DCN: 11999

ETHICS RULES FOR BRAC COMMISSIONERS

OFFICE OF THE GENERAL COUNSEL
BRAC COMMISSION
MAY 20, 2005

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ETHICS RULES FOR BRAC COMMISSIONERS

Introduction

This summary has been prepared for members appointed to serve on the 2005 Base Realignment and Closure (BRAC) Commission. If you have questions on any of the topics covered in this guidance, attorneys in the General Counsel's Office are always available to answer them.

Definition of a Special Government Employee (SGE)

As a Commissioner, you have been appointed as an SGE. An SGE is an officer or employee in the executive branch of the Federal Government who is appointed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days. 18 U.S.C. 202(a).

Even if you exceed the 130 days, you will still be considered to be an SGE for the remainder of that 365-day period. All days you work (whether paid or unpaid), and even if you do not work the entire day, counts towards the 130 day limit. The 365-day period begins the day you start working (not the day you were appointed to the BRAC Commission). The SGE status is important because the ethics rules for SGEs are somewhat less restrictive than the rules for other Federal employees and officials.

Financial Disclosure Reporting Requirements

All BRAC Commissioners have been appointed as SGEs and are required under the Ethics in Government Act, as amended by the Ethics Reform Act of 1989, and 5 C.F.R. Part 2634, to file a financial disclosure report (SF-278 form) when first appointed.

The information reported is used to determine the matters for which a Commissioner must be disqualified under the criminal financial conflict of interest statute, 18 U.S.C. 208(a), and the matters for which a Commissioner may be granted a waiver under 18 U.S.C. 208(b). Complete reporting is essential to protect the Commissioner from inadvertently violating any of the criminal conflict of interest statutes, and to assure the public that the advice provided by the BRAC Commission is free from any real, or perceived, conflicts of interest.

The information reported by Commissioners is confidential. However, once you have worked for 60 days or more for the BRAC Commission in any period of 365 consecutive days, this SF-278 form may be released upon an appropriate request. However, the SF-278 form may not be released under Freedom of Information (FOIA) requests.

I. Criminal Conflict of Interest Statutes

The following criminal conflict of interest statutes (18 U.S.C. 201-216) apply to SGEs:

- ***18 U.S.C. 201.*** Section 201, commonly known as the "bribery and illegal gratuities" statute, prohibits Federal employees, including SGEs, from seeking, accepting, or agreeing to receive anything of value in return for being influenced in the performance of an official act.

- ***18 U.S.C. 203.*** Section 203 prohibits an SGE from receiving compensation for representational services rendered by the employee or another person before the BRAC Commission or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party (i) in which the SGE has participated personally and substantially as a Government employee, or (ii) which is pending in the Government agency in which the SGE is serving if the SGE has served for 60 days or more during the immediately preceding 365 days.

  Exempted from this rule are representations required in the proper discharge of official duties. Also exempted are representations required in the performance of work under a grant, contract or other agreement with or for the benefit of the Government.

  A particular matter involving specific parties is a matter that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Particular matters may include, but are not limited to, reviews of grant proposals or contract applications, other funding decisions, studies or approvals of scientific studies or projects, and other actions that involve deliberation, decision, or action.

  Representational services include communications (written or oral) and appearances made on behalf of someone else, generally with the intent to influence or persuade the Government.

  An inquiry as to the status of a pending matter is not necessarily a representation, although depending upon the context of the inquiry, it could give rise to the appearance of a prohibited representation.

  To avoid appearance problems, during the period in which a the BRAC Commission is in session, Commissioners are advised not to contact BRAC staff concerning any matters pending before the BRAC Commission, or as to which the Commission has an interest.

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  Moreover, "senior employees" who are paid at an annual rate equivalent to 86.5% of Level II of the Executive Service or $140,216.50, are subject to a one-year "cooling-off" period which precludes any contacts with their former agency on any matter for which official action is sought, even if the former employee had no involvement with the matter while in Government service. For SGEs, this one-year "cooling-off" period does not apply if the SGE served less than 60 days in the one-year period prior to termination of senior employee status.

- ***18 U.S.C. 208.*** Section 208(a), the main conflict of interest statute, prohibits an SGE from participating personally and substantially in any particular matter that could affect the financial interests of the SGE, the SGE's spouse, minor child, general partner, an organization in which the SGE serves as an officer, director, trustee, general partner, or employee, or an organization with which the SGE is negotiating or with which the SGE has an arrangement for prospective employment.

A *waiver* for Commissioners may be granted under 18 U.S.C. 208(b)(3). Section 208(b)(3) authorizes issuance of a waiver to an SGE who serves on a commission subject to the Federal Advisory Committee Act if the official responsible for the individual's appointment, as delegated to the General Counsel, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the particular financial interest involved.

The waiver granted is considered a "general" waiver, in that it allows participation in matters that affect all institutions, or types of institutions, similarly. Even with a general waiver, however, SGEs must disqualify themselves from participation in all matters that specifically and uniquely affect their financial interests. The Ethics Official or the Designated Federal Official are available to further explain the procedures for disqualification.

In addition, under regulations issued by the Office of Government Ethics, a regulatory (i.e., automatic) waiver of the disqualification requirement of 18 U.S.C. 208 is available under certain circumstances, including instances involving the following classes of financial interests:

- interests held in broadly diversified investment funds;
- publicly traded securities of $5,000 or less;
- publicly traded securities of $25,000 or less if the matter is a general policy matter and the total value of all investments in the affected industry sector is no more than $50,000;

In addition, there is an automatic exemption which allows SGEs serving on Federal advisory commissions to participate in matters of general applicability where the otherwise-disqualifying financial interest arises solely from the Commissioner's federal employment or prospective employment, provided that the matter will not have a special or distinct effect on the employee or employer other than as part of a class.

II. Standards of Ethical Conduct

The following are some of the major Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that may pertain to BRAC Commissioners during the term of their appointment:

1. Teaching, Speaking and Writing in a Personal Capacity (Other Than as a Government Employee)

Generally, during their term of appointment, BRAC Commissioners may continue to receive fees, honoraria, and other compensation for teaching, speaking and writing undertaken in their personal or non-Governmental capacities. However, there are some limitations:

(1) An SGE is prohibited from receiving compensation for teaching, speaking, and writing that "relates to the employee's official duties." 5 C.F.R. 2635.807. The "relatedness" test is met for an SGE if:

(1) the activity is undertaken as an official Government duty;

(2) the circumstances indicate that the invitation to engage in the activity was extended to the SGE primarily because of the employee's position in the Government rather than the employee's expertise on the particular subject matter;

(3) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by the performance or nonperformance of the employee's official duties; or

(4) the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly-available.

(2) Additionally, if a Commissioner serves for 60 days or less during a one-year period, the SGE may not accept compensation for teaching, speaking, and writing if the subject matter of the teaching, speaking or writing concerns a particular matter, involving specific parties, in which the SGE participated or is participating personally and substantially as a Government employee.

(3) If a Commissioner serves for more than 60 days, the SGE is additionally prohibited from receiving compensation for teaching, speaking, and writing if the subject of the activity deals in significant part with any matter to which the SGE is presently assigned or was assigned during the previous one-year period.

EXCEPTIONS:

1. This rule does not preclude a Commissioner from receiving compensation for teaching, speaking, or writing on a subject within the Commissioner's discipline or inherent area of expertise based on the SGE's educational background or experience. The outside activity must not be about or distinctly related to the work the SGE is providing to the Government.

2. These restrictions also do not apply to teaching a course requiring multiple presentations that is part of the regularly established curriculum of an institution of higher education, an elementary or secondary school, or a program of education or training sponsored and funded by the Federal, State, or local government.

III. Gifts

Any gift given to a Commissioner because of the member's service on the BRAC Commission will raise concerns. The Ethics Official or the Designated Federal Official should be consulted should this situation arise. Gifts given to a Commissioner because of their position or achievements in the private (non-Government) sector may be permitted, depending on the circumstances. (Under the Foreign Gifts and Decorations Act, 5 U.S.C. Sec. 7342, gifts from foreign governments of a minimal value of $305.00 or less may be accepted, but please consult the Ethics Official concerning this.)

IV. Impartiality

Although Commissioners are prohibited under 18 U.S.C. 208(a) from participating in matters in which they have a financial interest, there may be other circumstances in which a Commissioner's participation in a particular matter involving specific parties would raise a question regarding the Commissioner's impartiality in the matter. For example, a Commissioner's impartiality may be questioned if he or she has business ties to a contractor near a base scheduled for closure or realignment, or has a close personal or professional relationship with such a business concern. In such circumstances, the Commissioner should discuss the relationship with the Ethics Official or the Designated Federal Official so that a determination

may be made as to whether the Commissioner in question should be disqualified from participation in the matter, or should be granted an "authorization" to permit the Commissioner to participate in the matter. 5 C.F.R 2635.502.

V. Misuse of Position

Commissioners are also subject to a number of prohibitions intended to address the use, or appearance of use, of "public office for private gain." 5 C.F.R. Part 2635, Subpart G. These prohibitions include:

(1) Using their BRAC or DoD titles or referring to their Government positions for their own private gain, the private gain of friends, relatives, or anyone with whom they are affiliated in a non-Governmental capacity (including nonprofit organizations which they serve as officers, members, employees, or in any other business relationship), or for the endorsement of any product, service, or enterprise.

(2) Using their official titles or Government positions to coerce or induce another person to provide any benefit to themselves or another person.

(3) Using non-public Government information in a financial transaction to further their private interests or those of another, or disclosing confidential or non-public information without authorization.

(4) Using Government property for unauthorized purposes.

VI. Employment by, or Gifts from, Foreign Governments

There are Constitutional limitations on a Commissioner's employment by a foreign government, including political subdivisions of a foreign government. For SGEs, this provision has particular relevance to positions with foreign universities that are government-operated rather than private institutions. United States Constitution, art. I 9, cl. 8. There are also statutory provisions restricting acceptance of gifts from foreign governments. 5 U.S.C. 7342. Commissioners should consult with the Ethics Official or the Designated Federal Official for details about these restrictions.

VII. Lobbying Activities

In their official capacities or as a group, Commissioners are prohibited from engaging in any activity which directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. 18 U.S.C. 1913. When authorized, Commissioners may appear before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal.

Commissioners also may communicate to Members of Congress at the request of any Representative or Senator. Communications to Members of Congress initiated by individual Commissioners, in their official capacity as members of the BRAC Commission, should be coordinated through the Office of the Chairman.

As private citizens, Commissioners may express their personal views (but not the views of the BRAC Commission) by stating their affiliation with the Commission, by factually stating the Commissioner's official position on the matter (to the extent that non-public information is not used). However, Commissioners may not take new positions and represent those views as the BRAC's position on the matter. Moreover, in expressing their private views, as with all other personal (non-Governmental) activities, Commissioners are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds. All personal activities must occur "off duty time."

In addition, Commissioners are prohibited in their personal capacities from making representations on behalf of others, to the Government, on particular matters involving specific parties in which they were involved as Government employees. (See discussion above under 18 U.S.C. 203 & 205.)

VIII. Political Activities

The Hatch Act (5 U.S.C. 7321-7328) prescribes the restrictions on certain political activities of Federal employees. Unlike the criminal statutes and most of the other ethics rules which are fully applicable to an SGE throughout the SGE's entire term of appointment, the Hatch Act restrictions apply only during the period of any day in which the SGE actually is performing Government business. For example, if an SGE attends a BRAC Commission meeting from 8:00 am - 1:00 pm, at 3:00 pm, the SGE could attend a political fund raiser and even solicit political contributions from the attendees. Please note that there are also criminal political statutes that apply at all times and prohibit coercion and intimidation regarding political activities.

If you are considering engaging in political activities, please contact the Ethics Official or the Designated Federal Official for guidance before agreeing to or accepting any participation in political activities.

POST-EMPLOYMENT ETHICS RULES FOR BRAC COMMISSIONERS APPOINTED AS SPECIAL GOVERNMENT EMPLOYEES (SGEs)

Personal Lifetime Ban	After you leave Government service, you may not represent someone else to the Government regarding *particular matters* that you worked on while in Government service.
Official Responsibility: 2 Year Ban	For *2 years* after leaving Government service, you may not represent someone else to the Government regarding *particular matters* that you did not work on yourself, but were pending under your responsibility during your last year of Government service.
Compensation Ban on Representation by Others	After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service. (Examples: Lobbying, consulting, and law firms). (18 U.S.C. 203).
Additional Restrictions for Retired Military Personnel and Reservists (Foreign Employment)	Unless you receive prior authorization from your Service Secretary, you may forfeit your military pay during the time you perform compensated services for a foreign government.
Administrative Reminders	Even though you have left Government service, you still may not use nonpublic

	information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

POST-EMPLOYMENT RULES FOR BRAC COMMISSIONERS

This summary has been prepared for Commissioners appointed to serve on the 2005 Base Closure and Realignment (BRAC) Commission. If you have questions on any of the topics covered in this guidance, you should consult with an attorney in the Office of the General Counsel.

Part 1: Personal Lifetime Ban

1.1 SIMPLIFIED RULE: After you leave Government service, you may not represent someone else to the Government regarding particular matters that you worked on while in Government service.

Official Responsibility: 2 Year Ban

1.2 SIMPLIFIED RULE: For 2 years after leaving Government service, you may not represent someone else to the Government regarding particular matters that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

Trade or Treaty: 1 Year Ban

1.3 SIMPLIFIED RULE: For 1 year after leaving Government service, you may not aid, advise, or represent someone else regarding trade or treaty negotiations that you worked on during your last year of Government service.

Part 2: Compensation Ban on Representation by Others

2.1 RULE: COMPENSATION FOR REPRESENTATION TO THE GOVERNMENT BY OTHERS: After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service (e.g., lobbying, consulting, and law firms).

Part 3: Additional Restrictions for Retired Military Personnel and Reservists

3.1 SIMPLIFIED RULE: FOREIGN EMPLOYMENT: Unless you receive prior authorization from your Service Secretary, you may forfeit your military pay during the time you perform compensated services for a foreign government.

Part 4: Administrative Reminder

4.1 USE OF NONPUBLIC INFORMATION: After leaving Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

May 13, 2005

MEMORANDUM FOR CHAIRMAN AND COMMISSIONERS
DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Subj: CONFLICT OF INTEREST AND BRAC

1. The ethics guidance below and that contained in the ethics binder are provided for your information and ready reference.

Potential Conflicting Financial and Personal Interests

What is a conflict of interest? You will have a conflict of interest if any of your personal financial interests, or those of someone with whom you have a specified relationship, may be affected by BRAC decisions or recommendations. Ethics laws and regulations require you to avoid not only actual conflicts, but even the appearance of a conflict of interest or loss of impartiality. Because of the importance and visibility of the BRAC process, which will impact the lives of many Americans and their communities, we must insure that the public has complete confidence in the process.

As commissioners, you are participating personally and substantially in the BRAC process. As such, you must be concerned about potential conflicts of interest.

While the SF 278, Financial Disclosure Form, that you have already submitted, is a good starting point, you have interests and relationships that may be involved in the BRAC process that are not reportable on them. For example, you do not report your personal residence or vacation property on the SF 278 unless you rent them.

We have developed this guidance to help you identify the relationships and interests that are not reported on the disclosure forms. Please review this guidance to determine whether you have any of the financial interests or relationships discussed below. If you believe that any of these interests or relationships may be affected by any potential BRAC decision, we can discuss them at your earliest convenience. When you become aware that specific installations are identified in the BRAC process, please review your interests and relationships again in connection with those installations.

Relationships

- **General Partners:** Do you have general partners in business ventures?
- **Potential Employers:** Are you negotiating for, or do you have an arrangement concerning, prospective employment with an organization?

- **Members of your Household:** Do you have members of your household in addition to those whose interests are already reported on our financial statement, i.e., someone other than your spouse or minor children?

- **Business Relationship**: Do you have, or seek to have, a business, contractual or financial relationship with someone, other than a routine consumer transaction?

- **Close Relatives:** Do you have relatives with whom you have a close personal relationship? (Yes, of course.)

- **Previous Employers:** Have you, in the last year served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee?

- **Relative's Employers:** Is your spouse, parent, or dependent child serving, or are they seeking to serve, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee?

- **Organizations**: Are you an active participant in an organization, other than a political party?

Potential Conflict

If you have identified any of the relationships in the previous questions, do any of them, to your knowledge, involve an entity at a military installation subject to the BRAC process, or do any have a financial interest that could be "directly and predictably" affected by a BRAC decision?

> "Directly" means a close causal link between a BRAC recommendation and any expected effect on a financial interest. The effect does not have to be immediate. "Predictable" means a real, not speculative, possibility that a BRAC recommendation will affect the financial interest. The dollar amount of the gain or loss is immaterial.

For your convenience, we have developed the following list of financial interests to help you in evaluating the effect of a BRAC decision. You should also consider any other interests of which you are aware.

Financial Interests

- Salaries from military installations or contractors at military installations.

- Ownership of real estate in the vicinity of a military installation.

- Interest in business activities, including utilities and DoD contractors, that do business with a military installation.

- Bonds issued by towns/cities in the vicinity of a military installation.
- Pensions from contractors at military installations.
- Active affiliation with a civic or private BRAC-proofing or Save-the-Base type organization.
- Potential employment interest with a person/organization that could be affected by closing or realigning a military installation.

Examples of how the relationships and interests may interact follow:

- Your sister works for a contactor whose major source of business is a military installation, and she owns her home in the vicinity.
- Your daughter works at a restaurant that depends upon the patronage of personnel at a military installation.
- You are actively participating in a Save-the-Base organization in your personal capacity.
- Your son has a large investment in municipal bonds issued by a city that could be greatly affected if a major base closed.

2. If you determine that any of these interests or relationships exist, we can review them in a timely fashion and take appropriate action to resolve any questions.

DAVID C. HAGUE
General Counsel

DCN: 11999

May 20, 2005

DELEGATION OF AUTHORITY

TO: Files

FROM: Chairman, Anthony J. Principi

SUBJECT: Designation of the Ethics Official

As the Chairman of the Base Closure and Realignment (BRAC) Commission, I have previously delegated the authority to act as Ethics Official to General Counsel, David C. Hague. As of May 21, 2005, I am hereby delegating this authority to Associate General Counsel, Ms. Rumu Sarkar. She shall have the authority to serve as the Commission's Ethics Official and, in that capacity, to provide legal counsel and guidance concerning ethics and related issues for all aspects of the Commission's activities, as needed.

This delegation of authority may be further redelegated in writing, as necessary.

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  Moreover, "senior employees," those paid at an annual rate equivalent to level ES-5 in the Senior Executive Service, are subject to a one-year "cooling-off" period which precludes any contacts with their former agency on any matter for which official action is sought, even if the former employee had no involvement with the matter while in Government service. For SGEs, this one-year "cooling-off" period does not apply if the SGE served less than 60 days in the one-year period prior to termination of senior employee status.

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- interests held in broadly diversified investment funds;
- publicly traded securities of $5,000 or less;
- publicly traded securities of $25,000 or less if the matter is a general policy matter

and the total value of all investments in the affected industry sector is no more than $50,000;

In addition, there is an automatic exemption which allows SGEs serving on Federal advisory commissions to participate in matters of general applicability where the otherwise-disqualifying financial interest arises solely from the Commissioner's federal employment or prospective employment, provided that the matter will not have a special or distinct effect on the employee or employer other than as part of a class.

II. Standards of Ethical Conduct

The following are some of the major Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that may pertain to BRAC Commissioners during the term of their appointment:

1. Teaching, Speaking and Writing in a Personal Capacity (Other Than as a Government Employee)

Generally, during their term of appointment, BRAC Commissioners may continue to receive fees, honoraria, and other compensation for teaching, speaking and writing undertaken in their personal or non-Governmental capacities. However, there are some limitations:

(1) An SGE is prohibited from receiving compensation for teaching, speaking, and writing that "relates to the employee's official duties." 5 C.F.R. 2635.807. The "relatedness" test is met for an SGE if:

(1) the activity is undertaken as an official Government duty;

(2) the circumstances indicate that the invitation to engage in the activity was extended to the SGE primarily because of the employee's position in the Government rather than the employee's expertise on the particular subject matter;

(3) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by the performance or nonperformance of the employee's official duties; or

(4) the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly-available.

(2) Additionally, if a Commissioner serves for 60 days or less during a one-year period, the SGE may not accept compensation for teaching, speaking, and writing if the subject matter of the teaching, speaking or writing concerns a particular matter, involving specific parties, in which the SGE participated or is participating personally and substantially as a Government employee.

(3) If a Commissioner serves for more than 60 days, the SGE is additionally prohibited from receiving compensation for teaching, speaking, and writing if the subject of the activity deals in significant part with any matter to which the SGE is presently assigned or was assigned during the previous one-year period.

EXCEPTIONS:

1. This rule does not preclude a Commissioner from receiving compensation for teaching, speaking, or writing on a subject within the Commissioner's discipline or inherent area of expertise based on the SGE's educational background or experience. The outside activity must not be about or distinctly related to the work the SGE is providing to the Government.

2. These restrictions also do not apply to teaching a course requiring multiple presentations that is part of the regularly established curriculum of an institution of higher education, an elementary or secondary school, or a program of education or training sponsored and funded by the Federal, State, or local government.

III. Gifts

Any gift given to a Commissioner because of the member's service on the BRAC Commission will raise concerns. The Ethics Official or the Designated Federal Official should be consulted should this situation arise. Gifts given to a Commissioner because of their position or achievements in the private (non-Government) sector may be permitted, depending on the circumstances. (Under the Foreign Gifts and Decorations Act, 5 U.S.C. Sec. 7342, gifts from foreign governments of a minimal value of $305.00 or less may be accepted, but please consult the Ethics Official concerning this.)

IV. Impartiality

Although Commissioners are prohibited under 18 U.S.C. 208(a) from participating in matters in which they have a financial interest, there may be other circumstances in which a Commissioner's participation in a particular matter involving specific parties would raise a question regarding the Commissioner's impartiality in the matter. For example, a Commissioner's impartiality may be questioned if he or she has business ties to a contractor near a base scheduled for closure or realignment, or has a close personal or professional relationship with such a business concern. In such circumstances, the Commissioner should discuss the relationship with the Ethics Official or the Designated Federal Official so that a determination may be made as to whether the Commissioner in question should be disqualified from participation in the matter, or should be granted an "authorization" to permit the Commissioner to participate in the matter. 5 C.F.R 2635.502.

V. Misuse of Position

Commissioners are also subject to a number of prohibitions intended to address the use, or appearance of use, of "public office for private gain." 5 C.F.R. Part 2635, Subpart G. These prohibitions include:

(1) Using their BRAC or DoD titles or referring to their Government positions for their own private gain, the private gain of friends, relatives, or anyone with whom they are affiliated in a non-Governmental capacity (including nonprofit organizations which they serve as officers, members, employees, or in any other business relationship), or for the endorsement of any product, service, or enterprise.

(2) Using their official titles or Government positions to coerce or induce another person to provide any benefit to themselves or another person.

(3) Using non-public Government information in a financial transaction to further their private interests or those of another, or disclosing confidential or non-public information without authorization.

(4) Using Government property for unauthorized purposes.

VI. Employment by, or Gifts from, Foreign Governments

There are Constitutional limitations on a Commissioner's employment by a foreign government, including political subdivisions of a foreign government. For SGEs, this provision has particular relevance to positions with foreign universities that are government-operated rather than private institutions. United States Constitution, art. I 9, cl. 8. There are also statutory provisions restricting acceptance of gifts from foreign governments. 5 U.S.C. 7342. Commissioners should consult with the Ethics Official or the Designated Federal Official for details about these restrictions.

VII. Lobbying Activities

In their official capacities or as a group, Commissioners are prohibited from engaging in any activity which directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. 18 U.S.C. 1913. When authorized, Commissioners may appear before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal.

Commissioners also may communicate to Members of Congress at the request of any Representative or Senator. Communications to Members of Congress initiated by individual Commissioners, in their official capacity as members of the BRAC Commission, should be

coordinated through the Office of the Chairman.

As private citizens, Commissioners may express their personal views (but not the views of the BRAC Commission by stating their affiliation with the Commission, by factually state the Commissioner's official position on the matter (to the extent that non-public information is not used). However, Commissioners may not take new positions and represent those views as the BRAC's position on the matter. Moreover, in expressing their private views, as with all other personal (non-Governmental) activities, Commissioners are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds. All personal activities must occur "off duty time."

In addition, Commissioners are prohibited in their personal capacities from making representations on behalf of others, to the Government, on particular matters involving specific parties in which they were involved as Government employees. (See discussion above under 18 U.S.C. 203 & 205.)

VIII. Political Activities

The Hatch Act (5 U.S.C. 7321-7328) prescribes the restrictions on certain political activities of Federal employees. Unlike the criminal statutes and most of the other ethics rules which are fully applicable to an SGE throughout the SGE's entire term of appointment, the Hatch Act restrictions apply only during the period of any day in which the SGE actually is performing Government business. For example, if an SGE attends a BRAC Commission meeting from 8:00 am - 1:00 pm, at 3:00 pm, the SGE could attend a political fund raiser and even solicit political contributions from the attendees. There are also criminal political statutes that apply at all times and prohibit coercion and intimidation regarding political activities.

If you are considering engaging in political activities such as those described below in the chart), please contact the Ethics Official or the Designated Federal Official for guidance before agreeing to or accepting any participation in political activities.

DCN: 11999

Ethics Program Responsibilities (5 CFR §2638.203*)

we will not set up program (like DoDo)

Program Element	Administrative Aspects	Substantive Aspects
Financial Disclosure*		
Public and Confidential	1.Develop written procedures and systems for identifying/notifying filers and for collecting/reviewing the forms 2.Develop a tracking system(s) 3.Maintain appropriate filing systems	-Knowledge of 5 CFR §2634 -~~Ability to review forms for~~ both technical sufficiency and compliance with ethics laws and regulations
Training*		
New employee orientation w/i 90 days (30-60 min)	1.Develop an annual written training plan NA 2.Identify employees and track type of training delivered/received 3.Schedule training sessions 4.Disseminate materials	-Knowledge of 5 CFR §2638 -~~Ability to develop/adapt~~ appropriate and meaningful ethics training courses/materials -Knowledge of ethics laws and regulations
Annual briefings: Public filers Other covered employees		
Counseling*		
Oral advice Written advice	1.Document advice 2.Maintain a filing system	-Knowledge of ethics laws and regulations -Ability to analyze factual situations, apply the appropriate rules, and provide accurate advice
Travel Payments (from non-federal source) gift to agency v. individual		
Prior approval/Conflicts analysis Reporting	1.Document requests/approvals 2.Prepare semi-annual report	-Knowledge of 31 USC §1353 and 41 CFR §304-1 -Ability to conduct conflict analyses

must file an application to review the report. However, the supervisor of an official with whom the deputy general counsel consults concerning matters arising in the review process need not file such an application.

Example 2. A state law enforcement agent is conducting an investigation which involves the private financial dealings of an individual who has filed a public financial disclosure report. The agent must complete a written application in order to inspect or obtain a copy.

Example 3. A financial institution has received an application for a loan from an official which indicates her present financial status. The official has filed a public financial disclosure statement with her agency. The financial institution cannot be given access to the disclosure form for purposes of verifying the information contained on the application.

(g)(1) Any public report filed with an agency or transmitted to the Director of the Office of Government Ethics under this section shall be retained by the agency, and by the Office of Government Ethics when it receives a copy. The report shall be made available to the public for a period of six years after receipt. After the six-year period, the report shall be destroyed unless needed in an ongoing investigation, except that in the case of an individual who filed the report pursuant to § 2634.201(c) as a nominee and was not subsequently confirmed by the Senate, or who filed the report pursuant to § 2634.201(d) as a candidate and was not subsequently elected, the report, unless needed in an ongoing investigation, shall be destroyed one year after the individual either is no longer under consideration by the Senate or is no longer a candidate for nomination or election to the Office of President or Vice President. See also the OGE/GOVT-1 Governmentwide executive branch Privacy Act system of records (available for inspection at the Office of Government Ethics), as well as any applicable agency system of records.

(2) For purposes of paragraph (g)(1) of this section, in the case of a reporting individual with respect to whom a trust has been certified under subpart D of this part, a copy of the qualified trust agreement, the list of assets initially placed in the trust, and all other publicly available documents relating to the trust shall be retained and made available to the public until the periods for retention of all other reports of the individual have lapsed under paragraph (g)(1) of this section.

(Approved by the Office of Management and Budget under control numbers 3209-0001 and 3209-0002)

[57 FR 11821, Apr. 7, 1992; 57 FR 21854, May 22, 1992, as amended at 59 FR 34756, July 7, 1994]

§ 2634.604 Custody of and denial of public access to confidential reports.

(a) Any report filed with an agency under subpart I of this part shall be retained by the agency for a period of six years after receipt. After the six-year period, the report shall be destroyed unless needed in an ongoing investigation. See also the OGE/GOVT-2 Governmentwide executive branch Privacy Act system of records (available for inspection at the Office of Government Ethics), as well as any applicable agency system of records.

(b) The reports filed pursuant to subpart I of this part are confidential. No member of the public shall have access to such reports, except pursuant to the order of a Federal court or as otherwise provided under the Privacy Act. See 5 U.S.C. 552a and the OGE/GOVT-2 Privacy Act system of records (and any applicable agency system); 5 U.S.C. app. (Ethics in Government Act of 1978, section 107(a)); sections 201(d) and 502(b) of Executive Order 12674, as modified by Executive Order 12731; and § 2634.901(d).

[57 FR 11821, Apr. 7, 1992; 57 FR 21854, May 22, 1992]

§ 2634.605 Review of reports.

(a) *In general.* The designated agency ethics official shall normally serve as the reviewing official for reports submitted to his agency. That responsibility may be delegated, except in the case of certification of nominee reports required by paragraph (c) of this section. See also § 2634.105(q). He shall note on any report or supplemental report the date on which it is received. Except as indicated in paragraph (c) of this section, all reports shall be reviewed within 60 days after the date of filing. Reports reviewed by the Director of the Office of Government Ethics shall be reviewed within 60 days from the date

on which they are received by that Office. Final certification in accordance with paragraph (b)(2) of this section may, of necessity, occur later, where additional information is being sought or remedial action is being taken under this section.

(b) *Responsibilities of reviewing officials*—(1) *Initial review.* The reviewing official may request an intermediate review by the filer's supervisor. In the case of a filer who is detailed to another agency for more than 60 days during the reporting period, the reviewing official shall obtain an intermediate review by the agency where the filer served as a detailee. After obtaining any intermediate review or determining that such review is not required, the reviewing official shall examine the report to determine, to his satisfaction that:

(i) Each required item is completed; and

(ii) No interest or position disclosed on the form violates or appears to violate:

(A) Any applicable provision of chapter 11 of title 18, United States Code;

(B) The Act, as amended, and the implementing regulations;

(C) Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations; or

(D) Any other agency-specific statute or regulation which governs the filer.

(2) *Signature by reviewing official.* If the reviewing official determines that the report meets the requirements of paragraph (b)(1) of this section, he shall certify it by signature and date. The reviewing official need not audit the report to ascertain whether the disclosures are correct. Disclosures shall be taken at "face value" as correct, unless there is a patent omission or ambiguity or the official has independent knowledge of matters outside the report. However, a report which is signed by a reviewing official certifies that the filer's agency has reviewed the report, and that the reviewing official has concluded that each required item has been completed and that on the basis of information contained in such report the filer is in compliance with applicable laws and regulations noted in paragraph (b)(1)(ii) of this section.

(3) *Requests for, and review based on, additional information.* If the reviewing official believes that additional information is required, he shall request that it be submitted by a specified date. This additional information shall be made a part of the report. If the reviewing official concludes, on the basis of the information disclosed in the report and any additional information submitted, that the report fulfills the requirements of paragraph (b)(1) of this section, the reviewing official shall sign and date the report.

(4) *Compliance with applicable laws and regulations.* If the reviewing official concludes that information disclosed in the report may reveal a violation of applicable laws and regulations as specified in paragraph (b)(1)(ii) of this section, the official shall:

(i) Notify the filer of that conclusion;

(ii) Afford the filer a reasonable opportunity for an oral or written response; and

(iii) Determine, after considering any response, whether or not the filer is then in compliance with applicable laws and regulations specified in paragraph (b)(1)(ii) of this section. If the reviewing official concludes that the report does fulfill the requirements, he shall sign and date the report. If he determines that it does not, he shall:

(A) Notify the filer of the conclusion;

(B) Afford the filer an opportunity for personal consultation if practicable;

(C) Determine what remedial action under paragraph (b)(5) of this section should be taken to bring the report into compliance with the requirements of paragraph (b)(1)(ii) of this section; and

(D) Notify the filer in writing of the remedial action which is needed, and the date by which such action should be taken.

(5) *Remedial action.* (i) Except in unusual circumstances, which must be fully documented to the satisfaction of the reviewing official, remedial action shall be completed not later than three months from the date on which the filer received notice that the action is required.

(ii) Remedial action may include, as appropriate:

(A) Divestiture of a conflicting interest (see subpart J of this part);

(B) Resignation from a position with a non-Federal business or other entity;

(C) Restitution;

(D) Establishment of a qualified blind or diversified trust under the Act and subpart D of this part;

(E) Procurement of a waiver under 18 U.S.C. 208(b)(1) or (b)(3);

(F) Preparation of a written instrument of recusal (disqualification); or

(G) Voluntary request by the filer for transfer, reassignment, limitation of duties, or resignation.

(6) *Compliance or referral.* (i) If the filer complies with a written request for remedial action under paragraph (b)(4) of this section, the reviewing official shall indicate, in the comment section of the report, what remedial action has been taken. The official shall also sign and date the report.

(ii) If the filer does not comply by the designated date with the written request for remedial action transmitted under paragraph (b)(4) of this section, the reviewing official shall, in the case of a public filer under subpart B of this part, notify the head of the agency and the Office of Government Ethics, for appropriate action. Where the filer is in a position in the executive branch (other than in the uniformed services or the Foreign Service), appointment to which requires the advice and consent of the Senate, the Director of the Office of Government Ethics shall refer the matter to the President. In the case of the Postmaster General or Deputy Postmaster General, the Director of the Office of Government Ethics shall recommend to the Governors of the Board of Governors of the United States Postal Service the action to be taken. For confidential filers, the reviewing official will follow agency procedures.

(c) *Expedited procedure in the case of individuals appointed by the President and subject to confirmation by the Senate.* In the case of a report filed by an individual described in § 2634.201(c) who is nominated by the President for appointment to a position that requires the advice and consent of the Senate:

(1) The Executive Office of the President shall furnish the applicable financial disclosure report form to the nominee. It shall forward the completed report to the designated agency ethics official at the agency where the nominee is serving or will serve, or it may direct the nominee to file the completed report directly with the designated agency ethics official.

(2) The designated agency ethics official shall complete an accelerated review of the report, in accordance with the standards and procedures in paragraph (b) of this section. If that official concludes that the report reveals no conflict of interest under applicable laws and regulations, the official shall:

(i) Attach to the report a description (when available) of the position to be filled by the nominee;

(ii) Personally certify the report by signature, and date the certification;

(iii) Write an opinion letter to the Director of the Office of Government Ethics, personally certifying that there is no unresolved conflict of interest under applicable laws and regulations, and discussing:

(A) Any actual or apparent conflicts of interest that were detected during the review process; and

(B) The resolution of those real or apparent conflicts, including any specific commitment, ethics agreement entered under the provisions of subpart H of this part, or other undertaking by the nominee to resolve any such conflicts. A copy of any commitment, agreement, or other undertaking which is reduced to writing shall be sent to the Director, in accordance with subpart H of this part; and

(iv) Deliver the letter and the report to the Director of the Office of Government Ethics, within three working days after the designated agency ethics official receives the report.

NOTE: The designated agency ethics official's certification responsibilities in § 2634.605(c) are nondelegable and must be accomplished by him personally, or by the agency's alternate designated agency ethics official, in his absence. See § 2638.203 of this chapter.

(3) The Director of the Office of Government Ethics shall review the report and the letter from the designated agency ethics official. If the Director is satisfied that no unresolved conflicts of interest exist, then the Director shall sign and date the report form. The Director shall then submit the report

with a letter to the appropriate Senate committee, expressing the Director's opinion whether, on the basis of information contained in the report, the nominee has complied with all applicable conflict laws and regulations.

(4) If, in the case of any nominee or class of nominees, the expedited procedure specified in this paragraph cannot be completed within the time set forth in paragraph (c)(2)(iv) of this section, the designated agency ethics official shall inform the Director. When necessary and appropriate, the Director may modify the rule of that paragraph for a nominee or a class of nominees with respect to a particular department or agency.

§2634.606 Updated disclosure of advice-and-consent nominees.

(a) *General rule.* Each individual described in §2634.201(c) who is nominated by the President for appointment to a position that requires advice and consent of the Senate, shall, at or before the commencement of the first Senate committee hearing to consider the nomination, submit to the committee an amendment to the report previously filed under §2634.201(c) and transmit copies of the amendment to the designated agency ethics official referred to in §2634.605(c)(1) of this subpart and to the Office of Government Ethics, which shall update, through the period ending no more than five days prior to the commencement of the hearing, the disclosure of information required with respect to receipt of:

(1) Outside earned income; and

(2) Honoraria, as defined in §2634.105(i).

(b) *Additional certification.* In each case to which this section applies, the Director of the Office of Government Ethics shall, at the request of the committee considering the nomination, submit to the committee an opinion letter of the nature described in §2634.605(c)(3) of this subpart concerning the updated disclosure. If the committee requests such a letter, the expedited procedure provided by §2634.605(c) of this subpart shall govern review of the updated disclosure, which shall be deemed a report filed for purposes of that paragraph.

§2634.607 Advice and opinions.

To assist employees in avoiding situations in which they might violate applicable financial disclosure laws and regulations:

(a) The Director of the Office of Government Ethics shall render formal advisory opinions and informal advisory letters on generally applicable matters, or on important matters of first impression. See also subpart C of part 2638 of this chapter. The Director shall insure that these advisory opinions and letters are compiled, published, and made available to agency ethics officials and the public. Good faith reliance on such opinions shall provide a defense to any penalty or sanction provided by this part for fact situations indistinguishable in all material aspects from those in the opinion.

(b) Designated agency ethics officials will offer advice and guidance to employees as needed, to assist them in complying with the requirements of the Act and this part on financial disclosure.

Subpart G—Penalties

SOURCE: 57 FR 11824, Apr. 7, 1992, unless otherwise noted.

§2634.701 Failure to file or falsifying reports.

(a) *Referral of cases.* The head of each agency, each Secretary concerned, or the Director of the Office of Government Ethics, as appropriate, shall refer to the Attorney General the name of any individual when there is reasonable cause to believe that such individual has willfully failed to file a public report or information required on such report, or has willfully falsified any information (public or confidential) required to be reported under this part.

(b) *Civil action.* The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information required by filers of public reports under subpart B of this part. The court in which the action is brought may assess against the

CONFLICTS OF INTEREST AND BRAC

Potential Conflicting Financial and Personal Interests

What is a conflict of interest? You will have a conflict if any of your personal financial interests, or those of someone with a relationship with you, may be affected by the BRAC decisions or recommendations. Ethics laws and regulations require personnel to avoid not only actual conflicts, but even the appearance of a conflict of interest or a loss of impartiality. Because of the importance and visibility of the BRAC process, which could potentially impact the lives of many Americans and their communities, the Department must ensure that the public has complete confidence in the fairness of the process.

As individuals participating in BRAC deliberations, you are participating personally and substantially in the BRAC process. As such, you must be concerned about potential conflicts of interest. That is why you have received the conflicts of interest training. Most, if not all of you, have already filed either a Public or Confidential Financial Disclosure Report (SF 278 or OGE 450) based on your BRAC or other official responsibilities. If you have not done so, please consult with one of your BRAC or ethics attorneys immediately. While these reports are a good starting point, you may have added interests since you filed your last report. Also, many of the interests and relationships that may be involved in the BRAC process are not reportable. For example, you do not report your personal residence or vacation property unless you rent them.

We have developed this guidance to help you identify the interests and relationships that are not reported on the disclosure forms. Please review it as soon as you can to determine whether you have any of the financial interests or relationships discussed below. If you believe that any of these interests or relationships may be affected by any potential BRAC decision, please contact your BRAC or ethics attorney to discuss as soon as possible. When you become aware that specific installations are identified in the BRAC process, please review your interests and relationships again in connection with those installations and contact your attorneys to discuss.

RELATIONSHIPS

1. **General Partners:** Do you have general partners in business ventures?

2. **Potential Employers:** Are you negotiating for, or do you have an arrangement concerning, prospective employment with an organization?

3. **Members of your Household:** Do you have members of your household in addition to those whose interests are already reported on your financial statements, *i.e.*, someone other than your spouse or minor child?

4. **Business Relationship:** Do you have, or seek to have, a business, contractual or financial relationship with someone, other than a routine consumer transaction?

5. **Close relatives:** Do you have relatives with whom you have a close personal relationship?

6. **Previous Employers:** Have you, in the last year, served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee?

7. **Relative's employers:** Is your spouse, parent, or dependent child serving, or are they seeking to serve, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee?

8. **Organizations:** Are you an active participant in an organization, other than a political party?

Potential Conflict

If you have identified any of the relationships in the previous questions, are any of them, to your knowledge, an entity at a military installation subject to the BRAC process, or do any have a financial interest that could be "directly and predictably" affected by a BRAC decision?

> "Directly" means a close causal link between the BRAC recommendation and any expected effect on the financial interest. The effect does not have to be immediate. "Predictable" means a real, not speculative, possibility that the BRAC recommendation will affect the financial interest. The dollar amount of the gain or loss is immaterial.

For your convenience, we have developed the following list of financial interests to help you in evaluating the effect of a BRAC decision. You should also consider any other interests of which you are aware.

Financial Interests

1. Salaries from military installations or contractors at military installations

2. Ownership of real estate in the vicinity of a military installation

3. Interest in business activities, including utilities and DoD contractors, that do business with a military installation

4. Bonds issued by towns/cities in the vicinity of a military installation

5. Pensions from contractors at military installations

6. Active affiliation with a civic or private BRAC-proofing or Save-the-Base type organization

7. Potential employment interest with a person/organization that could be affected by closing or realigning a military installation

Examples of how the relationships and interests may interact follow:

1. Your sister works for a contractor whose major source of business is the military installation, and she owns her home in the vicinity.

2. Your daughter works at a restaurant that depends upon the patronage of personnel at a military installation.

3. You are actively participating in a Save-The-Base organization in your personal capacity.

4. Your son has a large investment in municipal bonds issued by a city that could be greatly affected if a major base closed.

As we discussed, if you determine that any of these interests or relationships exist, please contact your BRAC or ethics attorney so that you can discuss them in a timely fashion and take appropriate action to resolve any questions.

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United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510–6050

March 7, 2005

MEMORANDUM FOR SENATORS WARNER AND LEVIN

FROM: Scott Stucky and Peter Levine

SUBJECT: Conflict of interest issues concerning the Defense Base Closure and Realignment Commission

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The Defense Base Closure and Realignment Act of 1990 (10 U.S.C. 2687 note), as amended by Title XXX of the National Defense Authorization Act for Fiscal Year 2002 (P.L.107-107, December 28, 2001), authorizes a single round of base closure in 2005. The administrative instrument for the closure decisions, as in the 1991, 1993, and 1995 rounds of base closure, is the Defense Base Closure and Realignment Commission (the Commission.) The procedures set out in the statute raise unique conflict of interest issues. This memorandum discusses those issues.

Background on the base closure commission

The 2005 Defense Base Closure and Realignment Commission is an "independent commission", consisting of nine members, including a Chairman, nominated by the President and confirmed by the Senate. Under the statute, nominations to the Commission must be submitted to the Senate by March 15, 2005. The Commission is to meet in calendar year 2005. The terms of the members, and the Commission itself, terminate on April 15, 2006.

The Chairman and the other members are not full-time employees; they are paid on a daily basis for days they perform services, and they receive travel and per diem expenses. It is expected that their actual service will be fewer than 130 days in a year, which makes them "special government employees" for the purposes of the criminal statutes and regulations governing conflict of interest. Special government employees are subject to certain of the criminal statutes only to the extent that they participated personally and substantially as employees in particular matters. Those serving fewer than 60 days in a year are also exempt from the one-year bar on certain post-employment communications with the department in which they served. Special government employees are also partially or wholly exempt from regulatory constraints on such things as outside employment and political activity.

The Committee has not insisted on divestiture by special government employees whose nominations fall within the Committee's jurisdiction, such as the Regents of the Uniformed Services University of the Health Sciences. Rather, it has allowed recusal in situations in which

a personal financial interest exists.

The members of the Commission, while not full-time employees, perform government services. The following summarizes the Commission's role in the base closure process.

- By May 16, 2005, the Secretary of Defense must transmit to Congress and publish a list of installations recommended for closure or realignment. The recommendations must be based upon criteria specified in the statute, and a force structure plan and inventory which were earlier submitted to Congress.

- The Commission is to have access to all information used by the Secretary in making his recommendations.

- The Commission holds public hearings on the Secretary's recommendations.

- Not later than September 8, 2005, the Commission transmits its findings and conclusions, based upon its review and analysis of the Secretary's recommendations, to the President. Additions to the Secretary's recommendations require a site visit and an affirmative vote of at least seven members of the Commission.

- By September 23, 2005, the President must approve or disapprove the Commission's recommendations.

  -- If the President approves the recommendations, he must forward them to Congress by November 7, 2005.

  -- If he disapproves the recommendations, he must provide the Commission with his reasons for disapproval.

    > Thereafter, by October 20, 2005, the Commission must submit revised recommendations to the President.

    > If the President approves the revised recommendations, he forwards them to Congress.

    > If the President does not transmit an approved set of recommendations to Congress by November 7, 2005, the closure process is terminated.

- If the President submits approved recommendations to Congress, the recommendations will take effect unless Congress passes a resolution of disapproval (and overrides the anticipated Presidential veto) within 45 days after

the President submits the recommendations (or by the sine die adjournment of Congress).

As illustrated by the foregoing, the Commission is an integral part of the decision-making process, not merely an advisory body. Therefore, Commission Members are subject to the basic conflict of interest requirements in 18 U.S.C. 208, which apply to part-time (special government) as well as full-time employees. Thus, members may not take actions that would have a direct and predictable effect on matters in which they have financial interests.

Generally, government employees may avoid statutory conflict of interest problems through: (1) divestiture; (2) recusal; or (3) a statutory waiver based upon a determination that the financial interests are not so substantial as to effect the integrity of the individual's government service. A waiver may be granted by the official who appointed the employee, or by the Office of Government Ethics for a class of employees.

Normally, the Committee has required Department of Defense appointees to use divestiture as the vehicle for eliminating conflicts of interest. The Committee has on occasion accepted recusal, rather than waiver, when the matter involved a closely-held, nonmarketable financial interest and the recusal would not substantially impair the ability of the nominee to fulfill the duties of office. As noted above, the Committee has accepted recusal and not insisted upon divestiture when dealing with part-time positions under its jurisdiction.

The Committee normally receives only the Standard Form 450, an abbreviated statement of a nominee's financial interests, for nominees to part-time positions. In our judgement, the Commission's functions are of such importance and sensitivity that nominees should provide the Standard Form 278, the full financial report, rather than the Form 450. The Form 278 was provided to the Committee when nominees for the 1991, 1993, and 1995 Commissions were considered. With the Form 278, the Committee will have information on the nominees' holdings equal to that it receives on nominees for full-time civilian positions in the Department of Defense.

Procedures used in the past to address conflict of interest issues in the base closure process

In many cases, the issue of whether a base closure or realignment decision would have a direct and predictable effect on a particular nominee's financial interests is a matter that cannot be determined until the Secretary's base closure list is announced, an announcement that is not due until May 16. It is likely that Committee action, confirmation, and appointment of the Commission members will have taken place by then. Accordingly, we recommend that the Committee follow the same procedure used during the 1991, 1993, and 1995 base closure rounds, which was worked out at that time between the Committee and the Department.

Under that procedure, the following actions would be taken:

(1) At the time the Secretary's list is announced, the Commission's General Counsel, (assuming one is appointed by that time), working with the DOD General Counsel and the Office of Government Ethics, will review the financial holdings of each member of the Commission and advise the member whether recusal or other remedial action (divestiture or waiver) is necessary.

(2) The Commission's General Counsel will advise the Committee of the results of the review and the actions taken by the members of the Commission.

(3) The Commission's General Counsel will establish a procedure that will provide for similar reviews, and information to the Committee, when and if the Commission considers taking action with respect to installations not on the Secretary's list.

In the base closure rounds held in the 1990s, application of this procedure resulted in some members recusing themselves from the consideration of certain installations, other members being granted waivers because of the nature and the breadth of their holdings, still others being required to divest certain holdings, and at least one member resigning from the Commission because he was unwilling to divest himself of certain interests.

In a letter dated February 22, 1993, BRAC Commission Chairman Courter provided the following additional information concerning the operation of the recusal process:

> When it has been determined by the Commission's General Counsel that a Commissioner has a potential conflict of interest and the recommended remedial measure is recusal in regards to the base, to avoid a conflict of interest or perception of a conflict, the Commission will adopt the following policy: the Commissioners shall be prohibited from participation in any and all discussions, debate and actions regarding the base in question. Additionally, Commissioners will not participate in any discussions, debate or actions involving bases that are being considered as substitutes to the first base in question. The prohibition regarding substitute bases will take effect the moment the additional base(s) is/are being considered as substitute(s) to the original base.

We would anticipate that the 2005 Commission would operate under similar constraints with regard to individual members who are recused from consideration of particular bases.

Conclusion

The Office of Government Ethics agreed with this procedure in the 1991, 1993, and 1995 BRAC rounds. In our judgement, these arrangements appropriately balance the necessity for adjustments caused by the statutory schedule of the Commission, the criminal conflict of interest statutes, and the Committee's accepted conflict of interest practices.

Standard Form 278
Executive Branch Personnel
PUBLIC FINANCIAL DISCLOSURE REPORT

Instructions for Completing SF 278

I. Introduction

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year, except Part II of Schedule C and Part I of Schedule D where you must also include any positions held and agreements or arrangements made from the beginning of the filing year until the date you file. Schedule B need not include transactions made, or gifts or reimbursements received, during a period when the filer was not a Federal employee.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination of Government employment in the position.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D (candidates do not file Part II of Schedule D), as follows:

• **Schedule A** - The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is less than 31 days before the date of filing.

• **Schedule C, Part I** (Liabilities) - The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is less than 31 days before the date of filing.

• **Schedule C, Part II** (Agreements or Arrangements) Show any agreements or arrangements as of the date of filing.

• **Schedule D** - The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Scope of Disclosure

The extent of the reporting requirement is noted in each schedule. The various schedules of this form require reporting of your financial interests and activities, both in the U.S. and abroad, except as otherwise noted. In addition to your individual financial information, you are required to report information concerning your spouse and dependent children in several schedules of the form. However, no report is required with respect to your spouse if he or she is living separate and apart from you with the intention of terminating the marriage or providing for permanent separation. In addition, no report is required with respect to any income or obligations of an individual arising from the dissolution of marriage or permanent separation from a spouse. There are other exceptions to the reporting of assets and income, transactions, and liabilities of a spouse or dependent child which are discussed in the instructions applicable to those subjects.

A basic premise of the statutory financial disclosure requirements is that those having responsibility for review of reports filed pursuant to the Ethics in Government Act or permitted public access to reports must be given sufficient information by reporting individuals concerning the nature of their outside interests and activities so that an informed judgment can be made with respect to compliance with applicable conflict of interest laws and standards of conduct regulations. Therefore, it is important that you carefully complete the attached form. This report is a safeguard for you as well as the Government, in that it provides a mechanism for determining actual or potential conflicts between your public responsibilities and your private interests and activities and allows you and your agency to fashion appropriate protections against such conflicts when they first appear.

A Presidential nominee to a position requiring the advice and consent of the Senate shall file with the Senate committee considering the nomination an amendment to the initial report, which shall update all items of earned income and honoraria through the period ending no earlier than 5 days before the scheduled date of the Senate committee hearing on the nomination. This update shall be provided in the manner requested by the Senate committee considering the nomination. Copies shall be provided to OGE and your agency ethics official.

Definition of Terms

• **Category of Amount**

Reportable financial interests are disclosed either by actual amount or by category of amount, depending on the interest, as specified by the form. You may, but you are not required to, indicate an actual amount where the form provides for a category of amount or value.

• **Dependent Child**

The term "dependent child" means your son, daughter, stepson, or stepdaughter if such person is either: (1) unmarried, under age 21, and living in your household, or (2) a "dependent" of yours within the meaning of section 152 of the Internal Revenue Code of 1986.

• **Excepted Investment Fund**

An excepted investment fund is a mutual fund, common trust fund of a bank, pension or deferred compensation plan, or any other investment fund, which is widely held; publicly traded (or available) or widely diversified; and under circumstances where you neither exercise control over nor have the ability to exercise control over the financial interests held by the fund. A fund is widely diversified when it holds no more than 5% of the value of its portfolio in the securities of any one issuer (other than the U.S. Government) and no more than 20% in any particular economic or geographic sector.

• Gifts

See instructions for Schedule B, Part II.B.

• Honoraria

The term "honoraria" means payments of money or anything of value to you or your spouse for an appearance, speech, or article, excluding necessary travel expenses. See 5 U.S.C. app. § 505(3).

• Personal Savings Account

The term "personal savings account" includes a certificate of deposit, a money market account, or any other form of deposit in a bank, savings and loan association, credit union, or similar financial institution.

• Trusts ("Qualified" and "Excepted")

See instructions for Schedule A, Part II.B., and 5 C.F.R. Part 2634, Subpart D.

• Value

You may use any one of the methods described below, in determining fair market value:

Option 1 - any good faith estimate of the value of the property if the exact value is unknown or not easily obtainable;

Option 2 - value based upon a recent appraisal of the property interest;

Option 3 - the purchase price of your property interest, or estimated retail price of a gift;

Option 4 - the assessed value of the property for tax purposes, adjusted to reflect current market value if the tax assessment is computed at less than 100% of current value;

Option 5 - the year-end book value of non-publicly traded stock, or the year-end exchange value of corporate stocks, or the face value of corporate bonds or comparable securities;

Option 6 - the net worth of your interest (as in a business partnership or other jointly held business interest);

Option 7 - the equity value of your interest (as in a solely owned business or commercial enterprise); or

Option 8 - exact value (e.g., personal savings accounts) or any other recognized indication of value (such as last sale on a stock exchange).

II. Who Must File

a. Candidates for nomination or election to the office of President or Vice President.

b. Presidential nominees to positions requiring the advice and consent of the Senate, other than those nominated for judicial office or as a Foreign Service Officer or for appointment to a rank in the uniformed services at a pay grade of O-6, or below.

c. The following newly elected or appointed officials:

• The President;

• The Vice President;

• Officers and employees (including special Government employees, as defined in 18 U.S.C. § 202) whose positions are classified above GS-15 of the General Schedule, or the rate of basic for which is fixed, other than under the General Schedule, at a rate equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule.

• Members of the uniformed services in pay grade O-7 or above;

• Officers or employees in any other positions determined by the Director of the Office of Government Ethics to be of equal classification to above GS-15;

• Administrative law judges;

• Employees in the excepted service in positions which are of a confidential or policy-making character, unless by regulation their positions have been excluded by the Director of the Office of Government Ethics;

• The Postmaster General, the Deputy Postmaster General, each Governor of the Board of Governors of the U.S. Postal Service and officers or employees of the U.S. Postal Service or Postal Rate Commission in positions for which the rate of basic pay is equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule;

• The Director of the Office of Government Ethics and each designated agency ethics official; and

• Civilian employees in the Executive Office of the President (other than special Government employees) who hold commissions of appointment from the President.

d. Incumbent officials holding positions referred to in section II.c. of these instructions if they have served 61 days or more in the position during the preceding calendar year.

e. Officials who have terminated employment after having served 61 days or more in a calendar year in a position referred to in section II.c. and have not accepted another such position within 30 days thereafter.

III. When to File

a. Within 30 days after becoming a candidate for nomination or election to the office of President or Vice

President, or by May 15 of that calendar year, whichever is later, but at least 30 days before the election, and on or before May 15 of each succeeding year an individual continues to be a candidate.

b. At any time after the President or President-elect has publicly announced an intention to nominate an individual referred to in section II.b. of these instructions, but no later than 5 days after the President transmits the nomination to the Senate.

c. Within 30 days after assuming a position described in section II.c. unless such an individual has left another such position within 30 days prior to assuming the new position, or has already filed a report with respect to nomination for the new position (section II.b.) or as a candidate for the position (section II.a.).

d. No later than May 15th annually, in the case of those in a position described in section II.d.

e. In the event an individual terminates employment in the position and does not accept another position described in section II.c. within 30 days, the report must be filed no later than the 30th day after termination.

f. Extensions. An employing agency may grant an extension of time of up to 45 days to a filer to file any report under sections III. c.-e. above (the FEC for any report under section III. a. above). OGE may grant an additional extension of time up to 45 days to file any such report.

g. Fee for Late Filing. Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a $200 late filing fee. A report is considered to be filed when it is received by the agency. Unless waived by OGE, such fee will be collected by the filer's agency, for deposit with the U.S. Treasury.

IV. Where to File

a. Candidates for President and Vice President, with the Federal Election Commission.

b. The President and Vice President, with the Office of Government Ethics.

c. Members of a uniformed service, with the Service Secretary concerned.

d. All others, with the designated agency ethics official, or that official's delegate, at the agency in which the individual serves, will serve or has served.

e. In the case of individuals nominated by or to be nominated by the President to positions requiring confirmation of the Senate, see 5 C.F.R. Part 2634 for expedited procedures and filing location.

V. General Instructions

a. This form consists of the front page and four Schedules. If possible, use a black ink pen or typewriter to fill out your report. You must complete each Part of all Schedules as required. If you have no information to report in any Part of a Schedule, you should indicate "None." If you are not required to complete Schedule B or Part II of Schedule D, you should leave it blank. Schedule A combines a report of income items with the disclosure of certain property interests. Schedule B deals with transactions in real property or certain other assets, as well as gifts and reimbursements. Schedules C and D relate to liabilities and employment relationships. After completing the first page and each Part of the Schedules (including extra sheets of any Schedule where continuation pages are required for any Part), consecutively number all pages.

b. The information to be disclosed is only that which the Ethics in Government Act of 1978, as amended (the Act) and 5 C.F.R. Part 2634 specifically require. You may, however, include any additional information, beyond those requirements, that you wish to disclose for purposes of clarification. Disclosure of information does not authorize any holdings, income, honoraria, liabilities, transactions, gifts, reimbursements, affiliations or positions otherwise prohibited by law, Executive order, rule or regulation.

c. Combine on one form the information applicable to yourself, your spouse and dependent children; or if more convenient, use separate schedules to report the required information applicable to family members. You may, if you desire, distinguish any entry for a family member by preceding the entry with an (S) if it is for a spouse or a (DC) if it pertains to a dependent child. Joint assets may be indicated by a (J). See 5 C.F.R. Part 2634, Subpart C, for exclusions in the case of separation or divorce.

d. Definitions of the various terms used in these instructions and detailed information as to what is required to be disclosed are contained in 5 C.F.R. Part 2634.

e. In the case of references to entities which are operating trades or businesses which do not have listed securities, you must provide sufficient information about these private entities to give the reviewers of your disclosure report an adequate basis for the conflicts analysis required by the Act. Thus, you must disclose the location and primary trade or business of private entities, as well as attributed interests and activities not solely incidental to such a primary trade or business. For instance, if your family swimming pool services corporation incurs a liability to purchase an apartment house for investment in addition to its pool services business, you will have to report the apartment house investment as part of the nature of the business of the family corporation.

f. In the case of references to entities which are investment funds such as mutual or pension funds (whether public or private), you must disclose the portfolio holdings and all other items such as transactions and liabilities to the extent otherwise required for reportable interests, unless the entity is an "excepted investment fund." See Definition of Terms above.

g. If you need assistance in completing this form, contact the designated agency ethics official of the agency in which you serve, will serve, or have served.

Schedule A

I. General Instructions

Two of the general disclosure requirements of the Act concern certain interests in property (generally referred to here as assets) and items of income. Schedule A is designed to enable you to meet both of these reporting requirements. Generally a description of your, your spouse's, and your dependent child's assets and sources of income is required to be listed in BLOCK A of the Schedule. Reading from left to right across the page from each description of the asset or income source, you will be able to report in BLOCK B the value of each asset, and in BLOCK C the type and amount of income generated by that asset or received from the non-asset source.

On Schedule A are four examples which are representative of the reporting scheme of this Schedule. The first example represents the proper method of reporting stock of Central Airlines Company held at the end of the reporting period which then had a value of $75,000. The individual had also received dividends of $1,500, reported in BLOCK C. If the Central Airlines stock had been sold, there would be a check in the "None (or less than $1,001)" column in BLOCK B if the individual no longer owned any of the stock at the end of the reporting period, and there would be an entry for capital gains as well as dividends in BLOCK C if they were realized during the period. The second example represents the proper method of reporting the source of $130,000 of earned income from private law practice, as well as $18,500 the reporting individual maintained in the capital account in the law firm at the end of the reporting period.

The third example represents acceptable reporting of an investment fund which is widely held, widely diversified (or publicly traded) and independently managed. Because it meets these requirements, no individual assets of the fund need to be reported, and the type of income does not need to be broken into dividends, interest, or capital gains as long as the column for "excepted investment fund" is marked. The fourth example reports a mutual fund held in an IRA from which the filer has accrued dividends of $10,000.

Normally you will have to list an item only once in BLOCK A with all other value and income information associated with that item shown on the same line to the right. However, when you have a number of different kinds of financial arrangements and income involving one entity, a full disclosure of all the required information for that entity may require more than one line. You may always use more than one line for clarification if you choose.

II. Property Interests and Assets

(BLOCKS A and B)

A. Items to Report

Report the identity and category of valuation of any interest in property (real or personal) held by **you, your spouse or dependent child** in a trade or business, or for investment or the production of income which has a fair market value which **exceeds $1,000** as of the close of the reporting period. These interests include, but are not limited to, stocks, bonds, pension interests and annuities, futures contracts, mutual funds, IRA assets, tax shelters, beneficial interests in trusts, personal savings or other bank accounts, real estate, commercial crops, livestock, accounts or other funds receivable, and collectible items held for resale or investment. **Exceptions:** Exclude your personal residence (unless rented out) and any personal liability owed to you, your spouse or dependent child by a spouse or dependent child, or by a parent, brother, sister or child of you, your spouse, or dependent child. Exclude any retirement benefits (including the Thrift Savings Plan) from Federal Government employment and any social security benefits. Exclude also any deposits aggregating $5,000 or less in personal savings accounts in a single financial institution.

With respect to assets of a spouse or a dependent child, do not report items:

(1) which represent your spouse's or dependent child's sole financial interest or responsibility and of which you have no knowledge;

(2) which are not in any way, past or present, derived from your income, assets, or activities; and

(3) from which you neither derive, nor expect to derive, any financial or economic benefit.

Note: It is very difficult for most individuals to meet all three parts of this test, especially (3). For instance, if you file a joint tax return with your spouse, you derive a financial or economic benefit from the items involved and you are charged with knowledge of those items. A trust for the education of your minor child would also convey a financial benefit to you. Therefore, those asset and income items do not fit the test.

A personal residence held for investment or production of income, such as a summer home rented during parts of the year, must be reported.

Intermittent sales from personal property such as collections of antiques or art holdings demonstrate that the items are held for investment or the production of income and should therefore be reported.

B. What to Show on the Form

Enter the identity of the asset in BLOCK A and then show the value in BLOCK B. **Only the category of value, rather than the actual value of the property interest or asset,** must be shown. You need not disclose which valuation methods you used.

For assets such as stocks, bonds, and securities, report any holdings directly held or attributable to **you, your spouse or dependent child** from one source totaling more than $1,000 in value. **Identify the holding and show the category of value.** If you hold different types of securities of the same corporation (e.g., bonds and stocks of "X" Corporation), these holdings should be considered as being from the same source for purposes of determining whether the aggregate value of the interest is below or above the $1,000 threshold value. Report personal savings accounts only if they aggregate more than $5,000 in a single financial institution.

If you have an interest in an investment fund or pool which is an "excepted investment fund" (see Definition of Terms above), you need only identify the interest by giving the complete name of the fund, rather than identifying the underlying assets as well.

To report interests of you, your spouse, or dependent child in a business, a partnership, or joint venture, or the ownership of property held for investment or the production of income, identify the character of the ownership interest, and the nature and location of the business or interest, unless it is a publicly traded security. For example, the entry for a holding of farm land might show, under BLOCK A... "sole ownership of 100 acres of unimproved dairy farmland on Rural Route #1 at Pine Bluff, Madison County, Wisconsin."

You must disclose the primary trade or business of non-public entities, as well as interests and activities not solely incidental to such a trade or business. For example, if your family is involved in a private real estate investment business but as a side interest buys stock through the business in a bank, you must disclose that in addition to real estate (by type and general location), the family business holds an interest in a bank.

For an IRA (Individual Retirement Account), indicate the value of each underlying asset, as well as the income derived therefrom (even though deferred for Federal tax purposes) in accordance with section IV below, to enable the reviewer to evaluate compliance with applicable laws and regulations. If the IRA were invested solely in a mutual fund such as "Templeton World Fund, Inc." and the investment properly disclosed in Schedule A, that would be sufficient identification of the asset, since for most reporting individuals that fund would be an "excepted investment fund." If, however, the IRA had an individual or privately managed portfolio, detailed disclosure of the portfolio would be required on Schedule A in the same amount of detail as if each investment were directly held.

With respect to trusts in which a vested beneficial interest in principal or income is held, or as to which you serve as trustee, report trust interests and trust assets which had a value in excess of $1,000. See 5 C.F.R. Part 2634 for more information about vested interests.

You need not report the identity of assets of a trust of which you, your spouse or dependent children are the beneficiaries if the interest is:

1. a "qualified blind trust" or "qualified diversified trust," which has been certified by the Office of Government Ethics, in accordance with 5 C.F.R. Part 2634, Subpart D, or

2. an "excepted trust," that is, one which:

A. was not created by you or your spouse or dependent children, and

B. has holdings or sources of income of which you, your spouse and dependent children have no knowledge.

In the case of these special types of trusts, you should show in BLOCK A the identity of the trust, including the date of creation, and in BLOCK C, the classification of the trust as a "qualified trust" or an "excepted trust." You should also report in Block B the category of the total cash value of the interest in a qualified blind or qualified diversified trust, unless the trust instrument was executed prior to July 24, 1995, and precludes the beneficiary from receiving information on the total cash value of any interest therein. (The category of amount of the trust income, if it exceeded $200, must also be reported in BLOCK C, in accordance with section IV below.)

Note: You are not permitted by the statute to "create" an excepted trust by instructing a trustee not to divulge information or otherwise avoiding previous sources of knowledge upon entering Government service.

Do not report a trust of which your spouse or dependent child is a beneficiary that meets the three part test set forth in the second paragraph under II.A. A trust that does not fit that exception may still be an excepted trust under this section; in such case, it must be reported, but the assets need not be identified.

Except for the special trusts or funds referred to above, you must identify each individual investment held by a trust or fund, which had a value in excess of $1,000. For example, in BLOCK A an entry such as "trust held by First National Bank (Boston, MA) consisting of ITT stock, U.S. Treasury certificates, and Dallas Municipal Bonds" might be made. In BLOCK B the applicable value of each trust asset would be entered. (As described under IV.B.6. Trust Income, below, the income from each asset would be entered in BLOCK C as well as income from assets of the trust sold during the reporting period.)

III. Earned and Other Non-Investment Income

(BLOCKS A and C)

A. Items to Report

For yourself, report the identity of the source in BLOCK A and the type and **actual** amount in BLOCK C of non-investment income **exceeding $200** from any one source. Such income includes fees, salaries, commissions, compensation for personal services, retirement benefits, and honoraria. Report these items on the same line as related interests in property, if any.

For your spouse, report the source, but not the amount, of non-investment income exceeding $1,000 and the source, amount and date of honoraria exceeding $200 from any one source. **No report of the earned or other non-investment income of your dependent children is required.**

Exclude for yourself and spouse income from employment by the United States Government and from any retirement system of the United States (including the Thrift Savings Plan) or from social security.

B. What to Show on the Form

1. HONORARIA - For **you or your spouse,** show honoraria aggregating more than $200 from any one source. Report the **identity of the source** in BLOCK A, and the **date** of the services performed and **actual amount** in BLOCK C. List each honorarium separately. For example, if, prior to your Government service, you received $1,500 for a speech before the Chicago Civic Club on March 19, 1999 of which $200 was actually spent for round-trip travel, and $200 went to the agent who made the speaking arrangement, on your new entrant report you would enter in BLOCK A... "Chicago Civic Club, 18 Lakeshore Dr., Chicago, IL"; in BLOCK C under OTHER (specify type)... "Honorarium"; for ACTUAL AMOUNT... "$1,100," and under DATE... "3/19/99." Honoraria received and donated to charity must be reported, but a notation explaining that fact may be included in reporting such items. The source, date and amount of payments made or to be made directly to a charitable organization in lieu of honoraria must also be disclosed.

2. EARNED AND OTHER NON-INVESTMENT INCOME - Include all income, exclusive of honoraria, from non-investment sources including fees, commissions, salaries, and income from personal services or retirement. Report the **identity of the source and give the actual amount of such income** exceeding $200 from any one source. For example, if you earned $450 teaching at a law school, enter in BLOCK A... "John Jones Law School, Rockville, MD"; in BLOCK C under OTHER... "Salary"; and under ACTUAL AMOUNT... "$450." If you earned $75 for teaching in one law school and $250 from teaching at another school, report only the $250 amount. Report employee benefits and severance payments which meet the reporting requirements separately from salary.

If **your spouse** has earned income in excess of $1,000 (other than honoraria) from any one source, **identify the source but show nothing under amount.** If your spouse is self-employed in a business or profession, for example as a practicing psychologist who earned $10,500 during the year, you need only show under BLOCK A... "practicing psychologist."

IV. Investment Income

(BLOCKS A and C)

Report items of investment income on the same line of Schedule A as the related property interest or other asset from which income is derived. Note that some property interests or other assets will not have a related item of income. In such a case, check "None (or less than $201)" in BLOCK C under category of amount.

A. Items to Report

Report the identity in BLOCK A and the type and value in BLOCK C of any investment income over $200 from any one source received by or accrued to the benefit of **you, your spouse or dependent child** during the reporting period. For purposes of determining whether you meet the over $200 threshold from any one source, you must aggregate all types of investment income from that same source. For your spouse or dependent child such income is only required to be reported if the asset source meets the reporting threshold in section II above.

Investment income includes, but is not limited to: income derived from dealings in property, interest, rents, royalties, dividends, capital gains; income from annuities, the investment portion of life insurance contracts, or endowment contracts; your distributive share of partnership or joint venture income, gross business income, and income from an interest in an estate or trust. You need not show the actual dollar amount of dividends, rents and royalties, interest, capital gains, or income from qualified trusts, excepted trusts, or excepted investment funds. For these specific types of income, you need only check the category of amount of the item reported. For all "other investment income" as described in item 7 below, you will have to report the actual dollar amount of income from each source, and indicate the type in the space marked "Other Income (Specify Type & Actual Amount)" in BLOCK C.

B. What to Show on the Form

Check all applicable classifications of income and corresponding categories of amounts. If more than one type of income is derived from the same asset, check all relevant types (unless an excepted investment fund) and categories of amount. Categories of amount may be distinguished by using the abbreviations D, R, I and CG in the boxes, in lieu of checks, to represent dividends, rents/royalties, interest or capital gains.

1. DIVIDENDS - Show in BLOCK C the amount **you, your spouse or dependent child** accrued or received as dividends from investment sources including common and preferred securities and underlying assets of pensions and mutual funds (unless an excepted investment fund). **Identify the source of such income and check the category of amount.** For example, if cash dividends of $950 were received for shares of common stock of IBM, enter in BLOCK A... "IBM common" and in BLOCK C check that dividend income was received and check the appropriate category of amount.

2. RENTS AND ROYALTIES - Show income accrued or received by **you, your spouse or dependent child** as rental or lease payments for occupancy or use of personal or real property in which any one of you has an interest. In addition, show payments accrued or received from such interests as copyrights, royalties, inventions, patents, and mineral leases or other interests. **Identify the source of such income and check the category of amount.** For example, if you received $2,000 as rental income from an apartment building in Miami, Florida, enter in BLOCK A..."apartment building at 5802 Biscayne Blvd., Miami, FL," and in BLOCK C check that rental income was received and check the appropriate category of amount.

3. INTEREST - Identify the source and the category of amount of any interest accrued or received by **you, your spouse or dependent child** as income from investment holdings including: bills and notes, loans, personal savings accounts, annuity funds, bonds, and other securities. For example, if you earned $300 in interest during the calendar year on a Savings Certificate with Federal Savings and Loan, enter in BLOCK A... "Federal Savings and Loan (Baltimore, MD)-Savings Certificate," and in BLOCK C check that interest income was received and check the appropriate category of amount.

4. CAPITAL GAINS - Report income from capital gains realized by **you, your spouse or dependent child** from sales or exchanges of property, business interests, partnership interests or securities. **Identify the source and check the category of amount of the gain.** An example of an entry in BLOCK A might be "sale of one-third interest in 100-acre farm in Hamilton County, Iowa" and in BLOCK C check that capital gains were received and check the appropriate category of amount.

5. INVESTMENT FUND INCOME - Identify the fund and the category of amount and the type(s) of income from investment funds such as mutual or pension funds for **you, your spouse or dependent child.** This may include dividends, capital gains and interest for a single fund or income from an excepted investment fund. Income from each individual asset of the fund must also be listed, unless it is an excepted investment fund, in which case income from individual assets is not required to be listed. See Definition of Terms above for discussion of excepted investment funds.

6. TRUST INCOME - Report the **category of amount and the type of income** accrued or received from any trust. Whenever you are required to identify the source of trust income, either for **yourself or for a spouse or dependent child,** it is not enough simply to say "John Jones Trust." Generally, the investment holdings of the trust, discussed above under "Property Interests and Assets," and the income derived from each holding must be identified to the same extent as if held directly. However, if the trust is a qualified trust or an excepted trust, in BLOCK A show only the identity of the trust including the date of creation, in BLOCK B the category of the total cash value of your interest (if a qualified trust), in BLOCK C check the classification of the trust interest as a "qualified trust" or "excepted trust," and also in BLOCK C show the category of amount of income attributable to you, your spouse or dependent child.

7. OTHER INVESTMENT INCOME - Report any other items of investment income exceeding $200 and not described above, along with the specific type and **actual amount,** such as gross income from business interests, endowment or annuity contract payments, estate income, or a distributive share of a partnership or joint business venture income. To identify the sources of other investment income, either for **you, your spouse, or a dependent child**, briefly characterize in BLOCK A the nature of the business or investment interest and, when applicable, the location: for example..."one-third ownership in a retail furniture store at 1010 Grand Ave., Chicago, IL." In BLOCK C under OTHER, specify the applicable type of income, for example... "distributive share" from a partnership or "gross income" from a proprietorship, and under ACTUAL AMOUNT the actual amount of such income which was received during the reporting period. Where the asset is listed because of a value of greater than $1,000 in BLOCK B, but it does not produce more than $200 in income for the reporting period, check "None (or less than $201)" instead of listing the actual amount.

Schedule B

I. Part I - Transactions

A. General Instructions and Items to Report

This part is to be completed by incumbents and termination filers only. Give a description, the date, and the category of amount of any purchase, sale, or exchange of any real property, stocks, bonds, commodity futures, excepted investment fund shares, and other securities by **you, your spouse or dependent child** when the amount involved in the transaction exceeded $1,000. Also, indicate whether sales were made pursuant to a certificate of divestiture previously issued by OGE to permit delayed recognition of capital gain. (For more information on certificates of divestiture, see 5 C.F.R. Part 2634, Subpart J.) This includes reporting any sale or exchange of an asset involving an amount exceeding $1,000 when the sold or exchanged asset did not yield income of more than $200 (and therefore was not reported on Schedule A), or reporting the purchase of an asset involving an amount exceeding $1,000 but at the end of the reporting period having a value of $1,000 or less and earning income of $200 or less during the reporting period (and therefore not appearing on

Schedule A). The example on the form shows the proper way to disclose Central Airlines common stock the reporting individual purchased for $75,000 on 2/1/99. Note that on Schedule A there is an entry for the stock as well since it was still held at the end of the reporting period.

You need not report a transaction involving (1) your personal residence (unless rented out); (2) a money market account or personal savings account; (3) an asset of your spouse or dependent child if the asset meets the three-part test set forth under the instructions for Schedule A, at II.A.; (4) a holding of a "qualified blind trust," a "qualified diversified trust," or an "excepted trust"; (5) U.S. Treasury bills, notes, and bonds; (6) transactions which occurred prior to your Federal Government employment; or (7) transactions solely by and between the reporting individual, spouse, or dependent child.

You will need to report any transactions made by a non-public business or commercial enterprise, investment pool, or other entity in which you, your spouse or dependent child have a direct proprietary, general partnership or other interest unless (1) the entity is an "excepted investment fund," or (2) the transaction is incidental to the primary trade or business of the entity as indicated by you on Schedule A. (See also sections V.e. and f. of the General Instructions preceding those for Schedule A.)

B. What to Show on the Form

Under identification of assets, identify the property or securities involved in the purchase, sale or exchange, and give the date of the transaction. For example, under IDENTIFICATION OF ASSETS... "GMC common stock"; under TYPE OF TRANSACTION... check type; under DATE... enter date transaction occurred; under AMOUNT OF TRANSACTION... check the category of value of the sale price, purchase price, or exchange value of the property involved in the transaction. You must also indicate whether an item was sold pursuant to a certificate of divestiture issued by the Office of Government Ethics under 5 C.F.R. Part 2634, Subpart J, to permit delayed recognition of capital gain.

Where multiple transactions have occurred which involve the same asset, you may list the item once, check purchase and/or sale, and indicate... "biweekly," "throughout year," or other appropriate frequency, and the aggregate amount of the sales and purchases. Reporting an exchange generally requires reporting two items since one item is exchanged for another.

II. Part II - Gifts, Reimbursements, and Travel Expenses

A. General Instructions

This Part is to be completed by incumbents and termination filers only. The Act requires you to disclose the receipt of certain gifts, in-kind travel expenses, and travel-related cash reimbursements **by you, your spouse or dependent child** from any one source other than the U.S. Government. This reporting requirement applies to gifts and reimbursements received by your spouse or dependent child to the extent the gift was not given to him or her totally independent of the relationship to you.

B. Items to Report

Report gifts received by **you, your spouse or dependent child** from any one source during the reporting period **aggregating more than $260,** such as tangible items, or food, lodging, transportation, or entertainment; and travel-related cash reimbursements **aggregating more than $260** from any one source. A "gift" means any payment, forbearance, advance, rendering or deposit of money, or anything of value, unless consideration of equal or greater value is received by the donor. In determining which gifts and reimbursements must be reported or aggregated, **exclude** these items:

1. Anything having a value of $104 or less;

2. Anything received from "relatives." The term "relatives" means an individual who is your father, mother, son, daughter, brother, sister, uncle, aunt, great uncle, great aunt, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, your spouse's grandfather or grandmother, or your fiance or fiancee;

3. Bequests and other forms of inheritance;

4. Suitable mementos of a function honoring the reporting individual;

5. Food, lodging, transportation, and entertainment or reimbursements provided by a foreign government within a foreign country or by the United States Government, or D.C., state or local governments;

6. Food and beverages not consumed in connection with a gift of overnight lodging;

7. Anything given to a spouse or dependent child totally independent of the relationship to you;

8. Gift items in the nature of communications to your office, such as subscriptions to newspapers and periodicals;

9. Gifts of hospitality (food, lodging, entertainment) on the donor's personal or family premises, as defined in 5 C.F.R. Part 2634;

10. Gifts and reimbursements received during non-Federal employment periods; and

11. Reimbursements you received for political trips which were required to be reported under section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. § 434).

C. What to Show on the Form

1. GIFTS - Report the identity of the source, a brief description, and the value of gifts aggregating more than $260 from any one source which were received by **you, your spouse or dependent child** and which do not fall within any of the categories of exclusions enumerated above.

a. Food, Lodging, Transportation, Entertainment. Include travel itinerary, dates, and nature of expenses provided. To reach a more than $260 aggregation, you determine whether any one or combination of the components within this gift category received from one source amounts to more than $260 in value. For example, if you spent a weekend at a hunting lodge owned by AmCoal Corporation, and you received lodging fairly valued at $150, food valued at $115, and entertainment valued at $125, the aggregate value of the gift is $390. A gift of this nature - hospitality at a lodge owned by a corporation rather than an individual - would not qualify as a "personal hospitality" exclusion. To report this gift you would show, under SOURCE ... "AmCoal Corp., 1210 North St., Chicago, IL"; under BRIEF DESCRIPTION... "lodging, food, and entertainment as a guest at hunting lodge owned by AmCoal, 1/25-27/99"; and under VALUE... "$390."

b. Other Gifts - If you and your spouse each receive a $175 figurine from the same donor (source), the gifts have a value of more than $260 and must be reported. To report a gift, identify the source, briefly describe the item(s), and show the value. In the case of the figurines, report on the form under SOURCE... "Artifact Co., 153 Utah St., Omaha, NE"; and under BRIEF DESCRIPTION..."two porcelain figurines." Under VALUE..."$350" would be shown.

2. REIMBURSEMENTS - Report the source, a brief description (including a travel itinerary, dates, and the nature of expenses provided), and the value of any cash reimbursements (except those from the United States Government or otherwise excluded) aggregating more than $260 which **you, your spouse or dependent child** received from any one source. For example, if you were reimbursed $400 for travel and lodging expenses in connection with a speech you made for the Denver Realtors Association, you would report this item on the form by showing under SOURCE..."Denver Realtors Assoc., 45 Bridge St., Denver, CO"; under BRIEF DESCRIPTION... "travel expenses for speech made in Denver: United Airlines round trip from Washington, D.C. 1/22-23/00, $275; Denver Airport Marriott, $125"; and under VALUE... "$400" would be shown. If your spouse made this speech and received the reimbursement totally independent of his or her relationship to you, no information for this item need be reported.

Note: If you receive food, transportation, lodging, and entertainment or a reimbursement of official travel expenses from a non-profit tax-exempt institution categorized by the IRS as one falling within the terms of 26 U.S.C. § 501(c)(3), you must report the name of the organization, a brief description of the in-kind services or the reimbursement and the value. If known, you may also wish to note the date you received the required written approval from your agency to accept such items. See 5 U.S.C. § 4111 and 5 C.F.R. Part 410, Subpart E. You do **not** have to report an official reimbursement received **by the agency** since it will not be received by you in your personal capacity (nor by your spouse or dependent child). See 31 U.S.C. § 1353 (or other agency statute) and 41 C.F.R. Chapter 304.

Schedule C

I. Part I - Liabilities

A. General Instructions

The Act requires you to disclose certain of your financial liabilities. The examples on the form show how to report a mortgage on real estate the reporting individual held for the production of income and a promissory note. Note that you will need to disclose the date, interest rate and term (if applicable) of each liability. Also note you must disclose the highest amount owed on any liability held during the reporting period, not just at the end of the period. If the liability was completely paid during the period, you may also note that on the form if you wish.

B. Items to Report

Identify and give the category of amount of the liabilities which **you, your spouse or dependent child** owed to any creditor which exceeded $10,000 at any time during the reporting period, **except:**

1. a personal liability owed to a spouse or dependent child, or to a parent, brother, sister, or child of you, your spouse or dependent child;

2. a mortgage or home equity loan secured by real property which is the personal residence (or a second residence not used for producing income) of you or your spouse;

3. a loan secured by a personal motor vehicle, household furniture, or appliances, where the loan does not exceed the purchase price of the item;

4. a revolving charge account where the outstanding liability did not exceed $10,000 as of the close of the reporting period; and

5. any liability of your spouse or dependent child which represents the sole financial interest or responsibility of the spouse or child, and about which you have no knowledge, and which is not derived from your income, assets, or activities, and concerning which you neither derive nor expect to derive any financial or economic benefit.

You are required to report any liability of any non-public company, investment pool, or other entity, in which you, your spouse or dependent child have an interest, unless (1) the liability is incidental to the primary trade or business of the entity as indicated by you on Schedule A, or (2) the entity is an excepted investment fund. (See also

sections V.e. and f. of the General Instructions preceding those for Schedule A.)

C. What to Show on the Form

Under CREDITORS (NAME AND ADDRESS), show the name and address of the actual creditor unless the reporting individual is only able to identify a fiduciary and certifies in the report that he has made a good faith effort to determine who the actual creditor is and was unable to do so, or upon his certification that such determination is otherwise impracticable. Under TYPE OF LIABILITY, briefly indicate the nature of the liability. Under DATE, enter date loan incurred; under INTEREST RATE, note the set rate or, if a variable one, the formula used to vary the rate, i.e. prime +2%; and under TERM, show the duration of the loan. Check the category of value for the highest amount owed during the reporting period.

II. Part II - Agreements or Arrangements

A. General Instructions and Items to Report

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits. This includes any agreements or arrangements with a future employer entered into by a termination filer. The example on the form shows the severance agreement under which the reporting individual expects to receive a lump sum payment from the law firm he has left in order to enter the Government. Also note the related asset and income reported in the second example on Schedule A of the form.

For purposes of public disclosure, you must disclose any negotiations for future employment from the point you and a potential non-Federal employer have agreed to your future employment by that employer whether or not you have settled all of the terms, such as salary, title, benefits, and date employment is to begin. Your agency may require internal disclosure of negotiations much earlier and you should seek guidance before conducting any negotiations with persons with whom you do business. A criminal statute, 18 U.S.C. § 208, applies to official actions you may take while negotiating future employment.

B. What to Show on the Form

Under STATUS AND TERMS, describe the agreement or arrangement with appropriate specificity. Under PARTIES, show the name of the organization, or entity, and (if applicable) the name and title of the official, corporate officer, or principal person responsible for carrying out the terms of the agreement or arrangement. Under DATE, show the date of any such arrangement. **No report is required regarding any agreement or arrangement entered into by a spouse or dependent child.**

Schedule D

I. Part I - Outside Positions

A. Items to Report

Report all outside positions held at any time during the reporting period, as well as those positions you currently hold as an officer, director, trustee, general partner, proprietor, representative, employee or consultant of (1) any corporation, company, firm, partnership, trust, or other business enterprise; (2) any non-profit organization; (3) any labor organization; (4) any educational institution; or (5) any organization other than the United States Government. **Exclude** positions held in any religious, social, fraternal, or political entity, and any positions solely of an honorary nature. Be sure to report on Schedule A any income over $200 that you received from acting in any of these positions. **No report is required regarding any positions held by your spouse or dependent child.**

B. What to Show on the Form

Give the name, address and brief description (type) of the organization, the title or other brief functional description of the position, and the dates you held the position. If you currently hold the position, in the entry block under TO, note "Present."

II. Part II - Compensation in Excess of $5,000 Paid by One Source

A. General Instructions

This Part is to be completed by nominees and new entrants only. You must disclose your sources of compensation in excess of $5,000 and the nature of the duties you provided. This includes not only the source of your salary or other fees, but the disclosure of clients for whom you personally provided more than $5,000 in services even though the clients' payments were made to your employer, firm or other business affiliation. The examples on the form show the proper way to disclose the business affiliation which paid the reporting individual's compensation, in this case a law firm, and a client of the firm for which the reporting individual personally provided over $5,000 worth of services. This Part does not require you to disclose the value of the compensation for these services; it does require a brief description of the services you provided. When a source has paid you directly, you should have a corresponding entry on Schedule A if the payment was within the reporting period for Schedule A. A client who paid your business affiliation more than $5,000 for your services will appear only in this Part.

B. Items to Report

Report the nature of the duties performed or services rendered for any person (other than the United States Government) from which compensation in excess of $5,000 in either of the two preceding calendar years or the present calendar year was received by you or an entity which billed for your services (business affiliation). **Exclude:** (1) information to the extent that it is considered confidential as a result of a privileged relationship established by law, or (2) information about persons for whom services were provided by a business affiliation of which you were a member, partner or employee unless you were directly involved in the provision of the services. The name of a client of a law firm is not generally considered confidential. **No report is required regarding compensation paid to your spouse or a dependent child.**

C. What to Show on the Form

Under SOURCE, give the name and address of the person to whom services were provided, for example, "Newark Real Estate Co. (Newark, NJ)"; and under BRIEF DESCRIPTION, the title or other brief functional description of the services rendered, for example: "tax matters researched for above firm while an associate with Quinn and Ouspensky."

Privacy Act Statement

Title I of the Ethics in Government Act of 1978, as amended (the Act), 5 U.S.C. app. § 101 et seq., and 5 C.F.R. Part 2634 of the Office of Government Ethics regulations require the reporting of this information. The primary use of the information on this report is for review by Government officials to determine compliance with applicable Federal laws and regulations. This report may also be disclosed upon request to any requesting person pursuant to section 105 of the Act or as otherwise authorized by law. You may inspect applications for public access of your own form upon request. Additional disclosures of the information on this report may be made: (1) to a Federal, State, or local law enforcement agency if the disclosing agency becomes aware of a violation or potential violation of law or regulation; (2) to a court or party in a court or Federal administrative proceeding if the Government is a party or in order to comply with a judge-issued subpoena; (3) to a source when necessary to obtain information relevant to a conflict of interest investigation or decision; (4) to the National Archives and Records Administration or the General Services Administration in records management inspections; (5) to the Office of Management and Budget (OMB) during legislative coordination on private relief legislation; and (6) in response to a request for discovery or for the appearance of a witness in a pending judicial or administrative proceeding, if the information is relevant to the subject matter. See also the OGE/GOVT-1 executive branchwide Privacy Act system of records. Knowing and willful falsification of information, or failure to file or report information required to be reported by section 102 of the Act, may subject you to a civil monetary penalty and to disciplinary action by your employing agency or other appropriate authority under section 104 of the Act. Knowing and willful falsification of information required to be filed by section 102 of the Act may also subject you to criminal prosecution.

Public Burden Information

This collection of information is estimated to take an average of three hours per response, including time for reviewing the instructions, gathering the data needed, and completing the form. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Associate Director for Administration, U.S. Office of Government Ethics (OGE), Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917. **Do not** file financial disclosure reports at this address; submit them as indicated in "Where to File" on page 3.

Pursuant to the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and no person is required to respond to, a collection of information unless it displays a currently valid OMB control number (that number, 3209-0001, is displayed here and in the upper right-hand corner of the first page of this Standard Form 278).

Important Note on Reporting of Higher-Value Category Items on Schedules A, B and C of the SF 278:

For assets, income, transactions and liabilities of over $1,000,000 in value that are held solely by your spouse or dependent children, just mark the over $1,000,000 column. For such items which you as the filer hold, either singly or jointly with your spouse or dependent children, you must mark the other higher categories of value, as appropriate. For assets, transactions and liabilities, the higher categories are $1,000,001 to $5,000,000; $5,000,001 to $25,000,000; $25,000,001 to $50,000,000; and over $50,000,000. For income, the higher categories are $1,000,001 to $5,000,000; and over $5,000,000. Asterisked notes on Schedules A, B, and C explain these higher-value category reporting requirements.

John Doe, Individually and on Behalf of All Others Similarly Situated, Petitioner v. United States.

No.04-742.

SUPREME COURT OF THE UNITED STATES

125 S. Ct. 1591; 161 L. Ed. 2d 277; 2005 U.S. LEXIS 2250; 73 U.S.L.W. 3529

March 7, 2005, Decided

PRIOR HISTORY: *Doe v. United States, 372 F.3d 1347, 2004 U.S. App. LEXIS 12444 (Fed. Cir., 2004)*

JUDGES: [*1] Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

John Doe, Individually and on Behalf of All Others Similarly Situated, Petitioner v. United States.

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SUPREME COURT OF THE UNITED STATES

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JUDGES: [*1] Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

JOHN DOE, on behalf of himself and all others similarly situated, Plaintiffs-Appellees, v. UNITED STATES, Defendant-Appellant.

03-5075

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2004 U.S. App. LEXIS 19863

September 1, 2004, Decided
September 1, 2004, Filed

NOTICE: [*1] THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

PRIOR HISTORY: CFC - 98-CV-896. *Doe v. United States, 372 F.3d 1347, 2004 U.S. App. LEXIS 12444 (Fed. Cir., 2004)*

OPINION: ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEES, * and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

* An amici curiae brief was filed by the National Treasury Employees Union, et al.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will [*2] issue on September 8, 2004.

Copyright 2005 SHEPARD'S - 19 Citing references

Doe v. United States, 372 F.3d 1347, 2004 U.S. App. LEXIS 12444, 9 Wage & Hour Cas. 2d (BNA) 1249 (Fed. Cir. 2004)

SHEPARD'S(R) Signal: Citing Refs. With Analysis Available
Restrictions: *Unrestricted*
FOCUS(TM) Terms: *No FOCUS terms*
Print Format: *FULL*
Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary
No negative subsequent appellate history.
Citing References:

Citing Decisions:	Citing decisions with no analysis assigned (9)
Other Sources:	Statutes (3)

LexisNexis Headnotes: HN1 (4), HN2 (1), HN4 (3), HN6 (2), HN7 (1), HN11 (3), HN12 (2), HN14 (3), HN17 (1), HN18 (1), HN20 (3)

PRIOR HISTORY (4 citing references)

1. *Doe v. United States*, 46 Fed. Cl. 399, 2000 U.S. Claims LEXIS 47, 6 Wage & Hour Cas. 2d (BNA) 462, 6 Wage & Hour Cas. 2d (BNA) 1462 (2000)

2. **Motion denied by:**
Doe v. United States, 47 Fed. Cl. 594, 2000 U.S. Claims LEXIS 183, 7 Wage & Hour Cas. 2d (BNA) 191 (2000)

3. **Partial summary judgment granted by:**
Doe v. United States, 54 Fed. Cl. 404, 2002 U.S. Claims LEXIS 304, 8 Wage & Hour Cas. 2d (BNA) 449 (2002)

4. **Petition granted by:**
Doe v. United States, 67 Fed. Appx. 596, 2003 U.S. App. LEXIS 9336 (2003)

Reversed by (CITATION YOU ENTERED):
Doe v. United States, 372 F.3d 1347, 2004 U.S. App. LEXIS 12444, 9 Wage & Hour Cas. 2d (BNA) 1249 (Fed. Cir. 2004)

SUBSEQUENT APPELLATE HISTORY (3 citing references)

5. **Rehearing denied by, Rehearing, en banc, denied by:**
Doe v. United States, 2004 U.S. App. LEXIS 19863 (Fed. Cir. Sept. 1, 2004)

6. **Motion denied by:**
Doe v. United States, 63 Fed. Cl. 798, 2005 U.S. Claims LEXIS 41 (2005)

7. **Writ of certiorari denied:**
Doe v. United States, 161 L. Ed. 2d 277, 125 S. Ct. 1591, 2005 U.S. LEXIS 2250, 73 U.S.L.W. 3529 (U.S. 2005)

CITING DECISIONS (9 citing decisions)

FEDERAL CIRCUIT - COURT OF APPEALS

8. **Cited by:**
Fla. Power & Light Co. v. United States, 375 F.3d 1119, 2004 U.S. App. LEXIS 14016, 94 A.F.T.R.2d (RIA) 5128, 2004-2 U.S. Tax Cas. (CCH) P50309, 2004-2 U.S. Tax Cas. (CCH) P70224 (Fed. Cir. 2004)
375 F.3d 1119 *p.1125*

FEDERAL CLAIMS COURT

9. **Cited by:**
Davidson v. United States, 2005 U.S. Claims LEXIS 180 (Fed. Cl. June 30, 2005)
2005 U.S. Claims LEXIS 180

10. **Cited by:**
Sinclair v. United States, 2005 U.S. Claims LEXIS 162 (Fed. Cl. June 15, 2005)
2005 U.S. Claims LEXIS 162

11. **Cited by:**
Adams v. United States, 65 Fed. Cl. 217, 2005 U.S. Claims LEXIS 112, 10 Wage & Hour Cas. 2d (BNA) 1000 (2005) **LexisNexis Headnotes HN1, HN4**
65 Fed. Cl. 217 *p.221*

12. **Cited by:**
Forsgren v. United States, 64 Fed. Cl. 456, 2005 U.S. Claims LEXIS 73 (2005) **LexisNexis Headnotes HN6, HN7, HN11, HN18**
64 Fed. Cl. 456 *p.458*

13. **Cited by:**
Christofferson v. United States, 64 Fed. Cl. 316, 2005 U.S. Claims LEXIS 53, 10 Wage & Hour Cas. 2d (BNA) 774 (2005) **LexisNexis Headnotes HN1, HN11, HN12, HN14, HN20**
64 Fed. Cl. 316 *p.319*
64 Fed. Cl. 316 *p.322*

14. **Cited by:**
Doe v. United States, 63 Fed. Cl. 798, 2005 U.S. Claims LEXIS 41 (2005) **LexisNexis Headnotes HN1, HN2, HN4, HN6, HN11, HN14, HN20**

15. **Cited by:**
Bull v. United States, 63 Fed. Cl. 580, 2005 U.S. Claims LEXIS 21, 150 Lab. Cas. (CCH) P34953, 10 Wage & Hour Cas. 2d (BNA) 550 (2005) **LexisNexis Headnotes HN1, HN4, HN12, HN14, HN17, HN20**
63 Fed. Cl. 580 *p.585*

16. **Cited by:**
Aaron v. United States, 62 Fed. Cl. 50, 2004 U.S. Claims LEXIS 234, 10 Wage & Hour Cas. 2d (BNA) 42 (2004)
62 Fed. Cl. 50 *p.54*

ANNOTATED STATUTES (3 Citing Statutes)

17. *5 USCS @ 5542*

18. *5 USCS @ 5544*

19. *28 USCS @ 2412*

JOHN DOE, on behalf of himself and all others similarly situated, Plaintiffs-Appellees, v. UNITED STATES, Defendant-Appellant.

03-5075

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

372 F.3d 1347; 2004 U.S. App. LEXIS 12444; 9 Wage & Hour Cas. 2d (BNA) 1249

June 23, 2004, Decided

DISPOSITION: Reversed.

JUDGES: Before RADER, BRYSON, and DYK, Circuit Judges.

OPINIONBY: DYK

OPINION: [*1348] DYK, [**2] Circuit Judge.

Department of Justice ("DOJ") attorneys brought a class action lawsuit in the [*1349] Court of Federal Claims seeking overtime compensation. The *Federal Employees Pay Act* ("FEPA"), *5 U.S.C. § 5542 (2000)*, provides for such compensation only when overtime has been "officially ordered or approved." Id. *§ 5542(a)*. The relevant Office of Personnel Management ("OPM") regulation requires that overtime be officially "ordered or approved . . . in writing." *5 C.F.R. § 550.111(c) (2004)*. Because the overtime here was not officially ordered or approved in writing as required by the regulation, we hold that the plaintiffs were not entitled to compensation under FEPA; reverse the Court of Federal Claims' grant of summary judgment in the plaintiffs' favor, see *Doe v. United States, 54 Fed. Cl. 404 (2002)* ("Doe I"); and hold that summary judgment should have been granted in favor of the government.

BACKGROUND

The facts of this case are straightforward and uncontested. The plaintiffs (appellees in this court) are representatives of a class of more than nine thousand former and current DOJ attorneys who brought [**3] suit in the Court of Federal Claims in 1998, claiming compensation under FEPA for overtime work performed from 1992 to the date of a final judgment in this case. The Court of Federal Claims granted class certification in 1999. Doe v. United States, No. 98-896 C (Fed. Cl. Aug. 27, 1999) ("Doe II"). n1

n1 In 1999 Congress enacted a statute prohibiting the payment of overtime compensation to attorneys in any division of the DOJ for work performed subsequent to the enactment of the legislation:

> None of the funds made available by this or any other Act may be used to pay premium pay under title *5, United States Code, sections 5542-5549*, to any individual employed as an attorney, including an Assistant United States Attorney, in the Department of Justice for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999].
>
> . . . Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title *5, United States Code, sections 5542-5549*, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, § 1000(a)(1), 113 Stat. 1501, 1535, 1501A-21 (1999). Therefore, the relevant period for purposes of this litigation is 1992-1999.

[**4]

Following discovery, the parties brought cross-motions for summary judgment on the issue of liability in 2000. The plaintiffs submitted a variety of documents on summary judgment in support of their claim that overtime was "officially ordered or approved." The plaintiffs submitted the deposition transcripts of former Assistant Attorney General Stephen R. Colgate, in which he confirmed "that component heads expect their attorneys if necessary to put in the extra hours to get the job done," (J.A. at 538), and that "it has been the culture of the Department of Justice that attorneys are to put in the hours necessary to get the job done, and if that requires extra hours they are to put those hours in to get the job done," (J.A. at 539-40). The plaintiffs particularly emphasized excerpts from various editions of the United States Attorney's Manual spanning 1984 to 2000, which stated that "Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." (J.A. 405-07, 410, 412; see also J.A. at 414, 416, [*1350] 418.) n2

n2 The record also includes various internal DOJ memoranda summarizing the statutory and regulatory framework governing attorney overtime work, including: a 1980 memorandum from a Deputy Assistant Attorney General to an Associate Attorney General warning that "the court is likely to conclude that much overtime performed by attorneys, especially work required to meet short deadlines, has been 'induced,'" (J.A. at 424); a 1984 memorandum from an attorney in the Commercial Litigation Branch to [a] Deputy Assistant Attorney General stating, in "response to a request for an opinion as to whether attorneys are entitled to overtime pay . . . [that] an attorney employed by the Civil Division is entitled to overtime pay," (J.A. at 427, 432); a 1984 memorandum from the Deputy Director of the Office of Attorney Personnel Management to the Director, explaining that "the bottom line is that title 5 of the United States Code entitles DOJ attorneys . . . to overtime pay or compensatory time . . . for all overtime ordered, approved, or induced, if they request it" (J.A. at 433 (emphasis in the original)); and a 1984 memorandum written by the Interagency Attorney Personnel Group, explaining that "when the performance of overtime work is 'induced' by supervisors it is compensable, even if not 'ordered or approved,'" (J.A. at 448). The record also includes a 1994 memorandum from then Assistant Attorney General Stephen R. Colgate establishing a Working Group to formulate attorney overtime policy and his 1996 recommendations to the Attorney General based on the findings of this Working Group, stating that "attorneys are rarely ordered or approved to perform overtime work, [but are] frequently expected to, and do, . . . without extra compensation," (J.A. at 467 (emphasis in original)).

[**5]

It was undisputed that at least some members of the class at some times worked more than a forty-hour workweek. The parties differed as to the interpretation of the statute and the interpretation and effect of the pertinent OPM regulation. FEPA generally mandates overtime compensation to federal employees in Grade 15 or below for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek." *5 U.S.C. § 5542(a)*. The government argued that the plaintiffs were not entitled to compensation because the pertinent regulation required that overtime be "ordered or approved . . . in writing by an officer or employee to whom this authority has been specifically delegated." *5 C.F.R. § 550.111(c)*. The government maintained that the requirement of a writing was not satisfied. The plaintiffs contended that "because [the DOJ] expected, encouraged, or induced plaintiffs to work substantial amounts of overtime and had knowledge that plaintiffs work substantial amounts of overtime, they have authorized and approved the overtime under *5 U.S.C. § 5542*." (Compl. at P 65.)

The Court of Federal [**6] Claims held in favor of the plaintiffs, granting the plaintiffs' summary judgment motion and denying the government's motion. *Doe I, 54 Fed. Cl. at 418*. The Court of Federal Claims found that "no plaintiff in the Class has requested overtime, and it follows that no authorized official could have ordered or approved it" in writing. *Id. at 409*. The court further explained that the "plaintiffs do not allege that they were explicitly ordered to work overtime by an authorized official, but that management's expectations and their caseloads require work in excess of forty hours a week to complete [sic] satisfactorily." *Id. at 406*. The court recognized that until the 1956 decision in *Anderson v. United States, 136 Ct. Cl. 365 (1956)*, our predecessor court, the Court of Claims, had strictly enforced the OPM regulation's requirement that an order or approval for overtime be made in writing. However, the court concluded that the Court of Claims adopted "a more equitable approach [*1351] in recent years," *Doe I, 54 Fed. Cl. at 407*, and

that "the phrase 'ordered or approved' as used in the pay statutes became subject [**7] to broader interpretations, including inducement, encouragement, and perhaps expectation." *Id. at 410.* The court concluded that official inducement suffices to warrant compensation and that there was extensive documentation in the record establishing such inducement:

> The Department of Justice informed attorneys that it expected them to work overtime when necessary. Authorized department officials testified that they understood the job to require overtime work. The Department's Manual states that attorneys should expect to work in excess of regular hours. These factors, along with management's understanding and approval of the process show that Department officials moved . . . into the area of "inducement."

Id. at 416 (citing *Byrnes v. United States, 163 Ct. Cl. 167, 330 F.2d 986 (Ct. Cl. 1963)*). Finding that the "official policy at the Department of Justice has been to accept overtime work from its attorneys without paying for it," id., the Court of Federal Claims held that because all such overtime was induced the "class members are entitled to overtime pay if they can meet the standards of proof required by law, [**8] " *id. at 405.*

The Court of Federal Claims certified its summary judgment order for interlocutory appeal on the ground that "judicial economy will be served by seeking appellate review of this court's liability determination before we address damages." Doe II, No. 98-896 C, slip op. at 1. The government timely petitioned our court for permission to take an interlocutory appeal. We granted this petition and have jurisdiction over the appeal pursuant to *28 U.S.C. § 1292(d)(2). Doe v. United States, 67 Fed. Appx. 596 (Fed. Cir. Apr. 2, 2003).*

DISCUSSION

"We review the Court of Federal Claims' grant of summary judgment without deference." *Agwiak v. United States, 347 F.3d 1375, 1377 (Fed. Cir. 2003).*

I

FEPA was first enacted in 1945. Federal Employees Pay Act of 1945, ch. 212, 59 Stat. 295 (initially codified at *5 U.S.C. § 911*; re-codified as amended at *5 U.S.C. § 5542*). In its present form, the Act provides:

> For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of [**9] 8 hours in a day, performed by an employee are overtime work and shall be paid for . . . at [the rates provided in *5 U.S.C. § 5542(a)(1)-(5)*].

5 U.S.C. § 5542(a). This overtime requirement applies only to employees in Grade 15 or below, and an employee may not receive overtime if such payment would increase the employee's aggregate compensation in excess of the maximum allowable rate for Grade 15 employees. Id. *§ 5547.* FEPA allows the head of an agency to "grant [an] employee compensatory time off from his scheduled tour of duty instead of payment under *section 5542.*" Id. *§ 5543(a)(1).* The head of an agency also may, with the approval of OPM, grant annual premium pay of up to twenty-five percent instead of overtime compensation when "an employee [is] in a position in which the hours of duty cannot [*1352] be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty." Id. *§ 5545(c)(2).*

FEPA expressly delegated rulemaking authority [**10] to the then Civil Service Commission, providing that "the Civil Service Commission is hereby authorized to issue such regulations . . . as may be necessary for the administration of the foregoing provisions of this Act." § 605, 59 Stat. at 304. Shortly after the Act was passed, the Civil Service Commission adopted an implementing regulation. See *10 Fed. Reg. 8,191, 8,194* (July 4, 1945). The Civil Service Commission was supplanted by OPM in 1978, which has since been responsible for FEPA regulations under identical statutory language. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a)(2), 92 Stat. 1111, 1224; see also *5 U.S.C. § 5548.* n3 Substantially the same regulation has applied from 1945 to the present. The current regulation provides:

Authorization of overtime pay.

. . .

(C) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

5 C.F.R. § 550.111 (emphasis added). For convenience, we refer to the regulation as the "OPM regulation. [**11] "

n3 The current statute states: "The Office of Personnel Management may prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter . . . insofar as this subchapter affects employees in or under an Executive agency." *5 U.S.C. § 5548(a).*

II

Beginning in the 1950s and ending in the 1970s, our predecessor court, the Court of Claims, repeatedly had occasion to consider FEPA and its accompanying regulations. Curiously, we have not had occasion to interpret the overtime provision of the statute or regulations in published opinions since that time.

In these Court of Claims cases, the government persistently argued that the OPM regulation did not permit overtime compensation unless an authorized official ordered or approved the overtime work in writing. As the Court of Federal Claims correctly noted here, the Court of Claims' early decisions agreed with the government, maintaining a strict interpretation of the statute and regulation to [**12] require prior official written authorization. In *Post v. United States, 121 Ct. Cl. 94 (1951)*, the court in dictum described the OPM writing regulation as "a necessary safeguard against subjecting the Government to improper expense." *Id. at 99.* Soon thereafter in *Tabbutt v. United States, 121 Ct. Cl. 495 (1952)*, the Court of Claims rejected a claim to overtime compensation brought by investigators who based their claim on the fact that their supervisors approved daily work records that reflected overtime. The court held that the supervisors' approval of these daily reports "could hardly be said to take the place of an order for these men to work overtime, or of an approval of their claim to compensation for having done so." *Id. at 505.*

The Court of Claims' insistence on written authorization or approval climaxed in *Gaines v. United States, 132 Ct. Cl. 408, 131 F. Supp. 925 (Ct. Cl. 1955)*, where it rejected a FEPA overtime claim. The plaintiff in [*1353] Gaines worked for the Civil Aeronautics Administration in a position that "required a considerable amount of travel," and he claimed that "he was required [**13] to be on official duty in excess of the prescribed 40-hour work week." *Id. at 926-27.* The court discussed FEPA and the pertinent regulation, and it explained that "any claim [for overtime under FEPA] must be based upon the performance of overtime services which were expressly authorized or approved in writing by an officer or employee to whom such authority has been specifically delegated." *Id. at 927.* Finding no such authorization, and relying on Post and Tabbut, the court entered summary judgment in favor of the government, stating: "absent the written authorization or approval as required by the statute and regulation, plaintiff is not entitled to recover." Id.; see also *Gray v. United States, 136 Ct. Cl. 312, 313, 317 (1956)* (dismissing plaintiff's FEPA overtime claim, which argued entitlement to compensation because authorized supervisors reviewed overtime work records and were aware of his overtime hours, "on the authority of Tabbut, . . . Post . . . and Gaines" because the official authorized to approve overtime "did not at any time officially approve or order in writing any agent to work overtime").

The Court of Claims' 1956 [**14] decision in *Anderson, 136 Ct. Cl. 365*, took a dramatically different approach to the OPM regulation's written order requirement. In Anderson, no "overtime in excess of the administrative workweek was ordered or approved in writing" as required by the OPM regulation. *Id. at 393.* Indeed, "in withholding written orders for or approval of the overtime, [the Agency's authorized officials] intended to withhold compensation for the services performed." *Id. at 370.* The court concluded that the substantive purpose of FEPA was to ensure compensation for officially ordered or approved overtime work; that the regulation's procedural writing requirement could not be used to subvert the intent of the Act; and that the government could not refuse to pay compensation if it had orally "induced" its employees to work overtime. *Id. at 371.* It was "not disputed" that the plaintiffs worked beyond the forty-hour FEPA workweek and that the work of the Customs and Border Patrol agents involved "was not the kind of work which could be easily accommodated to a 5-day, 40-hour week." *Id. at 367-68.* According to the court: [**15]

> The failure of the Commissioner of Customs to translate the 40-hour week into administrative reality for the patrol inspectors, and his suggestion of "voluntary" overtime to the district superintendents and their subordinate supervisory officials, together with his knowledge of the use made by them in rationalizing the extension of "voluntary" overtime, afford ample evidence of approval of the overtime worked by the plaintiffs by an official with authority under the statute and the regulations to give such approval.

Id. at 370. Because "the writing was required by the regulations, not by the statute" and because "the withholding of written orders or approval reflected observance of the letter of the regulation but denial of the substance of the statute," it could not protect the government against FEPA liability. *Id. at 370-71*. According to the court, FEPA's "mandate to pay additional compensation for overtime hours, when the work was, as here, officially ordered or approved" overrides the regulation's procedural requirement. *Id. at 371*.

[*1354] Anderson ushered in a series of cases where the court, following Anderson [**16] , awarded FEPA compensation for overtime induced by government officials even though there was no written order or written approval. These cases embraced Anderson's reasoning that the Civil Service Commission was without authority to attach procedural limitations to the substantive policy of FEPA. See, e.g., *Fix v. United States, 177 Ct. Cl. 369, 368 F.2d 609, 613 (Ct. Cl. 1966)* (holding that the statute entitles an employee to compensation if "induced or required" to work overtime and that "if the regulations attempt to lay down any other rule, they cannot stand since they would then be plainly inconsistent with the governing pay legislation as we have construed it"); *Rapp v. United States, 167 Ct. Cl. 852, 340 F.2d 635, 641 (Ct. Cl. 1964)* (holding that the government's contention in denying overtime compensation "runs counter to the Federal Employees Pay Act of 1945" because, as Anderson stated, "the mandate to pay additional compensation for overtime hours, when the work was, as here, officially ordered or approved, is overriding" (quoting *Anderson, 136 Ct. Cl. at 371*)); *Adams v. United States, 162 Ct. Cl. 766, 781 (1963)* [**17] (relying on Anderson's theory that in circumstances where overtime work has been orally induced, "the mandate of the statute overrides the lack of written authorization or approval"). Therefore, as the plaintiffs here urge, these cases held the writing requirement invalid as inconsistent with the purpose of FEPA because it added a procedural requirement that was not reflected in the statute. [RB at 52].

To some extent, these cases also suggested that equitable considerations prevented the government from denying overtime compensation where it "induced" overtime work. See *Baylor v. United States, 198 Ct. Cl. 331, 360 (1972)* ("To allow defendant to avoid payment of overtime compensation because it chose to require overtime indirectly rather than directly would obviously be inequitable."); *Adams, 162 Ct. Cl. at 784* (explaining that denying recovery for induced overtime would permit "the officials of the Department of Justice [to] commit[] a wrong" for which their employees "would be without remedy" and that "the inequity of such a result is manifest"); see also *McQuown v. United States, 199 Ct. Cl. 858, 866 (1972)* (congressional [**18] reference opinion by a review panel of commissioners of the Court of Claims, holding that the plaintiff "was induced and coerced by his supervisors . . . with the knowledge and approval of officials authorized to approve overtime work, . . . thereby estopping the defendant from relying on the provisions that overtime must be officially ordered or approved in writing").

III

Court of Claims decisions are, of course, binding upon us unless undermined by intervening Supreme Court or en banc authority. *Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368, 1373 (Fed. Cir. 2000)* (citing *Tex. Am. Oil Corp. v. United States Dep't of Energy, 44 F.3d 1557, 1561 (Fed. Cir. 1995)* (en banc)); see also *S. Corp. v. United States, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982)* (en banc). The problem is that the Court of Claims decisions discussed in the preceding section are not consistent with each other. The Court of Federal Claims aptly observed here that "an employee seeking overtime can likely find an opinion of [the Court of Claims] that fits his situation regardless of what it may be." *Doe I, 54* [*1355] *Fed. Cl. at 410* [**19] (quoting *Anderson v. United States, 201 Ct. Cl. 660 at 675* (Skelton, J., dissenting)). The plaintiffs argue that we should continue to reject the writing requirement as did our predecessor court in the more recent Anderson line of cases. The government urges that we follow Gaines and the earlier cases that strictly enforced the written order requirement on the theory that under the principle of stare decisis, "the Anderson panel had no more authority to 'discard' prior cases than any other panel." (Reply Br. for the Appellant at 17.) In this respect we agree with the plaintiffs. When the Court of Claims sat en banc, as it typically did in the Anderson line of cases, we are obligated to follow the court's most recent decision because an en banc court may

modify or effectively overrule its earlier decisions. See *George E. Warren Corp. v. United States, 341 F.3d 1348, 1351-52 (Fed. Cir. 2003).*

Alternatively, the government urges that the opinions in the Anderson line of inducement cases were all decided before the Supreme Court's decision in *Schweiker v. Hansen, 450 U.S. 785, 67 L. Ed. 2d 685, 101 S. Ct. 1468 (1981),* and that Hansen effectively [**20] overruled these cases. We agree. In holding that the OPM regulation was invalid because it added a procedural writing requirement to the substantive requirements of FEPA or because the result was inequitable, the Anderson line of cases is inconsistent with Hansen.

Hansen involved the *Social Security Act,* which extended benefits to a person who "has filed application." *42 U.S.C. § 402(g)(1)(D) (1976).* Benefits could be paid retroactively for the twelve months prior to the filing of an application. Id. *§ 402(j)(1).* The regulations promulgated pursuant to the Social Security Act required the application to be in writing, *20 C.F.R. § 404.602 (1974),* and the Social Security manual required administrators to inform applicants that their applications must be filed in writing, *Hansen, 450 U.S. at 786.* When the plaintiff orally applied for benefits, the Social Security administrator erroneously informed her that she was not entitled to benefits and, in violation of the manual, failed to inform the plainitff that the regulations required her to file a written application. Id. The plaintiff subsequently [**21] learned that she was entitled to benefits, and she filed a written application, including a claim for retroactive benefits for the twelve months prior to her oral application. *Id. at 786-87.* This claim was denied. While the facts of Hansen were substantially similar to those in the Anderson line of cases, the plaintiff's challenge to the writing requirement in Hansen was more limited. Rather than suggesting that the writing requirement was entirely invalid, the plaintiff urged that the regulation was entitled to less respect than the substantive policies of the statute and that the agency could therefore be estopped from relying on the regulation's writing requirement.

The Second Circuit held in favor of the plaintiff, and the Supreme Court described this decision in language that echoed the Anderson line of cases: "[the Second Circuit] considered the [regulation's] written-application requirement a mere 'procedural requirement' of lesser import than the fact that [the plaintiff] . . . had been 'substantively eligible' for the benefits" under the statute. *Id. at 787.* The Court concluded:

> [The Second Circuit's] majority's [**22] distinction between [the plaintiff's] "substantive eligibility" and her failure to satisfy a "procedural requirement" [*1356] does not justify estopping petitioner in this case. Congress expressly provided in the Act that only one who "has filed application" for benefits may receive them, and it delegated to petitioner the task of providing by regulation the requisite manner of application. A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.

Id. at 790 (emphases added) (third and fourth alterations in original). In so holding, the Supreme Court necessarily concluded that the writing requirement was not invalid simply because it added an additional procedural requirement to the substantive requirements of the statute. This result is directly at odds with the Anderson line of cases.

After *Hansen, in Boulez v. Commissioner, 258 U.S. App. D.C. 90, 810 F.2d 209 (D.C. Cir. 1987),* the District of Columbia Circuit sustained a Treasury regulation's addition of a writing requirement to the Internal Revenue Code's [**23] provision regarding compromise agreements with the Internal Revenue Service. *Id. at 212-13.* The court quoted the Supreme Court's earlier instruction that it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury," *id. at 218 n.68* (quoting *Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385, 92 L. Ed. 10, 68 S. Ct. 1 (1947)*), and it explained that Hansen taught that this "principle is no different where the requirement is promulgated by the agency charged by Congress with administering a statute," *Boulez, 810 F.2d at 218 n.68* (citing *Hansen, 450 U.S. 785, 67 L. Ed. 2d 685, 101 S. Ct. 1468*); see also *Am. Airlines, Inc. v. Austin, 75 F.3d 1535, 1541-42 (Fed. Cir. 1996).* The court further elaborated on Hansen's reasoning, explaining that the Supreme Court held that "no distinction between substantive and procedural requirements suffices to mitigate the court's responsibility to ensure observance of regulations governing claims on the public fisc." Id. (citing *Hansen, 450 U.S. at 790*).

The Anderson line of cases fares no better if it is viewed as resting on "equitable" considerations. [**24] Hansen directly held that such considerations could not impose liability on the government, *450 U.S. at 790,* a result reinforced in *Office of Personnel Management v. Richmond, 496 U.S. 414, 110 L. Ed. 2d 387, 110 S. Ct. 2465 (1990).* The plaintiff in Richmond, a recipient of federal disability annuity, was given an outdated publication in 1986 that incorrectly

advised him that he could work without forfeiting his disability payments. *496 U.S. at 417-18*. The plaintiff's disability payments were terminated once he began working. He argued that the government was estopped from terminating his benefits because it gave him incorrect advice. *Id. at 418*. The Court stated that "all parties here agree that the award [the plaintiff] seeks would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest." *Id. at 424*. Relying on Hansen, the Court rejected the plaintiff's estoppel claim because "the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized." *Id. at 426, 429*. While Richmond addressed a statutory limitation, [**25] the opinion cited Hansen in support of its holding, which treated statutory and regulatory requirements concerning the payment of money from the Treasury as equally binding. *Id. at 429*. Expressly following Hansen [*1357] and Richmond, our court held in *Koyen v. Office of Personnel Management, 973 F.2d 919 (Fed. Cir. 1992)*, that "the Supreme Court has left no doubt that it is 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Id. at 922-23* (quoting *Hansen, 450 U.S. at 788*). We therefore denied compensation "despite the equities" in favor of compensation because "we were bound by the dictates of Richmond." *Id. at 923*.

Thus, to the extent that the *Anderson* line of Court of Claims cases held that the Civil Service Commission was without authority to impose a "procedural" written order requirement because it restricted the substantive scope of the overtime statute or because of equitable considerations, they are inconsistent with Hansen and Richmond. In light of *Hansen* and *Richmond*, we are compelled to hold that the Anderson line [**26] of cases is no longer good law and that the written order requirement is not invalid on the ground that it imposes a procedural requirement that limits the right to overtime compensation under the statute or because it is inequitable. See *Bankers Trust, 225 F.3d at 1373*. We address below the plaintiffs' arguments that the writing requirement is invalid under the statute for other reasons.

A

The plaintiffs assert that the writing requirement is only "an administrative direction to employing agencies concerning procedures for administering overtime--not an attempt to limit the statutory pay entitlement Congress had enacted for federal employees." (Br. for Appellees at 32.) The plaintiffs argue that FEPA itself limits OPM's role to that of establishing merely administrative regulations.

Although there are some situations in which a statutory or regulatory requirement is purely an administrative directive that is not enforceable in litigation, n4 the OPM regulation here is not such a regulation. FEPA provides that "the Office of Personnel Management may prescribe regulations . . . necessary for the administration of this subchapter." *5 U.S.C. § 5548* [**27] *(a)* (emphasis added). We held in *Contreras v. United States, 215 F.3d 1267 (Fed. Cir. 2000)*, that the *Annual and Sick Leave Act of 1951, 5 U.S.C. § § 6301-6387*, in which "Congress authorized OPM to issue regulations 'necessary for the administration'" of the Act, allows OPM to "fill gaps in the statutory scheme left by Congress if it does so in a manner that is consistent with the policies reflected in the statutory program." *Id. at 1274* (quoting *5 U.S.C. § 6311*). We see no reason why FEPA's similarly phrased mandate to OPM should be interpreted any differently. OPM was not limited by the statute to promulgating merely administrative directives, but was empowered to issue regulations setting forth substantive requirements.

n4 See, e.g., *Barnhart v. Peabody Coal Co., 537 U.S. 149, 159, 154 L. Ed. 2d 653, 123 S. Ct. 748 (2003)* (holding that where a statute requires an agency to take certain action by a specific date, "if [the] statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction" (quoting *United States v. James Daniel Good Real Prop., 510 U.S. 43, 63, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993))*.

[**28]

In fact, Congress relied heavily on the Civil Service Commission, OPM's predecessor, to promulgate substantive standards for overtime statutes even before the passage of FEPA. For example, in the War Overtime Pay Act of 1943, ch. 93, 57 Stat. 75, [*1358] Congress invested the Civil Service Commission with the power "to promulgate such rules and regulations as may be necessary and proper for the purpose of coordinating and supervising the administration" of the overtime statute. Id. § 9, 57 Stat. at 77. Although the Act itself entitled federal employees to overtime compensation without any reference to the procedure for authorizing overtime work, the Civil Service Commission's regulations limited the authority to order overtime to "officers or employees to whom such authority has been specifically delegated by the head of the department or agency." 5 C.F.R. § 20.9 (1943 Supp.). Congress incorporated the substance of the

Civil Service Commission's standard in FEPA, thus suggesting approval of the Civil Service Commission's broad exercise of its rulemaking power.

Contrary to the plaintiffs' claim, we also note that OPM did not intend in the regulation to establish [**29] a mere administrative instruction. The OPM regulation was clearly designed to interpret or expound upon the FEPA's "officially ordered or approved" requirement, *5 U.S.C. § 5542(a)*. This intention is highlighted by the regulation's usage of parallel language: "Overtime work . . . may be ordered or approved only in writing," *5 C.F.R. § 550.111(c)*. None of the prior cases has suggested that the regulation should be interpreted as a mere administrative instruction.

B

We next consider whether OPM's regulation is entitled to Chevron deference, see *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. Chevron contemplates a two-step analytic process. *Id. at 842*. First, we ask "whether Congress has directly spoken to the precise question at issue"; if so, we "must give effect to the unambiguously expressed intent of Congress." *Id. at 842-43*. If, however, the statute is ambiguous, we proceed to Chevron step two: "whether the agency responsible for filling a gap in the statute has rendered an interpretation that 'is based on a permissible [**30] construction of the statute.'" *Koyo Seiko Co. v. United States, 258 F.3d 1340, 1346 (Fed. Cir. 2001)* (quoting *Chevron, 467 U.S. at 843*).

The first step of the Chevron analysis here centers on the phrase "ordered or approved." FEPA does not specify the form in which overtime must be "ordered or approved," and these words are ambiguous as to whether they refer to written or oral authorization or both. Dictionaries at the time FEPA was enacted in 1945 make clear that the term "order" may refer to either a written or oral direction. See VII A New English Dictionary on Historical Principles 183 (1st ed. 1909) [the second edition of which is known as the Oxford English Dictionary] ("23. An authoritative direction, injunction, mandate; a command, oral or written; an instruction."); see also Webster's New International Dictionary 1716 (2d ed. 1939) ("3. To give an order to; to command"). So too, modern dictionaries make clear that an order may refer to either an oral or written order. See X The Oxford English Dictionary 905 (2d ed. 2004) ("23. a. An authoritative direction, injunction, mandate; a command, oral or written; an instruction. [**31] "); Webster's Third New International Dictionary 1587-88 (2002) (providing various definitions for an "order," including "a formal written authorization to deliver materials, to perform work, or to do both"). The [*1359] term "approve" is broad enough to connote an oral or written approval. See I A New English Dictionary on Historical Principles 416 (1st ed. 1888) ("5. to confirm authoritatively; to sanction."); Webster's New International Dictionary 133 ("3. To sanction officially; to ratify; to confirm"); see also Webster's Third New International Dictionary 106 ("5a: to express often formally agreement with and support of or commendation of as meeting a standard"). Since the statutory terms "order" and "approve" are broad enough to encompass either written or oral communications (or both), these terms are ambiguous. See, e.g., *Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 741-742, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996)*; see also, *Boulez, 810 F.2d at 212* ("*Section 7122(a)* is facially ambiguous. It does not specify that compromise agreements must be in writing, nor does it explicitly sanction oral settlements."). There is no suggestion [**32] here that this ambiguity may be resolved by resort to FEPA's legislative history or by other traditional tools of statutory construction. Clearly, the first Chevron requirement - ambiguity - is present.

We then turn to the second Chevron analytic step. The Supreme Court has recognized that "a very good indicator" of the applicability of "Chevron treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings." *United States v. Mead Corp., 533 U.S. 218, 229, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001)*; see also *Pesquera Mares Australes v. United States, 266 F.3d 1372, 1380 (Fed. Cir. 2001)*. The OPM regulation, adopted "by virtue of the authority vested in the U.S. [sic] Civil Service Commission by section 605 of the Federal Employees Pay Act of 1945," Exec. Order No. 9,578, *10 Fed. Reg. 8,191* (July 4, 1945), has the necessary degree of formality to warrant Chevron deference. Under *Chevron*, if a statutory term "is ambiguous, the [agency's] regulation implementing [it] 'is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly [**33] contrary to the statute.'" *Household Credit Servs. v. Pfennig, 541 U.S. 232, 158 L. Ed. 2d 450, 124 S. Ct. 1741, 1748 (2004)* (quoting *Mead Corp., 533 U.S. at 227*). We have said that the party contesting the regulation "bears the burden of showing that the agency's approach is arbitrary or otherwise unreasonable." *Koyo Seiko Co., 258 F.3d at 1347*. The plaintiffs here have not met this burden with respect to OPM's regulation.

The plaintiffs argue that the OPM regulation is an unreasonable interpretation of FEPA that is not entitled to Chevron deference, relying on the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 152 L. Ed. 2d 167, 122 S. Ct. 1155 (2002)*, because the regulation's addition of a writing requirement is contrary to FEPA. In Ragsdale, the Supreme Court held invalid a regulation under the Family and Medical Leave Act of 1993, *29*

U.S.C. § 2601 et seq. (2000), which allowed monetary recovery for an employer's technical violation of the regulation without a showing of the prejudice to the employee. *535 U.S. at 84, 88.* The [**34] statute, however, expressly required an employee to show actual prejudice from an employer's actions as a prerequisite to compensation. *Id. at 89.* The Supreme Court held that "[a] regulation cannot stand if it is . . . manifestly contrary to the statute." *Id. at 86* (quoting *United States v. O'Hagan, 521 U.S. 642, 673, 138 L. Ed. 2d 724, 117 S. Ct. 2199 (1997)*) (internal quotation marks omitted). Likewise, in [*1360] *Brown v. Gardner, 513 U.S. 115, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994)*, the Supreme Court invalidated a Department of Veterans Affairs regulation that required veterans to prove negligence on the part of the Veterans Administration in order to recover certain benefits that the statute mandated simply upon proof of injury. *Id. at 120.* n5

n5 The plaintiffs also cite two of this court's cases holding that regulations that are inconsistent with statutes are invalid. See *Torres v. Office of Pers. Mgmt., 124 F.3d 1287, 1289-90 (Fed. Cir. 1997)* (invalidating an OPM regulation that required an employee to have worked at least 30 days in a particular agency before qualifying for early retirement because it was "contrary to the clear intent" of the statute, which "clearly and plainly delegated only . . . very specific limited tasks to OPM" to determine "where in the country the early retirement offer would be made, not when in time"); *Horner v. Hollander, 895 F.2d 759, 760-61 (Fed. Cir. 1990)* (invalidating an OPM regulation because it "ran counter to the plain meaning of the language" of the statute at issue because retirement eligibility under the statute "cannot reasonably be limited to" the class defined in the regulation).

[**35]

These Supreme Court decisions do not help the plaintiffs in the present case because the OPM regulation's written order requirement does not contradict the language of FEPA. FEPA merely limits compensation to those employees whose overtime work has been "officially ordered or approved." *5 U.S.C. § 5542(a).* This statement in and of itself is not at odds with the regulation's writing requirement, nor does it suggest that inducement is sufficient to constitute official order or approval. And the Act clearly contemplated that overtime would be "ordered or approved" through a somewhat formal procedure by providing an exception where such procedure is impossible. Where formal control is impractical, such as if "an employee [is] in a position in which the hours of duty cannot be controlled administratively" and "requires substantial amounts of irregular, unscheduled overtime duty," FEPA allows the employee to "receive premium pay for this duty on an annual basis . . . [at] an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position." *5 U.S.C. § 5545(c)(2).*

Significantly too, the [**36] Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at *29 U.S.C. § § 201-219*) ("FLSA"), enacted before FEPA, incorporated a different standard for overtime compensation that allowed recovery for inducement. Under FLSA, an employee is entitled to overtime pay if the employer "suffers or permits" the employee to work overtime. n6 *29 U.S.C. § 203(g)*; see also *29 C.F.R. § 785.11 (2003).* n7 The Supreme Court has repeatedly emphasized the expansive nature of this particular language, stating that "[a] broader or more comprehensive coverage of employees . . . [*1361] would be difficult to frame." *United States v. Rosenwasser, 323 U.S. 360, 362, 89 L. Ed. 301, 65 S. Ct. 295 (1945)*; see also, e.g., *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992)*; *Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 300 n.21, 85 L. Ed. 2d 278, 105 S. Ct. 1953 (1985).* Our sister circuits have interpreted this standard as requiring only that an employer "knows or has reason to believe the employee is continuing to work and the duties are an integral and indispensable [**37] part of the employee's principal work activity." *Mumbower v. Callicott, 526 F.2d 1183, 1188 (8th Cir. 1975)* (internal quotation marks and citations omitted); see also, e.g., *Pabst v. Okla. Gas & Elec. Co., 228 F.3d 1128, 1133 (10th Cir. 2000)*; *Holzapfel v. Town of Newburgh, NY, 145 F.3d 516, 524 (2d Cir. 1998)*; *Newton v. City of Henderson, 47 F.3d 746, 749 (5th Cir. 1995)*; *Reich v. Dep't of Conservation and Natural Res., 28 F.3d 1076, 1082 (11th Cir. 1994)*; *Forrester v. Roth's I. G. A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981).* The lack of such language in FEPA at least suggests that the Act's requirement that overtime be "officially ordered or approved," *5 U.S.C. § 5542(a)*, cannot be satisfied by merely "suffering or permitting," *29 U.S.C. § 203(g)*, overtime. This further supports OPM's view that FEPA's "ordered or approved" language can reasonably be interpreted to require a more formal means of authorization.

n6 In 1974 the FLSA was applied to federal employees, Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 55, 58 (codified as amended at *29 U.S.C. § 203*). The FLSA, however,

exempts "employee[s] employed in a . . . professional capacity" from its purview, and the attorneys here involved were not covered by the FLSA because they fell under this professional exemption. *29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.3(a)(1).* [**38]

n7 "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time." *29 C.F.R. § 785.11.*

The writing requirement also serves an important purpose of the statute - to control the government's liability for overtime. This purpose is discussed in the Act's legislative history. During the 1945 hearings before the House Committee on the Civil Service regarding FEPA, a Commissioner of the Civil Service Commission, Arthur Flemming, testified on behalf of the government in support of the proposed legislation, including the overtime provision. Commissioner Flemming's testimony suggested that FEPA had the dual purpose of ensuring that employees received overtime compensation while adequately controlling the government's [**39] obligation to pay overtime so as not to subject the Treasury to unanticipated liabilities. Salary and Wage Administration in the Federal Service: Hearing on H.R. 2497 and H.R. 2703 Before the House Comm. on the Civil Service, 79th Cong. 42 (1945). Commissioner Flemming described FEPA's provisions, including the overtime pay provision, explaining its benefits:

> Looking at it from the standpoint of government, as an employer, . . . if adequate controls are maintained over appropriations, the extra expense involved in overtime will discourage its use, and, in the long run, encourage better management.

Id. Representatives repeatedly questioned Commissioner Flemming on the oversight mechanisms included in the proposed legislation that would control the distribution of overtime pay. Representative Miller, for example, stated that "the final check . . . is the money that will have to be very definitely set up in the budgets of the departments for overtime pay," and Representative Vursell communicated that he was "fearful that you [i.e., Commissioner Flemming as the government's champion of the overtime provision] don't have that check." Id. at 51. Representative [**40] Miller elaborated on Congress' concern that there be adequate controls on the payment of overtime compensation: "if I am a $ 6,000 executive I just can't come in the morning and say, 'I decided to stay at the office last night for 2 hours and, therefore, I want [*1362] $ 1.75 an hour.'" Id. Commissioner Flemming responded to these concerns, explaining:

> The proposed section states that they get additional compensation for all hours of employment officially ordered or approved in excess of 40 hours. And, speaking now for my own agency, I know that the regulations under which overtime is ordered and compensated for are very strict, and in most instances requests for approval have to come all the way to the top.

Id.

Finally, deference is particularly warranted in this case because OPM's regulation was enacted almost contemporaneously with the statute. See *Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477, 59 L. Ed. 2d 519, 99 S. Ct. 1304 (1979); Baird v. Sonnek, 944 F.2d 890, 894 (Fed. Cir. 1991).*

In summary, we find that the OPM regulation interprets an ambiguous statute that it was expressly authorized to administer. OPM's construction [**41] of the phrase "ordered or approved," as requiring written authorization, is reasonable and entitled to Chevron deference because it comports with, and indeed furthers, the language and purpose of FEPA.

IV

This leads to the question whether the writing requirement was satisfied in this case. The plaintiffs contend that the written order requirement was satisfied here, citing a wide variety of writings that allegedly ordered and approved overtime work. These writings include a 1996 memorandum from former Assistant Attorney General Colgate, a pamphlet from the Office of the Attorney General entitled "General Office Information," an administrative bulletin from

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the Environmental and Natural Resources Division entitled "Professional Timekeeping," an Environmental and Natural Resources Division 1998 manual entitled "Case Management Policy and Procedures Manual," a 1996 document from the Case Management Staff of the Executive Office for United States Attorneys entitled "Overview of the United States Attorneys' Monthly Resource Summary Report," and the United States Attorneys' Manual (the "Manual"). There are two problems with these writings.

First, the vast majority of the writings [**42] cited by the plaintiffs were not written by officials with proper delegated authority to "officially order[] or approve[]," *5 U.S.C. § 5542(a)*, overtime. Just as the terms "ordered" and "approved" are ambiguous, so too the term "officially" is ambiguous. See *Reno v. Koray, 515 U.S. 50, 60-61, 132 L. Ed. 2d 46, 115 S. Ct. 2021 (1995)* (recognizing that the term "officially" in the statutory phrase "officially detained" was ambiguous). Under Chevron, OPM was authorized to define the term "officially" in the regulations. The OPM regulation explains that an order or approval is only official if made "by an officer or employee to [*1363] whom this authority has been specifically delegated." *5 C.F.R. § 550.111(c)*. The plaintiffs appear again to urge that this regulatory requirement is either merely an administrative instruction or invalid. We reject these contentions with respect to this portion of the regulation just as we have rejected these contentions with respect to the written order requirement. Indeed, one of the more recent Court of Claims cases addressing this issue held that overtime must be authorized by "an officer or employee [**43] to whom this authority has been specifically delegated" as required by the OPM regulation, *5 C.F.R. § 550.111(c)*, and it denied compensation because the plaintiffs were not instructed to work overtime by "officials designated by the regulation to authorize overtime." *Bilello v. United States, 174 Ct. Cl. 1253, 1257 (1966)*.

While the Court of Federal Claims indicated that the "parties agree that former Assistant Attorney General Colgate was the only person who had authority to order or approve overtime for the entire Class," *Doe I, 54 Fed. Cl. at 414*; see also *28 C.F.R. § 0.145 (2003)*, the plaintiffs in this court appear to assert that "the Attorney General, the Deputy Attorney General, the Associate Attorney General, and the Assistant Attorney General for Administration all had authority to authorize overtime work." (Br. for Appellees at 15.) Assuming that the plaintiffs are correct on this point, the majority of the orders or approvals they cite were not made by officials on this list.

Second, even those writings that were arguably issued by officials who were arguably authorized to order [**44] overtime are not orders or approvals within the meaning of the statute and regulation. The plaintiffs argue in particular that the Manual, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/, which is binding on Assistant United States Attorneys as well as all attorneys in the DOJ's litigation division, *28 C.F.R. § 0.22(b)*, satisfied the writing requirement. Because the Manual was prepared by the Executive Office for United States Attorneys under the supervision of the Attorney General and the direction of the Deputy Attorney General, see United States Attorneys' Manual, § 1-1.200, the plaintiffs contend that it constituted an official order to work overtime from the Attorney General. Assuming, without deciding, that the Manual constitutes a written statement of the Attorney General, the Manual still does not provide the requisite writing. The Manual does not order attorneys to work any amount of overtime -- it does not even, as the plaintiffs contend, order an indefinite number of overtime hours. The plaintiffs correctly quote the Manual as stating that:

> United States Attorneys are NOT authorized to approve overtime [**45] premium pay for attorney personnel. Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay.

Id. § 3-4.550. However, this statement instructs attorneys not to expect overtime compensation rather than instructing them to work particular amounts of overtime. The Manual repeatedly emphasizes the following two directives: "overtime under *5 U.S.C. § 5542* must be approved in writing, in advance, by a person authorized to do so" and "U.S. Attorneys are not authorized to approve overtime for attorney personnel," (J.A. at 414, 416 (the 1988 and 1992 Manuals) (emphasis added)), indicating, if anything, that the plaintiffs' overtime work was not officially ordered or approved. The other writings on which the plaintiffs rely are even less supportive of their claim. We have reviewed each of these documents, and none of them includes an express directive to work overtime, and none communicates the approval of overtime work by those officials authorized to order overtime.

Finally, the plaintiffs point to the fact that the DOJ maintained two sets of records of attorneys' work, one [**46] of which was used for pay purposes and reflected [*1364] forty hours of work a week per attorney, while the other was generally used for calculating attorneys fees and budget requests and reflected the number of hours worked by each attorney beyond the standardized forty-hour workweek. The plaintiffs contend that because "authorized officials received monthly or quarterly summaries and compilations of these records" the practice of maintaining these two sets

of records reflects "approval under FEPA." (Br. for Appellees at 23-24 (internal quotation marks and alterations omitted)). This practice does not, however, provide the plaintiffs with the written order or approval necessary to justify compensation under FEPA and its regulations. The maintenance of two sets of records may indicate official awareness of the overtime worked, but it does not provide prior written authorization or approval of such work.

V

In holding that the DOJ is not liable for overtime on an inducement theory, we do not wish to be seen as countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation. Our predecessor court was legitimately concerned that at least in some instances [**47] such evasion had occurred and that the government in effect was coercing uncompensated overtime. The government's brief in this case candidly admits that DOJ attorneys were expected to work overtime without compensation. If an adverse personnel action were taken against an employee who declined to work uncompensated overtime, that action might well be found to be invalid. n8 But that is not a ground for awarding overtime compensation that was not ordered and approved in strict compliance with the regulation. The problems that this case has exposed suggest that DOJ and other affected agencies might do well to reexamine the whole overtime question for employees not subject to the FLSA and seek a government-wide legislative solution. n9

n8 The government itself stated:

> To the extent that some class members believed that individual supervisors were acting inappropriately, they had various avenues of recourse. They could have refused to work extra hours. If penalized, they could have challenged any significant adverse personnel action before the Merit Systems Protection Board, with judicial review in this Court. And . . . they could have reported any suspected FEPA violations to OPM or the Justice Department's Inspector General for investigation; or sought relief through an administrative grievance system that the Justice Department maintains; or challenged the government's overtime policies through the Administrative Procedure Act, to the extent that the CSRA's remedies were not exclusive.

(Br. for Appellant at 61 (citations omitted).) [**48]

n9 As noted above, supra n.1, Congress enacted legislation in 1999 that prohibited overtime compensation for DOJ attorneys after November 29, 1999.

CONCLUSION

For the foregoing reasons, we reverse the Court of Federal Claims' grant of summary judgment.

REVERSED

COSTS

No costs.

DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

July 1, 1999
Incorporating Through Change 4, August 13, 2002

ADMINISTRATIVE INSTRUCTION NO. 29

SUBJECT: Incentive and Honorary Awards Programs

References: (a) Administrative Instruction No. 29, "Incentive Awards," January 8, 1990 (hereby canceled)
(b) Title 5, United States Code, "Government Organization and Employees"
(c) Title 5, Code of Federal Regulations, "Administrative Personnel"
(d) DoD 1400.25-M, "Department of Defense Civilian Personnel Manual," December 1996, authorized by DoD Directive 1400.25, November 25, 1996
(e) through (i), see enclosure 1

1. REISSUANCE AND PURPOSE

This Instruction:

1.1. Reissues reference (a) to update policy and responsibilities for the Incentive and Honorary Awards Programs under chapters 43 and 45 of 5 U.S.C. (reference (b)), 5 CFR 430 and 451 (reference (c)), and subchapter 451 of DoD 1400.25-M(reference (d)).

1.2. Continues to authorize and conduct the Incentive and Honorary Awards Programs to recognize:

1.2.1. Employee accomplishments achieved through suggestions, inventions, superior accomplishments, or other personal effort that contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or a special act or service in the public interest in connection with or related to official employment; and

1.2.2. Private citizens, groups, and organizations that significantly assist or support Department of Defense (DoD) functions, services, or operations performed as a public service.

1.3. Recognizes monetary awards for members of the Armed Forces covered by this Instruction in accordance with 10 U.S.C. 1124 (reference (e)) for suggestions, inventions, and scientific achievements.

2. APPLICABILITY

This Instruction applies to:

2.1. Civilian employees and members of the Armed Forces regularly assigned to the Office of the Secretary of Defense (OSD), the Organization of the Joint Chiefs of Staff (JS), and other activities for which operational support is provided by the Washington Headquarters Services (WHS) Directorate for Personnel and Security Customer Support Operating Office.

2.1.1. A civilian employee is an employee who meets the definition of "employee" under 5 U.S.C. 2105 (reference (b)).

2.1.2. Members of the Armed Forces are eligible to be paid monetary awards under this Instruction only for suggestions, inventions, and scientific achievements under 10 U.S.C. 1124 (reference (e)).

2.2. Former Employees. Under 5 CFR 451.104 (reference (c)), awards for contributions made by an individual when employed by the Department of Defense may be paid to a former employee or to the estate or legal heirs of a deceased employee. Awards to separated or deceased members of the Armed Forces for contributions made while the member was on active duty may be paid to the former member or to the member's estate or legal heirs.

2.3. Nonappropriated Fund Employees. Employees paid with nonappropriated funds are not eligible to receive monetary awards paid from appropriated funds, but may receive nonmonetary awards under this Instruction.

2.4. Foreign National Employees

2.4.1. A foreign national individual who meets the definition of employee as defined under 5 U.S.C. 2105 (reference (b)) and is paid with U.S. funds, i.e., a direct hire employee, is eligible to receive awards under this Instruction.

2.4.2. A foreign national individual who is paid on a cost reimbursable basis by agreement with a foreign country, i.e., an indirect hire employee, is not eligible to receive monetary awards but may receive nonmonetary awards under this Instruction.

3. DEFINITIONS

Terms used in this Instruction are defined in enclosure 2.

4. POLICY

4.1. It is WHS policy that the Incentive and Honorary Awards Programs shall:

4.1.1. Ensure that the type of recognition granted is in keeping with the value of the employee's contribution.

4.1.2. Ensure that maximum benefits for the Government are obtained by considering the applicability of employee contributions throughout the Federal Government.

4.1.3. Ensure that awards are not used as a substitute for other personnel actions or as a substitute for pay.

4.1.4. Ensure that awards are used to motivate, recognize, and reward eligible personnel as individuals or groups for contributions to the efficiency, economy, or other improvements in Government operations.

4.1.5. Ensure that due weight is given to awards when qualifying and selecting an employee for promotion and that all approved award recommendations are documented.

4.1.6. Ensure that awards are used to the extent that shall best support and enhance organizational goals and objectives and meet employee recognition needs.

4.1.7. Ensure that supervisory and management officials are trained properly in the effective use of awards covered by this Instruction.

4.1.8. Ensure that adequate funds are available for payment of awards.

4.1.9. Ensure that awards shall be granted consistent with Equal Employment Opportunity and Affirmative Employment Program policies and shall be free from discrimination regardless of race, color, religion, age, sex, national origin, or disability.

4.1.10. Provide a final board of review (the Incentive Awards Board) to review and recommend approval or disapproval of honorary awards and monetary awards for which the Heads of the OSD Components do not have authority.

4.2. Acceptance of a monetary award constitutes an agreement that the use by the Government of an idea, method, or device for which the award is made does not form the basis of a further claim of any nature against the Government by the employee, his or her heirs, or assigns.

4.3. Expenditures for superior accomplishment, special act or service, supervisor's cash, and performance awards for Senior Executive Service (SES) (excluding performance bonuses), Scientific or Professional (ST), Senior Level (SL), General Schedule (GS/GM), or Federal Wage System (FWS) employees who are assigned permanently, or on detail from other organizations, to activities for which operational support is provided by the WHS Directorate for Personnel and Security Customer Support Operating Office shall be paid from, and not exceed, the Component's annual awards budget allocation.

4.4. Either one monetary award or a time-off award may be granted to an employee for a contribution. A contribution shall not serve as the basis for more than one monetary award (including a performance award or bonus) or for a monetary award and a time-off award.

4.5. The Heads of the OSD Components may delegate approval authority for awards over which they have approval authority. Such delegations shall be submitted to the Assistant Director for Labor and Management Employee Relations, Directorate for Personnel and Security, WHS.

4.6. The Heads of the OSD Components may not delegate nomination authority for honorary awards over which the Secretary of Defense has final approval authority.

4.7. Persons or organizations having a commercial or profitmaking relationship with the Department of Defense or with a DoD Component shall not be granted recognition, unless the contribution is substantially beyond that specified or implied within the terms of the contract establishing the relationship, or the recognition is clearly in the public interest, in which case the recognition shall be honorary only.

5. RESPONSIBILITIES

5.1. The Director of Administration and Management, OSD (DA&M, OSD), shall:

5.1.1. Work jointly with the Assistant Secretary of Defense for Force Management Policy (ASD(FMP)), Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), in the development and establishment of DoD-wide awards.

5.1.2. Administer the DoD-level civilian honorary awards program.

5.1.3. Recommend to the Secretary of Defense and the Deputy Secretary of Defense approval of awards over which the Secretary has final approval authority.

5.2. The Director, Washington Headquarters Services (WHS), shall:

5.2.1. Establish the policies for and administer the Incentive and Honorary Awards Programs for activities receiving operational support from the WHS Directorate for Personnel and Security Customer Support Operating Office and for the JS.

5.2.2. Establish the annual awards budget ceiling for the OSD Components for payment of superior accomplishment, special act or service, and supervisor's cash awards under this Instruction and performance awards under Administrative Instruction No. 63 (reference (f)).

5.2.3. Approve monetary awards that would grant more than $5,000 cumulatively to a ST, SL, GS/GM, or FWS employee in a fiscal year for performance (including performance awards and the single-year increase in basic pay as a result of a quality step increase under Administrative Instruction No. 63 (reference (f)) and/or other accomplishments covered by this Instruction.

5.3. The Heads of the OSD Components shall:

5.3.1. Ensure that program or operational areas, where superior accomplishments may warrant award consideration, are identified through normal management review and control processes.

5.3.2. Encourage supervisors to identify employees or groups of employees deserving award consideration and request that award recommendations be submitted expeditiously.

5.3.3. Ensure that nominations that require Incentive Awards Board action are received by the Assistant Director for Labor and Management Employee Relations, Directorate for Personnel and Security, WHS, Attention: Executive Secretary to the Incentive Awards Board, not later than the first Wednesday of each month, for consideration by the Board at that month's meeting.

5.3.4. Ensure expenditures on superior accomplishment, special act or service, and supervisor's cash awards, under this Instruction and performance awards under Administrative Instruction No. 63 (reference (f)) for SES, ST, SL, GS/GM, and FWS employees assigned to the Component permanently or temporarily (including on details) do not exceed the awards budget allocation.

5.3.5. Approve or disapprove, within the awards budget allocation, nominations for monetary recognition (including incentive awards under this Instruction and performance awards and the value of the single-year increase in basic pay as a result of a quality step increase under Administrative Instruction No. 63 (reference (f))) for ST, SL, GS/GM, and FWS employees that would grant a gross cumulative dollar amount not in excess of $5,000 per employee per fiscal year.

5.3.6. Recommend in writing to the Director, WHS (through the Assistant Director for Labor and Management Employee Relations, WHS Directorate for Personnel and Security) approval of a monetary award that would cause the gross cumulative dollar amount of monetary recognition (including incentive awards under this Instruction and performance awards and the value of the single-year increase in basic pay as a result of a quality step increase under Administrative Instruction No. 63 (reference (f))) granted to a ST, SL, GS/GM, or FWS employee to exceed $5,000 in a fiscal year. Authority to recommend such approval may not be delegated.

5.3.7. Recommend, within the awards budget allocation, to the Incentive Awards Board for review and approval, incentive awards nominations that would grant more than $5,000 (gross) and less than $10,000 (gross) to a ST, SL, GS/GM, or FWS employee.

5.3.8. Recommend, within the awards budget allocation, to the Incentive Awards Board for review and approval, incentive awards nominations for SES members.

5.3.9. Approve or disapprove time-off awards.

5.4. The Incentive Awards Board shall:

5.4.1. Review nominations for the DoD Medal for Distinguished Civilian Service and the Secretary of Defense Medal for Meritorious Civilian Service and recommend approval or disapproval to the Secretary of Defense.

5.4.2. Review and approve any incentive award nomination that would grant in excess of $5,000 (gross), but not exceeding $10,000 (gross), to a ST, SL, GS/GM, or FWS employee.

5.4.3. Review and approve all monetary awards (excluding performance bonuses) that would not grant more than $10,000 (gross) to a SES member.

5.4.4. Notify the Head of the OSD Component of action taken on awards nominations.

5.4.5. Review and act on suggestions.

5.4.6. Arrange for preparation of honorary awards and payment of incentive monetary awards.

5.4.7. Monitor the operation of the Incentive and Honorary Awards Programs to ensure uniformity of policy and coordination with related programs.

5.4.8. Recommend procedures, guides, and standards for improving the Incentive and Honorary Awards Programs.

5.4.9. Normally, convene the second Wednesday of each month to review and/or approve or disapprove incentive and honorary awards nominations.

5.5. The Director for Personnel and Security, WHS, shall:

5.5.1. Ensure that honorary and monetary awards meet the eligibility criteria and are in accordance with applicable laws, rules, regulations, policy, and provisions of this Instruction.

5.5.2. Make awards budget allocations on a fiscal year basis. Allocations may change during a fiscal year as a result of augmentation or reduction in resources within Components.

5.5.3. Process approved monetary awards expeditiously.

5.5.4. Serve as the Executive Secretary to the Incentive Awards Board.

5.5.5. Forward award nominations for civilians that would grant in excess of $10,000 (gross), and up to $25,000 (gross), to the ASD(FMP), OUSD(P&R)), for submission to the Director of the Office of Personnel Management in accordance with subchapter 451 of DoD 1400.25-M (reference (d)).

5.5.6. Forward award nominations for members of the Armed Forces that would grant in excess of $10,000 (gross), and up to $25,000 (gross), to the ASD(FMP), OUSD(P&R), for review and approval in accordance with subchapter 451 of DoD 1400.25-M (reference (d)).

5.5.7. Document all monetary and time-off awards in compliance with 5 CFR 451.106(3) (reference (c)).

5.5.8. Communicate the relevant parts of this Instruction to managers, supervisors, and employees.

5.5.9. File awards documents in compliance with the requirements of 5 CFR 451.106(f) (reference (c)).

5.5.10. Report awards data as required.

5.6. Supervisors at all levels shall:

5.6.1. Identify employees or groups of employees whose superior accomplishments or suggestions merit special recognition and promptly recommend them for appropriate recognition.

5.6.2. Evaluate suggestions and ideas to determine applicability in their respective administrative areas and their possible application in other DoD Components and in other Federal Agencies.

6. EFFECTIVE DATE

This Instruction is effective July 1, 1999, except that no provision of this Instruction shall be applied in such a way as to affect any administrative procedure related to any award taken under provisions of reference (a) that was pending on July 1, 1999.

D. O. Cooke
Director

Enclosures - 21

E1. References, continued
E2. Definitions
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E4. Incentive Awards
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E13. Award Scale C, "Time-Off Award Scale for Full-Time Employees for Suggestions, Inventions, Special Acts or Service, and Scientific Achievements"
E14. DD Form 355, "Employee Suggestion"

E15. DD Form 2800, "Suggestion Evaluation"

E16. Director of Administration and Management Memorandum, "Nominations for the Office of the Secretary of Defense (OSD) Exceptional Civilian Service Award," February 10, 2000

E17. Director of Administration and Management Memorandum, "Expanded Eligibility for the OSD Exceptional Civilian Service Award," August 6, 2001

E18. Director of Administration and Management Memorandum, "Secretary of Defense Medal for the Defense of Freedom," October 17, 2001

E19. Director of Administration and Management Memorandum, "Office of the Secretary of Defense Medal for Valor," October 29, 2001

E20. Director of Administration and Management Memorandum, "Group Achievement Award," August 17, 2000

E21. *Director of Administration and Management Memorandum, "Increase from $250 to $500 for Supervisor's Cash Awards," August 6, 2002*

E1. ENCLOSURE 1

REFERENCES, continued

(e) Title 10, United States Code, "Armed Forces"
(f) Administrative Instruction No. 63, "Performance Appraisal Program for General Schedule, Federal Wage System, and Certain Other Employees," July 1, 1999
(g) Executive Order 10717, "The President's Award for Distinguished Federal Civilian Service," June 27, 1957, as amended
(h) Public Law 80-253, "National Security Act of 1947," July 26, 1947
(i) Public Law 103-425, "A Bill to Amend the Defense Department Overseas Teachers Pay and Personnel Practices Act," October 31, 1994

E2. ENCLOSURE 2

DEFINITIONS

E2.1. TERMS

E2.1.1. Award. Something bestowed or an action taken to recognize and reward individual or team achievement that contributes to meeting organizational goals or improving the efficiency, effectiveness, and economy of the Government or is otherwise in the public interest. Such awards include, but are not limited to, employee incentives that are based on predetermined criteria.

E2.1.2. Contribution. An accomplishment achieved through an individual or group effort in the form of a suggestion, invention, superior accomplishment, or other personal effort that contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or a special act or service in the public interest in connection with or related to official employment.

E2.1.3. Head of an OSD Component. For purposes of this Instruction, a Head of an OSD Component is a DoD official who has award approval authority; i.e., the Secretary of Defense and the Deputy Secretary of Defense; the Under Secretaries of Defense; the Assistant Secretaries of Defense who report directly to the Secretary of Defense or the Deputy Secretary of Defense; the General Counsel of the DoD; the Director, Operational Test and Evaluation; the Assistants to the Secretary of Defense who report directly to the Secretary of Defense or the Deputy Secretary of Defense; the Directors of the Defense Agencies and Field Activities who report directly to the Secretary of Defense or the Deputy Secretary of Defense; the Chairman of the Joint Chiefs of Staff; the Director of the Joint Staff; and the Chief Judge of the U.S. Court of Appeals for the Armed Forces.

E2.1.4. Honorary (Nonmonetary) Award. The recognition device is not a cash payment or time off as an award but rather an award of a honorific value, e.g., a letter, certificate, citation, medal, plaque, or other similar item of nominal value.

E2.1.5. Intangible Benefit. Savings to the Government that cannot be measured in terms of dollars.

E2.1.6. Monetary Award. The recognition device is a cash payment that does not increase the employee's rate of basic pay and is subject to applicable tax rules.

E2.1.7. Superior Accomplishment Award. A monetary award for contributions resulting in tangible benefits or savings and/or intangible benefits to the Government.

E2.1.8. Tangible Benefit. Savings to the Government that can be measured in terms of dollars.

E2.1.9. Time-Off Award. An alternate means of recognizing the superior accomplishments or other personal efforts of employees, including members of the SES, that contribute to the quality, efficiency, or economy of Government operations. Time off from duty is granted without loss of pay or charge to leave of the employee. The number of hours granted is commensurate with the employee's contribution or accomplishment.

E4. ENCLOSURE 4

INCENTIVE AWARDS

E4.1. SUPERIOR ACCOMPLISHMENT AWARD

A superior accomplishment award is a monetary form of recognition granted for a contribution resulting in tangible benefits or savings (see Award Scale A, enclosure 11) and/or intangible benefits (see Award Scale B, enclosure 12) to the Government. The Heads of the OSD Components shall accomplish this monetary form of recognition within awards budget allocations.

E4.1.1. Eligibility. Civilian employees covered by this Instruction.

E4.1.2. Format. See section E8.1. of enclosure 8.

E4.2. SPECIAL ACT OR SERVICE AWARD

A special act or service award is a monetary form of recognition granted for a contribution or accomplishment in the public interest that is a non-recurring contribution either in or outside of job responsibilities, a scientific achievement, or for the courageous handling of an emergency situation. The Heads of the OSD Components shall accomplish this monetary form of recognition within awards budget allocations.

E4.2.1. Eligibility. Civilian employees covered by this Instruction.

E4.2.2. Format. See section E8.2. of enclosure 8.

E4.3. SUPERVISOR'S CASH AWARD (SCA)

A SCA is a monetary form of recognition (not to exceed *$500.00)* granted for day-to-day accomplishments. The Heads of the OSD Components shall accomplish this monetary form of recognition within awards budget allocations. In determining the amount of this award, consideration shall be given to the significance of the employee's contribution and the period worked. Examples of achievements warranting the SCA are:

E4.3.1. Streamlining, eliminating, or modifying an office procedure to improve effectiveness, efficiency, or timeliness.

E4.3.2. Accomplishing a specific, short-suspense project that contributed to the mission of the organization.

E4.3.3. Eligibility. Civilian employees covered by this Instruction.

E4.3.4. Format. See section E8.3. of enclosure 8.

E4.3.5. Limitation. This award shall not exceed *$500.00* (gross).

E4.4. TIME-OFF AWARD (TOA)

A TOA is intended to increase employees' productivity and creativity by rewarding contributions to the quality, efficiency, or economy of Government operations. A TOA is an alternative to a monetary or honorary award and may be granted for superior accomplishments, special acts or service, contributions that are of a one-time, nonrecurring nature, etc. In determining the amount of the TOA, consideration must be given to the cost in lost production and the benefits realized from the employee's contributions (see Award Scale C, enclosure 13). A TOA may not be used as a substitute for, or in addition to, a performance-based monetary award or bonus. A TOA does not convert to a cash payment under any circumstances.

E4.4.1. Eligibility. Civilian employees covered by this Instruction, including members of the SES.

E4.4.2. Format. See section E8.4. of enclosure 8.

E4.4.3. Limitations

E4.4.3.1. Full-time employees may be granted up to 80 hours of time off during a leave year without charge to leave or loss of pay. The maximum amount of time off that may be granted a full-time employee for any single contribution is 40 hours.

E4.4.3.2. For part-time employees or employees with less than a 40-hour work week, the total time which may be granted during any leave year is the average number of hours of work in the employee's biweekly scheduled tour of duty. The maximum award for any single contribution for these employees is one-half of the maximum amount of time that could be granted during the year.

E4.4.3.3. A TOA that has been approved and not used at the time an employee covered by this Instruction transfers to a DoD Component not receiving operational support from the WHS Directorate for Personnel and Security Customer Support Operating Office, or to another Federal Agency, cannot be transferred. Similarly, unused time off shall not transfer with an employee who transfers from a DoD Component that does not receive operational support from the WHS Directorate for Personnel and Security Customer Support Operating Office or from another Federal Agency. Every effort shall be made to allow the employee to use the TOA prior to the employee's transfer.

E4.4.4. Scheduling Time Off

E4.4.4.1. The employee is responsible for requesting use of the approved time off on a Standard Form (SF) 71, "Application for Leave," in accordance with standard leave approval practices. Requests to use time off should be done far enough in advance to permit its use without undue interruption to the work of the organization.

E4.4.4.2. Time off may not be used and recorded on time and attendance records until documentation, approval, and processing requirements are completed, usually within 14 workdays after submission to the Labor and Management Employee Relations Division, Directorate for Personnel and Security, WHS. The SF 50 shall serve as confirmation that the TOA has been approved and processed.

E4.4.4.3. Time off granted as an award should be scheduled and used normally within 90 days of the effective date of the award, but in no case more than one (1) year after the effective date.

E4.5. SUGGESTIONS

To be considered for an award, a suggestion must identify an improvement in the quality of operations, a cost reduction opportunity, or an improvement in the timeliness of service delivery that results in tangible or intangible benefits to the U.S. Government; and be adopted in whole or in part for implementation. The suggestion must set forth a specific proposed course of action to achieve the improvement or cost reduction and must not already be under consideration.

E4.5.1. Eligibility. Civilian employees and members of the Armed Forces covered by this Instruction.

E4.5.2. Format. See section E8.5. of enclosure 8.

E8. ENCLOSURE 8

FORMATS

E8.1. SUPERIOR ACCOMPLISHMENT AWARD

Forward the original and six (6) copies of a memorandum addressed to the Assistant Director for Labor and Management Employee Relations, Directorate for Personnel and Security, WHS, and signed by the Head of the OSD Component that contains the following:

E8.1.1. Name; social security number (SSN); title, series, and grade; organization and location; period covered by the award; length of time with the organization; and a statement that the contributions have not been and shall not be recognized with any other monetary award (including a performance award or bonus) or a time-off award.

E8.1.2. Description of the achievement(s) in detail. Tangible and intangible benefits must be described separately. The justification must refer to the applicable award scales in enclosures 11 and 12.

E8.1.3. Amount of award based on, and with reference to, the applicable award scales in enclosures 11 and 12.

E8.2. SPECIAL ACT OR SERVICE AWARD

Same as in section E8.1., above.

E8.3. SUPERVISOR'S CASH AWARD (SCA)

Forward a memorandum addressed to the Assistant Director for Labor and Management Employee Relations, Directorate for Personnel and Security, WHS, and signed by an official at least one level higher than the recommending official. The memorandum shall contain the following:

E8.3.1. Name; SSN; title, series, and grade; organization and location; period covered by the award; and a statement that the contributions have not been and shall not be recognized with any other monetary award (including a performance award or bonus) or a time-off award.

E8.3.2. Description of the specific achievement(s).

E8.3.3. Amount of award not to exceed *$500.00* (gross).

E8.4. TIME-OFF AWARD (TOA)

Forward a memorandum approved by the Head of the OSD Component to the Assistant Director for Labor and Management Employee Relations, Directorate for Personnel and Security, WHS, that contains the following:

E8.4.1. Name; SSN; title, series, and grade; organization and location; period covered by the award; length of time with the organization; and a statement that the contributions have not been and shall not be recognized with any monetary award (including a performance award or bonus).

E8.4.2. Justification containing a description of the nominee's specific contributions to meeting organizational goals or improving the efficiency, effectiveness, and economy of the Government.

E8.4.3. Hours of time off granted based on the award scale in enclosure 13.

E8.4.4. Certification from the supervisor or recommending official that "Consideration of the cost of this time-off award in lost production has determined that the benefits realized by the organization from the employee's contributions support the amount of time off approved. The organization's workload and the employee's projected leave have been considered. The employee will be able to schedule the time off in addition to other projected leave not later than _____ [a date not later than 90 days from submission of the TOA for approval, if possible; otherwise, not later than one (1) year thereafter]. Other available forms of recognition and monetary awards were considered in determining the amount of this time-off award."

E8.4.5. The approved TOA shall be documented on a Standard Form 50 (SF 50), "Notification of Personnel Action," which shall be filed in the employee's Official Personnel Folder. The TOA justification shall be retained in the Labor and Management Employee Relations Division, Directorate for Personnel and Security, WHS. A separate SF 50 shall be prepared for each TOA. The number of hours approved as time off shall be in item 20, "Total Salary/Award," of the SF 50.

E11. ENCLOSURE 11

AWARD SCALE A, "Award Scale for Suggestions, Inventions, Special Acts or Service, and Scientific Achievements Resulting in Tangible Benefits to the Government"

BENEFITS	AWARDS
Estimated First - Year Benefits	Amount of Awards to Employee
Up to $100,000 in benefits	10 percent of benefits
$100,001 and above in benefits	$10,000 plus one percent of benefits above $100,001, up to $25,000, with the approval of the Office of Personnel Management
	Presidential approval is required for all awards of more than $25,000.

E12. ENCLOSURE 12

AWARD SCALE B, "Award Scale for Suggesting, Inventions, Special Acts or Service, and Scientific Achievements Resulting in Intangible Benefits to the Government"

	EXTENT OF APPLICATION			
VALUE OF BENEFIT	LIMITED	EXTENDED	BROAD	GENERAL
	Affects functions, mission, or personnel of one facility, installation, regional area, or an organizational element of headquarters. Affects small area of science or technology.	Affects functions, mission, or personnel of an entire regional area, command, or bureau. Affects an important area of science or technology.	Affects functions, mission, or personnel of several regional areas or commands, or an entire Department or Agency. Affects an extensive area of science or technology.	Affects functions, mission, or personnel of more than one Department or Agency, or is in the public interest throughout the nation and beyond.
MODERATE				
Change or modification of an operating principle or procedure with limited use or impact.	$25 - $125	$126 - $325	$326 - $650	$651 - $1,300
SUBSTANTIAL				
Substantial change or modification of procedures. An important improvement to the value of a product, activity, program, or service to the public.	$125 - $325	$326 - $650	$651 - $1,300	$1,301 - $3,150
HIGH				
Complete revision of a basic principle or procedures; a highly significant improvement to the value of a product or service.	$325 - $650	$651 - $1,300	$1,301 - $3,150	$3,151 - $6,300
EXCEPTIONAL				
Initiation of a new principle or major procedure; a superior improvement to the quality of a critical product, activity, program, or service to the public.	$650 - $1,300	$1,301 - $3,150	$3,151 - $6,300	$6,301 - $10,000

E13. ENCLOSURE 13

AWARD SCALE C, "Time-Off Award Scale for Full-Time Employees for Suggestions, Inventions, Special Acts or Service, and Scientific Achievements"

	EXTENT OF APPLICATION			
VALUE OF BENEFIT	LIMITED	EXTENDED	BROAD	GENERAL
	Affects functions, mission, or personnel of one facility, installation, regional area, or an organizational element of headquarters. Affects small area of science or technology.	Affects functions, mission, or personnel of an entire regional area, command, or bureau. Affects an important area of science or technology.	Affects functions, mission, or personnel of several regional areas or commands, or an entire Department or Agency. Affects an extensive area of science or technology.	Affects functions, mission, or personnel of more than one Department or Agency, or is in the public interest throughout the nation and beyond.
MODERATE				
Change or modification of an operating principle or procedure with limited use or impact.	2 - 4 hours	5 - 7 hours	8 - 11 hours	12 - 16 hours
SUBSTANTIAL				
Substantial change or modification of procedures. An important improvement to the value of a product, activity, program, or service to the public.	5 - 7 hours	8 - 11 hours	12 - 16 hours	17 - 24 hours
HIGH				
Complete revision of a basic principle or procedures; a highly significant improvement to the value of a product or service.	8 - 11 hours	12 - 16 hours	17 - 24 hours	25 - 32 hours
EXCEPTIONAL				
Initiation of a new principle or major procedure; a superior improvement to the quality of a critical product, activity, program, or service to the public.	12 - 16 hours	17 - 24 hours	25 - 32 hours	33 - 40 hours

General Provisions

§550.101 Coverage and exemptions.

(a) *Employees to whom this subpart applies.* (1) This subpart applies to each employee in or under an Executive agency, as defined in 5 U.S.C. 105, except those named in paragraphs (b) and (c) of this section.

(2) The sections in this subpart incorporating special provisions for certain types of work (§§550.141 through 550.164, inclusive) apply also to each employee of the judicial branch or the legislative branch who is subject to subchapter V of chapter 55 of title 5, United States Code.

(b) *Employees to whom this subpart does not apply.* This subpart does not apply to:

(1) An elected official;

(2) The head of a department;

(3) [Reserved]

(4) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under subchapter IV of chapter 53 of title 5, United States Code, or by a wage board or similar administrative authority serving the same purpose, except that §550.113(d) is applicable to such an employee whose rate of basic pay is fixed on an annual or monthly basis;

(5) An employee outside the continental United States or in Alaska who is paid in accordance with local prevailing wage rates for the area in which employed;

(6) An employee of the Tennessee Valley Authority;

(7) An employee of the Central Intelligence Agency (sec. 10, 63 Stat. 212, as amended; 50 U.S.C. 403j);

(8) A seaman to whom section 1(a) of the act of March 24, 1943 (57 Stat. 45; 50 U.S.C. App. 1291(a)) applies;

(9) A member of the United States Park Police or the United States Secret Service Uniformed Division, except for the purpose of night pay under §§550.121 and 550.122, pay for holiday work under §§550.131 and 550.132, and pay for Sunday work under §§550.171 and 550.172 of this subpart;

(10) An officer or member of the crew of a vessel, whose pay is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry (30 Comp. Gen. 158);

(11) A civilian keeper of a lighthouse, or a civilian employed on a lightship or another vessel of the Coast Guard (14 U.S.C. 432(f));

(12) A physician, dentist, nurse, or any other employee in the Department of Medicine and Surgery, Veterans Administration, whose pay is fixed under chapter 73 of title 38, United States Code;

(13) A student-employee as defined by section 5351 of title 5, United States Code;

(14) An employee of the Environmental Science Services Administration engaged in the conduct of meteorological investigations in the Arctic region (62 Stat. 286; 15 U.S.C. 327);

(15) An employee of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives;

(16) A "teacher" or an individual holding a "teaching position" as defined by section 901 of title 20, United States Code;

(17) A Foreign Service officer or a member of the Senior Foreign Service; or

(18) A member of the Senior Executive Service.

(c) *Employees to whom §§550.111, 550.113, and 550.114 of this subpart do not apply.* Except for the purpose of determining hours of work in excess of 8 hours in a day, §§550.111, 550.113, and 550.114 of this subpart do not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act of 1938 and part 551 of this chapter.

(d) *Services to which this subpart does not apply.* This subpart does not apply to overtime, night, Sunday, or holiday services for which additional pay is provided by the act of:

(1) February 13, 1911, as amended (36 Stat. 899, as amended; 19 U.S.C. 261, 267), involving customs inspectors and canine enforcement officers;

(2) July 24, 1919 (41 Stat. 241; 7 U.S.C. 394), involving employees engaged in enforcement of the Meat Inspection Act;

(3) March 2, 1931 (46 Stat. 1467; 8 U.S.C. 1353*a*), involving inspectors and employees, Immigration and Naturalization Service;

(4) May 27, 1936, as amended (49 Stat. 1380, as amended; 46 U.S.C. 382b), involving local inspectors of steam vessels and assistants, U.S. shipping commissioners, deputies, and assistants, and customs officers and employees;

(5) March 23, 1941 (55 Stat. 46; 47 U.S.C. 154(f)(3)), involving certain engineers of the Federal Communications OPM;

(6) August 4, 1949 (63 Stat. 495; 7 U.S.C. 349a), involving employees of the Bureau of Animal Industry who work at establishments which prepare virus, serum, toxin, and analogous products for use in the treatment of domestic animals; or

(7) August 28, 1950 (64 Stat. 561; 7 U.S.C. 2260), involving employees of the Department of Agriculture performing inspection or quarantine services relating to imports into and exports from the United States.

[33 FR 12458, Sept. 4, 1968, as amended at 48 FR 3933, Jan. 28, 1983; 56 FR 20341, May 3, 1991; 57 FR 2432, Jan. 22, 1992; 64 FR 69174, Dec. 10, 1999]

§550.102 Entitlement.

A department (and for the purpose of §§550.141 through 550.164, inclusive, a legislative or judicial branch agency) must determine an employee's entitlement to premium pay consistent with subchapter V of chapter 55 of title 5, United States Code.

[64 FR 69174, Dec. 10, 1999]

§550.103 Definitions.

In this subpart:

Administrative workweek means any period of 7 consecutive days (as defined in this section) designated in advance by the head of the agency under section 6101 of title 5, United States Code.

Agency means—

(1) A *department* as defined in this section; and

(2) A legislative or judicial branch agency which has positions that are subject to subchapter V of chapter 55 of title 5, United States Code.

Basic workweek, for full-time employees, means the 40-hour workweek established in accordance with §610.111 of this chapter.

Criminal investigator means a law enforcement officer as defined in 5 U.S.C. 5541(3) and this section—

(1) Whose position is properly classified under the GS–1811 or GS–1812 series in the General Schedule classification system based on OPM classification standards (or would be so classified if covered under that system);

(2) Who is a pilot employed by the United States Customs Service;

(3) Who is a special agent in the Diplomatic Security Service in a position which has been properly determined by the Department of State to have a Foreign Service primary skill code of 2501;

(4) Who is a special agent in the Diplomatic Security Service who has been placed by the Department of State in a non-covered position on a long-term training assignment that will be career-enhancing for a current or future assignment as a Diplomatic Security Service special agent, provided the employee is expected to return to duties as a special agent in a Foreign Service position with a 2501 primary skill code or to a position properly classified in the GS–1811 series immediately following such training;

(5) Who occupies a position in the Department of State in which he or she performs duties and responsibilities of a special agent requiring Foreign Service primary skill code 2501, pending the opening of a position with primary skill code 2501 and placement in that position as a special agent; or

(6) Who is a special agent in the Diplomatic Security Service with a Foreign Service personal primary skill code of 2501 (or whose position immediately prior to the detail was properly classified in the GS–1811 series) and who meets all of the following three conditions:

(i) The individual is assigned outside the Department of State;

(ii) The assigned position would have a primary skill code of 2501 (or would be properly classified in the GS–1811 series under the General Schedule classification system based on OPM classification standards) if the position were under the Foreign Service (or General Schedule) in the Department of State; and

(iii) The individual is expected to return to a position as a special agent in the Diplomatic Security Service with a 2501 primary skill code (or to a position that is properly classified in the GS–1811 series) immediately following such outside assignment.

Day (for overtime pay purposes) means any 24-hour period designated by an agency within the administrative workweek applicable to the employee. A day need not correspond to the 24-hour period of a calendar day. If the agency has not designated another period of time, a day is a calendar day.

Department means an executive agency and a military department as defined by sections 105 and 102 of title 5, United States Code.

Emergency means a temporary condition posing a direct threat to human life or property, including a forest wildfire emergency.

Employee means an employee to whom this subpart applies.

Head of a department means the head of a department and, except for the purpose of §550.101(b)(2), an official who has been delegated authority to act for the head of a department in the matter concerned.

Holiday work means nonovertime work performed by an employee during a regularly scheduled daily tour of duty on a holiday designated in accordance with §610.202 of this chapter.

Irregular or occasional overtime work means overtime work that is not part of an employee's regularly scheduled administrative workweek.

Law enforcement officer means an employee who—

(1) Is a law enforcement officer within the meaning of 5 U.S.C. 8331(20) (as further defined in §831.902 of this chapter) or 5 U.S.C. 8401(17) (as further defined in §842.802 of this chapter), as applicable;

(2) In the case of an employee who holds a secondary position, as defined in §831.902 of this chapter, and is subject to the Civil Service Retirement System, but who does not qualify to be considered a law enforcement officer within the meaning of 5 U.S.C. 8331(20), would so qualify if such employee had transferred directly to such position after serving as a law enforcement officer within the meaning of such section;

(3) In the case of an employee who holds a secondary position, as defined in §842.802 of this chapter, and is subject to the Federal Employees Retirement System, but who does not qualify to be considered a law enforcement officer within the meaning of 5 U.S.C. 8401(17), would so qualify if such employee had transferred directly to such position after performing duties described in 5 U.S.C. 8401(17)(A) and (B) for at least 3 years; and

(4) In the case of an employee who is not subject to either the Civil Service Retirement System or the Federal Employees Retirement System—

(i) Holds a position that the agency head (as defined in §§831.902 and 842.802 of this chapter) determines would satisfy paragraph (1), (2), or (3) of this definition if the employee were subject to the Civil Service Retirement System or the Federal Employees Retirement System (subject to OPM oversight as described in §§831.911 and 842.808 of this chapter); or

(ii) Is a special agent in the Diplomatic Security Service.

Nightwork has the meaning given that term in §550.121, and includes any nightwork preformed by an employee as part of his or her regularly scheduled administrative workweek.

Overtime work has the meaning given that term in §550.111 and includes irregular or occasional overtime work and regular overtime work.

Performing work in connection with an emergency means performing work that is directly related to resolving or coping with an emergency or its immediate aftermath.

Premium pay means the dollar value of earned hours of compensatory time off and additional pay authorized by subchapter V of chapter 55 of title 5, United States Code, and this subpart for overtime, night, Sunday, or holiday work; or for standby duty, administratively uncontrollable overtime work, or availability duty. This excludes overtime pay paid to employees under the Fair Labor Standards Act and compensatory time off earned in lieu of such overtime pay.

Protective duties means duties authorized by section 3056(a) of title 18, United States Code, or by section 2709(a)(3) of title 22, United States Code.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including any applicable special pay adjustment for law enforcement officers under section 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), locality-based comparability payment under 5 U.S.C. 5304, or continued rate adjustment under subpart G of part 531 of this chapter, before any deductions and exclusive of additional pay of any other kind.

Regular overtime work means overtime work that is part of an employee's regularly scheduled administrative workweek.

Regularly scheduled administrative workweek, for a full-time employee, means the period within an administrative workweek, established in accordance with §610.111 of this chapter, within which the employee is regularly scheduled to work. For a part-time employee, it means the officially prescribed days and hours within an administrative workweek during which the employee is regularly scheduled to work.

Regularly scheduled work means work that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with §610.111, excluding any such work to which availability pay under §550.181 applies.

Sunday work means nonovertime work performed by a full-time employee during a regularly scheduled daily tour of duty when any part of that daily tour of duty is on a Sunday. For any such tour of duty, not more than 8 hours of work are Sunday work, unless the employee is on a compressed work schedule, in which case the entire regularly scheduled daily tour of duty constitutes Sunday work.

Tour of duty means the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek.

[33 FR 12458, Sept. 4, 1968, as amended at 48 FR 3933, Jan. 28, 1983; 56 FR 11059, Mar. 15, 1991; 56 FR 20341, May 3, 1991; 57 FR 2434, Jan. 22, 1992; 57 FR 31630, July 17, 1992; 58 FR 3201, Jan. 8, 1993; 59 FR 66151, Dec. 23, 1994; 60 FR 33098, June 27, 1995; 60 FR 67287, Dec. 29, 1995; 61 FR 3542, Feb. 1, 1996; 63 FR 64592, Nov. 23, 1998; 64 FR 4519, Jan. 29, 1999; 64 FR 69174, Dec. 10, 1999]

Maximum Earnings Limitations

§550.105 Biweekly maximum earnings limitation.

(a) Except as provided in paragraph (c) of this section, an employee may receive premium pay under this subpart only to the extent that the payment does not cause the total of his or her basic pay and premium pay for any biweekly pay period to exceed the greater of—

(1) The maximum biweekly rate of basic pay payable for GS–15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law); or

(2) The biweekly rate payable for level V of the Executive Schedule.

(b) In applying the biweekly limitation under this section, premium pay of the types listed in §550.107(a) must be paid before paying any other type of premium pay.

(c) This section does not apply to—

(1) Any pay period during which an employee is subject to an annual limitation as provided in §550.106;

(2) An employee of the Federal Aviation Administration or the Department of Defense who receives premium pay under 5 U.S.C. 5546a.

[67 FR 19320, Apr. 19, 2002]

§550.106 Annual maximum earnings limitation.

(a)(1) For any pay period in which the head of an agency (or designee), or the Office of Personnel Management on its own motion, determines that an emergency exists, the agency must pay an affected employee premium pay under the limitations described in paragraph (c) of this section and §550.107 instead of under the biweekly limitation described in §550.105(a). An employee is affected if he or she has been determined by the head of the agency (or designee) to be performing work in connection with the emergency or its aftermath. (See definition of "emergency" in §550.103.)

(2) The head of an agency (or designee) must make the determination under paragraph (a)(1) of this section as soon as practicable after the work in connection with the emergency or its aftermath begins. Entitlement to premium pay under this annual limitation becomes effective on the first day of the pay period in which such work began.

(b)(1) For any pay period in which the head of an agency (or designee), in his or her sole discretion, determines that an employee is needed to perform work that is critical to the mission of the agency, the agency may pay premium pay under the limitations described in paragraph (c) of this section and §550.107 instead of under the biweekly limitation described in §550.105(a).

(2) Entitlement to premium pay under this annual limitation becomes effective on the first day of the pay period designated by the head of the agency (or designee).

(c) In any calendar year during which an employee has been determined to be performing emergency or mission-critical work as provided in paragraphs (a) or (b) of this section, the employee may receive premium pay under this subpart (excluding the types of premium pay identified in §550.107) only to the extent that the payment does not cause the total of his or her basic pay and premium pay for the calendar year to exceed the greater of—

(1) The maximum annual rate of basic pay payable for GS–15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law) in effect on the last day of the calendar year; or

(2) The annual rate payable for level V of the Executive Schedule in effect on the last day of the calendar year.

(d) The annual rates under paragraphs (c)(1) and (2) of this section must be computed as follows:

(1) Compute an hourly rate by dividing the published annual rate of basic pay by 2,087 hours and rounding the result to the nearest cent;

(2) Compute a biweekly rate by multiplying the hourly rate from paragraph (d)(1) of this section by 80 hours;

(3) Compute an annual rate by multiplying the biweekly rate from paragraph (d)(2) of this section by the number of pay periods for which a paycheck is issued in the given calendar year under the agency's payroll cycle (i.e., either 26 or 27).

(e) An agency may defer payment of the additional premium pay owed an employee as a result of the annual limitation until the end of the calendar year.

(f) Any payment made in the current calendar year that corrects an underpayment of premium pay in a previous calendar year must be treated as being made in the previous calendar year for the purpose of applying the annual cap under this section.

[67 FR 19321, Apr. 19, 2002]

§550.107 Premium payments capped on a biweekly basis when an annual limitation otherwise applies.

(a) The following types of premium pay remain subject to a biweekly limitation when other premium payments are subject to an annual limitation under §550.106:

(1) Standby duty pay under 5 U.S.C. 5545(c)(1);

(2) Administratively uncontrollable overtime pay under 5 U.S.C. 5545(c)(2);

(3) Availability pay for criminal investigators under 5 U.S.C. 5545a; and

(4) Overtime pay for hours in the regular tour of duty of a firefighter covered by 5 U.S.C. 5545b.

(b) An employee must receive premium pay of the types identified in paragraph (a) of this section before receiving any other type of premium pay.

(c) In any pay period during which an employee is subject to an annual limitation under §550.106, the employee may receive the types of premium pay identified in paragraph (a) of this section only to the extent that the payment does not cause the total of his or her basic pay and such premium pay for the pay period to exceed the greater of—

(1) The maximum biweekly rate of basic pay payable for GS–15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law); or

(2) The biweekly rate payable for level V of the Executive Schedule.

(d) Premium pay paid, or projected to be paid, under this section is included in determining whether the sum of the employee's basic pay and premium pay would exceed the annual limitation under §550.106.

[67 FR 19321, Apr. 19, 2002]

Overtime Pay

§550.111 Authorization of overtime pay.

(a) Except as provided in paragraphs (d), (f), and (g) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is—

(1) Officially ordered or approved; and

(2) Performed by an employee. Hours of work in excess of 8 in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in §550.113.

(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

(d) For an employee for whom the first 40 hours of duty in an administrative workweek is his basic workweek under §610.111(b) of this chapter, overtime work means work in excess of 40 hours in an administrative workweek that is:

(1) Officially ordered or approved, and

(2) Performed by an employee, when the employee's basic pay exceeds the minimum rate for GS–10 (including any applicable special rate of pay for law enforcement officers or special pay adjustment for law enforcement officers under section 403 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), respectively; a locality-based comparability payment under 5 U.S.C. 5304; and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law) or when the employee is engaged in professional or technical, engineering or scientific activities. For purposes of this section and section 5542(a) of title 5. United States Code, an employee is engaged in professional or technical engineering or scientfic activities when he or she is assigned to perform the duties of a profeesional or support technician position in the physical, mathematical, natural, medical, or social sciences or engineering or architecture.

(e) Notwithstanding paragraphs (a) and (d) of this section, when an employee's basic workweek includes a daily tour of duty of more than 8 hours and his hourly rate of basic pay exceeds the hourly rate of overtime pay provided by §550.113, the department shall pay him at his basic rate of pay for each hour of his daily tour of duty within his basic workweek.

(f)(1) Except as provided in paragraph (f)(2) of this section, for any criminal investigator receiving availability pay under §550.181, overtime work means actual work that is scheduled in advance of the administrative workweek—

(i) In excess of 10 hours on a day containing hours that are part of such investigator's basic 40-hour workweek; or

(ii) On a day not containing hours that are part of such investigator's basic 40-hour workweek.

(2) Notwithstanding paragraph (f)(1) of this section, all overtime work scheduled in advance of the administrative workweek on a day containing part of a criminal investigator's basic 40-hour workweek must be compensated under this section if both of the following conditions are met:

(i) The overtime work involves protective duties authorized by section 3056(a) of title 18, United States Code, or section 2709(a)(3) of title 22, United States Code; and

(ii) The investigator performs on that same day at least 2 consecutive hours of overtime work that are not scheduled in advance of the administrative workweek and are compensated by availability pay.

(3) Any work that would be overtime work under this section but for paragraphs (f)(1) and (f)(2) of this section will be compensated by availability pay under §550.181.

(g) For firefighters compensated under subpart M of this part, overtime work means officially ordered or approved work in excess of 106 hours in a biweekly pay period, or, if the agency establishes a weekly basis for overtime pay computations, in excess of 53 hours in an administrative workweek.

(h) Availability hours, as described in §550.182(c), are not hours of work for the purpose of determining overtime pay under this section.

(i) An employee is not entitled to overtime pay under this subpart for time spent in training, except as provided in §410.402 of this chapter.

[33 FR 12458, Sept. 4, 1968, as amended at 34 FR 19495, Dec. 10, 1969; 48 FR 36805, Aug. 15, 1983; 56 FR 20341, May 3, 1991; 57 FR 2434, Jan. 22, 1992; 59 FR 66151, Dec. 23, 1994; 61 FR 3542, Feb. 1, 1996; 63 FR 64592, Nov. 23, 1998; 64 FR 4520, Jan. 29, 1999; 64 FR 69175, Dec. 10, 1999]

§550.112 Computation of overtime work.

The computation of the amount of overtime work of an employee is subject to the following conditions:

(a) *Time spent in principal activities.* Principal activities are the activities that an employee is employed to perform. They are the activities that an employee performs during his or her regularly scheduled administrative workweek (including regular overtime work) and activities performed by an employee during periods of irregular or occasional overtime work authorized under §550.111. Overtime work in principal activities shall be credited as follows:

(1) An employee shall be compensated for every minute of regular overtime work.

(2) A quarter of an hour shall be the largest fraction of an hour used for crediting irregular or occasional overtime work under this subpart. When irregular or occasional overtime work is performed in other than the full fraction, odd minutes shall be rounded up or rounded down to the nearest full fraction of an hour used to credit overtime work.

(b) *Time spent in preshift or postshift activities.* A preshift activity is a preparatory activity that an employee performs prior to the commencement of his or her principal activities, and a postshift activity is a concluding activity that an employee performs after the completion of his or her principal activities. Such activities are not principal activities as defined in paragraph (a) of this section.

(1) (i) If the head of a department reasonably determines that a preshift or postshift activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per daily tour of duty, he or she shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

(ii) If the time spent in a preshift or postshift activity is compensable as hours of work, the head of the department shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the head of the department. In no case shall the time credited for the performance of an activity exceed the time scheduled by the head of the department. If the time period scheduled by the head of the department for the performance of a pereshift or postshift activity is outside the employee's daily tour of duty, the employee shall be credited with the time spent performing that activity in accordance with paragraph (a)(2) of this section.

(2) A preshift or postshift activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity. Time spent in preliminary or postliminary activities is excluded from hours of work and is not compensable, even if it occurs between periods of activity that are compensable as hours of work.

(c) *Leave with pay.* An employee's absence from duty on authorized leave with pay under subchapter I of chapter 61 of title 5, United States Code, during the time when he would otherwise have been required to be on duty during a basic workweek (including authorized absence on a legal holiday, on a nonworkday established by Executive or administrative order, and on compensatory time off as provided in §550.114) is deemed employment and does not reduce the amount of overtime pay to which the employee is entitled during an administrative workweek. Leave of absence with pay under subchapter I of chapter 61 of title 5, United States Code, is charged only for an absence that occurs during a basic workweek.

(d) *Leave without pay.* (1) For a period of leave without pay in an employee's basic workweek, an equal period of service performed outside the basic workweek, but in the same administrative workweek, shall be substituted and paid for at the rate applicable to his basic workweek before any remaining period of service may be paid for at the overtime rate on the basis of exceeding 40 hours in a workweek.

(2) For a period of leave without pay in an employee's daily tour of duty, an equal period of service performed outside the daily tour, but in the same workday, shall be substituted and paid for at the rate applicable to his daily tour of duty before any remaining period of service may be paid for at the overtime rate on the basis of exceeding 8 hours in a workday.

(e) *Absence during overtime periods.* Except as provided by paragraph (a) of this section, as expressly authorized by statute, or to the extent authorized while the employee is in a travel status, a period is counted as overtime work only when the employee actually performs work during the period or is taking compensatory time off as provided in §550.114.

(f) *Night, Sunday, or holiday work.* Hours of night, Sunday, or holiday work are included in determining for overtime pay purposes the total number of hours of work in an administrative workweek.

(g) *Time in travel status.* Time in travel status away from the official duty-station of an employee is deemed employment only when:

(1) It is within his regularly scheduled administrative workweek, including regular overtime work; or

(2) The travel—

(i) Involves the performance of actual work while traveling;

(ii) Is incident to travel that involves the performance of work while traveling;

(iii) Is carried out under such arduous and unusual conditions that the travel is inseparable from work; or

(iv) Results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of the employee to his or her official-duty station.

(h) *Call-back overtime work.* Irregular or occasional overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration for the purpose of premium pay, either in money or compensatory time off.

(i) Periods of duty that are compensated by annual premium pay under 5 U.S.C. 5545(c)(1) or (2) shall not be credited for the purpose of determining hours of work in excess of 8 hours in a day.

(j) *Official duty station.* An agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel under paragraph (g) of this section except that—

(1) An agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General Services Administration (41 CFR 301–1.3(c)(4)); and

(2) Travel from home to work and vice versa is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work.

(k) *Standby duty.* (1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.

(2) An employee is not considered restricted for "work-related reasons" if, for example, the employee remains at the post of duty voluntarily, or if the restriction is a natural result of geographic isolation or the fact that the employee resides on the agency's premises. For example, in the case of an employee assigned to work in a remote wildland area or on a ship, the fact that the employee has limited mobility when relieved from duty would not be a basis for finding that the employee is restricted for work-related reasons.

(l) *On-call status.* An employee is off duty, and time spent in an on-call status is not hours of work if—

(1) The employee is allowed to leave a telephone number or carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements for another person to perform any work that may arise during the on-call period.

(m) *Sleep and meal time.* (1) Bona fide sleep and meal periods may not be considered hours of work, except as provided in paragraphs (m)(2), (m)(3), and (m)(4) of this section. If a sleep or meal period is interrupted by a call to duty, the time spent on duty is hours of work.

(2) Sleep and meal periods during regularly scheduled tours of duty are hours of work for employees who receive annual premium pay for regularly scheduled standby duty under 5 U.S.C. 5545(c)(1).

(3) When employees are assigned to work shifts of 24 hours or more during which they must remain within the confines of their duty station in a standby status, and for which they do not receive annual premium pay for regularly scheduled standby duty under 5 U.S.C. 5545(c)(1), the amount of bona fide sleep and meal time excluded from hours of work may not exceed 8 hours in any 24-hour period. No sleep time may be excluded unless the employee had the opportunity to have an uninterrupted period of at least 5 hours of sleep during the applicable sleep period. For work shifts of less than 24 hours, agencies may not exclude on-duty sleep periods from hours of work, but must exclude bona fide meal periods during which the employee is completely relieved from duty.

(4) For firefighters compensated under 5 U.S.C. 5545b, on-duty sleep and meal time may not be excluded from hours of work.

[33 FR 12458, Sept. 4, 1968, as amended at 33 FR 18669, Dec. 18, 1968; 48 FR 3934, Jan. 28, 1983; 48 FR 36805, Aug. 15, 1983; 56 FR 20342, May 3, 1991; 57 FR 59279, Dec. 15, 1992; 59 FR 66332, Dec. 28, 1994; 64 FR 69175, Dec. 10, 1999]

§550.113 Computation of overtime pay.

(a) For each employee whose rate of basic pay does not exceed the minimum rate for GS–10 (including any applicable special rate of pay for law enforcement officers or special pay adjustment for law enforcement officers under section 403 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), respectively; a locality-based comparability payment under 5 U.S.C. 5304; and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law), the overtime hourly rate is 1 1/2 times his or her hourly rate of basic pay.

(b) For each employee whose rate of basic pay exceeds the minimum rate for GS–10 (as determined under paragraph (a) of this section), the overtime hourly rate is 1 1/2 times the hourly rate of basic pay at the minimum rate for GS–10 (as determined under paragraph (a) of this section), except as provided in 5 U.S.C. 5542(a) (3) and (4).

(c) An employee is paid for overtime work performed on a Sunday or a holiday at the same rate as for overtime work performed on another day.

(d) An employee whose rate of basic pay is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by a wage board or similar

administrative authority serving the same purpose is entitled to overtime pay in accordance with the provisions of section 5544 of title 5, United States Code. The rate of pay for each hour of overtime work of such an employee is computed as follows:

(1) If the rate of basic pay of the employee is fixed on an annual basis, divide the rate of basic pay by 2,087 and multiply the quotient by one and one-half; and

(2) If the rate of basic pay of the employee is fixed on a monthly basis, multiply the rate of basic pay by 12 to derive an annual rate of basic pay, divide the annual rate of basic pay by 2,087, and multiply the quotient by one and one-half.

Rates are computed in full cents, counting a fraction of a cent as the next higher cent.

(e)(1) For firefighters compensated under subpart M of this part, the overtime hourly rate for all overtime hours is 1 1/2 times the firefighter's hourly rate of basic pay under §550.1303(a) or (b)(2), as applicable, except as provided in paragraph (e)(2) of this section.

(2) For firefighters compensated under subpart M of this part who areexempt from the overtime provisions of the Fair Labor Standards Act and whose hourly rate of basic pay under §550.1303(a) or (b)(2), as applicable, exceeds the applicable minimum hourly rate of basic pay for GS–10 (as computed under paragraph (a) of this section by dividing the annual rate of basic pay by 2087 hours), the overtime hourly rate is equal to the greater of—

(i) One and one-half times the applicable minimum hourly rate of basic pay for GS–10 (as computed under paragraph (a) of this section by dividing the annual rate of basic pay by 2087 hours); or

(ii) The individual's own firefighter hourly rate of basic pay under §550.1303(a) and (b)(2), as applicable.

[33 FR 12458, Sept. 4, 1968, as amended at 56 FR 20342, May 3, 1991; 57 FR 2434, Jan. 22, 1992; 59 FR 11701, Mar. 14, 1994; 61 FR 3542, Feb. 1, 1996; 63 FR 64592, Nov. 23, 1998]

§550.114 Compensatory time off.

(a) At the request of an employee, the head of an agency (or designee) may grant compensatory time off from an employee's tour of duty instead of payment under §550.113 for an equal amount of irregular or occasional overtime work.

(b) At the request of an employee, as defined in 5 U.S.C. 2105, the head of an agency (or designee) may grant compensatory time off from an employee's basic work requirement under a flexible work schedule under 5 U.S.C. 6122 instead of payment under §550.113 for an equal amount of overtime work, whether or not irregular or occasional in nature.

(c) The head of an agency may provide that an employee whose rate of basic pay exceeds the maximum rate for GS–10 (including any applicable special rate of pay for law enforcement officers or special pay adjustment for law enforcement officers under section 403 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), respectively; a locality-based comparability payment under 5 U.S.C. 5304; and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law) shall be compensated for irregular or occasional overtime work with an equivalent amount of compensatory time off from the employee's tour of duty instead of payment under §550.113 of this part.

(d) The head of a department may fix a time limit for an employee to request or take compensatory time off and may provide that an employee who fails to take compensatory time off to which he is entitled under paragraph (a) or (b) of this section before the time limit fixed, shall lose his right both to compensatory time off and to overtime pay unless his failure is due to an exigency of the service beyond his control.

(e) The dollar value of compensatory time off when it is liquidated, or for the purpose of applying pay limitations, is the amount of overtime pay the employee otherwise would have received for the hours of the pay period during which compensatory time off was earned by performing overtime work.

[33 FR 12458, Sept. 4, 1968, as amended at 56 FR 20342, May 3, 1991; 57 FR 2434, Jan. 22, 1992; 61 FR 3542, Feb. 1, 1996; 62 FR 28307, May 23, 1997; 64 FR 69175, Dec. 10, 1999]

Civilian Personnel
Providing Professional HR Service

Overtime and Compensatory Time Under Title 5

Overview

This information covers overtime pay and compensatory time off for federal employees who are not covered by the Fair Labor Standards Act (FLSA). These "exempt" federal employees typically occupy executive, administrative or professional positions at the GS-7 level and above. Federal employees stationed in foreign countries are also exempted from the FLSA. Overtime for exempt employees is governed by 5 USC 5542 and is called Title 5 overtime. Only exempt employees may be paid under Title 5 overtime rules. Federal employees who are covered by the FLSA are considered "nonexempt" and must be compensated for overtime work in accordance with the FLSA. The determination as to whether a position is FLSA exempt or nonexempt is a decision made at the time a position is classified.

As a historical note, all federal employees were exempted from the FLSA until 1974, when Congress enacted legislation requiring almost all Federal Wage System (FWS) employees and many lower-graded General Schedule employees to be covered by both the FLSA and Title 5. Therefore, from 1974 until 1990, these nonexempt employees were entitled to receive overtime in accordance with whichever law provided them the greatest benefit. The passage of the Federal Employee's Pay Comparability Act (FEPCA) in 1990 modified the FLSA for federal employees and eliminated the requirement to pay overtime to nonexempt employees under Title 5 if it yielded a greater benefit than the FLSA.

Key Points

These key-point summaries cannot reflect every fact or point of law contained within a source document.

- Overtime consists of any hours of work performed by a full-time, part-time, or intermittent work schedule employee in excess of 40 hours in the administrative workweek or 8 hours in a regular workday if such overtime work is officially ordered and approved in advance by management. 5 USC 5542(a) and 5 CFR 550.111.
- Employees working under a flexible or compressed work schedule program may receive overtime only for work in excess of 40 hours in the administrative workweek or 8 hours in a regular workday officially ordered and approved in advance by management as overtime work. 5 USC 6121.
- When calculating the 40-hour workweek or the 8-hour workday, periods of leave with pay (e.g., sick leave) are included, but periods of leave without pay are not included. 5 CFR 550.112(c); 25 Comp. Gen. 254 (1945), 45 CGEN 20204.
- Overtime hours in excess of 8 hours in a workday are not included in calculating the 40-hour workweek. Nyberg, et al., 65 Comp. Gen. 273 (1986), 86 FPBR 1015.
- Working in excess of five consecutive 8-hour days in a row is not sufficient to establish entitlement to overtime under the 40-hour rule. The work must be accomplished within the same administrative workweek. It is entirely possible that an employee

could work ten consecutive 8-hour days in a row -- five in each of two administrative workweeks -- and not be entitled to any overtime compensation. Richardson, B-166794 (May 23, 1969), 69 FPBR 1074.

Compensatory Time

- Compensatory time earned is equal to the amount of time spent in overtime work, e.g., one hour and fifteen minutes of overtime work yields one hour and fifteen minutes of compensatory time. 5 USC 5543(a)(1); 5 CFR 550.114(a).
- The head of an agency may fix a time limit for an employee to request or take compensatory time off and may provide that an employee who fails to take compensatory time off shall lose both her right to the compensatory time off and to overtime pay unless her failure is due to an exigency outside of her control. 5 CFR 550.114(d).
- An employee may be paid overtime pay in lieu of the compensatory time the employee was unable to use due to reasons beyond his control, such as a shortage of manpower in his office. Wilcox, B-183751 (Oct. 3, 1975), 75 FPBR 1162. Simultaneous forfeiture and acquisition of compensatory time over a series of consecutive pay periods was sufficient evidence of an exigency of the service to preclude forfeiture of compensatory time. Reconsideration of Wilcox, B-183751 (Oct.19, 1976), 76 FPBR 1213. Where, due to reasons beyond the control of the employee, compensatory time off is not taken prior to separation, overtime compensation should be paid in lieu of the compensatory time off. 26 Comp. Gen. 750 (1947), 47 FPBR 1009.
- Employees who improperly received and used compensatory time instead of overtime pay for regular overtime work are entitled to the difference between the amount of the overtime compensation they should have received and the value of the compensatory time used. 53 Comp. Gen. 264 (1973), 73 CGEN 50019.
- Until compensatory time off is granted or is tendered by the agency and refused by the employee, the obligation to pay overtime compensation is not extinguished. B-159597 (Aug. 2, 1966), 66 FPBR 1029.
- An agency could solicit an employee to work overtime with the understanding that he would receive compensatory time off in lieu of overtime pay where the agency had no funds available to pay overtime and overtime would not have been performed without a volunteer willing to accept compensatory time off. The employee knew that he would receive compensatory time off in lieu of overtime compensation and voluntarily accepted compensatory time as full remuneration for the overtime performed. Barnitt, 58 Comp. Gen. 1 (1978), 78 FPBR 1208.

Limitations on Overtime and Compensatory Time

- Premium pay, in combination with the basic pay, locality pay, or special rate pay, may not cause the total compensation for any pay period for any GS employee to exceed the maximum rate of a GS-15 (i.e., GS-15, step 10). Premium pay includes night pay, compensatory pay, overtime, premium pay on an annual basis, and pay for Sunday and holiday work. 5 USC 5547(a) and 5 CFR 550.105.
- When the head of an agency, or a designee, or the Office of Personnel Management determines that an emergency exists, the biweekly limitation shall not apply to GS employees who are paid premium pay in conjunction with that emergency. 5 USC 5547

(a) and 5 CFR 550.106(a). Premium pay, in combination with the basic pay, locality pay, or special rate pay of GS employees performing work in connection with an emergency may not cause the total compensation for the employee in a calendar year to exceed the maximum annual rate of a GS-15 (i.e., GS-15, step 10). 5 CFR 550.106 (c).

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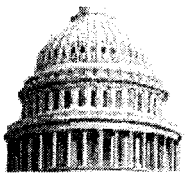

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§ 5542. Overtime rates; computation

Release date: 2005-05-26

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) or the hourly rate of basic pay of the employee, and all that amount is premium pay.

(3) Notwithstanding paragraphs (1) and (2) of this subsection for an employee of the Department of Transportation who occupies a nonmanagerial position in GS-14 or under and, as determined by the Secretary of Transportation,

(A) the duties of which are critical to the immediate daily operation of the air traffic control system, directly affect aviation safety, and involve physical or mental strain or hardship;

(B) in which overtime work is therefore unusually taxing; and

(C) in which operating requirements cannot be met without substantial overtime work; the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(4) Notwithstanding paragraph (2) of this subsection, for an employee who is a law enforcement officer, and whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of—

(A) one and one-half times the minimum hourly rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the hourly rate of basic pay of the employee,

and all that amount is premium pay.

(5) Notwithstanding paragraphs (1) and (2), for an employee of the Department of the Interior or the United States Forest Service in the Department of Agriculture engaged in emergency wildland fire suppression activities, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(b) For the purpose of this subchapter—

(1) unscheduled overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration; and

(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—

(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

(B) the travel

(i) involves the performance of work while traveling,

(ii) is incident to travel that involves the

performance of work while traveling,

(iii) is carried out under arduous conditions, or

(iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station.

(c) Subsection (a) shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair labor [1] Standards Act of 1938. In the case of an employee who would, were it not for the preceding sentence, be subject to this section, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding sentence.

(d) In applying subsection (a) of this section with respect to any criminal investigator who is paid availability pay under section 5545a—

(1) such investigator shall be compensated under such subsection (a), at the rates there provided, for overtime work which is scheduled in advance of the administrative workweek—

(A) in excess of 10 hours on a day during such investigator's basic 40 hour workweek; or

(B) on a day outside such investigator's basic 40 hour workweek; and

(2) such investigator shall be compensated for all other overtime work under section 5545a.

(e) Notwithstanding subsection (d)(1) of this section, all hours of overtime work scheduled in advance of the administrative workweek shall be compensated under subsection (a) if that work involves duties as authorized by section 3056 (a) of title 18 or section 37(a)(3) of the State Department Basic Authorities Act of 1956, and if the investigator performs, on that same day, at least 2 hours of overtime work not scheduled in advance of the administrative workweek.

(f) In applying subsection (a) of this section with respect to a firefighter who is subject to section 5545b—

(1) such subsection shall be deemed to apply to hours of work officially ordered or approved in excess of 106 hours in a biweekly pay period, or, if the agency establishes a weekly basis for overtime pay computation, in excess of 53 hours in an administrative workweek; and

(2) the overtime hourly rate of pay is an amount equal to

one and one-half times the hourly rate of basic pay under section 5545b (b)(1)(A) or (c)(1)(B), as applicable, and such overtime hourly rate of pay may not be less than such hourly rate of basic pay in applying the limitation on the overtime rate provided in paragraph (2) of such subsection (a).

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[1] So in original. Probably should be capitalized.

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29 CFR 541.3 - Professional.

- **Section Number:** 541.3
- **Section Name:** Professional.

The term employee employed in a bona fide * * * professional capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed, or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in Sec. 541.303; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week ($150 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: Provided further, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: Provided further, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6\1/2\ times the minimum wage provided by section 6 of the Act.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975; 57 FR 46744, Oct. 9, 1992]

Effective Date Note: Paragraph (e) in Sec. 541.3 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

Sec. 541.3 Professional.

* * * * *

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $250 per week beginning February 13, 1981 and $280 per week beginning February 13, 1983 ($225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually

engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: Provided further, That an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 (or $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983 if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a)(1) or (3) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

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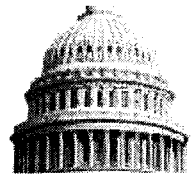

TITLE 29 > CHAPTER 8 > § 213

§ 213. Exemptions

Release date: 2004-10-27

(a) Minimum wage and maximum hour requirements The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101–157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if

(A) it does not operate for more than seven months in any calendar year, or

(B) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture

(A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor,

(B) if such employee is the parent, spouse, child, or other member of his employer's immediate family,

(C) if such employee

(i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment,

(ii) commutes daily from his permanent residence to the farm on which he is so employed, and

(iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year,

(D) if such employee (other than an employee described in clause (C) of this subsection)

(i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment,

(ii) is employed on the same farm as his parent or person standing in the place of his parent, and

(iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or

(E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13) , (14) Repealed. Pub. L. 93-259, §§ 9(b)(1), 23 (b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.]; or

(4) Repealed. Pub. L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93-259, § 21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8) Repealed. Pub. L. 95-151, § 14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located

(A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or

(B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)

(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery

payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207 (a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee

(A) is primarily employed during his workweek in agriculture by such farmer, and

(B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206 (a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged

(A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or

(B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18) , (19) Repealed. Pub. L. 93-259, §§ 15(c), 16 (b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law

enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25) , (26) Repealed. Pub. L. 95-151, §§ 6(a), 7 (a), Nov. 1, 1977, 91 Stat. 1249, 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee

(A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and

(B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under

section 5545a of title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and

(i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or

(ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206 (a)(5) of this title,

(B) is twelve years or thirteen years of age and

(i) such employment is with the consent of his parent or person standing in the place of his parent, or

(ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)

(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which

such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver

(I) for not more than eight weeks between June 1 and October 15 of any calendar year, and

(II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)

(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors—

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if—

(i)

(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5–1990 for scrap paper balers and Standard ANSI Z245.2–1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that—

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)

(i) Employers shall prepare and submit to the Secretary reports—

(I) on any injury to an employee under the age

of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide—

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212 (b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years

of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if—

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(d) Delivery of newspapers and wreathmaking The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine,

cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206 (a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206 (a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment

(1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and

(2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment

primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,
compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

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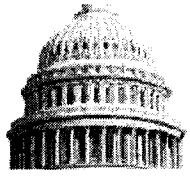

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§ 5542. Overtime rates; computation

Release date: 2005-05-26

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS–10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS–10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS–10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of one and one-half times the hourly rate of the minimum rate of basic pay for GS–10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) or the hourly rate of basic pay of the employee, and all that amount is premium pay.

(3) Notwithstanding paragraphs (1) and (2) of this subsection for an employee of the Department of Transportation who occupies a nonmanagerial position in GS–14 or under and, as determined by the Secretary of Transportation,

(A) the duties of which are critical to the immediate daily operation of the air traffic control system, directly affect aviation safety, and involve physical or mental strain or hardship;

(B) in which overtime work is therefore unusually taxing; and

(C) in which operating requirements cannot be met without substantial overtime work; the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(4) Notwithstanding paragraph (2) of this subsection, for an employee who is a law enforcement officer, and whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of—

(A) one and one-half times the minimum hourly rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the hourly rate of basic pay of the employee,

and all that amount is premium pay.

(5) Notwithstanding paragraphs (1) and (2), for an employee of the Department of the Interior or the United States Forest Service in the Department of Agriculture engaged in emergency wildland fire suppression activities, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(b) For the purpose of this subchapter—

(1) unscheduled overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration; and

(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—

(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

(B) the travel

(i) involves the performance of work while traveling,

(ii) is incident to travel that involves the

performance of work while traveling,

(iii) is carried out under arduous conditions, or

(iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station.

(c) Subsection (a) shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair labor [1] Standards Act of 1938. In the case of an employee who would, were it not for the preceding sentence, be subject to this section, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding sentence.

(d) In applying subsection (a) of this section with respect to any criminal investigator who is paid availability pay under section 5545a—

(1) such investigator shall be compensated under such subsection (a), at the rates there provided, for overtime work which is scheduled in advance of the administrative workweek—

(A) in excess of 10 hours on a day during such investigator's basic 40 hour workweek; or

(B) on a day outside such investigator's basic 40 hour workweek; and

(2) such investigator shall be compensated for all other overtime work under section 5545a.

(e) Notwithstanding subsection (d)(1) of this section, all hours of overtime work scheduled in advance of the administrative workweek shall be compensated under subsection (a) if that work involves duties as authorized by section 3056 (a) of title 18 or section 37(a)(3) of the State Department Basic Authorities Act of 1956, and if the investigator performs, on that same day, at least 2 hours of overtime work not scheduled in advance of the administrative workweek.

(f) In applying subsection (a) of this section with respect to a firefighter who is subject to section 5545b—

(1) such subsection shall be deemed to apply to hours of work officially ordered or approved in excess of 106 hours in a biweekly pay period, or, if the agency establishes a weekly basis for overtime pay computation, in excess of 53 hours in an administrative workweek; and

(2) the overtime hourly rate of pay is an amount equal to

one and one-half times the hourly rate of basic pay under section 5545b (b)(1)(A) or (c)(1)(B), as applicable, and such overtime hourly rate of pay may not be less than such hourly rate of basic pay in applying the limitation on the overtime rate provided in paragraph (2) of such subsection (a).

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set out in subsec. (b) of this section. 1985, 65 Op.Comp.Gen. 9.

Where guards at Rocky Mountain Arsenal claimed overtime compensation for time spent in drawing out weapons and equipment, but record did not establish that duties required more than ten minutes to perform, claim was not allowed under this section, since preshift duties that require ten minutes or less may be disregarded as de minimis. 1981, 60 Comp.Gen. 523.

11. Hours of employment—Generally

Entitlement to overtime compensation is determined by distinct criteria in subsec. (b)(2) of this section, as construed by interpretive decisions. 1981, 60 Comp.Gen. 681.

14. —— Eating and sleeping periods

Lunch breaks provided officers of Library of Congress Special Police Force may properly be offset against preshift and postshift hours compensable under this section; although officers are restricted to Library premises, and are subject to call, they are relieved from duty posts during lunch breaks. 1983, 62 Op.Comp.Gen. 447.

Civilian nurses at military hospital were entitled to overtime compensation under this section on occasions when they reported fifteen minutes early and worked through lunch without receiving appropriate remuneration. 1981, 61 Comp.Gen. 174.

15. —— Standby duty

Federal firefighters who work irregular or occasional overtime shift of twelve hours cannot be paid for less than twelve hours of overtime, regardless of rule that substantial time in standby status is presumed to be for sleep and meals. 1984, 64 Op.Comp.Gen. 1.

16. —— Time spent in travel status

Barth v. U.S., 568 F.2d 1329 [main volume] 215 Ct.Cl. 383.

Federal penitentiary employees who could show that they performed some significant work while traveling on prison boat from mainland to prison island, that work was officially ordered or approved, and that time involved was sufficient to clear de minimis standard, could be entitled to overtime compensation under this section. Abrahams v. U.S., 1982, 1 Cl.Ct. 305.

Air safety investigators, who travel to and from accident sites on aircraft or by automobile, and who perform investigative functions while traveling under emergent conditions, are performing compensable overtime work under this section. 1982, 61 Comp.Gen. 626.

Air safety investigator who is ordered to transport documents, equipment, and exhibits, and who is required to personally travel with the items in order to protect their integrity or to insure that they are not damaged, lost, or tampered with, may have such travel time considered work for the purpose of overtime under this section. Id.

Federal Aviation Administration employees assigned to remote radar site were entitled to compensation for travel time to and from place where they obtained and returned special purpose vehicles necessary for trip to work site. 1981, 61 Comp.Gen. 27.

Entitlement to overtime compensation while in travel status under subsec. (b)(2)(B)(iv) of this section requires at least (1) that travel result from event which could not be scheduled or controlled administratively; and (2) immediate official necessity in connection with event requiring travel to be performed outside employee's regular duty hours. 1981, 60 Comp.Gen. 681.

17. Rules and regulations

Even if Army's work schedule were found to be in violation of regulation stating that head of each agency shall establish by regulation a basic workweek of 40 hours which does not extend over more than six of any seven consecutive days, security guards at Army's arsenal had no basis upon which to recover overtime pay they sought, in that neither the Federal Employees Pay Act nor regulations promulgated thereunder prescribes any penalty for failure by government to comply with scheduling requirements governing number of consecutive days worked and, moreover, the Fair Labor Standards Act, which does have a penalty provision, does not proscribe the scheduling of any number of consecutive workdays. Sanford v. Weinberger, C.A.Fed.1985, 752 F.2d 636.

20. Jurisdiction

Statute under which civilian employee at missile test center claimed to be entitled to additional overtime compensation did not confer any entitlement to annual leave or to restoration of forfeited annual leave which would bring leave claim within jurisdiction of Claims Court. Manning v. U.S., 1984, 7 Cl.Ct. 128.

27. Duty to bargain

Federal Grain Inspection Service of the United States Department of Agriculture had no duty to bargain over union's proposal that all work in excess of 40 hours per week performed on Sunday be paid at twice basic rate of pay, since proposal concerned matter exclusively provided for by this section which required that such work "shall be paid for" at statutorily specified rate: one and one-half times employee's basic rate, or one and one-half times minimum GS-10 rate, whichever is lower. American Federation of Government Emp., AFL-CIO v. Federal Labor Relations Authority, 1981, 653 F.2d 669, 209 U.S.App.D.C. 414.

§ 5543. Compensatory time off

(a) The head of an agency may—

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

[See main volume for text of (b)]

(As amended Pub.L. 101-509, Title I, § 101(b)(3)(E), Title II, § 210(2), Nov. 5, 1990, 104 Stat. 1439, 1460.)

Historical and Statutory Notes

References in Text. Section 7 of the Fair Labor Standards Act of 1938, referred to in subsec. (a)(1), is classified to section 207 of Title 29, Labor.

Effective Date of 1990 Amendment. Amendment by Pub.L. 101-509 effective on such date as the President shall determine, but not earlier than 90 days, and not later than 180 days, after Nov. 5, 1990, see section 305 of Pub.L. 101-509, set out as a note under section 5301 of this title.

Notes of Decisions

Official order or approval 2
Part-time employees 1

1. Part-time employees

Except where prohibited for nonexempt employees, part-time employees may be granted compensatory time off in lieu of overtime compensation for irregular or occasional overtime work performed in excess of forty hours in an administrative workweek and eight hours in a workday but such employees may not be granted such compensatory time off simply because he works hours in excess of his regular part-time tour of duty. 1980, 59 Comp.Gen. 237.

2. Official order or approval

Where supervisor of government employee lacked the authority to order or approve overtime compensation, employee would not be entitled to such compensation and since compensatory time could be granted under this section only when the employee would be entitled to such compensation, such employee would also be ineligible to receive compensatory time. 1980, 59 Comp.Gen. 246.

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or

similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080 and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service. Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

This section, other than the sixth sentence, shall not be applicable to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act of 1938. In the case of an employee who would, were it not for the preceding sentence, be subject to this section, hours of work in excess of 8 hours in a day shall be deemed to be overtime hours for the purposes of such section 7 and hours in a paid nonwork status shall be deemed to be hours of work.

[See main volume for text of (b)]

(As amended Pub.L. 101-509, Title II, § 210(3), Nov. 5, 1990, 104 Stat. 1460.)

Historical and Statutory Notes

References in Text. Section 7 of the Fair Labor Standards Act of 1938, referred to in subsec. (a), is classified to section 207 of Title 29, Labor.

Effective Date of 1990 Amendment. Amendment by Pub.L. 101-509 effective on such date as the President shall determine, but not earlier than 90 days, and not later than 180 days, after Nov. 5, 1990, see section 305 of Pub.L. 101-509, set out as a note under section 5301 of this title.

Notes of Decisions

5. —— Employees whose pay is fixed according to prevailing rates

Foremen may continue to receive double overtime in accordance with Congressional purpose of preserving prevailing rate practices. 1980, 60 Comp.Gen. 58.

7. Computation of overtime pay—Generally

Government Printing Office security police employees' time spent in acquiring uniforms does not constitute "overtime work" for purposes of this section. 1981, 60 Comp.Gen. 431.

Where three Navy employees who performed temporary duty in Scotland returned to United States on Saturday (which was a non-workday), their travel time was not compensable as overtime under subsec. (a) of this section. 1980, 60 Comp. Gen. 90.

10. —— Per diem and hourly employees

Since premium pay was "determined as an appropriate percentage," within certain parameters, of minimum basic annual salary, employees could not claim under this section and simultaneously request their relief in terms of hours. Ater v. U.S., 1984, 6 Cl.Ct. 344, affirmed 770 F.2d 182.

12. Eating periods

Cook foremen at federal correctional institutions were not entitled to overtime pay under Federal Employees Pay Act for overtime worked during lunch breaks, where they were instructed to take break of 30 minutes each day and their duties did not entail constant or continuous work. Amos v. U.S., 1987, 13 Cl.Ct. 442.

Where the government stood ready and willing to pay overtime compensation to any crew member who performed substantial official duties during his lunch period while on board the patrol boat if the overtime work was properly documented and approved in accordance with prevailing regulations, the crew members were not entitled to overtime compensation for those lunch periods while on station when they were not required to

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See main volume for text of (b)]

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Since premium pay was "determined as an appropriate percentage," within certain parameters, of minimum basic annual salary, employees could not claim under this section and simultaneously request their relief in terms of hours. Ater v. U.S., 1984, 6 Cl.Ct. 344, affirmed 770 F.2d 182.

12. Eating periods

Cook foremen at federal correctional institutions were not entitled to overtime pay under Federal Employees Pay Act for overtime worked during lunch breaks, where they were instructed to take break of 30 minutes each day and their duties did not entail constant or continuous work. Amos v. U.S., 1987, 13 Cl.Ct. 442.

Where the government stood ready and willing to pay overtime compensation to any crew member who performed substantial official duties during his lunch period while on board the patrol boat if the overtime work was properly documented and approved in accordance with prevailing regulations, the crew members were not entitled to overtime compensation for those lunch periods while on station when they were not required to

observe the area or perform any other job-related duties, since time available for, or spent, in eating is generally noncompensable, even where the employee is required to be on the employer's premises, except where substantial labor is performed in the time regularly set aside for eating. Baker v. U.S., 1978, 218 Ct.Cl. 602.

13. Standby or on-call status

Civilian employees working on government vessels were not induced to remain on board during their off-duty hours to degree necessary to find equivalent of statutory "requirement" that they remain on vessel, and therefore they were not entitled, on that basis, to additional overtime for off-duty periods. Bowman v. U.S., 1985, 7 Cl.Ct. 302.

Civilian employee of Army Corps of Engineers was not entitled to overtime compensation simply because he was required to live in government housing near the dam at which he was employed, where employee was not required to be at jobsite outside his normal tour of duty, and where his presence on the jobsite due to location of his residence merely served to discourage vandalism, and to make him more available for call-back duty. McConnell v. U.S., 1984, 5 Cl.Ct. 785, affirmed 770 F.2d 176, affirmed 763 F.2d 414.

Employee required to live at dam reservation was not entitled to overtime compensation under subsec. (a) of this section during period he was restricted to the site, since he was not, in effect, required to be on "ready alert," and there was no indication that his activities were often interrupted by emergency or other work situation requiring prompt attention. 1982, 61 Comp.Gen. 301.

14. Waiting periods

That civilian employees were working aboard government vessels for six-hour on and six-hour off shifts did not compel conclusion that they were thereby "required" to remain on board during off-duty periods so as to be entitled to additional compensation for those periods, where facts indicated that crew members left vessels during off-duty times or remained on the vessels and watched television, fished, slept, ate and generally did as they wished. Bowman v. U.S., 1985, 7 Cl.Ct. 302.

§ 5545. Night, standby, irregular, and hazardous duty differential

(a) Except as provided by subsection (b) of this section, nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m., and includes—

[See main volume for text of (1) and (2)]

Except as otherwise provided by subsection (c) of this section, an employee is entitled to pay for nightwork at his rate of basic pay plus premium pay amounting to 10 percent of that basic rate. This subsection and subsection (b) of this section do not modify section 5141 of title 31, or other statute authorizing additional pay for nightwork.

[See main volume for text of (b)]

(c) The head of an agency, with the approval of the Office of Personnel Management may provide that—

(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS–10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), (or, for a position described in section 5542(a)(3) of this title, of the basic pay of the position), by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors; or

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unsche-

21. Abandonment of claims

Where no proof was adduced in support of claims of retired federal civil service employees for overtime compensation for work allegedly performed during civil defense test exercises, that aspect of their claims would be treated as having been abandoned. Rapp v. U. S., 1964, 340 F.2d 635, 167 Ct.Cl. 852.

22. Laches

Laches is an equitable defense and its application in each case must be considered in the light of the particular facts of the case and the relief being sought, and where a suit for overtime pay under this section is commenced some 10 years after the failure to pay for ordered and approved overtime began, the government can show no prejudice in the delay. Albright v. U. S., 1963, 161 Ct.Cl. 356.

23. Evidence

Evidence supported conclusion that overtime work of investigators of Alcohol and Tobacco Tax Division, Internal Revenue Service, was performed with full knowledge and inducement of regional and national officials within this section providing for overtime for employment "officially ordered or approved". Byrnes v. U. S., 1964, 330 F.2d 986, 163 Ct.Cl. 167.

24. Amendment of judgment

Court of Claims' amendment of judgment to declare in effect that premium compensation of investigators in two regions of Alcohol and Tobacco Tax Division should be computed after July 1, 1955 under same regulations of Civil Service Commission [now Office of Personnel Management] and Division as were applicable to same class of investigators in other regions during same period of litigation manifested intention that only lawful regulations be applied. Fix v. U. S., 1966, 368 F.2d 609, 177 Ct.Cl. 369.

25. Scope and extent of recovery

Retired federal civil service employees, who sought overtime compensation for periods during which they acted as duty officers outside their regular work week during employment for Civil Defense Administration [now Federal Emergency Management Agency] were not entitled to recover for any services performed more than six years preceding dates of filing of petitions, where employees limited their proof and requested findings solely to services allegedly rendered during six-year period immediately preceding filing of respective petitions. Rapp v. U. S., 1964, 340 F.2d 635, 167 Ct.Cl. 852.

26. Reopening of case

In view of reaffirmation in another case of Court of Claims' general interpretation of this section and of fact that factual record remained the same as when the general interpretation was made, Court of Claims would not reopen to see the record and law differently and hold that much so-called travel by investigators of Alcohol and Tobacco Tax Division was compensable work includable as basis of granting extra pay beyond per diem allowed while away from official station. Fix v. U. S., 1966, 368 F.2d 609, 177 Ct.Cl. 369.

Absent alteration in governing legal rules or change in the record, holding that retail liquor duty consisting of investigation as to whether retail liquor establishments had proper federal stamps, had paid federal tax, and were complying with federal regulations was compensable to extent that the work was performed during overtime would not be reexamined. Id.

§ 5543. Compensatory time off

(a) The head of an agency may—

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS–10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

(b) The Architect of the Capitol
an annual basis compensatory time
time pay for overtime work.

Pub.L. 89–554, Sept. 6, 1966, 80 St.
Sept. 11, 1967, 81 Stat. 200.

Historical and R

1966 A

Derivation: United States Code
5 U.S.C. 912

Explanatory

In subsection (a), the words "head of an agency" are substituted for "head of any department, independent establishment, or agency, including Government-owned or controlled corporations, or of the municipal government of the District of Columbia, or the head of any legislative or judicial agency to which this subchapter applies" because of the definition of "agency" and the application stated in section 5541.

In subsection (a) (1), the word "officer" is omitted as included in "employee".

In subsection (a) (2), the words "at his own discretion" are omitted as unnecessary in view of the permissive nature of the authority. The word "officer" is omitted as included in "employee". The word "scheduled" is omitted since section

1967 A

Section of title 5	Source (U.S. Code)
5543(a)(2)	5 App.:912 .....

Legislative History. For legislative history and purpose of Pub.L. 90–83, see

Library Ref

United States ⟹39(4, 5).

§ 5544. Wage-board overtime tion

(a) An employee whose pay is fi
time in accordance with prevailing r

(b) The Architect of the Capitol may grant an employee paid on an annual basis compensatory time off from duty instead of overtime pay for overtime work.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 486; Pub.L. 90–83, § 1(25), Sept. 11, 1967, 81 Stat. 200.

Historical and Revision Notes

1966 Act

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 912	June 30, 1945, ch. 212, § 202, 59 Stat. 297. May 24, 1946, ch. 270, § 9, 60 Stat. 218. Sept. 1, 1954, ch. 1208, § 204, 68 Stat. 1109.

Explanatory Notes

In subsection (a), the words "head of an agency" are substituted for "head of any department, independent establishment, or agency, including Government-owned or controlled corporations, or of the municipal government of the District of Columbia, or the head of any legislative or judicial agency to which this subchapter applies" because of the definition of "agency" and the application stated in section 5541.

In subsection (a) (1), the word "officer" is omitted as included in "employee".

In subsection (a) (2), the words "at his own discretion" are omitted as unnecessary in view of the permissive nature of the authority. The word "officer" is omitted as included in "employee". The word "scheduled" is omitted since section 603 of the Act of Oct. 11, 1962, Pub.L. 87–793, 76 Stat. 847, eliminated the necessity of referring to rates as scheduled or longevity. Reference to the "Classification Act of 1949, as amended" is omitted as unnecessary.

In subsection (b), the words "in his discretion" are omitted as unnecessary in view of the permissive nature of the authority. The words "overtime work" are substituted for "any work in excess of forty hours in any regularly scheduled administrative workweek" because of the definition of "overtime work" in section 5542(a).

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 Act

Section of title 5	Source (U.S. Code)	Source (Statutes at Large)
5343(a)(2)	5 App.:912	July 18, 1966, Pub.L. 89–504, § 404(b), 80 Stat. 297.

Legislative History. For legislative history and purpose of Pub.L. 90–83, see 1967 U.S. Code Cong. and Adm. News, p. 1538.

Library References

United States ⚷39(4, 5). C.J.S. United States §§ 17, 46.

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349

DCN: 11999

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Fair Labor Standards Act Summary Information

Please refer to the USOPM regulations and interpretive guidance at the following URL: http://www.opm.gov/flsa

Overtime pay entitlements require supervisors and managers to exercise good judgment when approving work schedules and overseeing employees. Both regularly scheduled and irregular/occasional overtime work must be scheduled and approved in advance of being performed. Overtime that is approved and worked is compensated according to the covered provisions of the law(s) that results in the highest earnings for the employees. General Schedule (GS) and Federal Wage System (FWS) employees are entitled to:

- The overtime premium pay provisions of Title 5; and,
- Certain GS and FWS employees are entitled to overtime premium pay under the Fair Labor Standards Act - These employees are designated as FLSA nonexempt; and,
- NIH nurses and allied health employees (both FLSA exempt and nonexempt) are entitled to the overtime premium pay provisions of the NIH Title 38 premium pay, and;
- NIH firefighters are covered by the special premium pay provisions of the Title 5 Fire Fighters Pay System.

The following information is based on 5 CFR Part 551 - Pay Administration Under the Fair Labor Standards Act. Refer to this section for detailed information.

The Federal Labor Standards Act (FLSA) was enacted in 1938 and provides for minimum standards for both wages and overtime entitlements and delineates administrative procedures by which covered work time must be compensated. There are two categories that determine how employees are compensated under the FLSA. These are "Exempt" or "Non-Exempt". In accordance with the provisions of the FLSA employees who are exempt are not automatically entitled to FLSA overtime pay whereas non-exempt are compensated for any hours worked outside their normally scheduled tours of duty. It is management's responsibility to ensure that employees in non-exempt positions not work more than their scheduled tour of duty without some

type of compensation (whether requested or not) provided the supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed. (See "suffered and permitted overtime" below).

See the NIH FLSA Decision Matrix for guidance in determining work that is covered (i.e., non-exempt) or included (i.e., exempt) from the FLSA.

Overtime Hours

To qualify as overtime, the hours worked must: exceed 8 hours in a day or 40 hours in a week; be officially ordered or approved; be performed by an employee; be documented in writing; be recorded in official T&A records; and be in addition to the normal daily or weekly work requirement. Hours in excess of a part-time work schedule are not overtime hours, unless they meet the above qualifying definition. This definition applies to all employees, those who are exempt from the FLSA and those who are nonexempt.

Nonexempt employees who work a regular work schedule (i.e., they do not participate in any part of a flexible system) may also be entitled to overtime which management "suffers or permits" them to perform. Supervisors "suffer or permit" work to take place when they know or have reason to believe the work is being performed and have or had an opportunity to prevent it. Within such a scenario, the supervisors need not have ordered the work in advance; the fact that they knew the employees were working is sufficient to entitle the employees to overtime compensation. "Suffer or permit" overtime is not, however, available to employees on flexible work schedules. "Suffer or permit" overtime may be available to employees on certain compressed work schedules. In an effort to prevent confusion, it is good management practice for the alternative work schedule plan of the organization to specially address this issue and inform the employees that by virtue of having requested an alternative work schedule they are relinquishing their opportunity to future claims of "suffered and permitted" overtime.

In addition to overtime, employees on flexible schedules may also earn credit hours. Credit hours differ from overtime/compensatory time in that credit hours are voluntary, while overtime/compensatory time is not. Employees choose and supervisors approve the working of credit hours; however, technically they are ordered to work overtime/compensatory time. Supervisors may, of course, offer employees the option of working credit hours. However, employees must not be indirectly intimidated to interfere with their right to work or not to work credit hours, or to request or not to request compensatory time off in lieu of payment for overtime hours. Employees on compressed work schedules may not earn credit hours.

OPM's comparison of flexible and compressed work schedule issues: http://www.opm.gov/oca/aws/html/appenda.asp

In certain situations, employees may work overtime on a continuing basis as a fixed part of their established schedules. This regularly scheduled overtime is somewhat rare in the Federal service. The more common type of overtime is irregular or occasional overtime--overtime that does not form any predictable pattern and, therefore, cannot be made a part of the employees' regular schedule. Irregular or occasional overtime is ordered on an ad hoc basis in response to the needs of the organization. Overtime is credited in quarter hour increments. Employees who are requested to work on a day that was not originally scheduled as a workday, or complete a normal workday schedule and depart, only to be called back to the office or other place of employment for additional duty later in the day, earn a minimum of 2 hours overtime. If the employees work more than 2 hours, the full time worked is credited; if the employees work less than 2 hours, 2 hours are credited.

Hours worked in excess of 8 hours per day are not included in computing hours of work in excess of 40 hours per week. This means that employees who have already received overtime credit for extra hours worked in a day cannot also use those hours to earn additional credits for the week. Only regular hours--not a combination of regular hours plus overtime or credit hours--count toward meeting the 40 hours per week standard.

Suffered or Permitted Overtime. Employers are also obligated to compensate nonexempt employees for overtime work that is allowed to take place without the appropriate prior authorization. Suffered and permitted overtime work is any work performed by employees for the benefit of an agency, whether requested or not, provided the employees' supervisors know or have reason to believe that the work is being performed and have an opportunity to prevent it. This type of overtime is not available to anyone under a flexible schedule. It does apply to regularly scheduled and potentially compressed work schedule tours of duty. Traditionally, suffer and permitted overtime work has been claimed and documented during periods of pre-shift, post-shift, or mealtime breaks. The burden of proof for claiming compensation for performing suffered and permitted overtime initially rests with the employee. To do so, the employee must evidence the following:

- Show that s/he performed overtime work under the FLSA for which s/he was not paid; and
- Produce enough evidence to show the amount and extent of that work as a matter of reasonable inference.

The adjudicator examines this information along with agency policies and practices to determine whether or not additional pay is warranted not qualify as hours worked).

QuickClassification

DCN: 11999

This page was last updated on December 17, 2004.

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National Institutes of Health (NIH)

Department of Health and Human Services

DCN: 11999

M E M O R A N D U M

March 18, 1993

To: Matt Behrmann
Caroline Cimons

From: Mary Ann Hook, Deputy General Counsel

Subject: Compensation/Overtime

TRAINEES/SECRETARIES

Trainees and secretaries are covered by the Fair Labors and Standards Act, FLSA, that provides that overtime may be compensated by either payment or time-off at the option of the employee.

Any employee properly classified at GS5 through GS10 shall be exempt only if the employee is an executive, administrative or professional employee as defined in 5 CFR 551.204, 205, 206. See attachments.

PROFESSIONAL STAFF

Professional staff are not covered under FLSA. The agency makes a determination for compensating employees in accordance with 5 U.S.C. 5543 which states:

> (a) The head of an agency may -- (2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS10 shall be granted comp time off from scheduled tour or duty equal to the amount of time spend in irregular and occasional overtime work instead of payment.

The agency may set a policy that provides the employees with compensation as time-off and not payment. The agency may set rules for when the time-off may be used by the employee.

5 Code of Federal Regulations provides that the head of the department may fix a time limit for an employee to request or take comp-time off and may provide that an employee who fails to take comp-time off to which he is entitled, before the time limit fixed shall lose his right to comp-time unless the failure is due to an exigency of the service. 5 CFR section 550.114 (c).

An example given by Ray Kogut, personnel expert at OMB, "The employee has 100 hours of compensation time which must be used in the next two weeks, date of May 1, 1993. Although it is mandated

that the time be compensated hour for hour, an agency may -- and does often -- according to Mr. Kogut -- determine that the time be used by a certain date.

Mr. Kogut said that the agency must be reasonable in its determinations for time-off. He said that all agencies set policy that is reasonable to both allow for the functioning of the agency as well as providing the compensation allowable for its employees who work overtime.

SPECIAL EMPLOYEES

- Detailees' overtime should be determined in accordance with their original agency.
- SES, or executive level employees with income over $86,600, are not granted overtime compensation.
- Military personnel are employed 24 hours a day and therefore do not qualify for overtime compensation.

RECORDKEEPING

It is mandated that proper recordkeeping procedures be established. Overtime for all employees must be approved by supervisors in advance of performance. See attached form.

OVERTIME APPROVAL

The Defense Base Closure and Realignment Commission is mandated to perform a thorough analysis of base closures and realignments in a brief period of time beginning on March 15, 1993 with recommendations to the President on July 1, 1993. It is expected that in order to achieve its goal, Commission employees will often work hours in addition to eight a day with hours totalling more than 40 hours a week. Overtime will be the practice rather than the exception, therefore, as supervisor of the following personnel I am approving in advance the overtime work hours of the following employees for the month of _____, 1993. I will closely monitor the hours weekly of the below employees to ensure that overtime work that is being done is required to accomplish the Commission's charge.

Furthermore, a weekly time sheet that is being used to record overtime will be carefully reviewed to avoid any possible abuses.

I approve the overtime hours of employees for the month of _____, 1993.

_____
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_____

Signature_____

Department_____

Date_____

Please return forms to Caroline Cimons, Director of Administration prior to the first of the applicable month.

POINT PAPER

AMCCC-G 15 June 2000

SUBJECT: The Fair Labor Standards Act: Overtime Pay

Purpose: To provide information on potential litigation under the Fair Labor Standards Act (FLSA)

Facts:

1. **Pending FLSA Grievance**

a. Filed by AFGE Local 62, representing approximately 30 employees of the Soldier System Team (SST), SBCCOM, Integrated Materiel Management Center (IMMC). The employees are physically located at a DLA installation in Philadelphia, PA.

b. Grievance alleges that GS employees in various series, grades 9 through 12, should be nonexempt. They also seek back pay for overtime and travel time.

c. The law firm representing the union, Mulholland & Hickey of Washington, D.C., has represented DLA employees located at the same installation as well as other employees nation-wide.

d. DLA has already settled FLSA grievances for approximately $5 million, but still has numerous grievances and court cases in process.

e. Many DLA employees at the Philadelphia, PA site received settlements of approximately $1400.00 per person.

f. DLA personnelists service the SST employees, but elected not to handle this grievance in recognition of the fact that it may have AMC-wide and DA-wide implications.

g. Negotiations are currently being conducted by an AMC, SBCCOM, and SSC team of personnelists and lawyers headed by Linda Mills, AMCCC-G.

2. **The Fair Labor Standards Act**

The FLSA of 1938, as amended, 29 USC 201-219, provides for minimum standards for both wages and overtime entitlement, and spells out administrative procedures by which covered worktime must be compensated. Non-exempt employees receive time and a half for overtime, as opposed to straight time for exempt employees. Non-exempt employees earn overtime if supervisors "suffer and permit" the work. Overtime for exempt employees must be ordered and approved. Non-exempt employees are often paid while travelling under circumstances which would not be considered duty hours for exempt employees.

3. **Coverage**

a. The FLSA began applying to employees of the United States Federal Government in 1974. Section 3(e)(2) of the Act authorizes the provisions of the Act to be applied to any person employed by the Government of the United States, as specified in that section.

b. Section 4(f) of the Act authorizes the Office of Personnel Management (OPM) to administer the provisions of the Act.

c. An **FLSA exempt employee** is one who is not covered by the minimum wage and overtime provisions of the Act.

d An **FLSA nonexempt employee** is one who is covered by the minimum wage and overtime provisions of the Act.

4. **Agency Authority**

The employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria in part 551 of title 5, Code of Federal Regulations (CFR), and supplemental guidance issued by OPM.

5. **General Principles of Exemptions**

a. Each employee is presumed to be FLSA non-exempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria in 5 CFR 551 and supplemental guidance issued by OPM.

b. Exemption criteria must be narrowly construed to apply only to employees who are clearly within the terms and spirit of the exemption.

c. The burden of proof rests with the agency.

d. An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

e. The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee (as opposed to duties described in a job description).

6. **Statute of limitations**

An FLSA pay claim is subject to the statute of limitations contained in the Portal-to-Portal Act of 1947, as amended (29 USC 255(a)), which imposes a **2-year statute of limitations**, except in cases of a willful violation where the statute of limitations is **3 years**. The term "willful violation" is broadly interpreted to include agency neglect. Liquidated damages can double the back pay award.

7. **Remedies**

There are four ways you may file an FLSA claim. You may file through a negotiated grievance procedure, an agency's administrative process, the U.S. Office of Personnel Management (OPM), or an appropriate United States court.

a. **Negotiated grievance procedure (NGP).** If at any time during the claim period, you were a member of a bargaining unit covered by a collective bargaining agreement that did not specifically exclude matters under the FLSA from the scope of the negotiated grievance procedure, you must use that negotiated grievance procedure as the exclusive administrative remedy for all claims under the Act. You have no right to further administrative review by the agency or by OPM.

b. - c. **Non-NGP administrative review by agency or OPM.** You may file a claim with the Federal agency employing you during the claim period or with OPM, but not both at the same time, if during the entire claim period you--

(1) Were not a member of a bargaining unit, or

(2) Were a member of a bargaining unit not covered by a collective bargaining agreement, or

(3) Were a member of a bargaining unit covered by a collective bargaining agreement that specifically excluded matters under the Act from the scope of the negotiated grievance procedure.

d. **Judicial review.** Nothing limits your right to bring an action in an appropriate United States court. Filing a claim with a Federal agency or with OPM does not stop the statute of limitations governing FLSA claims filed in court from running. OPM will not decide an FLSA claim that is in litigation.

8. **What's Being Done?**

a. Personnelists at DA level have formed a team which holds regular meetings to assess DA's position with respect to potential FLSA claims and to help recommend a plan of action. The team includes a legal representative from OTJAG, Labor & Employment Law Division, and from each MACOM.

b At the team's request, CPOCMA (which manages DA's Civilian Personnel Operating Centers), is training a "swat team" to conduct a paper review of all positions at the GS 7 through GS 12 levels. This will help us identify and correct clear errors, while also preparing for future challenges.

c. Labor relations specialists at the local level are being asked to review the bargaining unit status of local employees. Correct coding of bargaining unit employees in advance of "group" grievances will save time.

9. **What Should Be Done?**

a. Labor counselors should inform their CPACs that they are interested in being informed of any FLSA cases, particularly at installations where grievances are customarily handled exclusively by personnel.

2. Labor counselors at the local level should immediately notify the Office of Command Counsel (Linda B.R. Mills) of any grievances challenging FLSA determinations.

c. Labor counselors throughout the command should attempt to familiarize themselves with existing law on FLSA determinations. The OPM web site has an enormous amount of information. Information was also provided at the AMC CLE.

d. Labor counselors should encourage and assist local bargaining to resolve FLSA disputes prior to arbitration and before involvement of lawyers who will seek liquidated damages (double back pay for 2 years or, if agency found negligent, double back pay for 3 years.

RELEASED BY:
EDWARD J.KORTE
Command Counsel
DSN 767-8031

ACTION OFFICER:
LINDA B.R. MILLS
Associate Counsel
DSN 767-8049

The Fair Labor Standards Act
And its Relationship to Overtime Pay

	FLSA Exempt	FLSA Non-Exempt
Overtime – if not on a compressed schedule, defined as more than 8 hours/day or 40 hours in a week. If on a compressed schedule, any hours that exceed the scheduled hours in that day or in that workweek.	Overtime provisions covered under 5 CFR 550.111 Maximum payable rate is the greater of: ❑ 1 and ½ times the minimum hourly rate of basic pay for GS-10 (including locality) or ❑ employee's own hourly rate of basic pay	Overtime provisions covered under the FLSA, 5 CFR 551.501 Payable rate is 1 and ½ times basic pay (including locality)
Bi-weekly pay limitation – limits total pay (regular plus overtime and any other premium pay) for most employees to GS-15 step 10, currently $5180.10 per pay period. 5 CFR 550.105	Applies except when National Emergency is invoked.	Doesn't apply for overtime. 5 CFR 551.501(d)
Annual Maximum Earnings Limitation – applies when a National emergency is invoked and the bi-weekly limitation is no longer applicable. Limits total annual pay to maximum annual pay for GS 15 step 10 (currently $135,136 per annum)	Applies	Doesn't apply for overtime. 5 CFR 551.501 (d)
Compensatory Time 5 CFR 550.114	❑ May be required to take in lieu of OT ❑ Must take within 26 pay periods or automatic pay out	❑ May not be required to use in lieu of OT unless earning more than GS-10 step 10 rate of basic pay (including locality) ❑ Must take within 26 pay periods or automatic pay out

The Fair Labor Standards Act
And Its Relationship to Overtime Pay

The Fair Labor Standards Act (FLSA) provides the standards for both wage and overtime entitlements and the administrative procedures by which work time must be compensated. Outside the minimum wage provisions of the FLSA, the overtime provisions have the most impact on daily managerial decisions. Those employees covered by FLSA are **non-exempt**. Those not covered are **exempt**.

There are three categories of positions exempted from the FLSA: Supervisory, Managerial and Executive; Professional; and Administrative. Administrative positions are exempt if the work performed involves substantial participation in the executive or administrative functions of the supervisor, requires considerable specialized training, experience and knowledge, and involves exercising independent discretion.

There are two types of overtime

⇒ **Regularly scheduled,** i.e., scheduled in advance of the workweek, which is part of the regularly scheduled administrative workweek. Employees must be paid for regularly scheduled overtime to the extent that it does not cause the aggregate compensation for an exempt employee in a biweekly pay period to exceed the maximum payable rate of basic compensation. Non-exempt employees are entitled to compensation regardless of the biweekly maximum earnings limitation.

⇒ **Irregular and occasional,** i.e., not part of the regularly scheduled administrative workweek.

and two types of overtime compensation.

⇒ **Overtime with pay**

⇒ **Compensatory time off**

These two forms of overtime compensation apply differently to non-exempt and exempt employees and are summarized on the next page.

MAXIMUM GENERAL SCHEDULE PAY LIMITATIONS

TYPE OF PAY LIMIT	MAXIMUM LIMIT	REFERENCE
General Schedule (excluding any locality or other geographic payment)	Level V of the Executive Schedule	5 U.S.C. 5303(f)
Special salary rates (5 U.S.C. 5305)	Minimum rate may not exceed 30% of maximum rate for grade; maximum rate may not exceed level V of the Executive Schedule	5 U.S.C. 5305(a) and 5 CFR 530.303(a)
General Schedule, plus locality-based comparability payment	Level IV of the Executive Schedule	5 U.S.C. 5304(g)(1) and 5 CFR 531.604(b)
General Schedule, plus interim geographic adjustment continued rate adjustment	Level IV of the Executive Schedule	Section 302(c)(1) of FEPCA and 5 U.S.C. 5304 (g)(1)
Biweekly limitation on premium pay (See note 1.)	Greater of biweekly rate for GS-15, step 10, OR level V of the Executive Schedule	5 U.S.C. 5547(a) and 5 CFR 550.105
Annual limitation on premium pay for emergency work or for work critical to the mission of an agency (See note 2.)	Greater of annual rate for GS-15, step 10, OR level V of the Executive Schedule	5 U.S.C. 5547(b)(1) and (b)(2) and 5 CFR 550.106 and 550.107
Aggregate limitation on pay (See note 3.)	Level I of the Executive Schedule	5 U.S.C. 5307 and 5 CFR 530.203

NOTES

1. Under 5 U.S.C. 5547(a) and 5 CFR 550.105, GS employees, including law enforcement officers, may receive certain types of premium pay in a pay period only to the extent that the aggregate of basic pay and premium pay for the pay period does not exceed the greater of the **biweekly** rate for (1) GS-15, step 10 (including any applicable special salary rate or locality rate of pay), or (2) level V of the Executive Schedule. (See note 2 for exceptions to this rule.)

2. Under 5 U.S.C. 5547(b) and 5 CFR 550.106 and 5 CFR 550.107, the head of an agency may apply an annual pay cap to certain types of premium pay for any pay period for (1) employees performing work in connection with an emergency, including work performed in the aftermath of such an emergency, or (2) employees performing work critical to the mission of the agency. Such employees may receive certain types of premium pay only to the extent that the aggregate of basic pay and premium pay for the calendar year does not exceed the greater of the **annual** rate for (1)GS-15, step 10 (including any applicable special salary rate or locality rate of pay), or (2) level V of the Executive Schedule.

3. An employee may not receive any portion of any allowance, differential, bonus, award, or other similar payment under title 5, United States Code, in any calendar year, which when combined with the employee's basic pay

would cause the employee's aggregate compensation (including premium pay) to exceed the rate for level I of the Executive Schedule at the end of the calendar year. See 5 CFR 530.202 for definitions of "basic pay" and "aggregate compensation."

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United States Office of Personnel Management

Compensatory Time Off

Description

Compensatory time off is --

Time off with pay in lieu of overtime pay for irregular or occasional overtime work, **or**

When permitted under agency flexible work schedule programs, time off with pay in lieu of overtime pay for regularly scheduled or irregular or occasional overtime work.

Employee Coverage

Compensatory time off may be approved in lieu of overtime pay for irregular or occasional overtime work for both FLSA exempt and nonexempt employees who are covered by the definition of "employee" at 5 U.S.C. 5541(2).

Compensatory time off can also be approved for a "prevailing rate employee," as defined at 5 U.S.C. 5342(2), but there is no authority to *require* that any prevailing rate (wage) employee be compensated for irregular or occasional overtime work by granting compensatory time off.

Mandatory

Agencies may require that an FLSA exempt employee (as defined at 5 U.S.C. 5541(2)) receive compensatory time off in lieu of overtime pay for irregular or occasional overtime work, but only for an FLSA exempt employee whose rate of basic pay is above the rate for GS-10, step 10. No mandatory compensatory time off is permitted for wage employees or in lieu of FLSA overtime pay.

Regularly Scheduled Overtime

Compensatory time off may be approved (not required) in lieu of regularly scheduled overtime work only for employees, including wage employees, who are ordered to work overtime hours under flexible work schedules. See 5 U.S.C. 6123(a)(1).

Time Limits

An agency may set time limits for an FLSA exempt or nonexempt employee to take compensatory time off.

An agency may provide that an FLSA *exempt* employee who earns compensatory time off will lose entitlement to compensatory time off *and* overtime pay if it is not used within agency time limits, unless the failure was due to an exigency of the service beyond the employee's control.

If compensatory time off is not taken by an FLSA *nonexempt* employee within agency time limits, an agency *must* pay the employee for overtime work at the overtime rate in effect during the pay period in which the overtime work was completed.

Amount

1 hour of compensatory time off is granted for each hour of overtime work.

References

5 U.S.C. 5543 and 5 U.S.C. 6123(a)(1)
5 CFR 550.114 and 551.531
Comptroller General opinions: B-183751, October 3, 1975, and
October 19, 1976; 58 Comp. Gen. 1 (1978)
Section 1610 of Public Law 104-201, the National Defense Authorization Act, 1997

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Salary Table 2005-GS

INCORPORATING THE 2.50% GENERAL SCHEDULE INCREASE

EFFECTIVE JANUARY 2005

Annual Rates by Grade and Step

ASCII

Grade	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10
1	16016	16550	17083	17613	18146	18459	18984	19515	19537	20036
2	18007	18435	19031	19537	19755	20336	20917	21498	22079	22660
3	19647	20302	20957	21612	22267	22922	23577	24232	24887	25542
4	22056	22791	23526	24261	24996	25731	26466	27201	27936	28671
5	24677	25500	26323	27146	27969	28792	29615	30438	31261	32084
6	27507	28424	29341	30258	31175	32092	33009	33926	34843	35760
7	30567	31586	32605	33624	34643	35662	36681	37700	38719	39738
8	33852	34980	36108	37236	38364	39492	40620	41748	42876	44004
9	37390	38636	39882	41128	42374	43620	44866	46112	47358	48604
10	41175	42548	43921	45294	46667	48040	49413	50786	52159	53532
11	45239	46747	48255	49763	51271	52779	54287	55795	57303	58811
12	54221	56028	57835	59642	61449	63256	65063	66870	68677	70484
13	64478	66627	68776	70925	73074	75223	77372	79521	81670	83819
14	76193	78733	81273	83813	86353	88893	91433	93973	96513	99053
15	89625	92613	95601	98589	101577	104565	107553	110541	113529	116517

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Salary Table 2005-GS

INCORPORATING THE 2.50% GENERAL SCHEDULE INCREASE

EFFECTIVE JANUARY 2005

Hourly/Overtime Rates by Grade and Step

ASCII

Grade	B/O	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10
1	B	7.67	7.93	8.19	8.44	8.69	8.84	9.10	9.35	9.36	9.60
	O	11.51	11.90	12.29	12.66	13.04	13.26	13.65	14.03	14.04	14.40
2	B	8.63	8.83	9.12	9.36	9.47	9.74	10.02	10.30	10.58	10.86
	O	12.95	13.25	13.68	14.04	14.21	14.61	15.03	15.45	15.87	16.29
3	B	9.41	9.73	10.04	10.36	10.67	10.98	11.30	11.61	11.92	12.24
	O	14.12	14.60	15.06	15.54	16.01	16.47	16.95	17.42	17.88	18.36
4	B	10.57	10.92	11.27	11.62	11.98	12.33	12.68	13.03	13.39	13.74
	O	15.86	16.38	16.91	17.43	17.97	18.50	19.02	19.55	20.09	20.61
5	B	11.82	12.22	12.61	13.01	13.40	13.80	14.19	14.58	14.98	15.37
	O	17.73	18.33	18.92	19.52	20.10	20.70	21.29	21.87	22.47	23.06
6	B	13.18	13.62	14.06	14.50	14.94	15.38	15.82	16.26	16.70	17.13
	O	19.77	20.43	21.09	21.75	22.41	23.07	23.73	24.39	25.05	25.70
7	B	14.65	15.13	15.62	16.11	16.60	17.09	17.58	18.06	18.55	19.04
	O	21.98	22.70	23.43	24.17	24.90	25.64	26.37	27.09	27.83	28.56
8	B	16.22	16.76	17.30	17.84	18.38	18.92	19.46	20.00	20.54	21.08
	O	24.33	25.14	25.95	26.76	27.57	28.38	29.19	29.60	29.60	29.60
9	B	17.92	18.51	19.11	19.71	20.30	20.90	21.50	22.09	22.69	23.29
	O	26.88	27.77	28.67	29.57	29.60	29.60	29.60	29.60	29.60	29.60
10	B	19.73	20.39	21.05	21.70	22.36	23.02	23.68	24.33	24.99	25.65
	O	29.60	29.60	29.60	29.60	29.60	29.60	29.60	29.60	29.60	29.60
11	B	21.68	22.40	23.12	23.84	24.57	25.29	26.01	26.73	27.46	28.18
	O	29.60	29.60	29.60	29.60	29.60	29.60	29.60	29.60	29.60	29.60
12	B	25.98	26.85	27.71	28.58	29.44	30.31	31.18	32.04	32.91	33.77
	O	29.60	29.60	29.60	29.60	29.60	30.31	31.18	32.04	32.91	33.77
13	B	30.90	31.92	32.95	33.98	35.01	36.04	37.07	38.10	39.13	40.16
	O	30.90	31.92	32.95	33.98	35.01	36.04	37.07	38.10	39.13	40.16
14	B	36.51	37.73	38.94	40.16	41.38	42.59	43.81	45.03	46.24	47.46
	O	36.51	37.73	38.94	40.16	41.38	42.59	43.81	45.03	46.24	47.46
15	B	42.94	44.38	45.81	47.24	48.67	50.10	51.53	52.97	54.40	55.83
	O	42.94	44.38	45.81	47.24	48.67	50.10	51.53	52.97	54.40	55.83

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SOURCE: 33 FR 12458, Sept. 4, 1968, unless otherwise noted.

Subpart A—Premium Pay

AUTHORITY: 5 U.S.C. 5548 and 6101(c).

GENERAL PROVISIONS

§ 550.101 Coverage and exemptions.

(a) *Employees to whom this subpart applies.* (1) This subpart applies to each employee in or under an Executive agency as defined by section 105 of title 5, United States Code, except those named in paragraph (b) of this section.

(2) The sections in this subpart incorporating special provisions for certain types of work (§§ 550.141 to 550.164, inclusive) apply also to each employee of the judicial branch, legislative branch, and the government of the District of Columbia who is subject to subchapter V of chapter 55 of title 5, United States Code.

(b) *Employees to whom this subpart does not apply.* This subpart does not apply to:

(1) An elected official;

(2) The head of a department;

(3) [Reserved]

(4) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under subchapter IV of chapter 53 of title 5, United States Code, or by a wage board or similar administrative authority serving the same purpose, except that § 550.113(d) is applicable to such an employee whose rate of basic pay is fixed on an annual or monthly basis;

(5) An employee outside the continental United States or in Alaska who is paid in accordance with local prevailing wage rates for the area in which employed;

(6) An employee of the Tennessee Valley Authority;

(7) An employee of the Central Intelligence Agency (sec. 10, 63 Stat. 212, as amended; 50 U.S.C. 403j);

(8) A seaman to whom section 1(a) of the act of March 24, 1943 (57 Stat. 45; 50 U.S.C. App. 1291(a)) applies;

(9) A member of the United States Park Police or the United States Secret Service Uniformed Division;

(10) An officer or member of the crew of a vessel, whose pay is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry (30 Comp. Gen. 158);

(11) A civilian keeper of a lighthouse, or a civilian employed on a lightship or another vessel of the Coast Guard (14 U.S.C. 432(f));

(12) A physician, dentist, nurse, or any other employee in the Department of Medicine and Surgery, Veterans Administration, whose pay is fixed under chapter 73 of title 38, United States Code;

(13) A student-employee as defined by section 5351 of title 5, United States Code;

(14) An employee of the Environmental Science Services Administration engaged in the conduct of meteorological investigations in the Arctic region (62 Stat. 286; 15 U.S.C. 327);

(15) An employee of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives;

(16) A "teacher" or an individual holding a "teaching position" as defined by section 901 of title 20, United States Code;

(17) A Foreign Service officer or a member of the Senior Foreign Service; or

(18) A member of the Senior Executive Service.

(c) *Services to which this subpart does not apply.* This subpart does not apply to overtime, night, or holiday services for which additional pay is provided by the act of:

(1) February 13, 1911, as amended (36 Stat. 899, as amended; 19 U.S.C. 261, 267), involving inspectors, storekeepers, weighers, and other customs officers and employees;

(2) July 24, 1919 (41 Stat. 241; 7 U.S.C. 394), involving employees engaged in enforcement of the Meat Inspection Act;

(3) June 17, 1930, as amended (46 Stat. 715, as amended; 19 U.S.C. 1450, 1451, 1452), involving customs officers and employees;

(4) March 2, 1931 (46 Stat. 1467; 8 U.S.C. 1353*a*), involving inspectors and employees, Immigration and Naturalization Service;

(5) May 27, 1936, as amended (49 Stat. 1380, as amended; 46 U.S.C. 382b), involving local inspectors of steam vessels and assistants, U.S. shipping commissioners, deputies, and assistants, and customs officers and employees;

(6) March 23, 1941 (55 Stat. 46; 47 U.S.C. 154(f)(3)), involving certain engineers of the Federal Communications OPM;

(7) June 3, 1944 (58 Stat. 269; 19 U.S.C. 1451a), involving customs officers and employees;

(8) August 4, 1949 (63 Stat. 495; 7 U.S.C. 349a), involving employees of the Bureau of Animal Industry who work at establishments which prepare virus, serum, toxin, and analogous products for use in the treatment of domestic animals; or

(9) August 28, 1950 (64 Stat. 561; 7 U.S.C. 2260), involving employees of the Department of Agriculture performing inspection or quarantine services relating to imports into and exports from the United States.

[33 FR 12458, Sept. 4, 1968, as amended at 48 FR 3933, Jan. 28, 1983]

§ 550.102 Entitlement.

A department (and for the purpose of §§ 550.141 to 550.164, inclusive, a legislative or judicial agency and the government of the District of Columbia) shall determine an employee's entitlement to premium pay in accordance with subchapter V of chapter 55 of title 5, United States Code, and this subpart.

§ 550.103 Definitions.

In this subpart:

(a) "Department" means an executive agency and a military department as defined by sections 105 and 102 of title 5, United States Code.

(b) "Agency" means (1) a department as defined in paragraph (a) of this section, (2) the government of the District of Columbia, and (3) a legislative or judicial agency which has positions that are subject to subchapter V of chapter 55 of title 5, United States Code.

(c) "Employee" means an employee to whom this subpart applies.

(d) "Head of a department" means the head of a department and, except for the purpose of § 550.101(b)(2), an official who has been delegated authority to act for the head of a department in the matter concerned.

(e) "Nightwork" has the meaning given that term in § 550.121, and includes any nightwork preformed by an employee as part of his or her regularly scheduled administrative workweek.

(f) "Irregular or occasional overtime work" means overtime work that is not part of an employee's regularly scheduled administrative workweek.

(g) "Regular overtime work" means overtime work that is part of an employee's regularly scheduled administrative workweek.

(h) "Overtime work" has the meaning given that term by paragraphs (a) and (d) of § 550.111, and includes irregular or occasional overtime work and regular overtime work.

(i) "Premium pay" means additional pay authorized by subchapter V of chapter 55 of title 5, United States Code, and this subpart for overtime, night, holiday, or Sunday work, and for standby duty or administratively uncontrollable work.

(j) "Rate of basic pay" means the rate of pay fixed by law or administrative action for the position held by an employee, before any deductions and exclusive of additional pay of any kind.

(k) "Tour of duty" means the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek.

§ 550.103 Definitions.

In this subpart:

(a) "Department" means an executive agency and a military department as defined by sections 105 and 102 of title 5, United States Code.

(b) "Agency" means (1) a department as defined in paragraph (a) of this section, (2) the government of the District of Columbia, and (3) a legislative or judicial agency which has positions that are subject to subchapter V of chapter 55 of title 5, United States Code.

(c) "Employee" means an employee to whom this subpart applies.

(d) "Head of a department" means the head of a department and, except for the purpose of § 550.101(b)(2), an official who has been delegated authority to act for the head of a department in the matter concerned.

(e) "Nightwork" has the meaning given that term in § 550.121, and includes any nightwork preformed by an employee as part of his or her regularly scheduled administrative workweek.

(f) "Irregular or occasional overtime work" means overtime work that is not part of an employee's regularly scheduled administrative workweek.

(g) "Regular overtime work" means overtime work that is part of an employee's regularly scheduled administrative workweek.

(h) "Overtime work" has the meaning given that term by paragraphs (a) and (d) of § 550.111, and includes irregular or occasional overtime work and regular overtime work.

(i) "Premium pay" means additional pay authorized by subchapter V of chapter 55 of title 5, United States Code, and this subpart for overtime, night, holiday, or Sunday work, and for standby duty or administratively uncontrollable work.

(j) "Rate of basic pay" means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind.

(k) "Tour of duty" means the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek.

(l) "Administrative workweek" means a period of 7 consecutive calendar days designated in advance by the head of a department under section 6101(a) of title 5, United States Code.

(m) "Basic workweek," for full-time employees, means the 40-hour workweek established in accordance with § 610.111 of this chapter.

(n) "Regularly scheduled administrative workweek," for a full-time employee, means the period within an administrative workweek, established in accordance with § 610.111 of this chapter, within which the employee is regularly scheduled to work. For a part-time employee, it means the officially prescribed days and hours within an administrative workweek during which the employee is regularly scheduled to work.

(o) "Sunday work" means nonovertime work performed by an employee during a regularly scheduled daily tour of duty when any part of that daily tour of duty is on a Sunday.

(p) "Regularly scheduled" work means work that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with § 610.111 of this chapter.

(q) "Holiday work" means nonovertime work performed by an employee during a regularly scheduled daily tour of duty on a holiday designated in accordance with § 610.202 of this chapter.

[33 FR 12458, Sept. 4, 1968, as amended at 48 FR 3933, Jan. 28, 1983]

§ 550.105 Maximum limitation.

An employee may be paid premium pay under this subpart only to the extent that the payment does not cause his aggregate rate of pay for any pay period to exceed the maximum rate for GS-15.

OVERTIME PAY

§ 550.111 Authorization of overtime pay.

(a) Except as provided by paragraph (d) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is:

(1) Officially ordered or approved: and

(2) Performed by an employee. Hours of work in excess of eight in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in § 550.113.

(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

(d) For an employee for whom the first 40 hours of duty in an administrative workweek is his basic workweek under § 610.111(b) of this chapter, overtime work means work in excess of 40 hours in an administrative workweek that is:

(1) Officially ordered or approved, and

(2) Performed by an employee, when the employee's basic pay exceeds the minimum rate for GS-10 or when the employee is engaged in professional or technical engineering or scientific activities. For purposes of this section and section 5542(a) of title 5, United States Code, an employee is engaged in professional or technical engineering or scientific activities when he is assigned to perform the duties of a professional or support technician position in the physical, mathematical, natural, medical, or social sciences or engineering or architecture.

(e) Notwithstanding paragraphs (a) and (d) of this section, when an employee's basic workweek includes a daily tour of duty of more than 8 hours and his hourly rate of basic pay exceeds the hourly rate of overtime pay provided by § 550.113, the department shall pay him at his basic rate of pay for each hour of his daily tour of duty within his basic workweek.

[33 FR 12458, Sept. 4, 1968, as amended at 34 FR 19495, Dec. 10, 1969; 48 FR 36805, Aug. 15, 1983]

§ 550.112 Computation of overtime work.

The computation of the amount of overtime work of an employee is subject to the following conditions:

(a) *Time spent in principal activities.* Principal activities are the activities that an employee is employed to perform. They are the activities that an employee performs during his or her regularly scheduled administrative workweek (including regular overtime work) and activities performed by an employee during periods of irregular or occasional overtime work authorized under § 550.111. Overtime work in principal activities shall be credited as follows:

(1) An employee shall be compensated for every minute of regular overtime work.

(2) A quarter of an hour shall be the largest fraction of an hour used for crediting irregular or occasional overtime work under this subpart. When irregular or occasional overtime work is performed in other than the full fraction, odd minutes shall be rounded up or rounded down to the nearest full fraction of an hour used to credit overtime work.

(b) *Time spent in preshift or postshift activities.* A preshift activity is a preparatory activity that an employee performs prior to the commencement of his or her principal activities, and a postshift activity is a concluding activity that an employee performs after the completion of his or her principal activities. Such activities are not principal activities as defined in paragraph (a) of this section.

(1) (i) If the head of a department reasonably determines that a preshift or postshift activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per daily tour of duty, he or she shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

(ii) If the time spent in a preshift or postshift activity is compensable as hours of work, the head of the department shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the head of the department. In no case shall the time credited for

(a) *Time spent in princi-ties.* Principal activities are t ties that an employee is em perform. They are the activi an employee performs duri her regularly scheduled adm workweek (including regular work) and activities performe employee during periods of or occasional overtime work ized under § 550.111. Overtim principal activities shall be c follows:

(1) An employee shall be co ed for every minute of regul time work.

(2) A quarter of an hour shall largest fraction of an hour crediting irregular or occasion time work under this subpart irregular or occasional overtim is performed in other than fraction, odd minutes shall be up or rounded down to the near fraction of an hour used to cred time work.

(b) *Time spent in preshift o shift activities.* A preshift activit preparatory activity that an em performs prior to the commenc of his or her principal activities postshift activity is a concluding ity that an employee performs the completion of his or her prin activities. Such activities are not principal activities as defined in para (a) of this section.

(1) (i) If the head of a departm reasonably determines that a pr or postshift activity is closely re to an employee's principal activ and is indispensable to the perf ance of the principal activities that the total time spent in that ac ty is more than 10 minutes per tour of duty, he or she shall cred of the time spent in that activity cluding the 10 minutes, as hour work.

(ii) If the time spent in a preshi postshift activity is compensab hours of work, the head of the de ment shall schedule the time for the employee to perform th tivity. An employee shall be cre with the actual time spent in th tivity during the time period uled by the head of the depart In no case shall the time credited formance of an activity exceed e scheduled by the head of the ment. If the time period sched- the head of the department performance of a preshift or t activity is outside the em- daily tour of duty, the em- shall be credited with the time performing that activity in ac- e with paragraph (a)(2) of this

preshift or postshift activity not closely related to the per- ce of the principal activities is red a preliminary or postlimin- ity. Time spent in preliminary liminary activities is excluded hours of work and is not compen- ven if it occurs between periods ity that are compensable as of work.

Leave with pay. An employee's from duty on authorized leave ay under subchapter I of chap- of title 5, United States Code, the time when he would other- have been required to be on duty a basic workweek (including au- ed absence on a legal holiday, on workday established by Execu- administrative order, and on ensatory time off as provided in 114) is deemed employment and not reduce the amount of over- pay to which the employee is en- during an administrative work- *Leave of absence with pay under* hapter I of chapter 61 of title 5, ed States Code, is charged only n absence that occurs during a workweek.

Leave without pay. (1) For a d of leave without pay in an em- e's basic workweek, an equal d of service performed outside basic workweek, but in the same inistrative workweek, shall be sub- ted and paid for at the rate appli- to his basic workweek before any ining period of service may be for at the overtime rate on the of exceeding 40 hours in a work-

For a period of leave without pay employee's daily tour of duty, an period of service performed out- the daily tour, but in the same day, shall be substituted and paid t the rate applicable to his daily tour of duty before any remaining period of service may be paid for at the overtime rate on the basis of exceeding 8 hours in a workday.

(e) *Absence during overtime periods.* Except as provided by paragraph (a) of this section, as expressly authorized by statute, or to the extent authorized while the employee is in a travel status, a period is counted as overtime work only when the employee actually performs work during the period or is taking compensatory time off as provided in § 550.114.

(f) *Night, Sunday, or holiday work.* Hours of night, Sunday, or holiday work are included in determining for overtime pay purposes the total number of hours of work in an administrative workweek.

(g) *Time in travel status.* Time in travel status away from the official duty-station of an employee is deemed employment only when:

(1) It is within his regularly scheduled administrative workweek, including regular overtime work; or

(2) The travel (i) involves the performance of actual work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under such arduous and unusual conditions that the travel is inseparable from work, or (iv) results from an event which could not be scheduled or controlled administratively.

(h) *Call-back overtime work.* Irregular or occasional overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration for the purpose of premium pay, either in money or compensatory time off.

[33 FR 12458, Sept. 4, 1968, as amended at 33 FR 18669, Dec. 18, 1968; 48 FR 3934, Jan. 28, 1983; 48 FR 36805, Aug. 15, 1983]

§ 550.113 Computation of overtime pay.

(a) For each employee whose rate of basic pay does not exceed the minimum rate for GS-10 the overtime hourly rate is 1½ times his hourly rate of basic pay.

(b) For each employee whose rate of basic pay exceeds the minimum rate for GS-10 the overtime hourly rate is 1½ times the hourly rate of basic pay at the minimum rate for GS-10.

(c) An employee is paid for overtime work performed on a Sunday or a holiday at the same rate as for overtime work performed on another day.

(d) An employee whose rate of basic pay is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay in accordance with the provisions of section 5544 of title 5, United States Code. The rate of pay for each hour of overtime work of such an employee is computed as follows:

(1) If the rate of basic pay of the employee is fixed on an annual basis, divide the rate of basic pay by 2,080 and multiply the quotient by one and one-half; and

(2) If the rate of basic pay of the employee is fixed on a monthly basis, multiply the rate of basic pay by 12 to derive an annual rate of basic pay, divide the annual rate of basic pay by 2,080 and multiply the quotient by one and one-half.

Rates are computed in full cents, counting a fraction of a cent as the next higher cent.

§ 550.114 Compensatory time off for irregular or occasional overtime work.

(a) At the request of an employee, the head of a department may grant him compensatory time off from his tour of duty instead of payment under § 550.113 for an equal amount of irregular or occasional overtime work.

(b) The head of a department may provide that an employee whose rate of basic pay exceeds the maximum rate for GS-10 shall be paid for irregular or occasional overtime work with an equivalent amount of compensatory time off from his tour of duty instead of payment under § 550.113.

(c) The head of a department may fix a time limit for an employee to request or take compensatory time off and may provide that an employee who fails to take compensatory time off to which he is entitled under paragraph (a) or (b) of this section before the time limit fixed, shall lose his right both to compensatory time off and to overtime pay unless his failure is due to an exigency of the service beyond his control.

NIGHT PAY

§ 550.121 Authorization of night pay differential.

(a) Except as provided by paragraph (b) of this section, nightwork is regularly scheduled work performed by an employee between the hours of 6 p.m. and 6 a.m. Subject to § 550.122, and except as otherwise provided in this subpart, an employee who performs nightwork is entitled to pay for that work at his or her rate of basic pay plus a night pay differential amounting to 10 percent of his or her rate of basic pay.

(b) The head of a department may designate a time after 6 p.m. and a time before 6 a.m. as the beginning and end, respectively, of nightwork for the purpose of paragraph (a) of this section, at a post outside the United States where the customary hours of business extend into the hours of nightwork provided by paragraph (a) of this section. Times so designated as the beginning or end of nightwork shall correspond reasonably with the end or beginning, respectively, of the customary hours of business in the locality.

[33 FR 12458, Sept. 4, 1968, as amended at 48 FR 3934, Jan. 28, 1983]

§ 550.122 Computation of night pay differential.

(a) *Absence on holidays or in travel status.* An employee is entitled to a night pay differential for a period when he is excused from nightwork on a holiday or other nonworkday and for night hours of his tour of duty while he is in an official travel status, whether performing actual duty or not.

(b) *Absence on leave.* An employee is entitled to a night pay differential for a period of paid leave only when the total amount of that leave in a pay

DCN: 11999

M E M O R A N D U M

March 18, 1993

To: Matt Behrmann
Caroline Cimons

From: Mary Ann Hook, Deputy General Counsel

Subject: Compensation/Overtime

TRAINEES/SECRETARIES

Trainees and secretaries are covered by the Fair Labors and Standards Act, FLSA, that provides that overtime may be compensated by either payment or time-off at the option of the employee.

Any employee properly classified at GS5 through GS10 shall be exempt only if the employee is an executive, administrative or professional employee as defined in 5 CFR 551.204, 205, 206. See attachments.

PROFESSIONAL STAFF

Professional staff are not covered under FLSA. The agency makes a determination for compensating employees in accordance with 5 U.S.C. 5543 which states:

> (a) The head of an agency may -- (2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS10 shall be granted comp time off from scheduled tour or duty equal to the amount of time spend in irregular and occasional overtime work instead of payment.

The agency may set a policy that provides the employees with compensation as time-off and not payment. The agency may set rules for when the time-off may be used by the employee.

5 Code of Federal Regulations provides that the head of the department may fix a time limit for an employee to request or take comp-time off and may provide that an employee who fails to take comp-time off to which he is entitled, before the time limit fixed shall lose his right to comp-time unless the failure is due to an exigency of the service. 5 CFR section 550.114 (c).

An example given by Ray Kogut, personnel expert at OMB, "The employee has 100 hours of compensation time which must be used in the next two weeks, date of May 1, 1993. Although it is mandated

that the time be compensated hour for hour, an agency may -- and does often -- according to Mr. Kogut -- determine that the time be used by a certain date.

Mr. Kogut said that the agency must be reasonable in its determinations for time-off. He said that all agencies set policy that is reasonable to both allow for the functioning of the agency as well as providing the compensation allowable for its employees who work overtime.

SPECIAL EMPLOYEES

- Detailees' overtime should be determined in accordance with their original agency.
- SES, or executive level employees with income over $86,600, are not granted overtime compensation.
- Military personnel are employed 24 hours a day and therefore do not qualify for overtime compensation.

RECORDKEEPING

It is mandated that proper recordkeeping procedures be established. Overtime for all employees must be approved by supervisors in advance of performance. See attached form.

OVERTIME APPROVAL

The Defense Base Closure and Realignment Commission is mandated to perform a thorough analysis of base closures and realignments in a brief period of time beginning on March 15, 1993 with recommendations to the President on July 1, 1993. It is expected that in order to achieve its goal, Commission employees will often work hours in addition to eight a day with hours totalling more than 40 hours a week. Overtime will be the practice rather than the exception, therefore, as supervisor of the following personnel I am approving in advance the overtime work hours of the following employees for the month of _____, 1993. I will closely monitor the hours weekly of the below employees to ensure that overtime work that is being done is required to accomplish the Commission's charge.

Furthermore, a weekly time sheet that is being used to record overtime will be carefully reviewed to avoid any possible abuses.

I approve the overtime hours of employees for the month of _____, 1993.

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Signature_____

Department_____

Date_____

Please return forms to Caroline Cimons, Director of Administration prior to the first of the applicable month.

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378.

Revision Notes

ments" each time it is used in this title. See section 101(7) of title 10.

References

military departments, see section 513 of ure.

Title 10, Armed Forces.

References

C.J.S. Armed Services §§ 2 to 4, 11, 12.

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n" means a corporation owned or of the United States; and

corporation" does not include a ment of the United States.

at. 378.

Revision Notes

corporation" each time it is used in this title.

References

section 1501 et seq. of Title 7, Agriculture.
section 841 et seq. of Title 31, Money and

in United States, see section 468 et seq. of

poration, see section 981 et seq. of Title 33,

31 et seq. of Title 16, Conservation.

References

C.J.S. United States § 65.

§ 104. Independent establishment

For the purpose of this title, "independent establishment" means—

(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and

(2) the General Accounting Office.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379; Pub.L. 91–375, § 6(c)(2), Aug. 12, 1970, 84 Stat. 775.

Historical and Revision Notes

The section is supplied to avoid the necessity for defining "independent establishment" each time it is used in this title.

Certain agencies are not independent establishments under the definition since they are constituent agencies or parts of an independent establishment. However, these agencies would continue to be subject to the provisions of this title applicable to the independent establishment of which they are a constituent or part. Also, the definition does not expand or abridge any rights or authority possessed by these agencies as no substantive changes are intended, see section 7(a) of the bill.

1970 Amendment. Par. (1). Pub.L. 91–375 inserted "(other than the United States Postal Service or the Postal Rate Commission)" following "executive branch".

Effective Date of 1970 Amendment. Amendment by Pub.L. 91–375 effective within 1 year after Aug. 2, 1970, on date established therefor by the Board of Governors of the United States Postal Service and published by it in the Federal Register, see section 15(a) of Pub.L. 91–735, set out as a note preceding section 101 of Title 39, Postal Service.

Legislative History. For legislative history and purpose of Pub.L. 91–375, see 1970 U.S.Code Cong. and Adm.News, p. 3649.

Cross References

Board of Veterans' Appeals, see section 4001 et seq. of Title 38, Veterans' Benefits.
Department of Medicine and Surgery, see section 4101 et seq. of Title 38.
General Accounting Office, see section 41 et seq. of Title 31, Money and Finance.
Veterans' Administration, see section 201 et seq. of Title 38, Veterans' Benefits.
Veterans' Canteen Service, see section 4201 et seq. of Title 38.

Library References

United States ⟹31. C.J.S. United States § 31.

§ 105. Executive agency

For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Reviser's Note. The section is supplied to avoid the necessity for defining "Executive agency" each time it is used in this title.

Library References

United States ⟹31. C.J.S. United States § 31.

.PTER 3—POWERS

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ve department or military department may the government of his department, the con- distribution and performance of its busi- e, and preservation of its records, papers, on does not authorize withholding informa- limiting the availability of records to the

6, 80 Stat. 379.

cal and Revision Notes

Code	Revised Statutes and Statutes at Large
	R.S. § 161.
	Aug. 12, 1958, Pub.L. 85-619, 72 Stat. 547.

Explanatory Notes

nent" are the defi- le to this definition ction 101. vith law" regulation s invalid.

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"All laws, orders, regulations, and other actions relating to the National Military Establishment, the Departments of the Army, the Navy, or the Air Force, or to any officer or activity of such establishment or such departments, shall, except to the extent inconsistent with the provisions of this Act, have the same effect as if this Act had not been enacted; but, after the effective date of this Act, any such law, order, regulation, or other action which vested functions in or otherwise related to any officer, department, or establishment, shall be deemed to have vested such function in or relate to the officer or department, executive or military, succeeding the officer, department, or establishment in which such function was vested. For purposes of this subsection the Department of Defense shall be deemed the department succeeding the National Military Establishment, and the military departments of Army, Navy, and Air Force shall be deemed the departments succeeding the Executive Departments of Army, Navy, and Air Force."

This section was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, § 201(d), as added Aug. 10,

1949, ch. 412, § 4, 63 Stat. 579 (former 5 U.S.C. 171-1), which provides "Except to the extent inconsistent with the provisions of this Act [National Security Act of 1947], the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Equal Opportunity in Federal Employment. Establishment of equal employment opportunity programs by heads of Executive departments and agencies, see Ex.Ord.No.11246, Sept. 24, 1965, 30 F.R. 12319, set out as a note under section 2000e of Title 42, The Public Health and Welfare.

Cross References

Confidential records—
- Tax returns and lists, publicity, see section 6103 et seq. of Title 26, Internal Revenue Code.
- Visas or permits to enter United States, records of Department of State and of diplomatic and consular offices respecting issuance or refusal, see section 1202 of Title 8, Aliens and Nationality.

Library References

Armed Services ⟹1.
United States ⟹40.

C.J.S. Armed Services §§ 2 to 4, 11, 12.
C.J.S. United States §§ 38 to 40.

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CHAPTER 3—POWERS

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§ 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 22	R.S. § 161. Aug. 12, 1958, Pub.L. 85–619, 72 Stat. 547.

Explanatory Notes

The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in section 101. The words "not inconsistent with law" are omitted as surplusage as a regulation which is inconsistent with law is invalid.

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which provided:

"All laws, orders, regulations, and other actions relating to the National Military Establishment, the Departments of the Army, the Navy, or the Air Force, or to any officer or activity of such establishment or such departments, shall, except to the extent inconsistent with the provisions of this Act, have the same effect as if this Act had not been enacted; but, after the effective date of this Act, any such law, order, regulation, or other action which vested functions in or otherwise related to any officer, department, or establishment, shall be deemed to have vested such function in or relate to the officer or department, executive or military, succeeding the officer, department, or establishment in which such function was vested. For purposes of this subsection the Department of Defense shall be deemed the department succeeding the National Military Establishment, and the military departments of Army, Navy, and Air Force shall be deemed the departments succeeding the Executive Departments of Army, Navy, and Air Force."

This section was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, § 201(d), as added Aug. 10,

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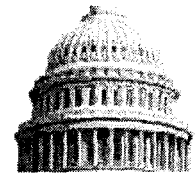

US CODE COLLECTION

§ 5547. Limitation on premium pay

Release date: 2005-05-26

(a) An employee may be paid premium pay under sections 5542, 5545 (a), (b), and (c), 5545a, and 5546 (a) and (b) only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed the greater of—

(1) the maximum rate of basic pay payable for GS–15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(2) the rate payable for level V of the Executive Schedule.

(b)

(1) Subject to regulations prescribed by the Office of Personnel Management, subsection (a) shall not apply to an employee who is paid premium pay by reason of work in connection with an emergency (including a wildfire emergency) that involves a direct threat to life or property, including work performed in the aftermath of such an emergency.

(2) Notwithstanding paragraph (1), no employee referred to in such paragraph may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent that, the aggregate of the basic pay and premium pay under those provisions for such employee would, in any calendar year, exceed the greater of—

(A) the maximum rate of basic pay payable for GS–15 in effect at the end of such calendar year (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the rate payable for level V of the Executive Schedule in effect at the end of such calendar year.

(3) Subject to regulations prescribed by the Office of Personnel Management, the head of an agency may determine that subsection (a) shall not apply to an employee who is paid premium pay to perform work that is critical to the mission of

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the agency. Such employees may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent that, the aggregate of the basic pay and premium pay under those provisions for such employee would not, in any calendar year, exceed the greater of—

(A) the maximum rate of basic pay payable for GS-15 in effect at the end of such calendar year (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the rate payable for level V of the Executive Schedule in effect at the end of such calendar year.

(c) The Office of Personnel Management shall prescribe regulations governing the methods of applying subsection (b)(2) and (b)(3) to employees who receive premium pay under section 5545 (c) or 5545a, or to firefighters covered by section 5545b who receive overtime pay for hours in their regular tour of duty, and the method of payment to such employees. Such regulations may limit the payment of such premium pay on a biweekly basis.

(d) This section shall not apply to any employee of the Federal Aviation Administration or the Department of Defense who is paid premium pay under section 5546a.

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§ 5546. Pay for Sunday and holiday work

Release date: 2005-05-26

(a) An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542 (a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay. For employees serving outside the United States in areas where Sunday is a routine workday and another day of the week is officially recognized as the day of rest and worship, the Secretary of State may designate the officially recognized day of rest and worship as the day with respect to which the preceding sentence shall apply instead of Sunday.

(b) An employee who performs work on a holiday designated by Federal Statute, Executive order, or with respect to an employee of the government of the District of Columbia, by order of the District of Columbia Council, is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not—

(1) in excess of 8 hours; or

(2) overtime work as defined by section 5542 (a) of this title.

(c) An employee who is required to perform any work on a designated holiday is entitled to pay for at least 2 hours of holiday work.

(d) An employee who performs overtime work as defined by section 5542 (a) of this title on a Sunday or a designated holiday is entitled to pay for that overtime work in accordance with section 5542 (a) of this title.

(e) Premium pay under this section is in addition to premium pay which may be due for the same work under section 5545 (a) and (b) of this title, providing premium pay for nightwork.

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the information specified in paragraphs (a) (1) through (3) of this section and an installment agreement (or other instruction on the payment schedule), if applicable, to the employee's paying agency.

(5) If the employee is in the process of separating, the creditor agency must submit its debt claim to the employee's paying agency for collection as provided in § 550.1104(1). The paying agency must certify the total amount of its collection and notify the creditor agency and the employee as provided in paragraph (c)(1) of this section. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the provisions of this section have been fully complied with. However, the creditor agency must submit a properly certified claim to the agency responsible for making such payments before the collection can be made.

(6) If the employee is already separated and all payments due from his or her former paying agency have been paid, the creditor agency may request, unless otherwise prohibited, that money due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801 *et seq.*), or other similar funds, be administratively offset to collect the debt. (See 31 U.S.C. 3716 and the FCCS.)

(b) *Responsibilities of paying agency*—(1) *Complete claim.* When the paying agency receives a properly certified debt claim from a creditor agency, deductions should be scheduled to begin prospectively at the next officially established pay interval. The employee must receive written notice that the paying agency has received a certified debt claim from the creditor agency (including the amount) and written notice of the date deductions from salary will commence and of the amount of such deductions.

(2) *Incomplete claim.* When the paying agency receives an incomplete debt from a creditor agency, the paying agency must return the debt claim with a notice that procedures under 5 U.S.C. 5514 and this subpart must be provided and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) *Review.* The paying agency is not required or authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(c) *Employees who transfer from one paying agency to another.* (1) If, after the creditor agency has submitted the debt claim to the employee's paying agency, the employee transfers to a position served by a different paying agency before the debt is collected in full, the paying agency from which the employee separates must certify the total amount of the collection made on the debt. One copy of the certification must be furnished to the employee, another to the creditor agency along with notice of the employee's transfer. However, the creditor agency must submit a properly certified claim to the new paying agency before collection can be resumed.

(2) When an employee transfers to another paying agency, the creditor agency need not repeat the due process procedures described by 5 U.S.C. 5514 and this subpart to resume the collection. However, the creditor agency is responsible for reviewing the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

[51 FR 21325, June 12, 1986]

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

Subpart A—General Provisions

Sec.
551.101 General.
551.102 Definitions.
551.103 Coverage.
551.104 Administrative authority.

Subpart B—Exemptions

551.201 Agency authority.

paying agency must return the debt claim with a notice that procedures under 5 U.S.C. 5514 and this subpart must be provided and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) *Review.* The paying agency is not required or authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(c) *Employees who transfer from one paying agency to another.* (1) If, after the creditor agency has submitted the debt claim to the employee's paying agency, the employee transfers to a position served by a different paying agency before the debt is collected in full, the paying agency from which the employee separates must certify the total amount of the collection made on the debt. One copy of the certification must be furnished to the employee, another to the creditor agency along with notice of the employee's transfer. However, the creditor agency must submit a properly certified claim to the new paying agency before collection can be resumed.

(2) When an employee transfers to another paying agency, the creditor agency need not repeat the due process procedures described by 5 U.S.C. 5514 and this subpart to resume the collection. However, the creditor agency is responsible for reviewing the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

[51 FR 21325, June 12, 1986]

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AUTHORITY: Sec. 4(f) of the Fair Labor Standards Act as amended by Pub. L. 93-259 enacted April 8, 1974, 88 Stat. 55; 29 USC 204f.

Subpart A—General Provisions

SOURCE: 45 FR 85663, Dec. 30, 1980, unless otherwise noted.

§ 551.101 General.

(a) Section 3(e)(2) of the Fair Labor Standards Act of 1938, as amended, authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section. Section 4(f) of the Act authorizes the Office of Personnel Management to administer the provisions of the Act for all such employees, except for those who are employed by the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority; the named groups of employees are specifically excluded from the Office of Personnel Management's administration.

(b) The Act provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups of employees from the application of certain of its provisions. It prescribes penalties for the commission of specifically prohibited acts.

(c) This part contains the regulations, criteria, and conditions that the Office of Personnel Management has prescribed for the administration of the Act. This part supplements and

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implements the Act, and must be read in conjunction with it.

§ 551.102 Definitions.

In this part:

(a) "Act" means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.);

(b) "Agency", for purposes of the Office of Personnel Management's administration of the Act, means any instrumentality of the United States Government, or any constituent element thereof acting directly or indirectly as an employer, as this term is defined in section 3(d) of the Act; but does not include:

(1) The Library of Congress;

(2) The United States Postal Service;

(3) The Postal Rate Commission; or

(4) The Tennessee Valley Authority;

all of which are subject to the administration of the Act by the Department of Labor, under Title 29, Code of Federal Regulations.

(c) "Employ" means to engage a person in an activity that is for the benefit of an agency, as defined for this part, and includes any hours of work that are suffered or permitted.

(d) "Employee" means a person who is employed:

(1) In an executive agency;

(2) As a civilian in a military department;

(3) In a nonappropriated fund instrumentality of an executive agency or a military department; or

(4) In a unit of the legislative or judicial branch of the Government that has positions in the competitive service.

(e) "Suffered or permitted" work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

(f) "Trainee" means a person who does not meet the definition of "employee" in paragraph (d) of this section, and who is assigned or attached to a Federal activity primarily for training. A person who attends a training program under the following conditions is considered a "trainee" and, therefore, is not an "employee" of t Government of the United States f purposes of the Act:

(1) The training, even though it i cludes actual operation of the faciliti of the Federal activity, is similar t that given in a vocational school, other institution of learning;

(2) The training is for the benefit the individual;

(3) The trainee does not displace re ular employees, but, rather, is supe vised by them;

(4) The Federal activity which pr vides the training derives no immed ate advantage from the activities the trainee; on occasion its operatio may actually be impeded;

(5) The trainee is not necessarily e titled to a job with the Federal acti ty at the completion of the trainin period; and

(6) The agency and the trainee u derstand that the trainee is not en tled to the payment of wages from t agency for the time spent in trainin

(g) "Volunteer" means a person wh does not meet the definition of "em ployee" in paragraph (d) of this se tion, and who volunteers or donat his or her service the primary bene of which accrues to the performer the service or to someone other th the agency. Under such circumstanc there is neither an expressed nor implied compensation agreeme Services performed by such a volu teer include personal services that, left unperformed, would not neces tate the assignment of an employee perform them.

(h) "Exempt area" means any fo eign country, or any territory with the jurisdiction of the United Stat other than the following locations:

(1) A State of the United States;

(2) The District of Columbia;

(3) Puerto Rico;

(4) The Virgin Islands;

(5) Outer Continental Shelf Lan as defined in the Outer Continent Shelf Lands Act (67 Stat. 462);

(6) American Samoa;

(7) Guam;

(8) Wake Island;

(9) Eniwetok Atoll;

(10) Kwajalein Atoll; and

(11) Johnston Island.

therefore, is not an "employee" of the Government of the United States for purposes of the Act:

(1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;

(2) The training is for the benefit of the individual;

(3) The trainee does not displace regular employees, but, rather, is supervised by them;

(4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training.

(g) "Volunteer" means a person who does not meet the definition of "employee" in paragraph (d) of this section, and who volunteers or donates his or her service the primary benefit of which accrues to the performer of the service or to someone other than the agency. Under such circumstances there is neither an expressed nor an implied compensation agreement. Services performed by such a volunteer include personal services that, if left unperformed, would not necessitate the assignment of an employee to perform them.

(h) "Exempt area" means any foreign country, or any territory within the jurisdiction of the United States other than the following locations:

(1) A State of the United States;
(2) The District of Columbia;
(3) Puerto Rico;
(4) The Virgin Islands;
(5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);
(6) American Samoa;
(7) Guam;
(8) Wake Island;
(9) Eniwetok Atoll;
(10) Kwajalein Atoll; and
(11) Johnston Island.

[45 FR 85663, Dec. 30, 1980, as amended at 51 FR 7426, Mar. 4, 1986]

§ 551.103 Coverage.

(a) Any employee of an agency who is not specifically excluded by another statute is covered by the Act. This includes any person who is:

(1) Defined as an employee under section 2105 of title 5, United States Code;

(2) Appointed under other appropriate authority; or

(3) Suffered or permitted to work by an agency whether or not formally appointed.

(b) The following persons are not covered under the Act:

(1) A person appointed under appropriate authority without compensation;

(2) A trainee as defined in § 551.102(f); or

(3) A volunteer as defined in § 551.102(g).

§ 551.104 Administrative authority.

The Office of Personnel Management is the administrator of the provisions of the Act with respect to any person employed by an agency, except for the equal pay provisions contained in section 6(d) of the Act, which are administered by the Equal Employment Opportunity Commission.

Subpart B—Exemptions

SOURCE: 51 FR 7426, Mar. 4, 1986, unless otherwise noted.

§ 551.201 Agency authority.

The employing agency shall exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions as shall be issued by the Office of Personnel Management.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that—

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be exempted.

§ 551.203 Exemption of General Schedule employees.

(a) Any employee properly classified at GS-4 or below (or the equivalent level in other white collar pay systems) shall be nonexempt;

(b) Any employee properly classified at GS-5 through GS-10 (or the equivalent level in other white collar pay systems) shall be exempt only if the employee is an executive, administrative, or professional employee as defined in §§ 551.204, 551.205, and 551.206 of this subpart.

[51 FR 7426, Mar. 4, 1986, as amended at 53 FR 1740, Jan. 22, 1988]

§ 551.204 Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee—

(1) Has authority to select or remove, and advance in pay and promote, or make any other status changes of subordinate employees, or has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) In addition to the primary duty criterion that applies to all employees, foreman level supervisors in the Federal Wage System (or the equivalent

in other wage systems), employees at the GS-7 through GS-9 level subject to section 207(k) of Title 29, United States Code, and employees classified at the GS-5 or GS-6 level (or equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

[53 FR 1332, Jan. 19, 1988, and 53 FR 1740, Jan. 22, 1988]

§ 551.205 Administrative exemption criteria.

An administrative employee is an advisor, assistance, or representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria:

(a) The employee's primary duty consists of work that—

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a mangement official.

(b) The employee performs office or other predominantly nonmanual work which is—

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

§ 551.206 Professional exemption criteria.

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of—

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule exployees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

§ 551.206 Professional exemption criteria.

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of—

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

§ 551.207 Foreign exemption.

(a) This section provides criteria for applying the "foreign exemption" contained in section 13(f) of the Act. An employee who is exempt under the foreign exemption is not subject to the minimum wage and overtime provisions of the Act. The exemption status of an employee to whom the foreign exemption is not applicable shall be determined under the general criteria contained in this subpart.

(b) Except as provided in § 551.208(d), an agency shall apply the foreign exemption to any employee who is permanently stationed in an "exempt area" as defined in § 551.102(h).

(c) An agency shall also apply the foreign exemption on a workweek basis to an employee on temporary duty who is not permanently stationed in an exempt area, but who performs *all* hours of work in a given workweek in an exempt area.

(d) The foreign exemption is not applicable to an employee permanently stationed in an exempt area for any given workweek in which the employee performs *any* hours of work in the United States or in a terrritory under the jurisdiction of the United States.

[51 FR 7426, Mar. 4, 1986. Redesignated at 53 FR 1740, Jan. 22, 1988]

§ 551.208 Application of the executive, administrative, and professional exemption criteria for periods of temporary duty.

(a) This section is not applicable when an employee is detailed to an identical additional position or to a position of the same grade, series code, and basic duties as the employee is regularly assigned to. This section applies only when an employee is assigned to perform duties which are not included in the employee's representative workweek. For the period of any such temporary duty, the exemption criteria contained in §§ 551.202 through 551.206 of this subpart shall be applied using the procedures specified in this section.

(b) A nonexempt employee who is assigned to perform duties which are not included in the employee's permanent position shall remain nonexempt for the entire period of the termporary duty unless the following three conditions apply:

(1) The temporary duty exceeds 30 days;

(2) The employee occupies a permanent position, or is temporarily promoted to a position which is either—

(i) Classified at GS-7 or above (or the equivalent level in other white collar pay systems); or

(ii) Classified as a General Foreman (or the equivalent level in other age systems);

(3) The employee's primary duty for the period of temporary duty is exempt duty as defined in this subpart.

(c) Except as provided in § 551.208(e), an exempt employee who is assigned to perform duties which are not included in the employee's permanent position shall remain exempt for the entire period of the temporary duty unless the following three conditions apply:

(1) The temporary duty exceeds 30 days;

(2) The employee occupies a permanent position, or is temporarily promoted to a position which is either—

(i) Classified at GS-7 or above (or the equivalent level in other white collar pay systems); or

(ii) Classified as a General Foreman (or the equivalent level in other wage systems);

(3) The employee's primary duty for the period of temporary duty is *not* exempt duty as defined in this subpart.

(d) An employee who becomes exempt under the criteria contained in § 551.208(b) shall be considered exempt for the entire period of temporary duty. An employee who becomes nonexempt under the criteria contained in § 551.208(c) shall be considered nonexempt for the entire period of temporary duty.

(e) An exempt employee who is classified at GS-5 or GS-6 (or the equivalent level in other white collar pay systems), or who is classified below General Foreman (or the equivalent level in other wage systems) who is assigned to perform duties which are not included in the employee's permanent position shall remain exempt *only* if

the employee spends more than 80 percent of a given workweek performing exempt duties, in which case the employee is exempt for that workweek.

(f) Notwithstanding any other provision of this section, and regardless of an employee's grade level, the agency may determine that an emergency situation exists which threatens the life or safety of people, or serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to perform emergency duties. In such a designated emergency the exemption status of an employee shall be determined on a workweek basis and the employee shall be nonexempt for any workweek in which the employee performs more than 20 percent nonexempt work.

[51 FR 7426, Mar. 4, 1986. Redesignated and amended at 53 FR 1740, Jan. 22, 1988]

Subpart C—Minimum Wage Provisions

Basic Provision

§ 551.301 Minimum wage.

(a) Except as provided in § 551.311, an agency shall pay each of its employees wages at rates not less than the minimum wage specified in section 6(a)(1) of the Act for all hours of work as defined in Subpart D of this part.

(b) An employee has been paid in compliance with the minimum wage provisions of this subpart if the employee's hourly regular rate of pay, as defined in § 551.511(a) of this part, for the workweek is equal to or in excess of the rate specified in section 6(a)(1) of the Act.

[45 FR 85664, Dec. 30, 1980]

Subminimum Wage

§ 551.311 Subminimum wage.

An agency may, if it meets certain criteria published by the Office of Personnel Management, employ certain groups of less than fully productive employees (e.g., handicapped patient workers) at rates less than the minimum wage specified in section 6(a)(1) of the Act.

[45 FR 85664, Dec. 30, 1980]

Subpart D—Hours of Work

SOURCE: 45 FR 85664, Dec. 30, 1980, unless otherwise noted.

General Provisions

§ 551.401 Basic principles.

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:

(1) Time during which an employee is required to be on duty;

(2) Time during which an employee is suffered or permitted to work; and

(3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

(b) Except as provided in paragraph (c) of this section, paid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work for the purpose of this part.

(c) Paid periods of nonwork (e.g., leave, holidays, or excused absences) are counted as hours of work for the purpose of this part for an employee who receives:

(1) Annual premium pay for standby duty under 5 CFR 550.141;

(2) Annual premium pay for administratively uncontrollable overtime work under 5 CFR 550.151; or

(3) Overtime pay for regularly scheduled overtime work, as defined in 5 CFR 550.103(p) and 610.102(g).

(d) Time that is considered hours of work under this part shall be used only to determine an employee's entitlement to minimum wages or overtime pay under the Act, and shall not be used to determine hours of work for pay administration under title 5, United States Code, or any other authority.

[45 FR 85664, Dec. 30, 1980, as amended at 52 FR 47687, Dec. 16, 1987, and 53 FR 27147, July 19, 1988]

§ 551.402 Agency responsibility.

(a) An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed.

[45 FR 85664, Dec. 30, 1980]

Subpart D—Hours of Work

SOURCE: 45 FR 85664, Dec. 30, 1980, unless otherwise noted.

GENERAL PROVISIONS

§ 551.401 Basic principles.

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:

(1) Time during which an employee is required to be on duty;

(2) Time during which an employee is suffered or permitted to work; and

(3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

(b) Except as provided in paragraph (c) of this section, paid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work for the purpose of this part.

(c) Paid periods of nonwork (e.g., leave, holidays, or excused absences) are counted as hours of work for the purpose of this part for an employee who receives:

(1) Annual premium pay for standby duty under 5 CFR 550.141;

(2) Annual premium pay for administratively uncontrollable overtime work under 5 CFR 550.151; or

(3) Overtime pay for regularly scheduled overtime work, as defined in CFR 550.103(p) and 610.102(g).

(d) Time that is considered hours of work under this part shall be used only to determine an employee's entitlement to minimum wages or overtime pay under the Act, and shall not be used to determine hours of work for pay administration under title 5, United States Code, or any other authority.

[45 FR 85664, Dec. 30, 1980, as amended at 52 FR 47687, Dec. 16, 1987, and 53 FR 27147, July 19, 1988]

§ 551.402 Agency responsibility.

(a) An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed.

(b) An agency shall keep complete and accurate records of all hours worked by its employees.

APPLICATION OF PRINCIPLES IN RELATION TO NORMAL WORKDAY

§ 551.411 Workday.

(a) For the purposes of this part, "workday" means the period between the commencement of the principal activities that an employee is engaged to perform on a given day, and the cessation of the principal activities for that day. All time spent by an employee in the performance of such activities is hours of work. The workday is not limited to a calendar day or any other 24-hour period.

(b) Any rest period authorized by an agency that does not exeed 20 minutes and that is within the workday shall be considered hours of work.

(c) *Bona fide* meal periods shall not be considered hours of work.

[45 FR 85664, Dec. 30, 1980, as amended at 48 FR 36805, Aug. 15, 1983]

§ 551.412 Preparatory or concluding activities.

(a) (1) If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

(2) If the time spent in a preparatory or concluding activity is compensable as hours of work, the agency shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the agency. In no case shall the time credited for the performance of an activity exceed the time scheduled by the agency. The employee shall be credited for the time spent performing preparatory or concluding activities in accordance with paragraph (b) of §551.521 of this part.

(b) A preparatory or concluding activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity. Time spent in preliminary or postliminary activities is excluded from hours of work and is not compensable, even if it occurs between periods of activity that are compensable as hours of work.

[48 FR 36805, Aug. 15, 1983]

APPLICATION OF PRINCIPLES IN RELATION TO OTHER ACTIVITIES

§ 551.421 Regular working hours.

(a) Under the Act there is no requirement that a Federal employee have a regularly scheduled administrative workweek. However, under title 5 United States Code, and Part 610 of this chapter, the head of an agency is required to establish work schedules for his or her employees. In determining what activities constitute hours of work under the Act, there is generally a distinction based on whether the activity is performed by an employee during regular working hours or outside regular working hours. For purposes of this part, "regular working hours" means the days and hours of an employee's regularly scheduled administrative workweek established under part 610 of this chapter.

[45 FR 85664, Dec. 30, 1980, as amended at 48 FR 36806, Aug. 15, 1983]

§ 551.422 Time spent traveling.

(a) Time spent traveling shall be considered hours of work if:

(1) An employee is required to travel during regular working hours;

(2) An employee is required to drive a vehicle or perform other work while traveling;

(3) An employee is required to travel as a passenger on a one-day assignment away from the official duty station; or

(4) An employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours.

(b) An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal

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"home to work" travel; such travel is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work as specified in paragraphs (a)(2) and (a)(3) of this section.

(c) An employee who is offered one mode of transportation, and who is permitted to use an alternative mode of transportation, or an employee who travels at a time other than that selected by the agency, shall be credited with the lesser of:

(1) The actual travel time which is hours of work under this section; or

(2) The estimated travel time which would have been considered hours of work under this section had the employee used the mode of transportation offered by the agency, or traveled at the time selected by the agency.

§ 551.423 Time spent on training or attending a lecture, meeting, or conference.

(a) Time spent in training, whether or not it is under the purview of Part 410 of this chapter, shall be administered as follows:

(1) Time spent in training during regular working hours shall be considered hours of work.

(2) Time spent in training outside regular working hours shall be considered hours of work if:

(i) The employee is directed to participate in the training by his or her employing agency; and

(ii) The purpose of the training is to improve the employee's performance of the duties and responsibilities of his or her current position.

(3) Time spent in apprenticeship or other entry level training, or internship or other career related work study training, or training under the Veterans Readjustment Act (5 CFR Part 307) outside regular working hours shall not be considered hours of work, provided no productive work is performed during such periods.

(4) Time spent by an employee performing work for the agency during a period of training shall be considered hours of work.

(b) The following phrases contained in paragraph (a) of this section, are further clarified:

(1) "Directed to participate" means that the training is required by the agency and the employee's performance or continued retention in his or her current position will be adversely affected by nonenrollment in such training.

(2) Training "to improve the employee's performance * * * of his or her current position" is distinguished from upward mobility training or developmental training to provide an employee the knowledge or skills needed for a subsequent position in the same career field.

(c) Time spent by an employee within an agency's allowance of preparatory time for attendance at training shall be considered hours of work if such preparatory time is:

(1) During an employee's regular working hours; or

(2) Outside the employee's regular working hours, and the purpose of the training meets the requirements of paragraph (a)(2) of this section.

(d) Time spent attending a lecture, meeting, or conference shall be considered hours of work if attendance is:

(1) During an employee's regular working hours; or

(2) Outside an employee's regular working hours, and

(i) The employee is directed by an agency to attend such an event; or

(ii) The employee performs work for the benefit of the agency during such attendance.

§ 551.424 Time spent adjusting grievances or performing representational functions.

(a) Time spent by an employee adjusting his or her grievance (or any appealable action) with an agency during the time the employee is required to be on the agency's premises shall be considered hours of work.

(b) "Official time" granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work. This includes time spent by an employee performing such

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(b) The following phrases contained in paragraph (a) of this section are further clarified:

(1) "Directed to participate" means that the training is required by the agency and the employee's performance or continued retention in his or her current position will be adversely affected by nonenrollment in such training.

(2) Training "to improve the employee's performance * * * of his or her current position" is distinguished from upward mobility training or developmental training to provide an employee the knowledge or skills needed for a subsequent position in the same career field.

(c) Time spent by an employee within an agency's allowance of preparatory time for attendance at training shall be considered hours of work if such preparatory time is:

(1) During an employee's regular working hours; or

(2) Outside the employee's regular working hours, and the purpose of the training meets the requirements of paragraph (a)(2) of this section.

(d) Time spent attending a lecture, meeting, or conference shall be considered hours of work if attendance is:

(1) During an employee's regular working hours; or

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(a) Time spent by an employee adjusting his or her grievance (or any appealable action) with an agency during the time the employee is required to be on the agency's premises shall be considered hours of work.

(b) "Official time" granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work. This includes time spent by an employee performing such

tions during regular working s (including regularly scheduled time hours), or during a period of ular, unscheduled overtime work, ded an event arises incident to sentational functions that must ealt with during the irregular, unauled overtime period.

1.425 Time spent receiving medical attention.

Time spent waiting for and receiving medical attention for illness or ry shall be considered hours of if:

) The medical attention is required workday an employee reported duty and subsequently became ill as injured;

) The time spent receiving medical ntion occurs during the employee's ular working hours; and

) The employee receives the medi- ttention on the agency's premises, t the direction of the agency at a ical facility away from the agen- premises.

b) Time spent taking a physical ex- ination that is required for the em- yee's continued employment with agency shall be considered hours work.

551.426 Time spent in charitable activities.

Time spent working for public or aritable purposes at an agency's re- est, or under an agency's direction control, shall be considered hours work. However, time spent voluntar- y in such activities outside an em- yee's regular working hours is not urs of work.

Special Situations

551.431 Time spent on standby duty or in an on-call status.

(a) An employee will be considered duty and time spent on standby ty shall be considered hours of work

(1) The employee is restricted to an ency's premises, or so close thereto at the employee cannot use the time ectively for his or her own pur- ses; or

(2) The employee, although not re- cted to the agency's premises:

(i) Is restricted to his or her living quarters or designated post of duty;

(ii) Has his or her activities substantially limited; and

(iii) Is required to remain in a state of readiness to perform work.

(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:

(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

§ 551.432 Sleep time.

(a) Except as provided in paragraph (b) of this section, *bona fide* sleep time that fulfills the following conditions shall not be considered hours of work if:

(1) The tour of duty is *24 hours or more;*

(2) During such time there are adequate facilities such that an employee may usually enjoy an uninterrupted period of sleep; and

(3) There are at least 5 hours available for such time during the sleep period.

(b) For employees engaged in fire protection activities or law enforcement activities, the exclusion of sleep time is appropriate for tours of duty *of more than 24 hours* only. However, paragraphs (a)(2) and (a)(3) of this section still apply to employees in these activities.

(c) Not more than 8 hours in a 24-hour period shall be considered sleep time.

(d) If sleep time is interrupted by a call to duty, the time spent on duty is considered hours of work.

Subpart E—Overtime Pay Provisions

SOURCE: 45 FR 85665, Dec. 30, 1980, unless otherwise noted.

BASIC PROVISIONS

§ 551.501 Overtime pay.

(a) Except as otherwise provided in this subpart, an agency shall compensate an employee who is not exempt under Subpart B of this part for all hours of work in excess of 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay.

(b) An employee's "workweek" is a fixed and recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of a day. For employees subject to Part 610 of this chapter, the workweek shall be the same as the administrative workweek defined in § 610.102 of this chapter.

(c) The maximum limitation on an employee's aggregate rate of pay under § 550.105 of this chapter does not apply to overtime pay due the employee under this subpart.

OVERTIME PAY COMPUTATIONS

§ 551.511 Hourly regular rate of pay.

(a) An employee's "hourly regular rate" is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid.

(b) "Total remuneration" includes all remuneration for employment paid to, or on behalf of, an employee except:

(1) Payments as rewards for service the amount of which is not measured by or dependent on hours of work, production, or efficiency (e.g., a cash award for a suggestion made by an employee and adopted by an agency);

(2) Payments for periods during which no work is performed (e.g., leave, holidays, or excused absences) for all employees except those in receipt of—

(i) Annual premium pay for standby duty under 5 CFR 550.141;

(ii) Annual premium pay for administratively uncontrollable overtime work under 5 CFR 550.151; or

(iii) Overtime pay for regularly scheduled overtime work, as defined in 5 CFR 550.103(p) and 610.102(g);

(3) Reimbursements for travel penses, or other similar expenses curred by an employee in furthera of an agency's interest, which are related to hours of work;

(4) Payments made in recognition services performed during a gi period, if both the fact that payme is to be made and the amount of th payment are determined at the s discretion of the agency (e.g., incent awards for outstandingly high-qual work);

(5) Contributions by an agency fund for retirement, insurance similar benefits;

(6) Extra compensation provided a premium rate paid for hours of wor performed by an employee in excess eight in a day, or in excess of th normal workweek applicable to th employee;

(7) Extra compensation provided a premium rate paid for hours of wor performed by an employee on Sunday or a holiday where such pre mium rate is at least one and one-ha times the employee's rate of pay fo work performed in nonovertime hou on other days; or

(8) Extra compensation provided a premium rate paid for hours of wo performed by an employee outside h or her regular working hours, whe such premium rate is at least one an one-half times the employee's rate pay for work performed in nonove time hours.

[45 FR 85665, Dec. 30, 1980, as amende 52 FR 47688, Dec. 16, 1987, and 53 FR 27 July 19, 1988]

§ 551.512 Overtime pay entitlement.

(a) An employee's overtime enti ment under this subpart includes:

(1) The straight time rate of times all overtime hours worked;

(2) One-half times the employ hourly regular rate of pay time overtime hours worked.

(b) An employee's "straight rate of pay" is equal to the emplo rate of pay for his or her position clusive of any premiums or diffe tials) except for an employee wh authorized annual premium pay un § 550.141 or § 550.151 of this chap For an employee who is authori annual premium pay, straight ti rate of pay is equal to basic pay pl annual premium pay divided by t hours for which the basic pay pl annual premium pay are intended.

(c) An employee has been paid compliance with the overtime pay pr visions of this subpart only if the en ployee has received pay at a rate least equal to the employee's straig time rate of pay for all nonovertim hours of work in the workweek.

§ 551.513 Payment of greater overtime pa entitlement.

An employee entitled to overtim pay under this subpart and overtim pay under § 550.113 of this chapter, o under any other authority, shall b paid under whichever authority pro vides the greater overtime entitlemen in the workweek. This overtime pa shall be paid in addition to all pay other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority.

FRACTIONAL HOURS OF WORK

§ 551.521 Fractional hours of work.

(a) An employee shall be compensat for every minute of regular overtime work.

(b) A quarter of an hour shall be the largest fraction of an hour used for crediting irregular or occasional overtime work under this subpart. When irregular or occasional overtime work performed in other than the full fraction, odd minutes shall be rounded up or rounded down to the nearest full fraction of an hour used to credit overtime work.

[48 FR 36806, Aug. 15, 1983]

COMPENSATORY TIME OFF

§ 551.531 Compensatory time off.

(a) An agency may grant an employ compensatory time off in lieu of overtime pay under appropriate statu authority, to be taken during the workweek in which the overtime work was performed.

(b) An employee who earns an over time pay entitlement under this sub part may be granted compensatory

annual premium pay, straight time rate of pay is equal to basic pay plus annual premium pay divided by the hours for which the basic pay plus annual premium pay are intended.

(c) An employee has been paid in compliance with the overtime pay provisions of this subpart only if the employee has received pay at a rate at least equal to the employee's straight time rate of pay for all nonovertime hours of work in the workweek.

§ 551.513 Payment of greater overtime pay entitlement.

An employee entitled to overtime pay under this subpart and overtime pay under § 550.113 of this chapter, or under any other authority, shall be paid under whichever authority provides the greater overtime entitlement in the workweek. This overtime pay shall be paid in addition to all pay, other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority.

FRACTIONAL HOURS OF WORK

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(a) An employee shall be compensated for every minute of regular overtime work.

(b) A quarter of an hour shall be the largest fraction of an hour used for crediting irregular or occasional overtime work under this subpart. When irregular or occasional overtime work is performed in other than the full fraction, odd minutes shall be rounded up or rounded down to the nearest full fraction of an hour used to credit overtime work.

[48 FR 36806, Aug. 15, 1983]

COMPENSATORY TIME OFF

§ 551.531 Compensatory time off.

(a) An agency may grant an employee compensatory time off in lieu of overtime pay under appropriate statutory authority, to be taken during the same workweek in which the overtime work was performed.

(b) An employee who earns an overtime pay entitlement under this subpart may be granted compensatory time off in a subsequent workweek provided:

(1) The employee earns overtime entitlement under § 550.113 of this chapter that is equal to or greater than the employee's overtime entitlement under this subpart; and

(2) The employee makes a written request to substitute compensatory time off for overtime payment.

SPECIAL OVERTIME PAY PROVISIONS

§ 551.541 Employees engaged in fire protection activities or law enforcement activities.

(a) An employee engaged in fire protection activities or law enforcement activities shall be paid at a rate equal to one and one-half times the employee's hourly regular rate of pay for those hours in a tour of duty which exceed the overtime standard for a work period specified in section 7(k) of the Act.

(b) The "tour of duty" of an employee engaged in these activities shall include all time the employee is on duty. Meal periods and sleep periods are included in the tour of duty except as otherwise provided in § 551.432 of this part.

(c) Each agency shall establish the "work period" to be used for application of section 7(k) of the Act. The work period shall be at least seven days and not more than 28 days.

PART 572—TRAVEL AND TRANSPORTATION EXPENSES; NEW APPOINTEES

Subpart A—General Provisions

Sec.
572.101 Agency authority.
572.102 Agencies' discretion in paying travel and transportation expenses.

Subpart B—Shortage Determinations for Positions above Grade GS-15 (or Equivalent)

572.201 Determination of manpower shortage for positions at level GS-16 and above (or equivalents).
572.202 Senior Executive Service: New appointees.

SC550. SUBCHAPTER 550

PAY ADMINISTRATION (GENERAL)
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SC550. SUBCHAPTER 550

PAY ADMINISTRATION (GENERAL)

References: (a) Chapter 55 and 63 of title 5, United States Code
(b) Title 5, Code of Federal Regulations, Part 550, "Pay Administration (General)"
(c) Deputy Assistant Secretary of Defense (Civilian Personnel Policy) memorandum, "Compensatory Time Off," June 3, 1997 (hereby canceled)
(d) Deputy Assistant Secretary of Defense (Civilian Personnel Policy) memorandum, "Limitation on Payment of Appropriated Fund Severance Payments to Certain Nonappropriated Fund (NAF) Positions," January 31, 1995 (hereby canceled)
(e) DoD Directive 1400.25, "DoD Civilian Personnel Management System," November 25, 1996
(f) DoD 7000.14-R, "Department of Defense Financial Management Regulation," Volume 8, "Civilian Pay Policy and Procedures," January 1995
(g) Office of Personnel Management Operating Manual, "The Guide to Processing Personnel Actions," June 1994
(h) Title 29, Code of Federal Regulations, Part 1605, "Guidelines on Discrimination Because of Religion"

SC550.1. PURPOSE

SC550.1.1. Implements Department of Defense (DoD) policy for pay administration under 5 U.S.C. 5501-5597 and 5 CFR 550 (references (a) and (b)) for each employee, except those named in 5 CFR 550.101(b) and (c) (reference (b)). A physician, dentist, nurse, or any other DoD employee paid under delegated 38 U.S.C. authority is not covered by this Subchapter, but is covered by Subchapters 540 through 543 of this Manual.

SC550.1.2. Cancels Deputy Assistant Secretary of Defense (Civilian Personnel Policy) (DASD(CPP)) memoranda of June 3, 1997 and January 31, 1995 (references (c) and (d)).

SC550.2. COVERAGE

This Subchapter applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, and the DoD Field Activities.

SC550.3. POLICY

SC550.3.1. Premium Pay

SC550.3.1.1. Maximum Earnings Limitation. The "Head of Agency" authority under 5 CFR 550.106(a) (reference (b)) to determine the existence of an emergency, thus allowing employees to be paid under the annual versus biweekly maximum earnings limitation on premium pay, is delegated to officials who exercise personnel appointing authority (normally the Head of an installation or activity). These authorities are delegated through, and subject to the authority of, the Military Departments; the Chairman of the Joint Chiefs of Staff; the Combatant Commands; the IG, DoD; the Defense Agencies; and the Director, Administration and Management (DA&M). A copy of each determination must be forwarded immediately to the servicing payroll office and the Office of the Deputy Assistant Secretary of Defense (Civilian Personnel Policy).

SC550.3.1.2. Time Spent in Pre-shift or Post-shift Activities. The "Head of Department" authority under 5 CFR 550.112(b) (reference (b)) concerning pre-shift or post-shift activities is delegated to officials who exercise personnel appointing authority (normally the Head of an installation or activity). These authorities are delegated through, and subject to the authority of, the Military Departments; the Chairman of the Joint Chiefs of Staff; the Combatant Commands; the IG, DoD; the Defense Agencies; and the DA&M. These officials may further delegate authority in writing to appropriate levels.

SC550.3.1.3. Compensatory Time Off

SC550.3.1.3.1. The "Head of Agency" authorities under 5 CFR 550.114 (a) through (c) (reference (b)) concerning the granting of compensatory time off are delegated to officials who exercise personnel appointing authority (normally the Head of an installation or activity). These authorities are delegated through, and subject to the authority of, the Military Departments; the Chairman of the Joint Chiefs of Staff; the Combatant Commands; the IG, DoD; the Defense Agencies; and the DA&M. These

officials may further delegate authority in writing to appropriate levels consistent with the existing pay administration policy.

SC550.3.1.3.2. Compensatory time off earned must be used by the end of the 26th pay period after that in which it was earned. With the exception of National Guard Technicians who may not be paid overtime, compensatory time off not used during the established time period will be paid at the overtime rate at which it was earned, in accordance with reference (f). Employees with unused compensatory time earned before June 8, 1997, (January 5, 1997, for Defense Logistics Agency employees) have had a separate "old compensatory time" account established for their use. Old compensatory time will be charged only if the employee has insufficient current compensatory time (earned on or after June 8, 1997) to cover the compensatory time off requested, in accordance with reference (f). Within each category of compensatory time, the oldest will be charged first.

SC550.3.1.3.3. When a DoD employee separates or transfers to another Department or Defense Agency (e.g., from Army to Navy, from Navy to Defense Logistics Agency, or from Air Force to Department of Treasury), any unused compensatory time off balance shall be paid at the overtime rate at which it was earned, in accordance with reference (f). National Guard Technicians shall forfeit any unused compensatory time off when they separate or transfer to a different Department or Agency.

SC550.3.1.4. Premium Pay for Civilian Air Traffic Controllers (Reserved)

SC550.3.2. Advances in Pay. Section 550.203 of reference (b) permits the Head of an Agency to provide for the advance payment of basic pay to an employee who is newly appointed to a position in the Agency. The Department of Defense does not exercise this authority.

SC550.3.3. Allotments and Assignments from Federal Employees. Information concerning allotments and assignments from DoD civilian employees is contained in DoD financial management regulations, such as Volume 8, "Civilian Pay Policy and Procedures," DoD 7000.14-R (reference (f)).

SC550.3.4. Pay for More than One Position

SC550.3.4.1. Delegation. The authority under 5 CFR 550.504(a) (reference (b)), to make an exception to 5 U.S.C. 5533(a) (reference (a)) upon determining that required services cannot be readily obtained otherwise, is delegated to officials who

exercise personnel appointing authority (normally the Head of an installation or activity). This authority is delegated through, and subject to the authority of, the Military Departments; the Chairman of the Joint Chiefs of Staff; the Combatant Commands; the IG, DoD; the Defense Agencies; and the DA&M. These officials may further delegate authority to appropriate levels.

SC550.3.4.2. Record Keeping. Activities shall maintain records of exceptions that specify the position(s) to which each applies.

SC550.3.5. Severance Pay

SC550.3.5.1. Limitation on Payment of Appropriated Fund Severance Payments to Certain Employees Moving to Nonappropriated Fund (NAF) Positions.

SC550.3.5.1.1. 5 U.S.C. 5595 (reference (a)) prevents DoD appropriated fund employees from receiving severance pay upon movement, on or after January 1, 1987, to DoD nonappropriated fund (NAF) positions without a break in service of more than 3 days. If the employee is involuntarily separated from NAF employment, the original appropriated fund severance pay entitlement is reinstated. This is true unless the employee is entitled to immediate payment of retired or retainer pay as a member or former member of the Uniformed Services, or to an immediate annuity (including an annuity from a NAF instrumentality), or is being removed for cause on charges of misconduct, delinquency, or inefficiency.

SC550.3.5.1.2. Civilian personnel offices/human resources offices (CPOs/HROs) responsible for the authorization of appropriated fund severance pay should not initiate payment of severance pay when it is known that the employee will accept NAF employment without a break in service of more than 3 days. Gaining CPOs/HROs should notify the employee's former servicing office immediately when the employee is appointed to a NAF position without a break in service.

SC550.3.5.2. Authority to Pay Severance Pay in a Lump Sum. 5 U.S.C. 5595(i) (reference (a)) provides that the Secretary of Defense or the Secretary of the Military Department concerned may, upon application by an eligible employee, pay severance pay to the employee in a lump sum rather than on a biweekly basis. Subject authority is delegated to the DA&M and Directors of Defense Agencies with independent appointing authority.

SC550.3.6. Back Pay (Reserved)

SC550.3.7. Pay for Duty Involving Physical Hardship or Hazard. Requests to establish new rates or categories of hazard pay differential must comply with 5 CFR 550.903(b) and shall be submitted through Component Heads to the DASD(CPP).

SC550.3.8. Adjustment of Work Schedules for Religious Observances

SC550.3.8.1. Entitlement. Within the Department of Defense, employee entitlement and responsibility with respect to religious compensatory time off shall be determined by application of 5 CFR 550.1002 (reference (b)). The alternative methods of accommodating religious practices in 29 CFR, Part 1605 (reference (h)) also apply.

SC550.3.8.2. Supplementation. Any supplementation of this section must consider the obligation to balance religious accommodation with the Agency's ability to accomplish its mission, as set forth in references (b) and (h).

SC550.3.8.3. Payment. When a DoD employee separates or transfers to another DoD Component, any unused religious compensatory overtime shall be paid at the basic hourly rate in effect when the time was worked.

SC550.3.9. Collection by Offset from Indebted Government Employees. Information concerning the recovery of certain debts by offset from the current pay account of DoD civilian employees is contained in DoD financial management regulations, such as Volume 8, "Civilian Pay Policy and Procedures," DoD 7000.14-R (reference (f)).

SC550.3.10. Lump-Sum Payment for Restored Annual Leave. 5 U.S.C. 5551(c)(1) (reference (a)) requires lump-sum payment for annual leave restored under 5 U.S.C. 6304(d)(3) (reference (a)) for a DoD employee moving to a position in any Federal Agency or Department outside of the Department of Defense, or to any position within the Department of Defense not located at an installation being closed or realigned as described in 5 U.S.C. 6304(d)(3) (reference (a)).