Standards Act of 1938, ch. 376, 52 Stat. 1060 (originally codified at 29 U.S.C. § 203(d) (1940)), provisions repealed by Act of Apr. 8, 1974, Pub. L. 93-259, § 6(a)(1), 88 Stat. 58, 64.

15. In 1974, Congress amended the FLSA, extending its coverage to nearly all state and local government employees. States therefore could not grant compensatory time. See Act of Apr. 8, 1974, Pub. L. 93-259, § 6(a)(1), 88 Stat. 58, 64. This restriction, however, lasted for only two years. The application of the FLSA to the states was quickly declared unconstitutional in National League of Cities v. Usery, 426 U.S. 833, 852 (1976). See infra notes 18-20 and accompanying text. Until the Supreme Court's 1985 decision in Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985), states effectively were able to grant compensatory time.

ments on constitutional grounds. In the 1976 case of *National League of Cities v. Usery*, the Supreme Court held that the 1974 amendments violated the tenth amendment. The Court concluded that federal laws that interfere with the states' performance of "traditional government functions" violate the concepts of federalism embodied in the tenth amendment. According to the Court, the application of the FLSA to the states would interfere with traditional aspects of state sovereignty by dictating how states should allocate state resources and deliver essential state services. As a result of *National League of Cities*, the FLSA no longer applied to state and local governments. Freed from the constraints of the FLSA, many states and municipalities either developed or reincarnated the practice of awarding compensatory time for overtime hours worked.

*National League of Cities* spawned much litigation over the definition of a "traditional government function." The lower federal courts found the "traditional government functions" standard particularly difficult to apply in individual cases. In 1985, the Supreme Court responded to the problems caused by *National League of Cities* by overruling the case in *Garcia v. San Antonio Metropolitan Transit Authority*. Specifically, the *Garcia* Court held that the FLSA could constitutionally apply to states and their political subdivisions. The decision

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18. *Id.* at 852. The complaint in *National League of Cities* was not that Congress had exceeded its power to regulate commerce in extending FLSA coverage to employees of state and local governments, but that the tenth amendment affirmatively prevented the exercise of that power. *Id.* at 837. The Court stated: "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* at 852.
19. *Id.*
22. See generally H.R. REP. NO. 331, supra note 12, at 18 (discussing these problems).
24. *Id.* at 556. In *Garcia*, the Supreme Court initially granted certiorari to determine whether public transportation constituted a "traditional government function" as contemplated by the *National League of Cities* decision. 469
rested both on a determination that the "traditional government functions" standard was unworkable and on a changed view of federalism: that the political process, not the tenth amendment, served to protect state sovereignty from intrusive congressional action. Under Garcia, then, state and local governments became subject to the overtime compensation requirements of the FLSA. After Garcia, the Department of Labor quickly adopted guidelines to ensure state and local government compliance with the FLSA.

U.S. at 536. Without deciding that issue, the Court ordered that the case be re-argued on the issue of whether National League of Cities should be overruled. Id.

25. The Court noted that it was impossible to state a coherent principle to explain the outcome of cases decided in the lower federal courts applying the "traditional government function" standard. Id. at 538. The Court also stated that none of the tests proposed in lower court cases to distinguish between state activities Congress could regulate and those it could not seemed workable. Id. at 545.

26. Id. at 552, 556. The Court's real reason for overturning National League of Cities was that the decision rested upon an improper conception of the role of the courts in a federal system. Id. at 546. Allowing the federal government to decide which state functions were traditional allowed the federal government to decide which state policy decisions it preferred. Id.

Therefore, in determining the scope of a state's protection from intrusions by the federal government, the Court rejected the idea that it could use "freestanding conceptions of state sovereignty." Id. at 550. The Court instead concluded that state integrity was to be protected by the structure of the federal government and the opportunity of the states to influence the composition of the federal government. Id. at 552. The Court stated:

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of authority under the Commerce Clause must reflect that position. But the principle and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 556.

27. The Department of Labor concluded that the effective date of the Garcia decision, April 15, 1985, would be the date from which the Department would measure compliance. Brock, The Application of the FLSA to State and Local Governments, 36 LABOR L.J. 739, 740 (1985). The Department said it would begin investigating compliance with the FLSA on October 15, 1985, for those state and local entities that had been considered "traditional" under National League of Cities, and would assess backpay beginning from April 15, 1985. Id. at 741. The Department also concluded that it could not delay the application of Garcia, phase it in over time, or revise overtime provisions for police and firefighters in order to relieve the burden on states and local agencies. Id. The Department believed that the legislative history of the Act did not allow them to make these kinds of adjustments. Id.
B. TEXT OF THE 1985 AMENDMENTS

The costs of immediate compliance with the FLSA, particularly the provisions requiring overtime payment, seriously concerned many state and local governments. In light of these concerns, Congress amended the FLSA overtime provisions in 1985. Congress sought to relieve states of part of the

29. The Senate Report states:

   In particular, in the wake of Garcia, the States and their political subdivisions have identified several respects in which they would be injured by immediate application of the FLSA. . . .

   The Committee recognizes that the financial costs of coming into compliance with the FLSA — particularly the overtime provisions of section 7 — are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional financial responsibilities which in at least some instances could be substantial.

   . . . .

   The committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled work week. These arrangements — frequently the result of collective bargaining, reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.

S. REP. NO. 159, supra note 20, at 7-8, 1985 U.S. CODE CONG. & ADMIN. NEWS at 655-56.

With respect to the costs of compliance with the FLSA, a letter to the Senate committee from Rudolph Penner, director of Congressional Budget Office, stated that "[o]ur preliminary analysis, based on information from over 30 states, communities, and concerned organizations, indicates that full application of the FLSA wage and overtime provisions as required by [the Garcia] decision would result in initial annual compliance costs totalling between 0.5 to 1.5 billion nationwide." Letter from Rudolph G. Penner to Senate Committee on Labor and Human Resources (Oct. 15, 1985), reprinted in S. REP. NO. 159, supra note 21, at 16, 1985 U.S. CODE CONG. & ADMIN. NEWS at 664.


(o) Compensatory time
   (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
burden of compliance with the FLSA overtime provisions, while still protecting public employees who work overtime.\textsuperscript{31} The 1985 amendments accomplish this dual purpose by allowing state and municipal governments to agree with their employees to award compensatory time\textsuperscript{32} in lieu of monetary payments for overtime.\textsuperscript{33} Furthermore, the 1985 amendments require that state and local governments award compensatory time at a rate not lower than one and one-half hour for every overtime hour an employee works.\textsuperscript{34} Failure to abide by these conditions subjects a state or local government to liability for double the overtime compensation owed and invalidates the public employer's compensatory time plan.\textsuperscript{35}

\begin{enumerate}
\item[(2)] A public agency may provide compensatory time under paragraph (1) only —
\begin{enumerate}
\item[(A)] pursuant to
\begin{enumerate}
\item[(i)] applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and the representatives of such employees; or
\item[(ii)] in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employees before the performance of the work; and
\end{enumerate}
\item[(B)] if the employee has not accrued compensatory time in excess of the limit applicable to the employee proscribed by paragraph (3).
\end{enumerate}
\end{enumerate}

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

\textit{Id.}

31. Congress passed the 1985 amendments to relieve states of the burden of full compliance with FLSA overtime provisions. The stated purpose for the amendments was "to provide flexibility to state and local governments and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees." H.R. Rep. No. 331, supra note 12, at 19.


35. The penalties section of the FLSA, 29 U.S.C. § 216 (1988), provides in
The FLSA amendments require public sector employers to enter into compensatory time agreements with their employees before the employees log any overtime. Such an agreement may take one of two forms. Section 207(o)(2)(A)(i) of the FLSA provides that states and municipalities may make compensatory time agreements pursuant to “applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees.” Section 207(o)(2)(A)(ii) provides that, in cases of employees not covered by subclause (i), state and local governments may grant their employees compensatory time pursuant to “an agreement or understanding arrived at between the employer and employee before the performance of the work.” Thus, if employees are covered by subclause (i), and the state does not reach agreement with the employees’ representative, the state may not grant compensatory time. If subclause (i) does not cover the employees, the state may agree with individual employees to grant compensatory time, or may continue granting compensatory time under a plan created before the effective date of the 1985 amendments to the FLSA.

The FLSA, however, does not clearly define when each section applies. Although section 207(o)(2)(A)(ii) applies to “employees not covered by subclause (i),” section 207(o)(2)(A)(i) does not explicitly state which public employees it covers. Rather, it speaks only in terms of the type of agreement:

pertinent part: "Any employer who violates the provisions of section 206 or section 207 of this title [29 U.S.C. §§ 206, 207] shall be liable to the employee or employees affected in the amount of their ... unpaid overtime compensation, ... and in an additional equal amount as liquidated damages." Id. § 216(b).

36. Id. § 207(o)(2)(A)(i); see also supra note 30 (quoting text of section involved).
38. Id. § 207(o)(2)(A)(ii).
39. Section 207(o)(2)(B) allows employers to continue granting compensatory time to employees who were hired before the effective date of the 1985 amendments. This exception, however, applies only to those employees with whom the state could reach individual compensatory time agreements under subclause (ii). Id. Compensatory time plans commenced before the effective date of the amendments must, however, comply with all other requirements of the amendments, including the time and a half provision. Id.
40. Id. § 207(o)(2)(A)(ii).
41. Subclause (i) does not explicitly define what kind of employees are covered by the FLSA. It states that compensatory time may be awarded pursuant to “applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and the representatives of such employees.” Id. § 207(o)(2)(A)(i). Unfortunately,
ment a state must have with its employees. Congress’s failure to clearly define when a state may agree with individual employees concerning compensatory time, and when it must agree with its employees’ representative, has led to much confusion and litigation.

C. LEGISLATIVE HISTORY CONCERNING THE SCOPE OF SECTION 207(o)(2)(A)(i) OF THE FLSA

There is little direct legislative history concerning the relationship between sections 207(o)(2)(A)(i) and 207(o)(2)(A)(ii) of the 1985 amendments. The conference report on the bill does not even mention the issue.42 Both the House and Senate committee reports, however, suggest that the presence or absence of a representative, and not an agreement, is the triggering event for the application of section 207(o)(2)(A)(i).43 The committee reports from the two houses do differ in important respects, however, concerning the kind of representative required to trigger the application of section 207(o)(2)(A)(i). The House Report states that section 207(o)(2)(A)(i) refers to a representative “designated” by the employees.44 In contrast, the Senate Report states that the representative must be one

the FLSA does not define when such agreement is required. The courts that have considered the issue have differed as to what triggers the application of subclause (i) and thus the requirement of agreement with the employee’s representative. See infra notes 70-102 and accompanying text.


43. The House Committee Report states that

The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and the employee, or notice to the employee, prior to the performance of the work. Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer, either through collective bargaining, through a memorandum of understanding or other type of agreement. Where employees do not have a representative, the agreement or understanding must be between the employer and the individual.

H.R. REP. No. 331, supra note 12, at 20 (emphasis added). The Senate Report concludes that “[w]here the employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee.” S. REP. No. 159, supra note 20, at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 658 (emphasis added).

44. The House Report explained the meaning of representative as follows:

Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer . . . .” H.R. REP. No. 331, supra note 12, at 20.
“recognized” by the state or agency to trigger the section 207(o)(2)(A)(i) agreement requirement.45

Other sources of legislative history have figured significantly in the courts’ interpretation of the relationship between sections 207(o)(2)(A)(i) and 207(o)(2)(A)(ii). For example, the implementing regulations46 promulgated by the Secretary of Labor refer to a “designated” representative.47 Comments to the regulations also provide that state law should control the question of what constitutes a representative for the purposes of section 207(o)(2)(A)(i).48 Courts also have cited a post-enact-

45. The Senate report referred to representative in the following terms: “Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee.” S. REP. No. 159, supra note 21, at 10, 1985 U.S. CODE CONG. & ADMIN. NEWS at 658. Every court of appeals that has considered this issue has determined that “recognized” representative means a group that the state somehow has agreed to meet with for purposes of deciding compensatory time issues. See infra notes 76-91 and accompanying text.


47. The regulations read:

Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.


48. The comments to the regulations state:

The Department believes that the proposed rule accurately reflects the statutory requirement that a [collective bargaining agreement], memorandum of understanding or other agreement be reached between the public agency and the representatives of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department’s intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.
ment letter from sponsors of the 1985 amendments to the Secretary of Labor agreeing with the Labor Department's interpretation of representative as a "designated" representative.

D. THE STATE LABOR RELATIONS LAW CONTEXT

When Congress passed the 1985 amendments to the FLSA, it noted that states and municipalities had a wide variety of labor relations laws. Unlike the private sector, no overarching federal framework exists to regulate labor relations between states and their employees. The National Labor Relations Act (NLRA), which regulates private sector collective bargaining, does not apply to public sector employment relation-

49. See Abbott v. City of Virginia Beach, 879 F.2d 132, 135 (10th Cir. 1989),

Section 2 of the 1985 Amendments provides that state and local governments may use compensatory time in lieu of cash payment for overtime only after certain conditions are met. Among those conditions is the agreement of representatives of the employees involved where such employees have designated a representative. (See FLSA Section 7(o)(3)(A)(i), as added by Section 2(a) of the 1985 Amendments.) We were careful in developing the amendment to be clear that the representative need not be a formally recognized collective bargaining representative and that recognition by the employer was not required.

It is the employees' designation, and not the employer's recognition or attitude toward that representative, that is vital. FLSA Section 7(o)(3)(A)(i) was specifically drafted to avoid any requirement of formal recognition. During the consideration of the legislation, specific references were made to a number of states where NLRA collective bargaining style recognition does not exist; but where large numbers of fire, police, and general public employees belong to labor organizations. We intended the FLSA requirement of an agreement on compensatory time to apply in those situations.


50. Id.
Although courts have held that public employees have a constitutional right to form and join labor unions, they have also held that states are not constitutionally required to bargain with those unions.

By 1984, twenty-six states had enacted collective bargaining systems similar to that mandated by the National Labor Relations Act, covering all categories of public sector employees. These systems grant public sector employees the right to organize and bargain collectively, much like the NLRA. These states also require both parties to bargain in good faith with respect to terms and conditions of employment, traditionally mandatory subjects of bargaining under the NLRA. There


54. Courts have held that the first amendment right to freedom of association includes the right to form and join labor unions. See, e.g., Lontine v. VanCleave, 483 F.2d 966, 967 (10th Cir. 1973); AFSCME v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287, 288 (7th Cir. 1968).

55. Courts have uniformly held that public employers are not required to bargain collectively with their employees. See, e.g., Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979) (per curiam) (“[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.”). Courts have not found equal protection violations where states allow bargaining by some employees, but not by others. See, e.g., Beverlin v. Board of Police Comm’rs, 722 F.2d 395, 396 (8th Cir. 1983) (no equal protection violation for state to allow bargaining by some employees and not others); Hanover Township Fed’n of Teachers, Local 1954 v. Hanover Community School Corp., 457 F.2d 456, 461-62 (7th Cir. 1972) (same); Newport News Fire Fighters Ass’n, Local 794 v. City of Newport News, 339 F. Supp. 13, 16 (E.D. Va. 1972) (same); Indianapolis Educ. Ass’n v. Lewallen, 72 L.R.R.M. (BNA) 2071, 2072 (1969) (same).

56. See R. KEARNEY, supra note 51, at 54-55. States with comprehensive, NLRA style collective bargaining policies include: Alaska, Hawaii, Iowa, Maine, Massachusetts, Montana, New Jersey, New York, South Dakota, Washington, and Wisconsin. Id. Other states provide for “local options” for municipal employees, police, and firefighters. Id. For specific statutory references, see, e.g., FLA. STAT. ANN. §§ 447.201-609 (West 1991); HAW. REV. STAT. §§ 89.1-20 (1985); MASS. GEN. LAWS ANN. ch. 150E (1989); S.D. CODIFIED LAWS ANN. §§ 3-18-1 to 3-18-17 (1987).

57. Most state statutes declare that public employees have the right to organize and bargain collectively. R. KEARNEY, supra note 51, at 55-57; Befort, Public Sector Bargaining: Fiscal Crisis and Unilateral Change, 69 MINN. L. REV. 1221, 1230 (1985).

58. Under the NLRA, parties are required to bargain over wages, hours and other terms and conditions of employment. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1988). In First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), the Supreme Court held that parties must bargain over a term of employment when the benefit to labor management relations and the collective bargaining process outweigh the burden placed on the employer’s business. 452 U.S. at 679. According to Professor Befort, most public sector
are, however, significant differences in some of these systems. Some states provide for bargaining only by certain classes of employees. Others allow local employees, but not state employees, to bargain collectively.

Other states have no comprehensive public-sector bargaining policies at all. Traditionally, courts have held that in the absence of authorizing legislation, public sector employers have no power to enter collective bargaining agreements with their employees. Despite this general rule, however, at least three states without legislated collective bargaining policies have upheld voluntary collectively bargained agreements between employees and municipalities. On the other hand, at least three southern states prohibit any form of collective bargaining between public employers and their employees. These states refuse to honor even voluntary agreements between public employees and employers.

Finally, some states mandate a "meet and confer" system decisions apply similar rules with respect to duty to bargain. Befort, supra note 57, at 1230-34. Many states, however, restrict the mandatory subjects of bargaining more strictly than does the NLRA. Id. at 1223.


62. States without comprehensive policies include Arizona, Arkansas, Colorado, and Utah. R. Kearney, supra note 51, at 55-57.

63. See Befort, supra note 57, at 1232-33.

64. Colorado, Louisiana, and Ohio have upheld collective bargaining arrangements in the absence of statutory schemes. See R. Kearney, supra note 51, at 75 n.4; see also, e.g., Littleton Educ. Ass'n v. Arapahoe County School Dist. No. 6, 191 Colo. 411, 416, 553 P.2d 793, 797 (1976). In North Dakota, unions bargain with public employers pursuant to an Attorney General's opinion. See R. Kearney, supra note 51, at 57.

65. States prohibiting collective bargaining are Georgia, North Carolina, and Virginia. R. Kearney, supra note 51, at 55-57. These states find that collective bargaining violates public policy by delegating away the legislative function. Id. According to some commentators, this characterization is misleading because collective negotiations, although contrary to public policy in these states, do occur to some extent in all of them. See Nolan, Public Employee Unionism in the Southeast: The Legal Parameters, 29 S.C.L. Rev. 235, 287 (1978); Developments, supra note 59, at 1679-80; Note, Public Employee Bargaining in North Carolina: From Paternalism to Confusion, 59 N.C.L. Rev. 214, 228 (1980).

of labor relations, where the state or local employer must meet with its employees or their representative over certain issues, but retains sole final decisionmaking power. Meet and confer states vary from requiring the government entity merely to convey employee proposals to the legislature or other decision-making body, to requiring bargaining that approaches that of NLRA-style jurisdictions.

67. States providing for meet and confer bargaining include: Alabama, California (local government employees), and Missouri. Developments, supra note 59, at 1680. One commentator described meet and confer bargaining relations as follows:

Meet and confer is an approach peculiar to the public sector. It implicitly rejects the legitimacy of transferring private sector bargaining rights to public employment in that meet and confer constitutes a denial of true bilateral decision making by equal parties. Under meet-and-confer policies there is no obligation on the part of the employer to negotiate and sign a written agreement. Rather, the employer retains final decision-making authority. Furthermore, meet and confer laws typically are less comprehensive in their treatment of such labor relations issues as unit determination, representation, administrative frameworks, dispute settlements, and unfair labor practices. Whereas meet and confer is favored by management oriented organizations like the Advisory Commission on Intergovernmental Relations, unions argue that meet and confer more closely approximates 'collective begging' than collective bargaining. . . . In reality, most states have adopted a modified approach in bilateral relations which falls somewhere in between the ideal models of meet and confer and collective bargaining. In practice, it often is not an easy matter to distinguish between the two, and the trend definitely is toward the collective bargaining model.

R. Kearney, supra note 51, at 62. Other commentators underscore the slippery line between meet and confer bargaining policies and pure collective bargaining policies. See Edwards, The Emerging Duty to Bargain in the Public Sector, 71 Mich. L. Rev. 885, 896-99 (1973) (distinguishing between collective bargaining and meet and confer statutes and concluding that the two approaches are not as far apart as they seem); Developments, supra note 59, at 1679-80 (same).

68. The Missouri statute has been construed to merely require the public employer to convey the employee proposal to the legislature or other decision-making body. See State ex rel. Missey v. City of Cabool, 441 S.W.2d 35, 41 (Mo. 1969) (construing Mo. Ann. Stat. §§ 105.500-.530 (Vernon Supp. 1989)). The Alabama statute concerning meet and confer rights of firefighters similarly grants employees the right to "present proposals." See Ala. Code § 11-43-143 (1989). This code has been construed to allow the public employer and the firefighters to reach a voluntary agreement, but not to compel them "to negotiate toward a labor contract as the terms are generally understood in the field of labor and management." Nichols v. Bolding, 291 Ala. 50, 57, 277 So. 2d. 868, 873 (1973). The public employer is required to consider employee proposals in good faith. Id.

69. The Kansas statute speaks of "meeting and conferring," Kan. Stat. Ann. § 75-4324 (1989), but imposes a "mutual obligation" on the public employees and employer to "endeavor to reach agreement," id. § 75-4322(m). The
II. APPELLATE COURT INTERPRETATIONS OF SECTION 207(o)(2)(A)(i)

The circuit courts have considered three main issues in determining whether state and local governments may enter into compensatory time agreements with individual employees, or whether they must agree with the employees' representative to grant compensatory time: (1) whether the triggering event for application of section 207(o)(2)(A)(i) is the presence of an agreement or the presence of a representative; (2) whether the "representative" referred to in section 207(o)(2)(A)(i) is "any" representative designated by the employees or a representative authorized or "recognized" under state law; and (3) whether the agreement entered into must be a collective bargaining agreement authorized under state law. This section discusses each issue in turn.

A. THE TRIGGERING EVENT FOR SECTION 207(o)(2)(A)(i): REPRESENTATIVE OR AGREEMENT?

The appellate courts that have considered the conditions under which a state may grant compensatory time to its employees in lieu of overtime pay have raised questions as to whether the presence of a representative or the presence of an agreement with the employees' representative, triggers section 207(o)(2)(A)(i).

The Eleventh Circuit considered this issue in the 1989 case Dillard v. Harris,70 holding that the presence or absence of an agreement was the triggering event.71 In Local 2203 v. West Kansas statute also provides for impasse resolution procedures rather than allowing for unilateral employer decisionmaking. Id. § 75-4332. 70. 885 F.2d 1549 (11th Cir. 1989), cert. denied, 111 S. Ct. 210 (1990). 71. Id. at 1554. The Dillard court stated:

We are satisfied with the way the Fourth Circuit dealt with these arguments [about whether § 207(o)(2)(a)(1) required a "recognized" or "designated" representative] in Abbott v. City of Virginia Beach, stating that the statute was unclear and looking to the legislative history. . . . Equally satisfactory, in our judgment, would be this analysis: the statute on its face is plain, and the legislative history does not mandate a contrary interpretation.

Id. at 1552 (citations omitted). The court also stated that:

Since we agree with the analysis [of the Fourth Circuit] . . . we could simply state that we are following that case and that the distinction in facts between that case and this one does not dictate a different result. . . . Because this issue is surfacing in various courts which are reaching divergent results, however a discussion of an alternative approach that reaches the same result may be appropriate.

Id. at 1550. The Dillard court reasoned that the plain language of the statute stated that employees are covered under § 207(o)(2)(A)(i) only if there is an
Adams Fire Protection District, however, the Tenth Circuit disagreed, holding that the presence or absence of a representative was the triggering event for the application of section 207(o)(2)(A)(i). Similarly, other courts considering the issue have concluded that the presence or absence of a representative was the triggering event for the application of section 207(o)(2)(A)(i). Therefore, the court based its conclusion on its determination that the legislative history contained no clear answer as to what effect the presence or absence of a representative would have on whether employees were covered by § 207(o)(2)(A)(i) or § 207(o)(2)(A)(ii). Id. at 816-17. The court noted that the details of the ambiguity were as follows:

Subclause (i) may be read as applying only to those employees who have a representative who has reached an agreement with the employer. In other words, employees are not covered by subclause (i) if (a) they have a representative, but the representative fails to reach an agreement with the employer, or (b) they have no representative. In either case, subclause (ii) applies, and the employer may use compensatory time pursuant to a regular practice in effect on April 15, 1986.

Alternatively, subclause (i) may be read as covering all employees who have a representative, even if the representative has not reached an agreement with the employer. Subclause (ii) addresses employees who have no representative. Therefore, for represented employees, including those whose representative has failed to reach an agreement, subclause (ii) is inapplicable and an employer’s regular practice does not constitute an agreement.

Id. at 817 n.1. The court concluded, based upon the legislative history, that subclause (i) applied to those employees who had a representative, whether or not there was an agreement between the state and the representative concerning compensatory time. Id. at 816-20. In Local 2203, the court relied upon the Department of Labor’s determination that the statute required agreement over compensatory time if the employees had a proper representative. Id. at 819. The court cited legislative history from both the Senate and House re-
tative is the triggering event for application of section 207(o)(2)(A)(i). Thus, the consensus is that the presence or absence of a representative is the triggering event for subclause (i), and the main unresolved issue is the type of representative required.

B. WHAT KIND OF REPRESENTATIVE IS REQUIRED?

Appellate courts have split over whether the representative required for application of section 207(o)(2)(A)(i) must be recognized by the state or merely designated by the employees. In *Local 2203 v. West Adams Fire Protection District*, the Tenth Circuit held that "representative," as used in section 207(o)(2)(A)(i), refers to a representative designated by the employees, whether or not the state has recognized that representative. The court gave significant weight to regulations promulgated by the Secretary of Labor that state that the representative does not have to be recognized by the state. Because the House Report to the 1985 amendments referred to a "designated" representative, the *Local 2203* court determined that the Department of Labor's construction of the statute was reasonable.

The Fourth Circuit considered this issue in *Abbott v. City*ports supporting this result. *Id.* For a discussion of the relevant legislative history, see *supra* notes 31-43 and accompanying text.

74. Nevada Highway Patrol Ass'n v. Nevada, 899 F.2d 1549, 1553 (9th Cir. 1989); *Abbott v. City of Virginia Beach*, 879 F.2d 132, 135 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 854 (1990). The Ninth Circuit explicitly followed the Tenth Circuit's reasoning in its determination. *Nevada Highway Patrol*, 899 F.2d at 1553. Although not addressing the issue as clearly, the Fourth Circuit's analysis shows that it considered the presence or absence of a representative to be the triggering event. *Abbott*, 879 F.2d at 135.

75. In considering this issue, the courts have viewed a "designated representative" as one chosen by the employees. The House Report to the 1985 amendments supports this view. See *supra* notes 43-44 and accompanying text (quoting the legislative history).

76. *877 F.2d 814* (10th Cir. 1989).

77. *Id.* at 816-20.

78. *Id.* at 817-18.


80. *Local 2203*, 877 F.2d at 820. The *Local 2203* court reached this conclusion even though the Senate Report spoke of a recognized representative. The court stated that: "Nonetheless, because of the support of the House report, we find that the Department reasonably determined that employees are represented if they have merely designated a representative whom the employer has failed to recognize." *Id.* The court also failed to consider the Labor Department comments, see *supra* note 48, stating that the question of whether a
of Virginia Beach. In Abbott, Virginia law specifically prohibited the public employer from bargaining with its employees. The employees argued that the “other agreement” provision of section 207(o)(2)(A)(i) required the state to reach agreement with their representative concerning compensatory time because it was a “designated” representative.

The Abbott court first determined that section 207(o)(2)(A)(i) does not define representative. The court then noted the discrepancy between the House Report, speaking of a “designated” representative, and the Senate Report, referring to a “recognized” representative. It held that the representative had to be a recognized representative, relying heavily on administrative regulations stating that state law should determine whether the employees had a representative.

Courts generally give considerable weight to interpretations of statutes given by agencies required to implement them. Courts uphold agency interpretations as long as they are reasonable, even if the court would have reached a different result on its own. See W. Eskridge & P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 803-15 (1987).


Id. at 134. In Abbott, the district court had held that § 207(o)(2)(A)(i) only requires such an agreement “where state law permits state and local government entities to recognize representatives of their employees for collective bargaining purposes.” Id. at 134 (quoting Abbott v. City of Virginia Beach, 689 F. Supp. 600, 603 (E.D. Va. 1988), aff’d, 897 F.2d 132 (4th Cir. 1989), cert. denied, 110 S. Ct. 854 (1990)).


Abbott, 879 F.2d at 134. In Abbott, members of the Virginia Beach police department belonged to two associations, one called the Virginia Beach Policeman’s Benevolent Association, the other known as the Virginia Beach Police Sergeant’s Association. Id. at 133. The police officers claimed that “representative” included any designee of the employees and that the associations represented them for compensatory time purposes. Id. at 134.

Id. at 135.

Id. at 134-35; see supra notes 44-45 and accompanying text (quoting text of reports and explaining discrepancy).

Abbott, 879 F.2d at 136. The court first cited the regulations promulgated by the Department of Labor to implement the statute, which spoke of a designated representative. Id. at 135; see supra note 47 (text of the regulations). The court noted that the Secretary of Labor responded to concerns that the proposed regulations for implementing § 207(o) would conflict with some state labor relations laws by stating that state law would control on the
The Abbott court rejected the interpretation of a post-enactment letter from the sponsors of the 1985 amendments agreeing with the Secretary of Labor's interpretation of "representative." The court noted that post-enactment letters by legislators are entitled to little weight in determining statutory meaning. Finally, it stated that the requirement of a recognized representative comported best with the stated purpose of the amendments: "to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees."

The Eleventh and Ninth Circuits have followed the Abbott court's reasoning in holding that section 207(o)(2)(A)(i) requires a recognized representative.

C. WHAT TYPE OF AGREEMENT IS REQUIRED?

The circuit courts have split over whether a representative issue whether a representative exists. Abbott, 879 F.2d at 136; see supra note 48 (quoting the text of the Secretary's comments).

88. Abbott, 879 F.2d at 135. For the text of the letter, see supra note 49.

89. Abbott, 879 F.2d at 136.

90. Id. at 136-37.

91. Nevada Employees Ass'n v. Bryan, 916 F.2d 1384 (9th Cir. 1990); Nevada Highway Patrol Ass'n v. Nevada, 899 F.2d 1549, 1553 (9th Cir. 1989); Dillard v. Harris, 885 F.2d 1549, 1550 (11th Cir. 1989), cert. denied, 111 S. Ct. 210 (1990). The Eleventh Circuit held that a recognized representative was required, noting that the House Report supported the employees' argument while the Senate Report supported the state. Dillard, 885 F.2d at 1554. The court accepted the Senate's interpretation requiring a recognized representative. Id. The court cited no specific reasons why it chose the Senate Report's interpretation. It stated:

On the other hand, the Senate committee report's use of the term "recognized representative" tends to support the State's position that the phrase means a representative with whom public agencies could lawfully negotiate, so that when state law prohibits such negotiation there can be no recognized representative. Since Georgia law prohibits state employers from recognizing third party representatives for purposes of negotiating with them over employment conditions, the employees lack the type of representative envisioned in subclause (i), and thus subclause (ii) applies.

Id. (emphasis in original). Earlier in the opinion, the court did note that where there is a conflict between the legislative history of the two houses, the history from the house in which the bill was introduced is more authoritative. These amendments were introduced in the Senate. Id. at 1552.

In two cases, the Ninth Circuit has held that a recognized representative is required to trigger § 207(o)(2)(A)(i). Nevada Employees, 916 F.2d at 1390; Nevada Highway Patrol, 899 F.2d at 1553. It also has agreed that "representative" should be defined with reference to state law. Bryan, 916 F.2d at 1390; Nevada Highway Patrol, 899 F.2d at 1554.
for section 207(o)(2)(A)(i) purposes must be authorized under state law to enter collective bargaining agreements. The Eleventh Circuit considered the issue in *Dillard v. Harris*, holding that "where state law prohibits agreements with employee representatives, public employers may enter into individual overtime agreements with employees." The court determined that even though under Georgia law the state might recognize an employee representative to meet and consult over labor issues, the prohibition of collective bargaining agreements prevented the state from entering the kind of "agreement" contemplated in section 207(o)(2)(A)(i). It characterized the role of the employees as merely having input, and determined that that role was insufficient to constitute the kind of agreement contemplated in section 207(o)(2)(A)(i). The Fourth Circuit, in *Abbot*, reached the same conclusion as the *Dillard* court.

Unlike the Fourth and Eleventh Circuits, however, the Ninth circuit, in *Nevada Employees Association v. Bryan* and *Nevada Highway Patrol Association v. Nevada*, did not find that the statute required the state to be able to enter an enforceable agreement with the employees' representative. In

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93. *Id.* at 1550.
94. *Id.* at 1555. The court summarized an attorney general’s position paper regarding the Georgia law:
   "Although a state employer may not lawfully enter into a binding collective bargaining contract with an employees representative," it may if it so desires, "meet and consult" with the representative over wages, hours, and conditions of employment and reach an understanding, which the employer could then voluntarily adopt according to its normal policy-making procedures without improperly delegating its decision making authority or obligating itself to bargain similarly in the future.
95. *Id.*
96. *Id.*
97. 916 F.2d 1384 (9th Cir. 1990).
98. 899 F.2d 1549 (9th Cir. 1989).
99. In *Nevada Highway Patrol*, the court held that although subclause (i) required that a representative be recognized by the state, the representative did not have to be an authorized collective bargaining agent. The court stated that “according to the Secretary [of Labor], unless state law is to the contrary, an agreement under subsection (i), is operative if the employees have recognized a representative.” *Id.* at 1554. The court continued:
   Accordingly, we must determine how Nevada law applies to this case. Some employees are represented, but their representative has made no agreement under section 207(o)(2)(A). If an agreement is precluded by state law we must then look to section 207(o)(2)(A)(ii). If
Bryan, the court said that the fact that the state could only meet with the representatives for discussion purposes did not prevent the application of section 207(o)(2)(A)(i). The two agreements are not precluded, the Secretary's interpretation of section 207(o)(2)(A) would favor a holding that subclause (ii) agreements are not available to the state in this case.

Id.

The court found that Nevada had no law specifically authorizing state employee bargaining. Id.; see also Bryan, 916 F.2d at 1390 (same). The court noted also that "even if formal collective bargaining were prohibited, we find no Nevada law supporting the proposition that, unless employees are specifically given permission, they cannot designate representatives to enter into agreements or understandings with their employers." Nevada Highway Patrol, 899 F.2d at 1554.

To bolster this conclusion, the Nevada Highway Patrol court pointed to a 1969 Assembly Concurrent Resolution that recognized the Nevada State Employees Association (NSEA) as the representative of its members "for purposes of preserving and advancing their interests as state employees." Id. at 1554-55 (quoting Act of May 21, 1969, No. 29, 1969 Nev. Stat. 1732). The court further noted that the Resolution advocated "preserving the rights of state employees who are not members of such association to speak for themselves." Id.

The Nevada Highway Patrol court, in a footnote, rejected the State's argument that, based on an opinion of the Nevada attorney general, state employees could not engage in collective bargaining and therefore could not have a recognized representative. Id. at 1554 n.6. The Attorney General issued this opinion after Nevada passed a law allowing collective bargaining by local governments and their employees. He reasoned that neither state nor local employees could bargain collectively before the law; because the law did not apply to the state employees, they were still prohibited from bargaining collectively. Id. The court noted that Attorney General opinions are not binding; furthermore, they found that no Nevada law prevented the legislature from recognizing an employee representative. Id.

The Bryan court also found the resolution creating the Nevada State Employees Association helpful in determining whether the employees had a recognized representative. "However, we recognized in Nevada Highway Patrol that whether Nevada state employees were barred from collective bargaining was unclear and that even if barred from collective bargaining, there was no prohibition against designating a representative to enter into agreements with the state." Bryan, 916 F.2d at 1390 (quoting Nevada Highway Patrol, 899 F.2d at 1554 n.6). The Bryan court declined to follow the district court decision in Abbott holding that the recognition of a group for discussion purposes only did not constitute a recognized representative under the statute. Id. (citing Abbott v. City of Virginia Beach, 689 F. Supp 600, 603 (E.D. Va. 1988), aff'd, 897 F.2d 132 (4th Cir. 1989), cert. denied, 110 S. Ct. 854 (1990)). The court supported this decision by reference to the House report and the C.F.R. statements specifically saying that the representative need not be one authorized for collective bargaining. Id. The court also noted that the Department of Labor changed the implementing regulations to specifically recognize that the representative need not necessarily be an authorized collective bargaining agent. Id. (quoting 52 Fed. Reg. 2014 (1987) (stating that the C.F.R. section referring to the definition of a representative, 29 C.F.R. § 553.23(b)(1) (1990), was amended to read "recognized or otherwise designated representative").

100. Bryan, 916 F.2d at 1390.
Ninth circuit cases reached differing results about whether the state had to agree with the employees' representative. In *Bryan*, the court held that the employees' representative was recognized because the state legislature had named it the employees' representative; therefore, the state had to enter an agreement with the employees' representative concerning compensatory time.101 The employee organization in *Nevada Highway Patrol* had not been so recognized and the court therefore held in that case that the Highway Patrol could enter into compensatory time agreements with individual employers.102

### III. ANALYSIS

In the 1985 amendments to the FLSA, Congress attempted to balance several competing goals. First, it wanted to reduce the monetary impact of overruling *National League of Cities* that would result from the attendant imposition of the FLSA regulations on states and municipalities.103 Second, Congress recognized that many public employees regard compensatory time as a welcome substitute to overtime, and prefer the extra time off to cash payments.104 Congress also realized that collective bargaining agreements govern many public employees, and it wanted to avoid interfering with existing collective bargaining processes.105 Finally, at least some members of Congress were concerned that even though constitutional, the FLSA still imposed too great a burden on state and local governments.106

Reading the compensatory time amendments to require agreement with any representative designated by the employees conceivably could force the employer into a bargaining obli-

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101. *Id.*
102. *Nevada Highway Patrol*, 899 F.2d at 1555.
103. *See supra* notes 28-31 and accompanying text.
104. *See supra* note 29 and accompanying text.
105. *Id.* Congress also realized that some of these systems were not traditional NLRA-style collective bargaining systems. *Id.*
106. During the floor debates on the bill, Senator Wilson stated:

> But I must tell you that while this is an improvement over what would occur were there no such legislation — and a significant improvement — it is still but half a loaf. It, by no means, corrects Congress' terrible transgression committed many years ago when we passed the overtime provisions of the Fair Labor Standards Act.

gation not required by state law. Such a reading would at least condition the state’s use of compensatory time on reaching a compensatory time agreement with the representative.\textsuperscript{107} Because the parties must agree, the employees’ representative could hold out for other concessions as a condition of agreement.

The record shows that some have viewed the 1985 amendments as creating an opportunity for employees to gain increased bargaining power. Several commentators expressed concern that the designated representative requirement of the Labor Department regulations would allow employees to create bargaining relationships not allowed under state law.\textsuperscript{108} For example, the National Education Association objected to regulations allowing compensatory time to be made a condition of employment for unrepresented employees; it claimed the act was intended to give employees more bargaining power by designating a compensatory time representative.\textsuperscript{109} Moreover, some of the cases can be explained only by inferring that the employees designated a representative solely to create a new bargaining relationship for other purposes.\textsuperscript{110}

Given the background of the 1985 amendments to the FLSA, they should not be read to create a bargaining obligation not required under state law. Instead, courts should require a section 207(o)(2)(A)(i) agreement with the employees represen-


\textsuperscript{109} See id. at 2015.

\textsuperscript{110} See Abbott v. City of Virginia Beach, 879 F.2d 132, 136 (4th Cir. 1989), cert. denied, 110 S. Ct. 854 (1990) (employees individually had absolute choice as to whether to take compensatory time or money for overtime); Bleakly v. City of Aurora, 679 F. Supp. 1008, 1010 (D. Colo. 1988) (employees could receive compensatory time or overtime pay at their discretion). In Abbott, Virginia law prohibited collective bargaining. 879 F.2d at 134. Thus, there was no preexisting bargaining relationship. In Bleakly, the court noted that a collective organization represented the employees, 679 F. Supp. at 1010, but the court did not state what kind of bargaining relationship, if any, existed.

In Dillard v. Harris, the state planned to grant compensatory time unless there was enough money budgeted to cover overtime pay. 695 F. Supp. 565, 566 (N.D. Ga. 1987), aff’d, 885 F.2d 1849 (11th Cir. 1989), cert. denied, 111 S. Ct. 210 (1990). Even if the employees were not trying to create the bargaining relationship, they were trying to set up a barrier to the state’s use of compensatory time by appointing a representative with whom the state must negotiate. The FLSA does not support such a barrier. See H.R. REP. No. 331, supra note 12, at 19 (expressing desire that states use compensatory time whenever possible).
tative only when state law would require such an agreement, or when the public employer has a past practice of bargaining with the representative and the state has acquiesced in that bargaining. The purpose of this interpretation is to reach the result most consistent with the present state system of public sector labor relations. This Note thus disagrees with courts that have construed section 207(o)(2)(A)(i) to require public sector employers to agree with any representative designated by its employees. It attempts also to provide a definition for the “recognized representative” requirement.

A. Policy Considerations Favor Determining Whether Section 207(o)(2)(A)(i) Applies With Reference to State Law

Several strong policy considerations favor interpreting the agreement requirement with reference to state law. First, the circumstances behind the passage of the amendments suggest that Congress intended to decrease state burdens, not increase them for choosing the compensatory time option. Second, problems peculiar to public sector labor relations suggest that congressional action should not be read to change such relations unless Congress has clearly considered the ramifications. Finally, principles of federalism suggest that congressional action should not be read to affect important

111. State law would probably not require parties to agree on the terms, because NLRA-style systems would not require either party to make a concession as long as they bargained in good faith with present intent to reach an agreement. See Befort, supra note 57, at 1224. In these states, however, the applicable bargaining law would prohibit the state from unilaterally imposing compensatory time on its represented employees. Therefore, state law would in effect require the state to agree over compensatory time in order to grant it pursuant to § 207(o)(2)(A)(i). Id.

112. Several states have upheld the validity of collectively bargained agreements between public sector employers and their employees in the absence of state statutes allowing such bargaining. See supra note 64 and accompanying text.

113. See id.

114. This proposal recognizes that the comments to the Labor Department’s implementing regulations state that the question of whether employees have a § 207(o)(2)(A)(i) representative should be decided with reference to state law. The regulations, however, provide conflicting signals. See infra notes 166-71 and accompanying text. This proposal tries to sort out these signals and provide a more balanced approach.

115. See supra notes 24-37 and accompanying text (discussing the circumstances influencing the passage of the 1985 FLSA amendments).

116. See infra notes 122-32 and accompanying text.
state interests absent clear congressional intent.\textsuperscript{117}

1. The Policies Behind the Compensatory Time Acts

Congress enacted the compensatory time amendments to the FLSA to deal with what it perceived to be a serious fiscal crisis for the states.\textsuperscript{118} Congress intended the amendments to relieve states of the burden of full compliance with the FLSA.\textsuperscript{119}

The legislative history contains repeated references that belie the idea that Congress intended to condition states’ use of the compensatory time option on making an agreement with an entity with which it had no previous bargaining obligation under state law. Committee reports note that states need the freedom to structure their work forces and personnel relations to meet their existing needs.\textsuperscript{120} Similarly, the legislative history expresses the desire that agreements over compensatory time be reached “whenever possible.”\textsuperscript{121} Such language shows no intent to limit states’ ability to use compensatory time by requiring a new bargaining obligation.

2. Peculiar Problems of State Labor Relations

Public sector labor relations involve several problems not found in the private sector which suggest that state public sector labor law merits deference. First, public sector collective bargaining often requires accommodation between the bargaining system and other state statutes that are incompatible with private sector bargaining practices.\textsuperscript{122} Some states have municipal civil service laws that specify terms of employment, or resolve issues such as teacher tenure or pension contribution rates.\textsuperscript{123} States with defined collective bargaining systems often provide specific solutions concerning what happens when bar-

\textsuperscript{117} See infra notes 133–50 and accompanying text.

\textsuperscript{118} See supra notes 28–31 and accompanying text. Some estimates of the total cost of applying FLSA to the states ranged as high as $3 billion. See 51 Fed. Reg. 13,402, 13,405 (1986).

\textsuperscript{119} See supra note 31.

\textsuperscript{120} The House Report stated that “it is essential that the particular needs of the states and their political subdivisions be carefully weighed and fully accommodated.” H.R. REP. NO. 331, supra note 12, at 17. The Senate Report stated essentially the same proposition. See S. REP. No. 159, supra note 20, at 7, 1985 U.S. CODE CONG. & ADMIN. NEWS at 658.

\textsuperscript{121} See H.R. REP. NO. 331, supra note 12, at 20.

\textsuperscript{122} Befort, supra note 57, at 1235.

\textsuperscript{123} Id. at 1252.
gaining terms conflict with such statutes.\textsuperscript{124} Second, in many cases, the entity negotiating on behalf of the state does not have final decisionmaking power.\textsuperscript{125} Instead, the legislature or other elected body must approve any agreement.\textsuperscript{126} Thus it is sometimes difficult to determine which entity is the public employer.\textsuperscript{127} Third, the NLRA and many state statutes provide that the union selected pursuant to its procedures is the employees’ exclusive representative.\textsuperscript{128} These statutes also regulate the bargaining unit to ensure that employees in the same bargaining unit have similar interests.\textsuperscript{129} Allowing bargaining by any representative designated by the employees could result in similarly situated employees designating different representatives with competing goals.\textsuperscript{130} Ignoring state law regarding representatives could also subject employees in the same classification to a compensatory time agreement made with the representative, while others in the same classification might be regulated by individual compensatory time agreements.\textsuperscript{131}

These special problems peculiar to public sector labor relations suggest that courts should not apply the agreement requirement in a manner that would change state labor law obligations. Reading the compensatory time provisions to require agreement where state law would not, where employees have merely designated a representative, forces the state to accept that bargaining relationship or not to use compensatory time.\textsuperscript{132} Given the problems inherent in public sector labor re-

\textsuperscript{124} \textit{Id.} at 1233.
\textsuperscript{125} \textit{Id.} at 1232-35.
\textsuperscript{126} \textit{Id.} at 1235.
\textsuperscript{127} \textit{Id.}
\textsuperscript{129} \textit{See}, e.g., 29 U.S.C. § 159(a) (1988).
\textsuperscript{130} Kearney suggested that southern states that prohibit collective bargaining, but in which some bargaining activity does occur, should seriously consider adopting public sector bargaining legislation because of the problems caused by fragmented bargaining units and competition between bargaining units when there is no provision for exclusive representation. \textit{R. KEARNEY, supra} note 51, at 61-62.
\textsuperscript{131} The Ninth Circuit did bring about this result in \textit{Nevada Employees Ass'n v. Bryan}, 916 F.2d 1384, 1388-89 (9th Cir. 1990). The court required the state of Nevada to agree with all of its employees who had registered with the employee association, but allowed individual contracts with the employees who had not joined. \textit{Id.} If the employees covered by the representative hold out for, and receive concessions, the question arises whether only those employees receive those benefits, or whether all do.
\textsuperscript{132} Two district court decisions required this result. \textit{See} Jacksonville Professional Fire Fighters Ass'n v. Jacksonville, 685 F. Supp. 513, 523 (E.D.N.C.
lations, courts should not require this result unless Congress clearly commanded it.

3. Principles of Federalism

After Garcia, the tenth amendment does not provide an independent check on congressional action.\(^{133}\) Courts have held, however, that legislation should not be read to intrude on important state interests unless Congress clearly so states. In United States v. Bass,\(^ {134}\) for example, the Supreme Court held that a federal firearms statute must be read to require that the accused possessed the firearm "in commerce" when the statute was ambiguous as to the commerce requirement.\(^ {135}\) The Court reasoned that legislation affecting the federal-state balance should be construed narrowly, to require that Congress actually considered its action and the possible effects of such action.\(^ {136}\)
Two recent appellate court decisions have applied this canon in cases involving the application of the Age Discrimination in Employment Act\textsuperscript{137} to appointed state judges.\textsuperscript{138} In \textit{Gregory v. Ashcroft}\textsuperscript{139} and \textit{EEOC v. Massachusetts},\textsuperscript{140} the Eighth and First Circuits held that appointed state judges fell within an ADEA exception for state governmental “appointee[s] on the policymaking level.”\textsuperscript{141} Both courts held that the tenure of state judges is an important attribute of state sovereignty,\textsuperscript{142} and that unless the ADEA clearly applies to state judges, they would not read it to so apply.\textsuperscript{143}

Courts should apply this canon to determine that section 207(o)(2)(A)(i) does not change existing state labor relations law. In \textit{Gregory}, the Eighth Circuit applied this canon because the tenure of state judges was important to the states\textsuperscript{144} and has traditionally been regulated by the states. Likewise, regulation of its employees, and the process by which states make employment decisions, is a matter of considerable importance to the states.\textsuperscript{145} State public labor relations laws affect how the states spend taxpayer dollars and how they provide essential

\textsuperscript{138} The ADEA prohibits an employer from discriminating on the basis of age on most employment decisions involving an employee who is more than 40 years old. \textit{Id.} §§ 623, 631. The ADEA presently has no upper age limit. \textit{Id.} § 631(a).
\textsuperscript{140} 858 F.2d 52 (2d Cir. 1988).
\textsuperscript{141} \textit{See Gregory}, 898 F.2d at 599; \textit{EEOC}, 858 F.2d at 54.
\textsuperscript{142} \textit{Gregory}, 898 F.2d at 599; \textit{EEOC}, 858 F.2d at 58.
\textsuperscript{143} In \textit{EEOC}, the court stated: “If congress did not specifically consider applying the ADEA to judges, and the exception by its terms and its goals, appears to apply to judges, we will so construe it.” 858 F.2d at 55. Similarly, in \textit{Gregory}, the court held that:

because, however, the tenure of state judges is a matter of considerable importance to the state, and one that traditionally has been left to each state to regulate, we will examine the ADEA to determine whether Congress explicitly and unequivocally manifested its intent to preempt state law in this area.

898 F.2d at 600. The Supreme Court agreed, stating that “[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are included.” 111 S. Ct. at 2404 (emphasis in original).
\textsuperscript{144} \textit{See Gregory}, 898 F.2d at 599.
\textsuperscript{145} Even though \textit{Garcia} removed the tenth amendment as an independent barrier to congressional action regarding the states, see \textit{supra} notes 24-28 and accompanying text, it does not necessarily refute the contention that the FLSA is a significant intrusion on states’ ability to structure its employment relations and to provide essential services. \textit{Garcia} merely changes the way that the Court examines such issues.
government services. 146 Many states have held that in the absence of a statute, a state government may not delegate through collective bargaining its responsibility to regulate its employees. 147 Furthermore, with the exception of the FLSA, states traditionally have regulated relations with their employees free from federal interference. Congress excluded states and their political subdivisions from the coverage of the NLRA. 148 Moreover, Congress has not passed legislation regulating state public sector bargaining, even though it has done so for federal employees. 149

Requiring state and local governments to make an agreement with any “designated” employees’ representative in order to use compensatory time, even when state labor relations law would not allow it, is a greater intrusion on the states than the mere application of FLSA. The FLSA overtime provisions merely dictate a term of employment. 150 The agreement requirement in the 1985 FLSA amendments, however, requires state and local governments to conform to a specific process in making decisions about managing their employees. Given that the overriding purpose of the 1985 amendments was to relieve the burdens of FLSA compliance for state and local governments, it would be anomalous to read them to impose another process not contemplated under state law.

B. CONGRESS DID NOT INTEND TO DISPLACE STATE LABOR RELATIONS LAW

Given the policy reasons against reading the 1985 FLSA amendments to change state labor relations law, courts should not so read the amendments absent clear congressional intent to that effect. An examination of the text, legislative history, and purposes behind the statute shows that Congress did not

148. See supra notes 51-53 and accompanying text.
149. See supra note 51 and accompanying text.
clearly intend to change state law bargaining obligations when it enacted the agreement requirement.

1. The Plain Language of the Statute

The plain language of section 207(o)(2)(A)(i) does not create a new collective bargaining obligation between state and local governments and their employees. Read together, sections 207(o)(2)(A)(i) and 207(o)(2)(A)(ii) merely require that state and local governments agree with their employees to grant compensatory time before employees log overtime hours. Section 207(o)(2)(A)(i) says nothing about changing the existing collective bargaining rights of public employees with respect to when employees have a representative. For example, the Eleventh Circuit in Dillard, in construing the statute to require a recognized representative, noted that the statutory language did not provide that any representative the employees chose would constitute a representative for purposes of section 207(o)(2)(A)(i). Had Congress intended such a requirement, it could have clearly stated so.

The lack of any reference in the text of the 1985 amendments to the creation of new collective bargaining rights for state employees suggests that Congress did not intend to change existing collective bargaining obligations created by state law.

Moreover, Congress did not believe that employees must be represented in order for states to use the compensatory time option. Congress allowed states to make compensatory time agreements with individual employees. This provision strongly suggests that Congress did not consider the employees' ability

151. The statute does require an agreement; however, the method of agreement is stated in the alternative. Subclause (i) requires that the agreement be with the employees' representative, 29 U.S.C. § 207(o)(2)(A)(i) (1988), while subclause (ii) allows such agreements to be made with individual employees, id. § 207(o)(2)(A)(ii). Neither subclause, however, defines what constitutes a representative. Id. Thus the plain language does not create a new bargaining obligation.

152. Dillard v. Harris, 885 F.2d at 1549, 1556 (11th Cir. 1989) (“In any event, if the mere designation of a representative with whom the agency could not merely make an agreement should be sufficient to control the method of compensation, it would have been simple for the statute to plainly so provide.”), cert. denied, 111 S. Ct. 210 (1990).

153. Id.

154. The fact that Congress allowed compensatory time agreements with individual employees shows that they did not see bargaining as a requirement. In fact, the House committee report states that compensatory time may be made a condition of employment for individual, unrepresented employees. H.R. REP. NO. 331, supra note 12, at 20.
to meaningfully bargain over the issue to be of controlling importance,\textsuperscript{155} because individual employees have little power to bargain over their terms and condition of employment.\textsuperscript{156} Thus, requiring agreement with a representative over compensatory time must have been motivated by something other than a congressional desire to create a meaningful bargaining opportunity for public sector employees.

What seems more likely, given the circumstances surrounding the passage of the amendments, is that the requirement of an agreement with the employees' representative demonstrates Congress's intent to give employees some ability to choose whether or not to accept compensatory time, and yet to allow as many jurisdictions as possible to use the compensatory time option. Congress showed an intent not to upset existing collective bargaining agreements regarding compensatory time.\textsuperscript{157} Congress also realized that under some state labor relations laws the employer will only be able to make such an agreement with the employees' representative.\textsuperscript{158} Congress's stated goals of giving employees some choice regarding compensatory time\textsuperscript{159} and allowing as many jurisdictions as possible to take advantage of the compensatory time option,\textsuperscript{160} belie the conclusion that Congress passed the 1985 amendments with the intention that no new bargaining relationship be created.

\textsuperscript{155} Congress included the agreement requirements to give employees some element of choice concerning compensatory time. \textit{See id.} at 19.

\textsuperscript{156} Congress passed the NLRA in part to ameliorate the lack of bargaining strength of unorganized labor. Section One of the act states, inter alia: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens commerce." National Labor Relations (Wagner) Act of 1935, § 1, ch. 372, 49 Stat. 449, 449 (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

\textsuperscript{157} \textit{See} H.R. REP. No. 331, \textit{supra} note 12, at 18.

\textsuperscript{158} In states with NLRA-style policies involving exclusive representation and mandatory bargaining, states will have to make an agreement with the representative. \textit{See Befort, supra} note 57, at 1230. A letter from the Congressional Budget Office suggests that the purpose of agreement with representative requirement is to permit collective bargaining jurisdictions to preserve existing agreements regarding compensatory time. \textit{See Letter from Rudolph G. Penner to Senate Committee on Labor and Human Resources (Oct. 15, 1985), reprinted in S. REP. No. 159, \textit{supra} note 21, at 16, 1985 U.S. CODE CONG. & ADMIN. NEWS at 664.}


\textsuperscript{160} \textit{See id.} at 137.
2. Legislative History

The legislative history of and administrative regulations promulgated under the 1985 FLSA amendments do not clearly demonstrate congressional intent to change existing state labor relations law bargaining obligations. The House Report appears to require an agreement with a representative if the employees simply have designated that representative. Such a reading would create a new collective bargaining obligation. The Senate Report, however, does not support this interpretation. It states that individual agreements are permitted unless the employees have a recognized representative. The Senate committee's reference to a "recognized" representative suggests that the public employer is the body that must recognize the representative, and that state law governs such recognition. Thus, read together, the committee reports do not create a new collective bargaining obligation.

The Senate Report should be considered as more authoritative than the House Report. Congress ultimately passed the Senate version of the amendments. Where legislative histories conflict, courts find the history from the house where the bill originated more authoritative. Thus, the Senate interpretation should control, and courts should not find a congressional intent to change state public sector labor relations law.

The Department of Labor regulations similarly do not support a congressional intent to change existing public sector la-

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161. See supra notes 44-45 and accompanying text.
162. See supra note 45 and accompanying text.
163. At least one court has looked to other statutes to define recognition. "Recognition", as that term is understood in the context of the National Labor Relations Act, the Taft-Hartley amendments, and labor law in general, means the acknowledgement by an employer that a collective-bargaining representative has been designated by a majority of employees in the appropriate bargaining unit and thus that the employer is obligated to bargain exclusively with the representative. Abbott v. City of Virginia Beach, 689 F. Supp. 600, 602 (E.D. Va. 1988) (citing NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 687, 692-93 (8th Cir. 1967); NLRB v. Clinton E. Hobbs Co., 132 F.2d 249, 251 (1st Cir. 1942)), aff'd, 879 F.2d 132 (1989), cert. denied, 110 S. Ct. 854 (1990). Because there is no federal statute concerning state and local government labor relations, recognition would have to occur under state law. See supra notes 51-53 and accompanying text (discussing lack of federal statute for public sector bargaining outside of federal government employees).
164. See H.R. CONF. REP. NO. 357, supra note 42, at 7, 1985 U.S. CODE CONG. & ADMIN. NEWS at 668. The House substituted the Senate bill as an amendment to its version. Id.
abor law bargaining obligations. The regulations require agreement with the employee’s representative whenever the employees have a “recognized or otherwise designated representative.” At the same time, comments to the regulations state that whether the employees have a representative is a question of state law. If “designated” means merely to choose a representative, the regulations are internally inconsistent.

Comments to the regulations also reject the contention that Congress intended to change state labor relations law. During the comment period, the National Education Association (NEA) opposed regulations allowing public sector employers to make compensatory time a condition of employment for unrepresented employees. The NEA argued that such a provision conflicted with Congress’s intent to allow employees to increase their bargaining power by designating representatives for compensatory time agreements. The Labor Department disagreed, stating that Congress clearly allowed compensatory time as a condition of employment, suggesting that the mere designation of a representative by the employees is insufficient to trigger the representative requirement of section 207(o)(2)(A)(i).

IV. A NEW ANALYSIS: LOOKING AT THE EXISTING BARGAINING RELATIONSHIP

An examination of the text and legislative history of the 1985 amendments, as well as underlying labor law policy, compels the conclusion that the “representative” prong of the 1985 amendments does not change existing collective bargaining relationships between public sector employers and their employees. The courts that have found that the amendments require a recognized, not merely a designated, representative, correctly interpret the amendments. Given the variety of existing state labor law, and the unclear Labor Department regulations, the requirement needs further definition. Courts should apply

166. See 29 C.F.R. § 553.3(b)(1) (1990) (quoted supra note 47).
168. Such inconsistency shows the lack of clear congressional intent to create a new bargaining obligation. The terms “recognized” and “designated,” as they seem to be used here, are mutually exclusive.
170. Id.
171. Id.
172. See supra notes 49-51 (giving the text of relevant regulations and explaining their ambiguity).
the "agreement with representative" requirement when existing state labor relations law provides an obligation to bargain with the representative or the parties have a prior state approved practice of bargaining over similar issues. In this manner, the 1985 amendments will disrupt state public labor relations as little as possible.

Such a reading of the amendments recognizes the variety of state labor law. It would not allow employees to use the amendments to force themselves into a bargaining relationship that the state does not require and the employer does not want. The reading, however, recognizes also that in certain situations, public sector employers, in the absence of statutory authority, have entered into collective negotiations with employees in which states have acquiesced.

Above all, this proposal recognizes that Congress was trying to relieve the burdens caused by the Garcia decision, and that Congress neither intended to allow employers to get around existing bargaining obligations nor to create new ones.

A. STATES FOLLOWING NLRA-STYLE LABOR RELATIONS POLICIES

In states that have enacted NLRA-style bargaining policies, application of the "non-interference" test is simple. If the employees have organized themselves as the state statute provides, the state must make an agreement with the representative before granting compensatory time. In states with such poli-

173. The cases show that public sector employers are faced with a choice if the designated representative requirement is accepted: either agree with the representative or forego the compensatory time option. See Nevada Employees Ass'n v. Bryan, 916 F.2d 1384, 1390 (9th Cir. 1990); Local 2203 v. West Adams Fire Protection Dist., 877 F.2d 814, 816-20 (10th Cir. 1989). Some states might not uphold or allow the agreement.

174. See supra note 65 and accompanying text.

175. See supra notes 27-32 (discussing the circumstances and purposes behind the amendments). The intent of Congress to relieve states of some of the burdens of FLSA compliance makes it unlikely that they conditioned use of the compensatory time option on state acceptance of an additional burden not imposed under state law.

176. A straightforward application of the text of the statute leads to this conclusion. After the 1985 amendments, the FLSA requires an agreement with the employees before compensatory time can be offered. 29 U.S.C. § 207(o)(2)(A) (1988). This agreement can be reached with the employees' representative under § 207(o)(2)(A)(i). Id. If the employees do not have a recognized collective bargaining representative under the applicable state statute, then the state can agree with individual employees, pursuant to § 207(o)(a)(2)(ii). Id. If the employees have selected a representative under the state labor relations law, the state will, under its own law, be prohibited
cies, overtime compensation will almost certainly be a mandatory subject of bargaining. Thus, under state law, the public employer would be required to bargain with the representative over compensatory time and could not unilaterally impose compensatory time policies. Also, the exclusive representation principle would prevent the state or local government from making individual contracts with employees on issues subject to mandatory bargaining. Following the non-interference principle, requiring agreement with the representative over compensatory time would have the least disruptive effect on the existing bargaining relationship.

B. STATES THAT PROHIBIT COLLECTIVE BARGAINING

States that have no formal public sector labor relations policy and that prohibit, or refuse to enforce, collective bargaining agreements, also present a simple case under the "non-interference" principle. In these states, there is no bargaining relationship. The state has determined that collective bargaining is not in the public interest. Requiring agreement with a representative "designated" by the employees in this situation contravenes that policy and would further no clearly articulated federal policy. Such a requirement would also potentially from unilaterally imposing compensatory time. See Befort, supra note 57, at 1232-35. Also, because of the exclusive representation principle in NLRA-style states, the employer will not be able to reach individual contracts on issues that are subjects of mandatory bargaining. Id. at 1235. Therefore the interplay of state law and the 1985 amendments requires an agreement with the employees' representative.

177. See supra notes 56-58 and accompanying text.

178. The NLRA has been interpreted to invalidate contracts with individual employees on issues subject to mandatory bargaining when employees have a collective bargaining representative. See J.I. Case, Co. v. NLRB, 321 U.S. 332, 337 (1944) ("individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining"). State labor relations laws based on the NLRA have been similarly interpreted. See Befort, supra note 57, at 1233.

179. To say that the parties would not have to reach agreement when state law requires it would require a finding that Congress intended to preempt state law to allow such unilateral action by the states. The fact that Congress included a section of the FLSA allowing agreements to be made with employees' representatives strongly suggests that it did not intend to preempt state law in this regard. In fact, Congress intended the opposite. Therefore, requiring agreement with the representative in NLRA-style bargaining states requires merely that one follow state law.

180. See supra note 67 and accompanying text.

181. The 1985 amendments contain no clearly articulated policy to change, or preempt, existing state labor relations law. See supra notes 131-51. Requir-
subject the public sector employer to the problems of bargain-
ing with a non-exclusive representative. The principle that
the 1985 amendments did not intend to change the bargaining
obligations of the parties leads to the conclusion that, where
states do not have a labor relations policy and prohibit collective agreements, public sector employers may grant compensa-
tory time pursuant to agreements with individual employees.

Under this analysis, the appellate courts in Abbott and
Dillard correctly concluded that the public sector employers
could grant compensatory time pursuant to agreements with in-
dividual employees. In both cases, the state prohibited public
sector collective bargaining. Requiring an agreement in situa-
tions such as these would contravene state policy without a
clear statement of federal policy to do so.

C. STATES THAT ALLOW BARGAINING WITHOUT A COLLECTIVE
BARGAINING STATUTE

Some states have no articulated labor relations policy, yet
allow bargaining to occur, and state courts have been willing to
uphold such agreements. In these states, public sector em-
ployers should have to make an agreement with employee rep-
resentatives concerning compensatory time only if they have a
preexisting bargaining relationship concerning wages and hours
issues that state courts have upheld. Construing the statu-
tory requirements in this manner has two advantages. First,

182. The Ninth Circuit did bring about this result in Nevada Employees
Ass'n v. Bryan, 916 F.2d 1384 (9th Cir. 1990). The court required the state of
Nevada to agree with all of its employees who had registered with the
employee association, but allowed individual contracts with the employees who
had not joined. Id. at 1388-89. If the employees covered by the representative
hold out for, and receive concessions, the question arises whether only those
employees receive those benefits, or whether all do.

183. Under the analysis above, courts should not find preemption in impor-
tant areas of state regulation unless Congress clearly intends it. Where Con-
gress has not clearly so stated, state policy must stand. See supra notes 131-50
and accompanying text.

184. Abbott v. City of Virginia Beach, 879 F.2d 132 (4th Cir. 1989), cert. de-

185. Dillard v. Harris, 885 F.2d 1549 (11th Cir. 1989), cert. denied, 111 S. Ct.

186. See supra notes 82-91, 93-97 and accompanying text.

187. See supra notes 151-71 and accompanying text.

188. See supra note 64 and accompanying text (discussing such states).

189. This approach changes existing state labor relations law the least. The
state, by not mandating bargaining, but yet allowing it, has allowed individual
this construction recognizes that public sector employers may see the value of collective negotiation even if the state does not require it. Second, this construction does not allow public sector employers to use the 1985 amendments as an excuse to avoid bargaining over compensatory time when they have done so concerning similar issues in the past. Under this approach, however, an employee organization could not force the public sector employer to bargain for the first time over compensatory time issues. Again, existing bargaining obligations under state law would remain unchanged.

Under the approach of this Note, courts would need more information to decide whether an agreement with the employees' representative would be required in cases like *Nevada Employees Association v. Bryan* and *Nevada Highway Patrol Association v. Nevada*. In both cases, the Ninth Circuit formalistically adhered to the "recognized" representative requirement. The court required an agreement with the representative in *Bryan* because it had been officially "recognized" by the state legislature. In *Nevada Highway Patrol*, the court did not require an agreement because the representative had not been "recognized." To apply the test suggested by this Note, the court would need to know whether the state had bargained in the past over these issues with the representative. Similarly, in *Local 2203 v. West Adams International

employers to make the choice. Thus, state policy is followed most closely by requiring agreements only where there is a past practice of doing so.

190. Statements in the legislative history of the 1985 amendments suggest that Congress recognized the value of collectively negotiated agreements, where states allowed them, and did not want to interfere with that process. See H.R. REP. NO. 331, supra note 12, at 19.

191. This approach ensures that the public employer has considered the pros and cons of collective negotiation and decided negotiation was in its best interest.

192. 916 F.2d 1384 (9th Cir. 1990).

193. 899 F.2d 1549 (9th Cir. 1989).

194. In *Bryan*, the court found that the employees had a recognized representative because the state legislature had passed a resolution proclaiming the association as the employees' representative. 916 F.2d at 1390. The association at issue in *Nevada Highway Patrol* had not been similarly recognized. Id.

195. Id. at 1390.

196. *Nevada Highway Patrol*, 899 F.2d at 1554-55.

197. See supra notes 96-102 and accompanying text. One might argue that the court in this case did determine the method that would least impair existing state law. It seems, however, that the court thought that the statute required merely a formalistic recognition of a representative in its examination of state law. Such an analysis can lead to a result that deviates from existing practice, a result not compelled by the statute. Courts also should not merely look for the word "recognized" concerning a specific representative. Instead,
Association of Firefighters, the court would need to know if bargaining had occurred in the past and if the employer had acquiesced. If so, the 1985 amendments would require agreement with the representative. If not, the statute would not require such an agreement.

CONCLUSION

When Congress enacted the compensatory time amendments to the FLSA in 1985, it intended to relieve states of some of the burdens of complying with the overtime provisions of the FLSA. Congress did not intend to create a new obligation for states to agree with any representative that the employees designate. This Note suggests that courts should require such agreements with employee representatives only where doing so would not change existing bargaining obligations under state law or existing state practice. Such a reading conforms with congressional intent to provide states with options in employee relations. In addition, it does not hinder the development of collective negotiations by willing public sector employers even where not required by law.

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they should specifically examine the prior practice of the parties to determine whether or not requiring agreement with a representative would be most consistent with existing state practice.

198. 877 F.2d 814 (10th Cir. 1989).

199. Although Colorado, which does not have a comprehensive bargaining policy, see supra note 64, has upheld such agreements, it has also upheld the right of municipalities to bar collective bargaining in their city charter. See Fellows v. LaTronica, 151 Colo. 300, 394-06, 377 P.2d 547, 550-51 (1962) (en banc).