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RIN 3206–AH11

Miscellaneous Changes in Compensation Regulations

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations to correct or clarify various regulatory provisions dealing with the compensation of Federal employees. Many of the changes were prompted by questions and comments from users of the regulations. The regulatory changes are intended to assist agencies in administering compensation programs and to provide clearer information to employees covered by those programs.

DATES: This rule is effective January 10, 2000.

FOR FURTHER INFORMATION CONTACT: Bryce Baker, (202) 606–2858, FAX: (202) 606–0824, or email to payleave@opm.gov.

SUPPLEMENTARY INFORMATION: On November 24, 1998, the Office of Personnel Management (OPM) published proposed regulations dealing with a number of miscellaneous changes in OPM's pay administration regulations. (See 63 FR 64880.) These changes were proposed to correct various typographical or technical errors or omissions and to codify or clarify OPM policies. The supplementary information section of the proposed regulations changes included a table describing each regulatory change by section number.

OPM received comments from five agencies, one labor union, and four individuals on the proposed regulations. Several agencies made general comments supporting the proposed regulations as providing helpful clarification. We provide below a description of each specific comment and our response. All references to regulatory sections are in title 5, Code of Federal Regulations, unless otherwise noted.

Review of Comments on Proposed Regulations

Aggregate Limitation on Pay

Section 530.202—Discretionary Payment

A union questioned the proposed revision of the definition of *discretionary payment* in § 530.202. It commented that the change is described as a clarification without a supporting citation.

In the supplementary information section of the proposed regulations, we cited the supplementary information section of the original final regulations on the aggregate pay limitation'i.e., 58 FR 50248, September 27, 1993—which included this statement: ''Retention allowances are the only payments made on a pay-period-by-pay-period basis that remain discretionary once they have been authorized.'' Thus, the proposed revision is consistent with the intent of the original aggregate pay limitation regulations.

Section 530.202—Estimated Aggregate Compensation

A union opposed the proposal to revise the definition of *estimated aggregate compensation* in § 530.202 so that it clearly includes nondiscretionary payments to which an employee is expected to be entitled. The union believes that an overestimate of expected compensation would prevent the employee from receiving a discretionary payment. It stated that the current regulation is preferable because it does not allow speculation. The union also stated that if the purpose is to prevent excess payments, § 530.204 already provided an adequate mechanism for handling excess payments.

The proposed change merely clarifies that the term *estimated aggregate compensation* includes estimated or projected nondiscretionary payments. (See the supplementary information accompanying the final aggregate pay limitation regulations at 58 FR 50247 (September 27, 1993).) In the current regulations, the beginning part of the definition already states that a ''projection'' of what an employee ''will receive during the year'' based on ''known factors'' must be made. Thus, estimates of projected nondiscretionary payments must take into account known future changes that will affect the amount payable to the employee. (Note use of the term ''projected'' in § 530.203(c). Also, see examples given in the supplementary information accompanying the proposed rule at 63 FR 64880.) The purpose is to prevent excess payments, consistent with the intent of the law.

Section 530.204 does not deal with preventing or handling excess payments, but rather addresses the payment of monies properly withheld from the employee because of the cap that become payable at the beginning of the next calendar year. A new paragraph (f) in § 530.203 addresses the handling of erroneous excess payments.

We note that, with the exception of retention allowances, the aggregate pay limitation does not control the amount of discretionary payments agencies may award; however, the cap may result in such payments being delayed until the beginning of the next calendar year. If a projection of compensation is found to be high, the agency may immediately pay any previously deferred amounts as allowed under current projections, and any unpaid amount would be payable at the beginning of the next year. In these final regulations, we are revising the definition of *estimated aggregate compensation* as proposed, except that we are substituting the word ''projected'' in place of ''expected'' to emphasize the connection to the introductory part of the definition.

Section 530.203(f)

An agency suggested that we clarify the tax implications of deeming erroneous excess payments to be paid on January 1 of the next calendar year. It noted that, if the payment is treated as taxable income in the year paid (the normal rule), then the taxable income and the aggregate compensation for the subsequent year will differ.

OPM does not have authority to regulate tax matters. Our regulations deem erroneous excess payments to be paid on January 1 of the next calendar year only for the purpose of applying the aggregate pay limitation. Thus, it

may be possible that, in rare cases where the cap is exceeded, agencies will have to maintain different balances for taxable income and aggregate pay.

Basic Pay Administration

Section 531.203(d)(3)

An agency noted that the proposed § 531.203(d)(3) should reference § 531.203(d)(2)(vii) instead of (d)(2)(vi). We agree and are making the correction in these final regulations.

Section 531.203(d)(3) and 531.204(a)(2)

An agency requested that we add appropriate references to statutory special rates for law enforcement officers in §§ 531.203(d)(3) and 531.204(a)(2), consistent with the proposed change in § 531.203(d)(2).

We agree that law enforcement special rates should be excluded in applying the rule in § 531.203(d)(3), since that rule has application only for cases involving other types of special rates that are not basic pay for all purposes. Also, in § 531.204(a)(2) (dealing with pay setting upon promotion), a law enforcement special rate should be included within the term ''existing rate of basic pay.'' We have made appropriate changes in these final regulations.

Pay Retention

Section 536.102

A union opposed the proposed clarification of the definition of *demotion at an employee's request* in § 536.102. It stated that the proposed language referencing management actions ''related to'' personal cause could be broadly interpreted so that employees are miscategorized as ineligible for grade or pay retention.

The proposed revision of the definition of *demotion at an employee's request* is intended to make clear that a management action that is prompted by an employee's misconduct or unacceptable performance cannot be the basis for entitlement to grade or pay retention. By law, an employee is not eligible for grade or pay retention if demoted for personal cause or at the employee's request. Our regulations on grade and pay retention cover not only employees who are subject to purely involuntary reductions in grade or pay (*e.g.,* due to a reduction in force), but also employees whose reductions in grade or pay result from an employee's voluntary choice, if that choice was caused or influenced by a management action. This language is subject to broad interpretation to the benefit of employees. However, the interpretation cannot be so broad as to provide grade or pay retention to employees who voluntarily accept a reduction in grade in lieu of an adverse action based on misconduct or unacceptable performance.

The proposed revision would clarify that an employee who accepts a reduction in grade after receipt of a notice of demotion or separation based on misconduct or unacceptable performance would be considered demoted at the employee's request. Similarly, an employee who voluntarily accepts a lower grade as part of a settlement in lieu of an adverse management action based on personal cause would be considered demoted at the employee's request. Accordingly, we are making the proposed revision in these final regulations, except that we are adding the word ''directly'' before ''related'' to emphasize that the management action is directly prompted by the employee's misconduct or unacceptable performance.

Section 536.205(b)(4)

Two agencies questioned the justification for the proposed new rule, which prevents a retained rate employee's pay from being set below the maximum rate of the range for the employee's new position. One agency stated that the provision is contrary to the intent of the pay retention provision, since it provides for an increase in pay rather than just keeping the employee from losing money.

The proposed rule is designed to address an inequity that exists for certain employees entitled to a retained rate who are moved to a position for which there is a higher basic pay rate range. Under the pay retention rules, if the employee remains in the same position, the retained rate will eventually fall below the maximum (step 10) rate, and the employee will become entitled to that maximum rate. However, if, while still entitled to a retained rate, the employee is moved to a different position for which a higher basic pay rate range applies (*e.g.,* from a regular General Schedule rate range to a special rate range), the employee's pay could be slotted into the new rate range at a rate below the maximum rate. (See 5 CFR 536.205(b)(1)–(2).) In contrast, if the employee had already been at step 10 at the time of the movement, he would have been entitled to the step 10 rate in the new rate range. (See 5 CFR 530.306(e).) Since the maximum rate of the applicable range is the target rate for a retained rate employee, it makes sense to ensure that the employee is treated no worse than an employee receiving such maximum rate. We believe the proposed rule is equitable and appropriate and we are retaining it in these final regulations.

Overtime and Other Premium Pay

Section 550.103—Administrative Workweek

An individual requested clarification regarding the definition of *administrative workweek*-namely, do the seven consecutive 24-hour periods correspond to seven consecutive ''days'' as defined in this section? The answer is yes. The same ''day'' (a 24-hour period, not necessarily a calendar day) used in computing an employee's daily overtime entitlements must also be used in establishing the employee's *administrative workweek.* We have revised the definition of *administrative workweek* to directly link to the definition of *day.*

Section 550.103—Premium Pay

An agency suggested that the word ''earned'' be inserted before ''compensatory time off'' in the definition of *premium pay* in § 550.103. We agree that the intent was to include ''earned'' compensatory time off in the definition of premium pay, since the value of compensatory time off when earned is used in applying premium pay caps and in determining the value of unused compensatory time off when an employee becomes entitled to a cash payment (*e.g.,* at separation). Accordingly, we have revised the definition to clarify this. However, to assist users of the regulations, we have moved the second sentence of the definition, which dealt with how to determine the dollar value of compensatory time off, to the sections of the regulations dealing specifically with compensatory time off. Thus, a new paragraph is being added to §§ 550.114 and 551.531 in these final regulations.

A union objected to the proposal to clarify that compensatory time off is considered premium pay for purposes of applying biweekly and annual pay caps. It stated that employees may never receive pay for compensatory time off earned, since the employee is instead compensated by time off from his or her regular work schedule at a later date. The union concluded that other forms of premium pay should not be limited due to the accumulation of compensatory time off that may never be converted to pay.

The proposed inclusion of compensatory time off earned in the definition of *premium pay* is consistent with the longstanding policy of the Government. Many years ago, the Comptroller General found that compensatory time off should be

assigned a dollar value and used in applying aggregate pay caps. (See 26 Comp. Gen. 750 (1947) and 37 Comp. Gen. 362 (1957).) Compensatory time off is converted to dollars when an employee separates (or otherwise becomes eligible) using the overtime rate in effect at the time the hours were earned.

However, we note that, for employees covered by (nonexempt from) the Fair Labor Standards Act (FLSA) overtime provisions, overtime pay and compensatory time off earned in lieu of overtime pay are not considered to be ''premium pay'' under title 5, United States Code. This means that overtime pay and earned compensatory time off for FLSA-covered employees are disregarded when applying various pay caps, including the premium pay caps in 5 U.S.C. 5547. Thus, the inclusion of compensatory time off in the definition of *premium pay* has relevance only for FLSA-exempt employees. To assist users of the regulations, we are adding a sentence to the definition of *premium pay* to clearly state that FLSA overtime pay and compensatory time off earned in lieu of such overtime pay are excluded.

Sections 550.112(k)(1) and 551.431(a)(1)

An agency commented that the standards used to determine hours of standby duty are incomplete. As an example, the agency pointed out that an employee who is restricted to a ship may still have noncompensable off-duty hours while so restricted. It recommended that the proposed § 550.112(k)(1) and a parallel rule in the FLSA regulations at § 551.431(a)(1) be revised to more clearly consider whether the employee is restricted to an area because of an agency's need for the employee to remain in a constant state of readiness to perform work, as opposed to other reasons. It specifically cited OPM's standby duty premium pay regulations (5 CFR 550.143(a)(1)) as providing preferred language.

We agree that clarification is needed. There are situations where an employee may be relieved from duty but have limited mobility because of geographic isolation. For example, an employee may be temporarily assigned to a ship or to a post in a remote wildland area. Also, an employee may actually reside temporarily or indefinitely on agency premises adjacent to his or her work site. In such cases, the employee would be considered officially on duty only when the employee is required to work or is placed in a standby status by the agency. If an employee is relieved from duty and free to pursue personal activities (though, for practical reasons, limited in where he or she may go), the employee is not in a duty status and the hours are not compensable.

For example, an employee on a ship is not in a duty status if he or she is relieved from duty, released from his specific work station or post of duty, and allowed to pursue personal activities elsewhere on the ship. The fact that some restrictions may be placed on an employee's personal activities does not mean that the employee must be placed in duty status. For instance, certain work-related limitations such as restrictions on alcohol consumption or use of medication are not a basis for finding that an employee's activities are substantially limited. Accordingly, we are revising the proposed § 550.112(k) and making parallel changes in § 551.431(a) to provide appropriate clarification. (Note: If an employee in a nonduty status is called back to the work station to perform irregular or occasional overtime work, the employee is entitled to a minimum of 2 hours of overtime pay, consistent with 5 U.S.C. 5542(b)(1).)

Section 550.112(l)

A union commented that time in an ''on-call'' status should be considered hours of work because of the significant restrictions placed on the employee. The union stated that standby status and on-call status are not distinguishable.

The proposed rule in § 550.112(l) reflects the Government's longstanding policy and practice. (See Comptroller General decisions B–190369, February 23, 1978, and B–205118, March 8, 1982, and Federal Labor Relations Authority decision 51 FLRA No. 105, May 24, 1996.) We believe there is a discernible distinction between on-call status and standby status based on the nature of the restrictions placed upon the employee. We further believe that on-call hours during which the employee is under limited restrictions should not be compensable as hours of work. We are including the proposed § 550.112(l) without change in these final regulations.

Section 550.112(m)(3)

An individual inquired regarding OPM's policy on when sleep time constitutes compensable hours of work. In referencing the proposed rule in § 550.112(m), we realized that the use of the term ''tours of duty'' in paragraph (3) is inappropriate, since it is a defined term in subpart A (see § 550.103) that encompasses only regularly scheduled hours. The sleep time rule operates based on the length of the employee's work shift, without regard to whether the hours involved are regularly scheduled or irregular. Therefore, we have substituted the term ''work shifts'' in place of ''tours of duty'' in § 550.112(m)(3). For consistency, parallel changes are made in § 551.432 of OPM's FLSA overtime regulations.

Section 550.162(f)

A union stated its agreement with the proposed new paragraph (f) in § 550.162, which protects the status of employees receiving annual premium pay (i.e., administratively uncontrollable overtime pay and standby duty premium pay) who suffer an on-the-job injury resulting in entitlement to workers' compensation benefits. An agency requested clarification of the proposed provision in paragraph (f)(3) since some agency reviewers incorrectly interpreted the language to require payment of annual premium pay during periods of leave without pay. It recommended that paragraph be reorganized to distinguish between ''authorization'' of premium pay (which has an impact on retirement benefit computations, but no pay implications) and actual payment of premium pay.

While this matter was explained in the supplementary information section of the notice of proposed regulations, we agree that the regulatory text should be further clarified. We have made appropriate changes in these final regulations.

Section 551.423(a) and Section 410.402(d)

We received questions regarding how to reconcile apparent inconsistencies between § 551.423(a)(2) and § 410.402(d). In the proposed regulations, we had modified § 551.423(a)(2) by adding a cross reference to § 410.402(d). We agree that the two sections appear to be inconsistent with respect to the relationship between performance improvement and creditability of training hours as hours of work. Section 410.402(d) requires that, for training hours outside regular working hours to be considered hours of work, the training in question must be intended to improve an employee's performance up to the fully successful level or to help the employee to perform newly assigned duties. In contrast, § 551.423 uses less limiting language, saying that the training is intended to improve the employee's performance in his or her current position.

To address this inconsistency, we are removing the specific rules in § 410.402(d) and replacing them with a cross reference to § 551.423 and a

sentence clarifying that the part 410 prohibitions on premium pay during training do not apply to FLSA overtime pay. In addition, we are revising the definition of *directed to participate* in § 551.423(b)(1) to clarify that the fact that an agency pays for all or part of the expenses of training is not a basis for deciding whether the training was directed. In many cases, an agency may fund training that is requested by the employee on his or her own initiative. If the training is voluntary, as opposed to being required by the agency, the employee may not be credited with overtime hours of work for time spent in that training.

Section 551.501(a)(5)

An agency commented that the supplementary information section of the proposed regulations included an incorrect citation in the description of the proposed revision of § 551.501(a)(5). Specifically, the referenced title 4 is in the D.C. Code, not the United States Code.

We agree that the citation was incorrect. The pay provisions for Secret Service Uniformed Division and Park Police officers are contained in title 4 of the D.C. Code. (There was no error in the regulatory text.)

Section 551.512

An individual commented that the language describing the ''boosted hour method'' in proposed § 551.512(d)(3) was confusing.

We agree. When we reviewed the proposed new paragraph (d) in § 551.512, we realized that the instructions on computing Fair Labor Standards Act (FLSA) overtime pay in cases involving nondiscretionary bonuses were flawed. In these final rules, we provide clarification by addressing the distribution of a group bonus separately from the computation of overtime pay in an individual bonus situation. We are providing the rules for computing FLSA overtime pay in cases involving nondiscretionary bonuses in a separate, new section, § 551.514. Paragraph (b) of that section covers individual computation methods, while paragraph (c) covers the distribution of a group bonus. We revised the provisions generally to use more precise language. In addition, for individual bonus situations, we have added a bonus hourly rate method in § 551.514(a)(2), which is based on a method found in the Department of Labor's FLSA regulations. (See 29 CFR 778.209.)

As part of our efforts to clarify the treatment of bonuses under the FLSA overtime regulations, we have made one other conforming change. We are amending § 551.511(b)(3) to reference the term ''discretionary cash awards or bonuses.'' (In § 551.514, we refer to § 551.511(b)(3) to contrast nondiscretionary bonuses to discretionary bonuses.)

Severance Pay

Section 550.703—Immediate Annuity

A union commented regarding the proposal to revise the definition of immediate annuity to clarify that it includes any voluntarily postponed annuity (such as a Minimum Retirement Age (MRA) plus 10 years (MRA + 10) postponed annuity under the Federal Employees Retirement System (FERS)). The union recommended that an annuity entitlement should bar severance pay only if the employee is actually beginning to receive annuity payments within 1 month after separation.

The current definition of *immediate annuity* in § 550.703 already provides that a postponed MRA+10 FERS annuity under § 842.204 is considered an immediate annuity. This rule is based on the law, which requires that severance pay be barred to any individual who has ''fulfilled the requirements for immediate annuity.'' The proposed revision makes clear that the term *immediate annuity* for severance pay purposes also encompasses any deferred annuity (*i.e.,* an annuity where eligibility is reached after separation) that begins to accrue within 1 month after separation, including such a deferred MRA+10 annuity under § 842.212(b) whose commencing date is postponed. (Paragraph (a) of the current definition already encompasses deferred annuities that begin accruing within 1 month after separation. However, paragraph (b), which deals with MRA+10 annuities with postponed commencing dates, specifically references only non-deferred MRA+10 annuities. Thus, clarification is needed.) Accordingly, we have decided to go forward with the proposed revision of the definition of *immediate annuity* in these final regulations.

Section 550.703—Nonqualifying Appointment

An individual pointed out that paragraph (f)(5) in the definition of *nonqualifying appointment* referenced an obsolete appointing authority-namely, limited executive assignments under part 305. Accordingly, we are deleting that paragraph and renumbering the succeeding paragraphs.

Section 550.703—Qualifying Appointment

An agency proposed revising the definition of *qualifying appointment* to clarify that the voluntary movement from a qualifying permanent appointment to a time-limited appointment does not adversely affect an otherwise eligible employee's entitlement to severance pay upon expiration of the time-limited appointment.

We do not believe further clarification is needed. The current definitions of *involuntary separation* and *qualifying appointment* both clearly state that a separation resulting from the expiration of a time-limited appointment that took effect within 3 calendar days after a separation from a qualifying permanent appointment is qualifying, without any condition that the first separation be on an involuntary basis. Prior to 1990, OPM regulations did provide that a time-limited appointment could be qualifying only if it followed an involuntary separation from a permanent appointment. However, as the result of a court case, OPM revised the severance pay regulations (*i.e.,* the above-mentioned definitions). The current rules have been in effect since March 1990. (See 54 FR 23215, May 31, 1989, and 55 FR 6591, February 26, 1990, for explanations given in proposed and final rules.)

Section 550.704

An agency requested that § 550.704 (dealing with eligibility for severance pay) be amended to reference the provisions in 5 U.S.C. 5595(h) that prohibit payment of severance pay to certain employees transferring to nonappropriated fund positions.

We already addressed this issue in the proposed regulations in § 550.709(f). We placed the provision in § 550.709 (dealing with the payment of severance pay) because we believe the bar on severance pay during an employee's time in a nonappropriated fund position is more properly viewed as a suspension of payments. Under 5 U.S.C. 5595(h), severance payments may, under certain conditions, be ''resumed'' upon involuntary separation from the nonappropriated fund position.

Section 550.706

An agency requested that we further clarify the rule in § 550.706 regarding when a resignation may be treated as an involuntary separation for severance pay purposes. The agency was concerned about resignations following notice of a proposed removal for (1) failure to accept a directed reassignment

to a new location and (2) medical inability to perform duties. It asked whether a final removal action needed to be issued before such a resignation could be qualifying for severance pay purposes.

The answer is that a final involuntary removal action is not necessary to qualify for severance pay if an employee resigns after receipt of the specific written notice of proposed removal. This is no different from resignation after receipt of a proposed removal as part of a reduction in force. Since we believe that it is clear that the broad language in § 550.706(a)(1) encompasses all specific notices of proposed involuntary separations (as defined in § 550.703), including involuntary separations involving the circumstances cited by the agency, we are making no change in the proposed regulation.

A union opposed the proposed changes in § 550.706, stating that the changes add unnecessary barriers to getting severance pay for employees who resign in the face of a separation and meet the ''substantive requirements.'' We disagree. The proposed changes merely provide a clearer definition of what constitutes a formal, official notice that would trigger entitlement to severance pay, consistent with current OPM policies. By law, severance pay entitlement is based on an involuntary separation. In regulating the law, OPM does allow resignations to be treated as involuntary separations for severance pay purposes if an official notice informs the employee that an involuntary separation will occur. If a notice does not contain the elements (*e.g.,* nature of action, effective date of separation) described in the proposed revision, that shows that the involuntary separation decision has not been finalized. An uncertain separation decision cannot be the basis for severance pay upon resignation, since that would be contrary to the law's requirements. The types of specific notices of involuntary separation that commonly trigger severance pay-e.g., a reduction-in-force separation notice or a notice of separation for failure to accept a geographic reassignment—already routinely include the required elements.

Section 550.709–710

An agency suggested further revising § 550.710 to clarify which agency is responsible for making severance payments when (1) an employee has a qualifying temporary appointment (*i.e.,* appointed within 3 days following a qualifying permanent appointment) and (2) an employee's severance pay resumes following a temporary suspension during one or more nonqualifying temporary appointment.

We agree that clarification in this area would be helpful. The answer is that severance payment responsibility rests with the agency employing the individual at the time of the involuntary separation that triggered the severance pay entitlement. (See 5 U.S.C. 5595(b).) In the case of an employee with a qualifying temporary appointment, the severance pay entitlement is based on the separation from the temporary appointment, not on the separation from the preceding permanent appointment. (See definition of *involuntary separation* in § 550.703.) Accordingly, we are adding language in paragraphs (b) and (c) of § 550.709 to make clear that the agency employing the employee in a qualifying temporary appointment is responsible for making severance payments. We are also adding a sentence in § 550.710 to make clear that, when severance payments resume after a period of suspension during a nonqualifying temporary appointment, severance pay liability continues to rest with the agency originally responsible for the severance payments. In addition, we have corrected several erroneous regulatory citations in the proposed § 550.709(a).

We are also making changes in § 550.709(g) because of recent changes in law. Under section 1104(a) of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106–65, October 5, 1999), the authority of the Department of Defense to pay lump-sum severance payments to certain employees under 5 U.S.C. 5595(i) was extended to cover employees separating through September 30, 2003. The authority had been scheduled to expire on September 30, 1999. In addition, section 3243 added a new paragraph (j) to section 5595, which provides that the Department of Energy may pay severance pay in a lump sum to certain employees whose entitlement derives from the establishment of the National Nuclear Security Administration. We are amending § 550.709(g) to provide a general reference to lump-sum severance payments expressly authorized by law, rather than attempting to include specific references to such laws.

Back Pay

Section 550.803

A union opposed the proposed changes in the definitions of *pay, allowances, and differentials* and *employee*. It specifically objected to the proposed exclusion of retirement investment fund contributions and of post-separation payments (such as lump-sum payments for annual leave, severance payments, and retirement annuity payments). The union stated that no explanation was given for excluding employee and agency contributions to a retirement investment fund and that this would prevent the employee from being made financially whole. The union also stated that OPM provided no rationale or legal support for the exclusion of post-separation payments.

Regarding the exclusion of retirement investment fund contributions, we explained in the supplementary information section of the proposed regulations (63 FR 64883) that the correction of agency errors affecting an employee's Thrift Savings Plan account is subject to specific and independent laws and regulations. (See 5 U.S.C. 8432a and 5 CFR parts 1605 and 1606.) Furthermore, the Comptroller General considered this issue and found that pay, allowances, and differentials under the back pay law do not include earnings on contributions to the Thrift Savings Fund. (See 68 Comp. Gen. 220 (1989).) Therefore, we believe the exclusion of retirement investment fund contributions is necessary and appropriate.

Regarding the exclusion of post-separation benefits, the proposed definition reflects OPM's interpretation of the back pay law. Section 5596(b)(1) of title 5, United States Code, states that the back pay provisions apply to an ''employee of an agency'' who is affected by an unjustified or unwarranted ''personnel action'' resulting in the withdrawal or reduction of ''pay, allowances, or differentials of the employee.'' Also section 5596(b)(1)(A) refers to the ''period for which the personnel action was in effect'' and to the amount the ''employee'' normally would have received during that period. We believe the term ''employee'' clearly refers to an individual currently employed by a Federal agency, consistent with the definition in 5 U.S.C. 2105. (This would include both an individual who was actually employed or who was deemed to be employed based on a retroactive reinstatement.) Furthermore, the terms ''personnel action'' and ''pay, allowances, and differentials'' are commonly used in connection with individuals in an active employment status.

In addition, section 5596(b)(1)(B) states that an employee who is entitled to back pay during a period when an erroneous personnel action was in effect ''is deemed to have performed service for the agency during that period.''

Clearly, Congress would not have included such a requirement if it intended the back pay law to cover benefits to which an employee is entitled after a valid separation from service.

It is true that the existing back pay regulations define the term *employee* to mean an ''employee or former employee of an agency.'' However, OPM understands the reference to a ''former employee'' as merely making clear that an individual separated from Federal service may file a claim for and receive back pay for periods of actual or deemed employment. (Deemed employment refers to periods during which an individual is retroactively placed in an employment status and is deemed to have been performing service as part of a corrective action by an authorized authority—for example, a period during which an erroneous separation was in effect or an individual was erroneously denied reinstatement based on a statutory reemployment right.) We note that the existing regulatory definition of *pay, allowances, and differentials* includes ''monetary and employment benefits'' to which an employee is entitled based on the ''performance of a Federal function,'' which OPM understands to refer to compensation for work by an active employee. In the supplementary information for the final regulations on back pay published in 1981 (46 FR 58271, December 1, 1981), we referred to the definition of *pay, allowances, and differentials* and stated that ''benefits received following retirement are not included because they are not received for the period covered by the corrective action.'' Finally, we point to the former Federal Personnel Manual, which clarified the definition of *employee* as follows:

> ''Employee'' means an employee or former employee of an agency. The back pay law applies to employees or former employees who, *while employed by the Federal Government* [emphasis in original], were affected by an unjustified or unwarranted personnel action that resulted in a loss of pay and to former employees who are improperly denied a statutory reemployment right. [See former Federal Personnel Manual Supplement 990–2, S8–3, page 550–57, April 20, 1984.]

Accordingly, as we proposed, we are clarifying the definitions of *employee* and *pay, allowances, and differentials* consistent with OPM's past practice and policy. The defining of these statutory terms is within OPM's broad regulatory authority in 5 U.S.C. 5596. We note that this does not mean an individual is not entitled to corrective payments if it is found that he or she was paid less than the amount due the individual for severance pay, for a lump-sum payment for annual leave, or for retirement benefits. Under the law governing the payment in question, the individual is entitled to be paid correctly, if a timely claim is filed. However, the provisions of section 5596, including that section's interest provisions, are not applicable in such cases.

Appendix A

An agency suggested that, in appendix A to subpart H of part 550, we clarify the definition of *basic pay—e.g.,* whether it includes locality pay.

We did not intend that appendix A contain a restatement of all the rules governing the various deductions that might apply to a back pay award. While the deduction table in appendix A uses the term *basic pay* in reference to retirement and life insurance deductions, it is expected that readers would understand that they must use the normal definition of that term as set forth in the applicable retirement and life insurance laws and regulations. For example, locality pay is included under those definitions. The second sentence of appendix A already states: ''To compute these deductions, an agency must determine the appropriate base or follow other rules.'' We have revised this sentence by adding the words ''consistent with applicable law.''

Commuting Area

Sections 550.703, 575.103, and 575.203

A union objected to the proposed revision of the definition of *commuting area* in various regulatory parts dealing with severance pay, recruitment bonuses, and relocation bonuses. The union stated four objections, which we will review and respond to in the following paragraphs.

First, the union stated that the proposed regulation would remove existing language referring to the commuting area as the area that ''normally is considered one area for employment purposes.'' The union believes this language is helpful in establishing that a commuting area should be based on ''normal objective expectations'' or ''common general understandings,'' not defined arbitrarily.

We agree that agencies should take into account common general expectations and understandings of what a normal commuting trip is for the particular work site in question, and we will revise the proposed definition to include language stating that an agency must define a commuting area based on the generally held expectations of the local community. However, we believe it does not make sense to use a single commuting area for a metropolitan area that includes multiple Federal work sites that can be at opposite ends of the metropolitan area. For example, both Leesburg, Virginia, and Columbia, Maryland, could be considered to be within the Washington, DC, commuting area. An individual could live in Baltimore and work in Columbia and have a reasonable commuting trip. However, if the work site were changed to Leesburg, an agency could appropriately find that Baltimore is outside the normal commuting area for the Leesburg work site. This example shows that it is essential to base commuting areas on the specific work site in question and to consider the location of the employee's residence relative to that work site. We note that the term ''employee's commuting area'' is used in the definition of *reasonable offer* in the existing severance pay regulations, showing that the location of the individual employee's residence is intended to be a consideration.

Second, the union stated that the proposed regulation gives agencies sole and unfettered discretion in establishing the commuting area. The union stated that the definition of the commuting area should be reached in negotiation with the affected employees' exclusive representatives.

Under existing regulations, it is the employing agency that must make a determination regarding the boundaries of the commuting area in order to apply the applicable law and regulations. The proposed regulation merely makes this responsibility clear. The proposed regulation does not give agencies unlimited discretion in establishing the commuting area. These decisions may not be made on an arbitrary or capricious basis. We note that the proposed regulation requires that the commuting area be an area surrounding the work site that ''encompasses the localities where people live and reasonably can be expected to travel back and forth daily.'' As previously stated, we will add language referencing the need to base decisions about commuting areas on the generally held expectations of people in the local community to emphasize that the interpretation of what is reasonable should be consistent with those expectations. The proposed language does not limit the normal application of the laws governing employees' bargaining rights.

Third, the union stated that the proposed regulation added a ''subjective'' element by using the ''significantly more burdensome'' standard in judging whether an employee who lives outside the

standard commuting area for a new work site should be considered to live within or outside the commuting area for the purpose of the benefit in question. It pointed out that the proposed regulation is based on the employee's current commuting trip, even if the current residence happens to be only a temporary one.

It is necessary to take into account where an employee lives relative to a new work site to ensure equitable treatment of employees. For example, an employee may work in Washington, DC, but choose to live in and commute from Fredericksburg, Virginia, which would be outside the normal commuting area for a work site in DC. If the agency changed the employee's duty station from Washington, DC, to Fredericksburg, it would not be reasonable to award a benefit like severance pay based on a finding that the employee's new work site is outside the commuting area for the old work site. In this example, the employee is closer to the new work site than the old work site and would not be compelled to move in order to accept the job at the new work site. Under a different but less common scenario, an employee may live outside the standard commuting area for a new work site but still be as close or closer in terms of commuting time and distance to the new work site than to the old work site. If a commuting trip is not significantly more burdensome than before the duty station change, we believe the employee should not be considered to be outside the commuting area for the new work site. We agree with the union's point that these decisions should not be based on an employee's temporary residence. We are adding language to address this. We note that reasoned judgment will have to be applied by the authorized agency official in determining whether or not a residence is truly temporary.

Fourth, the union objected to the criterion relating to whether an employee would be compelled to change his or her place of residence because of a change in duty station. It stated that this is too high a standard. The union was concerned that an agency may argue that a 2-hour commute each way does not compel an employee to move. It was also concerned about the vagueness of the term ''other relevant factors'' and the lack of specific mention of factors such as traffic patterns, location of a child's school or day care, and location of medical facilities.

The proposed compelled-to-move rule is not a new rule, but is based on longstanding policy. OPM and its predecessor, the Civil Service Commission, have long used this rule to ensure that severance pay is not awarded in cases where duty station changes did not actually compel an employee to move. (For example, see Comptroller General decisions B–182300 (January 16, 1975, and December 4, 1975) and B–2105424 (June 6, 1983), in which the compelled-to-move criterion was used in adjudicating severance pay claims.)

A similar rule is used under the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS) for employees filing for discontinued service retirement (i.e., early retirement based on involuntary separation). An employee's separation is considered involuntary for discontinued service retirement purposes if he or she refuses to accept a directed reassignment outside the commuting area. Under the retirement rules, it must be determined that complying with the duty station change would ''compel the employee to change his or her residence in order to continue employment.'' (See CSRS and FERS Handbook for Personnel and Payroll Offices, chapter 44, sections 44A2.1–3 and 44B1.1–1C.)

We acknowledge that reasoned judgment is necessary to apply this rule. Since a variety of interrelating factors may come into play in deciding whether an employee would be compelled to move depending on the specific area and the specific employee, it is not possible to prescribe a precise, works-in-every-situation rule. The ''other relevant factors'' language is necessary to allow the agency official to consider all possibly relevant factors, including the factors cited by the union and others that may work to the employee's benefit. Any review of an agency official's decision regarding the compelled-to-move issue will certainly be based on whether it is consistent with what a reasonable person would conclude. We expect that agencies will apply this rule in a fair and equitable way.

In summary, we are proceeding with the proposed change in the definition of *commuting area* as used in the regulations for severance pay, recruitment bonuses, and relocation bonuses; however, we have made some modifications in the proposed language to provide clarification and to respond to comments.

Changes Related to New Firefighter Regulations

On November 23, 1998, we published interim regulations to implement statutory changes affecting the pay of Federal firefighters. (See 63 FR 64589.) Some of those interim regulations affected the proposed regulations that are being made final through this notice. We are making appropriate changes consistent with the interim firefighter pay regulations.

The proposed regulations added a new paragraph (g) to § 550.111; however, the interim firefighter pay regulations added a different paragraph (g) and a subsequent regulation added a paragraph (h) (64 FR 4520, January 29, 1999). Therefore, we are redesignating the proposed paragraph (g) as paragraph (i).

The proposed regulations revised § 550.707(b), but did not include a provision related to computing severance pay for firefighters with variable workweeks. The interim firefighter regulations included a change to address such firefighters in § 550.707(b)(4). We are revising the proposed § 550.707(b) to incorporate the firefighter provision.

The proposed regulations included changes in §§ 550.112(m) and 551.432, which deal with when sleep time is considered hours of work for overtime purposes. These sections of the proposed regulations do not address firefighters paid under the new firefighter pay computation method established by 5 U.S.C. 5545b. Our position is that, for firefighters compensated under 5 U.S.C. 5545b, all official duty hours, including all sleep hours during official duty hours, are compensable hours for all pay purposes. The 2756-hour factor used in computing firefighter hourly rates under 5 U.S.C. 5545b already takes into account the existence of compensable sleep hours. We are revising §§ 550.112(m) and 551.432 accordingly.

The proposed regulations revised § 551.501(a)(5), but did not include a reference to firefighters paid under 5 U.S.C. 5545b, as reflected in the interim firefighter pay regulations. We are revising § 551.501(a)(5) to incorporate that reference.

Other Changes

We are making some additional technical changes not included in the proposed regulations. These changes involve correction of obvious errors.

In § 550.1104(c)(2), we are inserting the word ''contesting,'' which was inadvertently left out when revisions were recently made in the salary offset regulations in subpart K of part 550. (See 63 FR 72100, December 31, 1998, and compare to 5 U.S.C. 5514(a)(3).)

In § 550.1104(d)(2), we are correcting a typographical error. (The word ''account'' was misspelled as ''accont.'')

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects in 5 CFR Parts 410, 530, 531, 536, 550, 551, 575, 591, and 610

Administrative practice and procedure, Claims, Education, Freedom of information, Government employees, Holidays, Law enforcement officers, Reporting and recordkeeping requirements, Travel and transportation expenses, Wages.

U.S. Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, OPM is amending parts 410, 530, 531, 536, 550, 551, 575, 591, and 610 of title 5 of the Code of Federal Regulations as follows:

PART 410—TRAINING

1. The authority citation for part 410 continues to read as follows:

Authority: 5 U.S.C. 4101, *et seq.*; E.O. 11348, 3 CFR, 1967 Comp., p. 275.

Subpart D—Paying for Training Expenses

2. In § 410.402, paragraph (d) is revised to read as follows:

§ 410.402 Paying premium pay.

* * * * *

(d) Regulations governing overtime pay for employees covered by Fair Labor Standards Act (FLSA) during training, education, lectures, or conferences are found in § 551.423 of this chapter. The prohibitions on paying premium pay found in paragraph (a) of this section are not applicable for the purpose of paying FLSA overtime pay.

* * * * *

PART 530—PAY RATES AND SYSTEMS (GENERAL)

3. The authority citation for part 530 continues to read as follows:

Authority: 5 U.S.C. 5305 and 5307; E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316;

Subpart B also issued under secs. 302(c) and 404(c) of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), 104 Stat. 1462 and 1466, respectively;

Subpart C also issued under sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981.

Subpart B—Aggregate Limitation on Pay

4. In § 530.202, the definition of *estimated aggregate compensation* is amended by removing the words ''is entitled'' and adding in their place the words ''is or is projected to be entitled'', and the definition of *discretionary payment* is revised to read as follows:

§ 530.202 Definitions.

* * * * *

Discretionary payment means a payment that an agency has discretion to pay or not to pay to an employee, including a retention allowance but excluding any other payment that is preauthorized to be paid to an employee at a regular fixed rate each pay period.

* * * * *

5. In § 530.203, paragraph (c) is amended by removing the word ''proved'' and adding in its place the word ''provided'', and a new paragraph (f) is added to read as follows:

§ 530.203 Administration of aggregate limitation on pay.

* * * * *

(f) If an agency makes an incorrect estimate of aggregate compensation at an earlier date in the calendar year, the sum of an employee's remaining payments of basic pay (which may not be deferred) may exceed the difference between the aggregate compensation the employee has actually received to date in that calendar year and the rate for level I of the Executive Schedule. In this case, the employee will become indebted to the Federal Government for any amount paid in excess of the level I aggregate limitation. To the extent that the excess amount is attributable to amounts that should have been deferred and would have been payable at the beginning of the next calendar year, the debt will be extinguished on January 1 of the next calendar year. As part of the correction of the error, the excess amount will be deemed to have been paid on January 1 of the next calendar year (when the debt was extinguished) as if it were a deferred excess payment as described in § 530.204 and must be considered part of the employee's aggregate compensation for the new calendar year.

Subpart C—Special Salary Rate Schedules for Recruitment and Retention

6. In § 530.303, paragraphs (d) and (i) are revised to read as follows:

§ 530.303 Establishing and adjusting special salary rate schedules.

* * * * *

(d) All requests to establish or adjust special salary rate schedules must be transmitted directly to OPM's central office by the agency's headquarters. Each request must include a certification by the head of the agency (or another official designated to act on behalf of the head of the agency with respect to the given schedule) that the requested special salary rates are considered necessary to ensure staffing adequate to the accomplishment of the agency's mission.

* * * * *

(i) The determination as to whether an employee is covered by a special salary rate schedule must be based on the employee's position of record and the official duty station for that position. For the purpose of this subpart, the employee's position of record and corresponding official duty station are the position and station documented on the employee's most recent notification of personnel action, excluding a notification associated with a new assignment that is followed immediately (*i.e.*, within 3 workdays) by a reduction in force resulting in the employee's separation before he or she is required to report for duty at the new location. For an employee who is authorized to receive relocation allowances under 5 U.S.C. 5737 in connection with an extended assignment, the position and duty station associated with that assignment are the employee's position of record and official duty station.

PART 531—PAY UNDER THE GENERAL SCHEDULE

7. The authority citation for part 531 continues to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316;

Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2);

Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of FEPCA, Pub. L. 101–509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102–378, 106 Stat. 1356;

Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2);

Subpart E also issued under 5 U.S.C. 5336;

Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682;

Subpart G also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101–509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376.

Subpart B—Determining Rate of Basic Pay

8. In § 531.203:

A. Paragraph (d)(3) is amended by removing ''5303'' and adding in its place ''5305'', by removing ''§ 532.231'' and adding in its place ''part 532'', by adding ''(other than section 403 of FEPCA)'' after ''other legal authority'' and by removing ''(d)(2)(vi)'' and adding in its place ''(d)(2)(vii)'';

B. Paragraph (c)(1)(ii) is amended by adding a new sentence at the end of the paragraph;

C. The introductory text of paragraph (d)(2)(vii) is revised; and

D. Paragraph (f) is revised.

The addition and revisions read as follows:

§ 531.203 General provisions.

* * * * *

(c) * * *

(1) * * *

(ii) * * * If the employee's highest previous rate was greater than the maximum rate for the grade in which pay is being fixed, the maximum rate of basic pay that may be paid to the employee is the maximum rate for that grade.

* * * * *

(d) * * *

(2) * * *

(vii) A special rate established under 5 U.S.C. 5305 and part 530 of this chapter, part 532 of this chapter, or other legal authority (other than section 403 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101–509, 104 Stat. 1465), unless, in a reassignment to another position in the same agency—

* * * * *

(f) *Simultaneous actions.* (1) General pay adjustments must be processed before any individual pay action that takes effect at the same time. General pay adjustments include annual adjustments under 5 U.S.C. 5303, adjustments in locality rates of pay under subpart F of this part, adjustments in special law enforcement adjusted rates of pay under subpart C of this part, adjustments in special salary rates under 5 U.S.C. 5305 or similar provision of law (including section 403 of FEPCA), increases in retained rates under part 536 of this chapter, and increases in continued rates under subparts C and G of this part.

(2) Pay adjustments (other than general pay adjustments) that take effect at the same time must be processed in the order that gives the employee the maximum benefit. When a position or appointment change and entitlement to a higher rate of pay occur at the same time, the higher rate of pay is deemed to be the employee's existing rate of basic pay.

* * * * *

9. In § 531.204, paragraph (a)(2) is revised to read as follows:

§ 531.204 Special provisions.

(a) * * *

(2) For the purpose of section 5334(b) of title 5, United States Code, an employee's ''existing rate of basic pay'' includes any applicable special rate established under section 5305 of title 5, United States Code, or law enforcement special rate established under section 403 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101–509, 104 Stat. 1465).

* * * * *

Subpart C—Special Pay Adjustments for Law Enforcement Officers

10. In § 531.301, the definition of *official duty station* is revised to read as follows:

§ 531.301 Definitions.

* * * * *

Official duty station means the duty station for an employee's position of record as indicated on his or her most recent notification of personnel action, excluding a new duty station for an assignment that is followed immediately (*i.e.*, within 3 workdays) by a reduction in force resulting in the employee's separation before he or she is required to report for duty at the new location. For an employee who is authorized to receive relocation allowances under 5 U.S.C. 5737 in connection with an extended assignment, the temporary duty station associated with that assignment is the employee's official duty station.

* * * * *

11. In § 531.304:

A. Paragraph (b)(4) is amended by removing the word ''and';

B. Paragraph (b)(5) is amended by removing the period at the end of the paragraph and adding a semicolon and the word ''and'' in its place; and

C. A new paragraph (b)(6) is added.

The addition reads as follows:

§ 531.304 Administration of special law enforcement adjusted rates of pay.

* * * * *

(b) * * *

(6) Basic pay that a career appointee in the Senior Executive Service elects to continue while serving under certain Presidential appointments, as provided by 5 U.S.C. 3392(c)(1) and § 317.801 of this chapter.

* * * * *

Subpart D—Within-Grade Increases

12. In § 531.407, paragraph (d) is revised to read as follows:

§ 531.407 Equivalent increase determinations.

* * * * *

(d) *Merit increases.* For the purpose of applying section 5335 of title 5, United States Code, and this subpart, all or any portion of a merit increase, or a zero merit increase, authorized under former section 5404 of title 5, United States Code (which was repealed as of November 1, 1993, by Public Law 103–89), is an equivalent increase.

Subpart F—Locality-Based Comparability Payments

13. In § 531.602, paragraph (1) of the definition of *employee* and the definition of *official duty station* are revised to read as follows:

§ 531.602 Definitions.

* * * * *

Employee means—

(1) An employee in a position to which subchapter III of chapter 53 of title 5, United States Code, applies and whose official duty station is located in a locality pay area within the continental United States, including a GM employee (as defined in § 531.202); and

* * * * *

Official duty station means the duty station for an employee's position of record as indicated on his or her most recent notification of personnel action, excluding a new duty station for an assignment that is followed immediately (*i.e.*, within 3 workdays) by a reduction in force resulting in the employee's separation before he or she is required to report for duty at the new location. For an employee who is authorized to receive relocation allowances under 5 U.S.C. 5737 in connection with an extended assignment, the temporary duty station associated with that assignment is the employee's official duty station.

* * * * *

14. In § 531.606

A. Paragraph (b)(4) is amended by removing the word ''and';

B. Paragraph (b)(5) is amended by removing the period at the end of the paragraph and adding a semicolon and the word ''and'' in its place; and

C. A new paragraph (b)(6) is added.

The addition to read as follows:

§ 531.606 Administration of locality rates of pay.

* * * * *

(b) * * *

(6) Basic pay that a career appointee in the Senior Executive Service elects to continue while serving under certain Presidential appointments, as provided

by 5 U.S.C. 3392(c)(1) and § 317.801 of this chapter.

* * * * *

PART 536—GRADE AND PAY RETENTION

15. The authority citation for part 536 continues to read as follows:

Authority: 5 U.S.C. 5361–5366; sec. 7202(f) of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508), 104 Stat. 1338–336; sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981; § 536.307 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92–502.

Subpart A—Definitions; Coverage and Applicability

16. In § 536.102, the definition of *rate of basic pay* is amended by removing the words ''or any kind'' and adding in their place the words ''of any kind'', and the definition of *demotion at the employee's request* is revised to read as follows:

§ 536.102 Definitions.

* * * * *

Demotion at an employee's request means a reduction in grade that is initiated by the employee for his or her benefit, convenience, or personal advantage. A demotion that is caused or influenced by a management action is not considered to be at an employee's request, except that a voluntary demotion in response to a management action directly related to personal cause is considered to be at the employee's request.

* * * * *

Subpart B—Determination of Retained Grade and Rate of Basic Pay; Loss of, or Termination of Eligibility

§ 536.203 [Amended]

17. In § 536.203, paragraph (b) is amended by removing the misspelled word ''immediatley'' and adding in its place ''immediately'.

18. In § 536.205, paragraph (a)(2) is amended by removing the reference to ''531.204(d)(4)'' and adding in its place ''531.204(e)(4)'', and a new paragraph (b)(4) is added to read as follows:

§ 536.205 Determination of rate of basic pay.

* * * * *

(b) * * *

(4) If an employee moves to another position at the same grade while entitled to pay retention, the employee's rate of basic pay after movement may not be less than the maximum rate of basic pay for the newly applicable rate range.

* * * * *

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart A—Premium Pay

19. The authority citation for subpart A of part 550 continues to read as follows:

Authority: 5 U.S.C. 5304 note, 5305 note, 5541(2)(iv), 5548 and 6101(c); E.O. 12748, 3 CFR, 1991 Comp., p. 316.

20. In § 550.101

A. Paragraph (a)(2) is revised;

B. The introductory text of paragraph (d) is amended by adding ''Sunday,'' after ''night,';

C. Paragraphs (d)(3) and (d)(7) are removed;

D. Paragraphs (d)(4) through (d)(6) are redesignated as (d)(3) through (d)(5), respectively;

E. Paragraphs (d)(8) and (d)(9) are redesignated as (d)(6) and (d)(7), respectively; and

F. Paragraph (d)(1) is revised.

The revisions read as follows:

§ 550.101 Coverage and exemptions.

(a) * * *

(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.

* * * * *

(d) * * *

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

* * * * *

21. Section 550.102 is revised to read as follows:

§ 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.

22. In § 550.103, the definition of *day* is added in alphabetical order, and the definitions of *administrative workweek, agency, law enforcement officer,* and *premium pay are* revised to read as follows:

§ 550.103 Definitions.

* * * * *

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.

* * * * *

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.

* * * * *

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.

* * * * *

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.

* * * * *

§ 550.107 [Amended]

23. In § 550.107, the introductory text is amended by removing ''any period'' and adding in its place ''any pay period''.

24. In § 550.111, a new paragraph (i) is added to read as follows:

§ 550.111 Authorization of overtime pay.

* * * * *

(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.

25. In § 550.112, paragraphs (k), (l), and (m) are added to read as follows:

§ 550.112 Computation of overtime 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.

26. In § 550.114, a new paragraph (e) is added to read as follows:

§ 550.114 Compensatory time off.

* * * * *

(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.

27. In § 550.121, a new paragraph (c) is added to read as follows:

§ 550.121 Authorization of night pay differential.

* * * * *

(c) An employee is not entitled to night pay differential while engaged in training, except as provided in § 410.402 of this chapter.

28. In § 550.131, a new paragraph (d) is added to read as follows:

§ 550.131 Authorization of pay for holiday work.

* * * * *

(d) An employee is not entitled to holiday premium pay while engaged in training, except as provided in § 410.402 of this chapter.

§ 550.153 [Amended]

29. In § 550.153, paragraph (d)(1) is amended by removing ''§ 550.112(f)'' and adding in its place ''§ 550.112(h)''.

30. In § 550.162, a new paragraph (f) is added to read as follows:

§ 550.162 Payment provisions.

* * * * *

(f) Unless an agency discontinues authorization of premium pay under § 550.141 or § 550.151 for all similar positions, it may not discontinue authorization of such premium pay for an individual employee's position—

(1) During a period of paid leave elected by the employee and approved by the agency in lieu of benefits under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 *et seq.*), following a job-related injury;

(2) During a period of continuation of pay under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 *et seq.*);

(3) During a period of leave without pay, if the employee is in receipt of benefits under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 *et seq.*). (Note: No premium pay is payable during leave without pay; however, the continued authorization may prevent a reduction in an employee's retirement benefits if the leave without pay period occurs during the employee's high-3 average salary period.)

31. In § 550.171, the existing text is designated as paragraph (a), and a new paragraph (b) is added to read as follows:

§ 550.171 Authorization of pay for Sunday work.

* * * * *

(b) An employee is not entitled to Sunday premium pay while engaged in training, except as provided in § 410.402 of this chapter.

Subpart B—Advances in Pay

32. The authority citation for subpart B of part 550 continues to read as follows:

Authority: 5 U.S.C. 5524a, 5545a(h)(2)(B); sections 302 and 404 of the Federal Employees Pay Comparability Act of 1990 (Public Law 101–509), 104 Stat. 1462 and 1466, respectively; E.O. 12748, 3 CFR, 1992 Comp., p. 316.

33. In § 550.202, paragraph (c) of the definition of *newly appointed* is revised to read as follows:

§ 550.202 Definitions.

* * * * *

Newly appointed * * *

(c) A permanent appointment in the competitive service following termination of employment under the Student Educational Employment Program (as described in § 213.3202 of this chapter), provided such employee—

(1) Was separated from the service, in a nonpay status, or a combination of both during the entire 90-day period immediately before the permanent appointment; and

(2) Has fully repaid any former advance in pay under § 550.205.

* * * * *

§ 550.205 [Amended]

34. In § 550.205, paragraph (b) is amended by removing the word ''recover'' and adding in its place the word ''recovery''.

Subpart C—Allotments and Assignments From Federal Employees

35. The authority citation for subpart C of part 550 continues to read as follows:

Authority: 5 U.S.C. 5527, E.O. 10982, 3 CFR 1959–1963 Comp., p. 502.

§ 550.311 [Amended]

36. In § 550.311, paragraph (b) is amended by removing ''paragraph (b)'' and adding in its place ''paragraph (a)''.

37. In § 550.312, paragraphs (a), (c), (d), and (e) are revised to read as follows:

§ 550.312 General limitations.

(a) The allotter must specifically designate the allottee and the amount of the allotment.

* * * * *

(c) The allotter must personally authorize a change or cancellation of an allotment.

(d) The agency has no liability in connection with any authorized allotment disbursed by the agency in accordance with the allotter's request.

(e) Any disputes regarding any authorized allotment are a matter between the allotter and the allottee.

38. Section 550.341 is revised to read as follows:

§ 550.341 Scope.

An agency must permit an employee to make an allotment for charitable contributions to a Combined Federal Campaign in accordance with § 950.901 of this chapter.

§ 550.342 [Removed]

39. Section 550.342 is removed.

Subpart G—Severance Pay

40. The authority citation for subpart G of part 550 continues to read as follows:

Authority: 5 U.S.C. 5595; E.O. 11257, 3 CFR, 1964–1965 Comp., p. 357.

41. In § 550.703:

A. The definition of *involuntary separation* is amended by removing the words ''the commuting area'' in both places and adding in each place the words ''his or her commuting area'';

B. A new definition of *employed by the Government of the United States* is added in alphabetical order; the definitions of *commuting area, employee, immediate annuity,* and *nonqualifying appointment* are revised;

C. Paragraph (g) of the definition of *qualifying appointment* is revised; and

D. paragraph (c)(3) of the definition of *reasonable offer* is revised.

The addition and revisions read as follows:

§ 550.703 Definitions.

* * * * *

Commuting area means the geographic area surrounding a work site that encompasses the localities where people live and reasonably can be expected to travel back and forth daily to work, as established by the employing agency based on the generally held expectations of the local community. When an employee's residence is within the standard commuting area for a work site, the work site is within the employee's commuting area. When an employee's residence is outside the standard commuting area for a proposed new work site, the employee's commuting area is deemed to include the expanded area surrounding the employee's residence and including all destinations that can be reached via a commuting trip that is not significantly more burdensome than the current commuting trip. This excludes a commuting trip from a residence where the employee planned to stay only temporarily until he or she could find a more permanent residence closer to his or her work site. For this purpose, a commuting trip to a new work site is considered significantly more burdensome if it would compel the employee to change his or her place of residence in order to continue employment, taking into account commuting time and distance, availability of public transportation, cost, and any other relevant factors.

Employed by the Government of the United States refers to employment by any part of the Government of the United States, including the United States Postal Service and similar independent entities, but excluding enlistment or activation in the armed forces (as defined in 5 U.S.C. 2101).

Employee (for the purpose of establishing initial entitlement to severance pay upon separation) means an employee as defined in 5 U.S.C. 5595(a)(2), excluding an individual employed by the government of the District of Columbia.

(Note to definition of ''employee'': The term ''individual employed'' in 5 U.S.C. 5595(a)(2)(A) refers to an ''employee'' as defined in 5 U.S.C. 2105.)

Immediate annuity means—

(a) A recurring benefit payable under a retirement system applicable to Federal civilian employees or members of the uniformed services that the individual is eligible to receive (disregarding any offset described in § 550.704(b)(5)) at the time of the involuntary separation from civilian service or that begins to accrue within 1 month after such separation, excluding any Social Security retirement benefit; or

(b) A benefit that meets the conditions in paragraph (a) of this definition, except that the benefit begins to accrue more than 1 month after separation solely because the employee elected a later commencing date (such as allowed under § 842.204 of this chapter).

* * * * *

Nonqualifying appointment means an appointment that does not convey eligibility for severance pay under this subpart, including—

(a) An appointment at a noncovered agency;

(b) An appointment in which the employee has an intermittent work schedule;

(c) A Presidential appointment;

(d) An emergency appointment;

(e) An excepted appointment under Schedule C; a noncareer appointment in the Senior Executive Service, as defined in 5 U.S.C. 3132(a); or an equivalent appointment made for similar purposes; and

(f) A time-limited appointment (except for a time-limited appointment that is qualifying because it is made effective within 3 calendar days after separation from a qualifying appointment), including—

(1) A term appointment;

(2) A temporary appointment pending establishment of a register (TAPER);

(3) An overseas limited appointment with a time limitation;

(4) A limited term or limited emergency appointment in the Senior Executive Service, as defined in 5 U.S.C. 3132(a), or an equivalent appointment made for similar purposes;

(5) A Veterans Readjustment Appointment under part 307 of this chapter; and

(6) A Presidential Management Intern appointment under part 362 of this chapter.

Qualifying appointment * * *

(g) A time-limited appointment (including a series of time-limited appointments by the same agency without any intervening break in service) for full-time employment that takes effect within 3 calendar days after the end of one of the qualifying appointments listed in paragraphs (a) through (f) of this definition, provided the time-limited appointment is not nonqualifying on grounds other than the time-limited nature of the appointment.

* * * * *

Reasonable offer means * * *

(c) * * *

(3) Of equal or greater tenure and with the same work schedule (part-time or full-time); and

* * * * *

42. In § 550.706, paragraph (a) is revised and paragraph (c) is added to read as follows:

§ 550.706 Criteria for meeting the requirement for involuntary separation.

(a) An employee who resigns because he or she expects to be involuntarily separated is considered to have been involuntarily separated if the employee resigns after receiving—

(1) Specific written notice that he or she will be involuntarily separated by a particular action effective on a particular date; or

(2) A general written notice of reduction in force or transfer of functions which—

(i) Is issued by a properly authorized agency official;

(ii) Announces that the agency has decided to abolish, or transfer to another commuting area, all positions in the competitive area (as defined in § 351.402 of this chapter) by a particular date (no more than 1 year after the date of the notice); and

(iii) States that, for all employees in that competitive area, a resignation following receipt of the notice constitutes an involuntary separation for severance pay purposes.

* * * * *

(c) A resignation is not considered an involuntary separation if the specific or general written notice is canceled before the separation (based on that resignation) takes effect.

43. In § 550.707, the section heading is revised; paragraph (b) is revised; and a new paragraph (d) is added to read as follows:

§ 550.707 Computation of severance pay fund.

* * * * *

(b) *Basic severance pay allowance for employees with variable work schedules or rates of basic pay.* In the following circumstances, the weekly rate of basic pay used in computing the basic severance pay allowance must be determined based on the weekly average for the last position held by the employee during the 26 biweekly pay periods immediately preceding separation, as follows:

(1) For positions in which the number of hours in the employee's basic work schedule (excluding overtime hours) varies during the year because of part-time work requirements, compute the weekly average of those hours and multiply that average by the hourly rate of basic pay in effect at separation.

(2) For positions in which the rate of annual premium pay for standby duty regularly varies throughout the year, compute the average standby duty premium pay percentage and multiply that percentage by the weekly rate of basic pay (as defined in § 550.103) in effect at separation.

(3) For prevailing rate positions in which the amount of night shift differential pay under 5 U.S.C. 5343(f) varies from week to week under a regularly recurring cycle of work schedules, determine for each week in the averaging period the value of night shift differential pay expressed as a percentage of each week's scheduled rate of pay (as defined in § 532.401 of this chapter), compute the weekly average percentage, and multiply that percentage by the weekly scheduled rate of pay in effect at separation.

(4) For positions with seasonal work requirements, compute the weekly average of hours in a pay status (excluding overtime hours) and multiply that average by the hourly rate of basic pay in effect at separation.

(5) For positions held by firefighters compensated under subpart M of this part, where the firefighter has a recurring cycle of variable workweeks within his or her regular tour of duty (as defined in § 550.1302), compute the weekly average of hours in the regular tour of duty and determine the weekly rate of basic pay based on the average workweek and the rate of basic pay in effect at separation.

* * * * *

(d) *Lifetime limitation.* The severance pay fund is limited to that amount which would provide 52 weeks of severance pay (taking into account weeks of severance pay previously received, as provided in § 550.712).

44. In § 550.708:

A. Paragraph (a) is revised;

B. Paragraph (c) is amended by removing the word ''and'' at the end of the paragraph;

C. Paragraph (d) is amended by removing the period at the end of the paragraph and adding a semicolon and the word ''and'' in its place; and

D. A new paragraph (e) is added.

The revision and addition read as follows:

§ 550.708 Creditable service.

* * * * *

(a) Civilian service as an employee (as defined in 5 U.S.C. 2105), excluding time during a period of nonpay status that is not creditable for annual leave accrual purposes under 5 U.S.C. 6303(a);

* * * * *

(e) Service performed with the government of the District of Columbia by an individual first employed by that government before October 1, 1987, excluding service as a teacher or librarian of the public schools of the District of Columbia.

45. Section 550.709 is revised to read as follows:

§ 550.709 Accrual and payment of severance pay.

(a) Severance pay accrues on a day-to-day basis following the recipient's separation from Federal employment. If severance pay begins in the middle of a pay period, 1 day of severance pay accrues for each workday or applicable holiday left in the pay period at the same rate at which basic pay would have accrued if the recipient were still employed. Thereafter, accrual is based on days from Monday through Friday, with each day worth one-fifth of 1 week's severance pay. Accrual ceases when the severance pay entitlement is suspended or terminated, as provided in §§ 550.710 and 550.711. If severance pay is suspended during a nonqualifying time-limited appointment as provided in § 550.710, accrual will

resume following separation from that appointment.

(b) Severance payments must be made at the same pay period intervals that salary payments would be made if the recipient were still employed. The amount of the severance payment is computed using the recipient's rate of basic pay in effect immediately before separation, with credit for each day of severance pay accrual during the pay period corresponding to the payment date. A severance payment is subject to appropriate deductions for income and Social Security taxes. Severance payments are the responsibility of the agency employing the recipient at the time of the involuntary separation that triggered the current entitlement to severance pay.

(c) When an individual receives severance pay as the result of an involuntary separation from a qualifying time-limited appointment, the severance payment is based on the rate of basic pay received at the time of that separation. Severance payments are the responsibility of the agency that employed the individual under the qualifying time-limited appointment.

(d) When an individual is in a nonpay status immediately before separation, the amount of the severance payment is determined using the basic pay that he or she would have received if he or she had been in a pay status at the time of separation.

(e) When an individual's severance pay fund is computed under § 550.707(b) using an average rate of basic pay, that average rate is used to determine the amount of the severance payment. Exception: In the case of a seasonal employee, the agency may choose instead to use the employee's rate of basic pay at separation (as computed based on the employee's work schedule during the established seasonal work period) and then authorize severance payments only during that seasonal work period.

(f) In the case of individuals who become employed by a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard under the conditions described in 5 U.S.C. 5595(h)(4), payment of severance pay may be suspended consistent with the rules in 5 U.S.C. 5595(h) and any supplemental regulations issued by the Department of Defense.

(g) Notwithstanding paragraph (b) of this section, an agency may pay severance pay in a single lump sum if expressly authorized by law.

46. Section 550.710 is revised to read as follows:

§ 550.710 Suspension of severance pay.

When an individual entitled to severance pay is employed by the Government of the United States or the government of the District of Columbia under a nonqualifying time-limited appointment, severance pay must be suspended during the life of the appointment. Severance pay resumes, without any recomputation, when the employee separates from the nonqualifying time-limited appointment. The resumed severance payments are the responsibility of the agency that originally triggered the individual's severance pay entitlement by separating the individual while he or she was serving under a qualifying appointment.

47. Section 550.711 is revised to read as follows:

§ 550.711 Termination of severance pay entitlement.

Entitlement to severance pay ends when—

(a) The individual entitled to severance pay is employed by the Government of the United States or the government of the District of Columbia, unless employed under a nonqualifying time-limited appointment as described in § 550.710; or

(b) The severance pay fund is exhausted.

§ 550.713 [Amended]

48. Section 550.713 is amended by removing the second sentence.

Subpart H—Back Pay

49. The authority citation for subpart H of part 550 continues to read as follows:

Authority: 5 U.S.C. 5596(c); Pub. L. 100–202, 101 Stat. 1329.

50. In § 550.803, the definitions of *employee* and *pay, allowances, and differentials* are revised to read as follows:

§ 550.803 Definitions.

* * * * *

Employee means an employee of an agency. When the term *employee* is used to describe an individual who is making a back pay claim, it also may mean a former employee.

* * * * *

Pay, allowances, and differentials means pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment. Agency and employee contributions to a retirement investment fund, such as the Thrift Savings Plan, are not covered. Monetary benefits payable to separated or retired employees based upon a separation from service, such as retirement benefits, severance payments, and lump-sum payments for annual leave, are not covered.

* * * * *

51. In § 550.805, paragraph (e) is revised and a new paragraph (h) is added to read as follows:

§ 550.805 Back pay computations.

* * * * *

(e) In computing the net amount of back pay payable under section 5596 of title 5, United States Code, and this subpart, an agency must make the following offsets and deductions (in the order shown) from the gross back pay award:

(1) Any outside earnings (gross earnings less any associated business losses and ordinary and necessary business expenses) received by an employee for other employment (including a business enterprise) undertaken to replace the employment from which the employee was separated by the unjustified or unwarranted personnel action during the interim period covered by the corrective action. Do not count earnings from additional or ''moonlight'' employment the employee may have engaged in while Federally employed (before separation) and while erroneously separated.

(2) Any erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action, which, in the case of erroneous payments received from a Federal employee retirement system, must be returned to the appropriate system. Such payments must be recovered from the back pay award in the following order:

(i) Retirement annuity payments (i.e., gross annuity less deductions for life insurance and health benefits premiums, if those premiums can be recovered by the affected retirement system from the insurance carrier);

(ii) Refunds of retirement contributions (i.e., gross refund before any deductions);

(iii) Severance pay (i.e., gross payments before any deductions); and

(iv) A lump-sum payment for annual leave (i.e., gross payment before any deductions).

(3) Authorized deductions of the type that would have been made from the employee's pay (if paid when properly due) in accordance with the normal order of precedence for deductions from pay established by the agency, subject to any applicable law or regulation, including, but not limited to, the

following types of deductions, as applicable:

(i) Mandatory employee retirement contributions toward a defined benefit plan, such as the Civil Service Retirement System or the defined benefit component of the Federal Employees Retirement System;

(ii) Social Security taxes and Medicare taxes;

(iii) Health benefits premiums, if coverage continued during a period of erroneous retirement (with paid premiums recoverable by the retirement system) or is retroactively reinstated at the employee's election under 5 U.S.C. 8908(a);

(iv) Life insurance premiums if—

(A) Coverage continued during a period of erroneous retirement;

(B) Coverage was stopped during an erroneous suspension or separation and the employee suffered death or accidental dismemberment during that period (consistent with 5 U.S.C. 8706(d)); or

(C) Additional premiums are owed because of a retroactive increase in basic pay; and

(v) Federal income tax withholdings.

(Note to paragraph (e)(3): See appendix A to this subpart for additional information on computing certain deductions.)

(4) Administrative offsets under 31 U.S.C. 3716 to recover any other outstanding debt(s) owed to the Federal Government by the employee, as appropriate.

* * * * *

(h) Agencies must correct errors that affect an employee's Thrift Savings Plan account consistent with regulations prescribed by the Federal Retirement Thrift Investment Board. (See parts 1605 and 1606 of this title.)

52. In § 550.806, paragraph (h) is removed, and paragraph (a) is amended by redesignating paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2) to read as follows:

§ 550.806 Interest computations.

(a) * * *

(2) Interest accrual ends at a time selected by the agency that is no more than 30 days before the date of the back pay interest payment. No interest is payable if a complete back pay payment is made within 30 days after any erroneous withdrawal, reduction, or denial of a payment, and the interest accrual ending date is set to coincide with the interest accrual starting date.

* * * * *

53. A new appendix A is added to subpart H of part 550 to read as follows:

Appendix A to Subpart H of Part 550—Information on Computing Certain Common Deductions From Back Pay Awards

To determine the net back payment owed an employee, an agency must make certain required deductions. (See § 550.805(e)(3).) To compute these deductions, an agency must determine the appropriate base or follow other rules, consistent with applicable law. Some deductions, such as tax deductions, are not subject to OPM regulation. To assist agencies, this appendix summarizes the rules for certain common deductions. For further information on Federal tax deductions from back pay awards, please contact the Internal Revenue Service directly or review relevant IRS publications.

Type of deduction	How to Compute the deduction
(a) Mandatory employee retirement contributions.	Compute the deduction based on the basic pay portion of gross back pay before adding interest or applying any offset or deduction.
(b) Life insurance premiums	Compute the deduction based on the basic pay portion of gross back pay before adding interest or applying any offset or deduction.
(c) Social Security (OASDI) and Medicare taxes.	Compute the deduction based on adjusted gross back pay (gross back pay less the offset for outside earnings under § 550.805(e)(1), but before adding interest). The deduction may be reduced dollar-for-dollar by the amount of any Social Security or Medicare taxes that were withheld from erroneous payments made in the same calendar year as the back pay award, but only if— (1) Those erroneous payments were actually recovered by the Government by offsetting the back pay award as provided in § 550.805(e)(2); and (2) Those withheld taxes have not already been repaid to the employee. Note: Social Security taxes are subject to the applicable Social Security tax wage base limit. In addition, see IRS guidance regarding possible correction and refunding of Social Security and Medicare taxes withheld from erroneous payments in a prior calendar year.
(d) Federal income tax withholdings	Compute the deduction based on adjusted gross back pay (gross back pay less the offset for outside earnings under § 550.805(e)(1), but before adding interest) less any part of back pay not subject to income tax deductions, such as nonforeign area cost-of-living allowances and contributions to the Thrift Savings Plan that are deducted from the pay of the employee. The deduction may be reduced dollar-for-dollar by the amount of any Federal income taxes withheld from erroneous payments made in the same calendar year as the back pay award, but only if— (1) Those erroneous payments were actually recovered by the Government by offsetting the back pay award as provided in § 550.805(e)(2); and (2) Those withheld taxes have not already been repaid to the employee. Note: Additional Federal income tax withholdings from the interest portion of the back pay award may be required by the Internal Revenue Service in certain specific circumstances.

Subpart I—Pay for Duty Involving Physical Hardship or Hazard

54. The authority citation for subpart I of part 550 continues to read as follows:

Authority: 5 U.S.C. 5545(d), 5548(b).

55. In § 550.902, the definition of *employee* is revised to read as follows:

§ 550.902 Definitions.

* * * * *

Employee means an employee covered by the General Schedule (i.e., covered by chapter 51 and subchapter III of chapter 53 of title 5, United States Code).

* * * * *

56. In § 550.903, the introductory text of paragraph (b) is revised to read as follows:

§ 550.903 Establishment of hazard pay differentials.

* * * * *

(b) Amendments to appendix A of this subpart may be made by OPM on its own motion or at the request of the head of an agency (or authorized designee).

The head of an agency (or authorized designee) may recommend the rate of hazard pay differential to be established and must submit, with its request for an amendment, information about the hazardous duty or duty involving physical hardship showing—

* * * * *

57. Section 550.905 is revised to read as follows:

§ 550.905 Payment of hazard pay differential.

(a) When an employee performs duty for which a hazard pay differential is authorized, the agency must pay the hazard pay differential for the hours in a pay status on the day (a calendar day or a 24-hour period, when designated by the agency) on which the duty is performed, except as provided in paragraph (b) of this section. Hours in a pay status for work performed during a continuous period extending over 2 days must be considered to have been performed on the day on which the work began, and the allowable differential must be charged to that day.

(b) Employees may not be paid a hazardous duty differential for hours for which they receive annual premium pay for regularly scheduled standby duty under § 550.141, annual premium pay for administratively uncontrollable overtime work under § 550.151, or availability pay for criminal investigators under § 550.181.

Subpart K—Collection of Offset From Indebted Government Employees

58. The authority citation for subpart K of part 550 continues to read as follows:

Authority: 5 U.S.C. 5514; sec. 8(1) of E.O. 11609; redesignated in sec. 2–1 of E.O. 12107.

§ 550.1104 [Amended]

59. In § 550.1104, paragraph (c)(2) is amended by adding ''contesting'' after ''point of contact for'', and paragraph (d)(2) is amended by removing ''accont'' and adding ''account'' in its place.

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

60. The authority citation for part 551 continues to read as follows:

Authority: 5 U.S.C. 5542(c); Sec. 4(f) of the Fair Labor Standards Act of 1938, as amended by Pub. L. 93–259, 88 Stat. 55 (29 U.S.C. 204f).

Subpart D—Hours of Work

§ 551.401 [Amended]

61. In § 551.401, paragraphs (f) and (g) are amended by removing ''§ 410.602'' and adding in its place ''§ 410.402'.

62. In § 551.423, paragraph (a)(3) is amended by removing the period at the end of the paragraph and adding in its place '', except as provided by § 410.402(b) of this chapter and paragraphs (f) and (g) of § 551.401.'' and paragraph (b)(1) is revised to read as follows:

§ 551.423 Time spent in training or attending a lecture, meeting, or conference.

* * * * *

(b) * * *

(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. The fact that an agency pays for all or part of the expenses of training does not create an entitlement to overtime hours of work unless participation in the training is directed by the agency.

* * * * *

63. In § 551.431, paragraph (a) is revised to read as follows:

§ 551.431 Time spent on standby duty or in an on-call status.

(a)(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.

* * * * *

64. In § 551.432:

A. Paragraph (a)(1) is amended by removing ''tour of duty'' and adding ''work shift'' in its place;

B. Paragraphs (b) and (c) are revised; and

C. New paragraphs (e) and (f) are added.

The revisions and additions read as follows:

§ 551.432 Sleep time.

* * * * *

(b) For employees engaged in law enforcement or fire protection activities who receive annual premium pay under 5 U.S.C. 5545(c)(1) or (2), the requirements of paragraph (a) of this section apply, except that on-duty sleep time may be excluded from hours of work only if the work shift is more than 24 hours.

(c) The total amount of bona fide sleep and meal time that may be excluded from hours of work may not exceed 8 hours in a 24-hour period.

* * * * *

(e) On-duty sleep and meal time during regularly scheduled hours for which standby duty premium pay under 5 U.S.C. 5545(c)(1) is payable may not be excluded from hours of work.

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

Subpart E—Overtime Pay Provisions

65. In § 551.501, paragraph (a)(2) is amended by removing ''§ 410.602'' and adding in its place ''§ 410.402'', and paragraph (a)(5) is revised to read as follows:

§ 551.501 Overtime pay.

(a) * * *

(5) On the basis of hours of work in excess of 40 hours in a workweek for an employee engaged in fire protection or law enforcement activities when the employee is receiving compensation under 5 U.S.C. 5545(c)(1) or (2) or 5545b, or is not an employee (as defined in 5 U.S.C. 5541(2)) for the purposes of 5 U.S.C. 5542, 5543, and 5544;

* * * * *

§ 551.511 [Amended]

66. In § 551.511, paragraph (b)(3) is amended by removing ''(*e.g.,* incentive awards for outstandingly high-quality work)'' and adding in its place ''(*i.e.,* discretionary cash awards or bonuses)''.

§ 551.512 [Amended]

67. In § 551.512, paragraph (b) is amended by removing ''(exclusive of any premiums or differentials)'' and adding in its place ''(exclusive of any premiums, differentials, or cash awards or bonuses)''.

68. A new § 551.514 is added to read as follows:

§ 551.514 Nondiscretionary bonuses.

(a) When an employee earns a nondiscretionary cash award or bonus (as opposed to discretionary cash awards or bonuses as described in § 551.511(b)(3)), the bonus must be taken into account in determining overtime pay for the period of time during which the bonus was earned. An agency may meet the overtime pay requirements for the bonus period by using one of the procedures described in paragraphs (b) and (c) of this section. The procedures in paragraphs (b)(1) and (b)(2) of this section calculate the additional overtime pay the employee is due. The procedures in paragraphs (b)(3), (c)(2), and (c)(3) of this section describe methods where the overtime pay requirements are met in the calculation or distribution of the bonus itself.

(b) *Individual computation methods.* (1) *Week-by-week recomputation method.* The agency may compute the additional overtime pay owed an employee by allocating the nondiscretionary bonus payable under the agency bonus plan to the weeks or hours during which it was earned and recomputing the employee's total remuneration, hourly regular rate, and overtime pay for each applicable workweek in the bonus period.

(2) *Bonus hourly rate method.* The agency may assume that an equal amount of the nondiscretionary bonus applies to each hour worked during the bonus period and derive a bonus hourly rate by dividing the employee's total bonus by the total number of hours worked by the employee during the bonus period. Then the agency may compute the employee's additional overtime pay by multiplying one-half of that bonus hourly rate by the total number of overtime hours worked by the employee during the bonus period.

(3) *Percentage bonus method.* An agency may establish a nondiscretionary bonus as a fixed percentage of total pay (*i.e.,* pre-bonus total remuneration, including straight time pay for any overtime hours, plus any half-rate overtime pay under § 551.512(a)(2)) to be earned by the employee during a future period of service. This method may not be used to circumvent any bonus limitations that might otherwise apply. At the agency's discretion, the portion of the bonus attributable to the employee's half-rate overtime pay under § 551.512(a)(2) may be excluded in applying bonus limitations, since it can be viewed as constituting additional FLSA overtime pay. (This method does not apply to nondiscretionary bonuses established as a percentage of a segment of pay, such as ratings-based cash awards under § 451.104(g) of this chapter that are expressed as a percentage of basic pay, excluding locality adjustments. To meet overtime pay requirements for these types of bonuses, use one of the methods described in paragraphs (b)(1) or (b)(2) of this section.)

(c) *Group-based bonus distribution methods.* (1) For employees who have earned nondiscretionary group cash awards or bonuses, payment of a bonus under one of the methods of distribution described in paragraphs (c)(2) and (c)(3) of this section is considered to be in full compliance with the overtime pay requirements of this subpart. These methods may not be used to circumvent any bonus limitations that might otherwise apply.

(2) *Percentage method.* (i) Identify the amount of the group bonus under the agency's bonus plan and the period of time during which it was earned;

(ii) Establish the group bonus as a percentage of the total pay (i.e., total remuneration before considering the group bonus, including straight time pay for any overtime hours, plus any half-rate overtime pay under § 551.512(a)(2)) earned by employees in the group during the bonus period; and (iii) Multiply the percentage in paragraph (c)(2)(ii) of this section times each individual employee's total pay earned during the bonus period to determine each employee's share of the group bonus.

(3) *Boosted hour method.* (i) Identify the amount of the group bonus under the agency's bonus plan and the period of time during which it was earned;

(ii) Determine the total number of boosted hours for all employees under the group bonus plan by adding up the total number of hours of work by those employees (nonovertime and overtime hours) and increasing that sum by one-half of the total number of overtime hours;

(iii) Divide the amount of the group bonus by the total number of boosted hours for all employees under the group bonus plan to determine the amount of the bonus allocable to each hour; and (iv) Multiply this hourly bonus amount by the number of boosted hours credited to each individual employee in the bonus period to determine each employee's share of the group bonus.

69. In § 551.531, a new paragraph (e) is added to read as follows:

§ 551.531 Compensatory time off.

* * * * *

(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.

§ 551.541 [Amended]

70. In § 551.541, paragraph (b) is amended by removing ''511.411(c)'' and adding in its place ''551.411(c)''.

PART 575—RECRUITMENT AND RELOCATION BONUSES; RETENTION ALLOWANCES; SUPERVISORY DIFFERENTIALS

71. The authority citation for part 575 is revised to read as follows:

Authority: 5 U.S.C. 1104(a)(2), 5753, 5754, and 5755; secs. 302 and 404 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101–509), 104 Stat. 1462 and 1466, respectively; E.O. 12748, 3 CFR, 1992 Comp., p. 316.

Subpart A—Recruitment Bonuses

72. In § 575.102, paragraph (a)(3) is revised to read as follows:

§ 575.102 Delegation of authority.

(a) * * *

(3) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

* * * * *

73. In § 575.103, the definition of *involuntary separated* is amended by removing the words ''the commuting area'' wherever they appear and adding in their place the words ''his or her commuting area''; the definition of *service agreement* is amended by removing the words ''of a minimum of 12 months''; and the definition of *commuting area* is revised to read as follows:

§ 575.103 Definitions.

* * * * *

Commuting area has the meaning given that term in § 575.203.

* * * * *

Subpart B—Relocation Bonuses

74. In § 575.202, paragraph (a)(3) is revised to read as follows:

§ 575.202 Delegation of authority.

(a) * * *

(3) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

* * * * *

75. In § 575.203, the definition of *involuntary separated* is amended by removing the words ''the commuting area'' wherever they appear and adding in their place the words ''his or her commuting area''; and the definitions of *commuting area* and *employee* are revised to read as follows:

§ 575.203 Definitions.

* * * * *

Commuting area means the geographic area surrounding a work site that encompasses the localities where people live and reasonably can be expected to travel back and forth daily to work, as established by the employing agency based on the generally held expectations of the local community. When an employee's residence is within the standard commuting area for a work site, the work site is within the employee's commuting area. When an employee's residence is outside the standard commuting area for a proposed new work site, the employee's commuting area is deemed to include the expanded area surrounding the employee's residence and including all destinations that can be reached via a commuting trip that is not significantly more burdensome than the current commuting trip. This excludes a commuting trip from a residence where the employee planned to stay only temporarily until he or she could find a more permanent residence closer to his or her work site. For this purpose, a commuting trip to a new work site is considered significantly more burdensome if it would compel the employee to change his or her place of residence in order to continue employment, taking into account commuting time and distance, availability of public transportation, cost, and any other relevant factors.

Employee means—

(a) An individual in the civil service (as defined in 5 U.S.C. 2101) who is relocated without a break in service upon appointment to a position in or under an agency in a different commuting area; or

(b) An employee in or under an agency whose duty station is changed permanently or temporarily to a different commuting area.

* * * * *

§ 575.205 [Amended]

76. In § 575.205, paragraph (b)(5) is amended by adding a parenthesis after the word ''Code''.

Subpart C—Retention Allowances

77. In § 575.302, paragraph (a)(3) is revised to read as follows:

§ 575.302 Delegation of authority.

(a) * * *

(3) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

* * * * *

78. In § 575.307, paragraph (a) is revised to read as follows:

§ 575.307 Reduction or termination of retention allowances.

(a) The agency must reduce or terminate the authorized amount of a retention allowance to the extent necessary to ensure that the employee's estimated aggregate compensation, as defined in § 530.202 of this chapter, does not exceed the rate for level I of the Executive Schedule at the end of the calendar year.

* * * * *

PART 591—ALLOWANCES AND DIFFERENTIALS

Subpart B—Cost-of-Living Allowance and Post Differential—Nonforeign Areas

79. The authority citation for subpart B of part 591 continues to read as follows:

Authority: 5 U.S.C. 5941; E.O. 10000, 3 CFR, 1943–1948 Comp., p. 792; and E.O. 12510, 3 CFR, 1985 Comp., 338.

80. In § 591.201, the definition of *official duty station* is revised to read as follows:

§ 591.201 Definitions.

* * * * *

Official duty station means the duty station for an employee's position of record as indicated on his or her most recent notification of personnel action, excluding a new duty station for an assignment that is followed immediately (i.e., within 3 workdays) by a reduction in force resulting in the employee's separation before he or she is required to report for duty at the new location. For an employee who is authorized to receive relocation allowances under 5 U.S.C. 5737 in connection with an extended assignment, the temporary duty station associated with that assignment is the employee's official duty station.

* * * * *

PART 610—HOURS OF DUTY

Subpart A—Weekly and Daily Scheduling of Work

81. The authority citation for subpart A of part 610 is revised to read as follows:

Authority: 5 U.S.C. 6101; sec. 1(1) of E.O. 11228, 3 CFR, 1964–1965 Comp., p. 317.

82. In § 610.102, the definition of *administrative workweek* is revised to read as follows:

§ 610.102 Definitions.

* * * * *

Administrative workweek means any period of 7 consecutive 24-hour periods designated in advance by the head of the agency under section 6101 of title 5, United States Code.

* * * * *

§ 610.111 [Amended]

83. Section 610.111 is amended by removing the word ''regulation'' in the introductory text of paragraph (a) and adding the words ''a written agency policy statement'' in its place, by removing the word ''regulation'' in paragraphs (a)(1) and (a)(2) and adding in each place the words ''written agency policy statement'', and by removing the words ''regulation of the agency'' in paragraph (c)(2) and adding the words ''a written agency policy statement''.

Subpart D—Flexible and Compressed Work Schedules

84. The authority citation for subpart D of part 610 continues to read as follows:

Authority: 5 U.S.C. 6133(a).

85. In § 610.407, the existing text is designated as paragraph (a), and a new paragraph (b) is added to read as follows:

§ 610.407 Premium pay for holiday work for employees on compressed work schedules.

* * * * *

(b) An employee on a compressed work schedule is not entitled to holiday premium pay while engaged in training, except as provided in § 410.402 of this chapter.

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