

§ 178.208 Applicability of general procedures.

When not in conflict with this subpart, the provisions of subpart A of this part relating to procedures applicable to claims generally are also applicable to the settlement of account of deceased civilian officers and employees.

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**OFFICE OF PERSONNEL
MANAGEMENT**
5 CFR Part 551
RIN 3206-AG70
**Pay Administration Under the Fair
Labor Standards Act**

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is publishing a proposed rule to amend regulations on the Fair Labor Standards Act (referred to as "the Act" or "FLSA"). The purpose of the majority of the revisions is to make text clearer, standardize terms, change to the active voice, reorganize material for added clarity, insert or revise headings to accurately reflect content, reduce internal cross-referencing, correct typographical, punctuation, and grammatical errors, and use "plain English." The proposed rule includes guidance published in the sunsetted Federal Personnel Manual (FPM), adds certain work in the computer software field to the professional exemption criteria, adds an exemption for certain pilots, adds the statutory exclusion of customs officers, and includes regulations on child labor and claims and compliance.

DATES: Written comments will be considered if received on or before October 24, 1997. Please organize and identify comments by section and paragraph designation.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Jeffrey D. Miller, Director, Classification Appeals and FLSA Programs, Office of Personnel Management, 1900 E Street NW., Room 7679, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Jeffrey D. Miller, Director, Classification Appeals and FLSA Programs, by telephone on 202-606-2990; by fax on 202-606-2663; or by e-mail at ADOMSOE@opm.gov.

SUPPLEMENTARY INFORMATION: On January 10, 1995, OPM published a proposed rule (60 FR 2549) to amend regulations on the Fair Labor Standards Act by adding a subpart F—Complaints and Compliance. That subpart F provided for FLSA complaint adjudication by the agency involved rather than by OPM. Comments were received from four Federal agencies, four labor organizations, and one employee organization. OPM reconsidered its proposal and withdrew the proposed subpart F (62 FR 9995, March 5, 1997).

The purpose of the majority of these revisions is to make text clearer, standardize terms, change to the active voice, reorganize material for added clarity, insert or revise headings to accurately reflect content, reduce internal cross-referencing, correct typographical, punctuation, and grammatical errors, and use "plain English." The proposed rule includes guidance published in the sunsetted Federal Personnel Manual, adds certain work in the computer software field to the professional exemption criteria, adds an exemption for certain pilots, adds the statutory exclusion of customs officers, and adds two new subparts, subpart F—Child Labor and subpart G—FLSA Claims and Compliance. The changes are discussed section by section below. When the reason for a revision is one or more of the ones described in this paragraph, we do not repeat the reason when we describe the change.

1. Nomenclature Changes

References to the Office of Personnel Management are changed to "OPM"; the word "shall" is changed to "will" or "must," as appropriate; the phrase "shall be" is changed to "is"; the phrase "employee in a position properly classified" is substituted for "employee classified"; and "primary duty test" is substituted for "primary duty criterion."

2. Miscellaneous Changes

The following changes are made throughout: quotation marks are removed, and paragraph headings are added.

3. New Sections

Two new sections are added to subpart B—Exemptions and the subpart is retitled "Exemptions and Exclusions." One new section (551.204) describes the exemption of Federal Wage System employees. The other new section (551.211) describes the statutory exclusion of customs officers of the United States Customs Service. Customs officers whose exclusive entitlement to overtime pay is governed by section 5 of

the Act of Feb. 13, 1911, as amended (sections 261 and 267 of title 19, United States Code), are excluded from the hours of work and overtime pay provisions of the FLSA. As used in section 5, the term "customs officer" means a customs inspector, a supervisory customs inspector, a canine enforcement officer, or a supervisory canine enforcement officer.

4. New Subparts

Two new subparts are added. The first (subpart F) addresses child labor and the second (subpart G) addresses complaints and compliance.

5. Subpart A

Subpart A is restructured. Section 551.102—Definitions is redesignated § 551.104 with the same title. Section 551.104—Administrative authority is redesignated § 551.102 and retitled "Authority and administration".

6. Section 551.101—General.

The second sentence of paragraph (a) is revised by deleting all that follows the word "Act". Revised paragraph (a) is moved to redesignated § 551.102—Authority and administration.

Paragraph (b) is redesignated paragraph (a). In the first sentence, the phrase "Fair Labor Standards Act of 1938, as amended (referred to as "the Act" or "FLSA")" replaces the word "Act".

Paragraph (c) is redesignated paragraph (b).

7. Redesignated § 551.102—Authority and Administration

Paragraph (a) is moved to this section from published § 551.101 and paragraphs (b), (c), and (d) are added.

Paragraph (a), moved here from published § 551.101, describes OPM's authority. The sole sentence of published § 551.104—Administrative authority is added to paragraph (a) and is revised by deleting all the text following the word "except" and substituting "as specified in paragraphs (b), (c), and (d) of this section."

Paragraph (b) states that the Equal Employment Opportunity Commission administers the equal pay provisions of the Act.

Paragraph (c) lists the United States Government entities for which the Department of Labor administers the Act. Those are the Library of Congress, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority.

Paragraph (d) lists the United States Government entities for which the Office of Compliance administers the Act. The Congressional Accountability

Act of 1995 (Pub. L. 104-1, 109 Stat. 4, January 23, 1995) authorized the application of the provisions of the FLSA to the legislative branch of the Federal Government and authorized the Office of Compliance to administer the FLSA for any employee of the United States House of Representatives; the United States Senate; the Capitol Guide Service; the Capitol Police; the Congressional Budget Office; the Office of the Architect of the Capitol; the Office of the Attending Physician; the Office of Compliance; and the Office of Technology Assessment.

8. Section 551.103—Coverage

The phrase “as defined in § 551.102” is deleted from paragraphs (b)(2) and (b)(3).

9. Redesignated § 551.104—Definitions

Several of the current definitions are revised. The phrase “or FLSA” is added to the definition of “Act”. The definition of “agency” is revised by deleting the colon and all text following the colon and adding “the entities of the United States Government listed in § 551.101 for which the Department of Labor and the Office of Compliance administer the Act.” The definition of “employ” is revised by deleting the phrase “as defined for this part”. The definition of “employee” is revised by adding a reference to law to subparagraphs (1) and (2) and deleting the words “legislative or” from subparagraph (4). The list of locations under the definition of “exempt area” is updated—“U.S.” is inserted before the name “Virgin Islands,” Eniwetol Atoll and Kwajalein Atoll are deleted, and Midway Atoll and Palmyra are added.

Many of the terms used in the FLSA arena have acquired well-established interpretations that sometimes differ from the customary interpretations in the Federal service. Terms and definitions from FPM Letter No. 551-7, dated July 1, 1975, are added, as well as definitions of other FLSA and pay administration terms. Terms added are as follows:

- Administrative employee
- Claim
- Claim period
- Claimant
- Customarily and regularly
- De minimis activity or worktime
- Discretion and independent judgment
- Emergency
- Essential part of administrative or professional functions
- Executive employee
- FLSA exempt
- FLSA exemption status
- FLSA exemption status determination claim
- FLSA nonexempt
- FLSA overtime pay

- FLSA pay claim
- Foreign exemption
- Formulation or execution of management programs or policies
- Hours of work
- Management or general business function or supporting service
- Nonexempt area
- Participation in the executive or administrative functions of a management official
- Perform work in connection with an emergency
- Preserve the claim period
- Primary duty
- Professional employee
- Reckless disregard of the requirements of the Act
- Recognized organizational unit
- Situations 1 through 4
- Statute of limitations
- Supervisory and closely related work
- Temporary work or duties
- Title 5 overtime pay
- Willful violation
- Work of an intellectual nature
- Work of a specialized or technical nature
- Workday
- Worktime
- Worktime in a representative workweek
- Workweek
- Workweek basis

10. Section 551.201—Agency Authority

The statement “All employees are presumed to be FLSA nonexempt unless the employing agency makes a determination that the position meets one or more of the exemption criteria of this subpart.” is added as the first sentence.

11. Section 551.202—General Principles Governing Exemptions

The introductory language is revised by deleting the phrase “the principles that—” and substituting “following principles:”.

In paragraph (c), the phrase “must be exempted” is changed to “must be designated FLSA exempt” and the sentence “If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.” is added.

Four additional general principles from FPM Letter 551-7, dated July 1, 1975, are added as paragraphs (d) through (g). An additional general principle is added as paragraph (h).

12. Section 551.203—Exemption of General Schedule Employees

At the end of paragraph (a) the caveat is added that employees in positions properly classified at GS-4 or below are nonexempt unless subject to the foreign exemption.

In paragraph (b), the phrase “GS-5 or above” is substituted for the phrase “GS-5 through GS-10” and the

reference “§§ 551.204, 551.205, and 551.206” is deleted. At the end of paragraph (b) the caveat is added that the exemption status of employees in positions properly classified at GS-5 or above may be affected if the employee is required to temporarily perform work or duties that are not consistent with the employee’s official position description or if the employee is subject to the foreign exemption.

13. Section 551.204—Executive Exemption Criteria

The section is redesignated from § 551.204 to § 551.205.

In the introductory paragraph, the term “executive employee” is italicized and the quotation marks removed. The title “foreman” is deleted. The phrase “regularly and customarily” is changed to “customarily and regularly” to be consistent with the use of the phrase elsewhere. The phrases “at least three” and “(excluding support personnel)” are removed. The word “both” is substituted for “all.” There is no need to distinguish between General Schedule (or equivalent) supervisors and Federal Wage System (or equivalent) supervisors. The *General Schedule Supervisory Guide* published in April 1993 specifies no minimum number of employees to be supervised for a position to be classified as supervisory.

In paragraph (a), the entire text is deleted and the phrase “The primary duty test is met if the employee—” is substituted.

In paragraph (a)(1), the phrase “select or remove, and advance in pay and promote, or make any other status changes of” is changed to “make personnel changes that include, but are not limited to, selecting, removing, advancing in pay, or promoting.”

In paragraph (b), the phrase “supervisors in positions properly classified in the Federal Wage System below situation 3 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors*” is substituted for “foreman level supervisors in the Federal Wage System” to update the nomenclature. The word “level” is inserted after the word “equivalent,” and the word “comparable” is inserted before the phrase “wage systems.” The phrase “employees at the GS-7 through GS-9 level” is deleted and “firefighting or law enforcement employees in positions properly classified in the General Schedule at GS-7, GS-8, or GS-9 that are” is substituted to describe the types of employees subject to 207(k) of title 29, United States Code. The phrase “employees classified at” is deleted and “employees in positions properly

classified in the General Schedule at" is substituted. The words "the" and "level" are deleted from the phrase "classified at the GS-5 or GS-6 level" and inserted in the parenthetical clause to read "(or the equivalent level in other white-collar pay systems)." The phrase "to meet the 80-percent test" is added after "closely related work." Paragraph (b) is restructured to more clearly and easily identify the types of employees to which the paragraph applies.

14. Section 551.205—Administrative Exemption Criteria

The section is redesignated from § 551.205 to § 551.206.

In the introductory paragraph, the term "administrative employee" is italicized. The words "advisor, assistance," are deleted and the phrase "advisor or assistant to management" is substituted. The phrase "who meets all" is changed to "and meets all four".

In paragraph (a), the introductory text "The employee's primary duty consists of work that—" is changed to "The primary duty test is met if the employee's work—".

In paragraph (a)(1), the phrase "management policies or programs" is changed to "management programs or policies".

In paragraph (a)(3), the spelling of the word "management" is corrected.

In paragraph (c), the phrase "must frequently exercise" is changed to the phrase "frequently exercises" to be consistent with wording elsewhere.

In paragraph (d), the word "level" is inserted after the word "equivalent," the word "pay" is inserted after the word "collar," and the phrase "to meet the 80-percent test" is added to the end of the sentence.

15. Section 551.206—Professional Exemption Criteria

The section is redesignated from § 551.206 to § 551.207.

In the introductory paragraph, the term "professional employee" is italicized.

In paragraph (a), the introductory text "The employee's primary duty consists of—" is replaced with "The primary duty test is met if the employee's work consists of—".

At the end of paragraph (a)(2), the period is replaced with a semicolon followed by the word "or."

Paragraph (a)(3) is added and adds certain work in the computer software field to the types of work meeting the primary duty test. This change brings OPM's regulations into conformance with those of the Department of Labor which implemented the provisions of Pub. L. 101-583, enacted November 15,

1990. That law required the issuance of regulations to permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers to qualify for exemption from the minimum wage and overtime compensation requirements of the Act under section 13(a)(1), the executive, administrative, and professional exemption.

In paragraph (d), the spelling of the word "employees" is corrected, the word "level" is inserted after the word "equivalent," the phrase "white-collar pay" is inserted after the word "other," and the word "in" is changed to "on" after the word "workweek" to make this paragraph consistent with published § 551.204(b) and 551.205(d).

16. Section 551.207—Foreign Exemption

The section is redesignated from § 551.207 to § 551.209 and retitled "Foreign exemption criteria." The section is reorganized for clarity and rewritten in plain English.

17. Section 551.208—Application of the Executive, Administrative, and Professional Exemption Criteria for Periods of Temporary Duty

The section title is changed from "Application of the executive, administrative, and professional exemption criteria for periods of temporary duty" to "Effect of temporary work or duties on FLSA exemption status." The section is reorganized for clarity and rewritten in plain English. The changes include the following.

The phrase "temporary work or duties" is substituted for the phrase "temporary duty" to make clear that the subject is the work an employee is performing on a temporary basis. The change emphasizes that an employee's FLSA exemption status may change when an employee is temporarily required to perform work or duties not consistent with the employee's official position description and eliminates confusion with the term "TDY" (temporary duty). TDY is commonly used to refer to an employee in travel status or located somewhere on a temporary basis. To further emphasize this point, a sentence is added that states "The period of temporary work or duties may or may not involve a different geographic duty location."

To focus attention on the tasks an employee is being asked to perform temporarily, rather than the type of appointment (permanent appointment, temporary appointment, or term appointment) or the temporariness or permanence of a personnel action (detail or temporary promotion), the

phrases "consistent with the employee's official position description" or "not consistent with the employee's official position description" are used in lieu of "duties which are not included in the employee's representative workweek" and "permanent position."

Nomenclature is updated and phrasing is revised to parallel earlier sections. For example, the phrase "in the Federal Wage System at situation 3 or 4 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors*" is substituted for "General Foreman"; the phrase "in the Federal Wage System below situation 3 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors*" is substituted for "below General Foreman"; and the phrase "80 percent or more of the worktime in a given workweek" is substituted for "more than 80 percent of a given workweek".

18. Section 551.209—Exemption of Criminal Investigators Receiving Availability Pay

The section is redesignated from § 551.209 to § 551.110 and retitled "Exemption of employees receiving availability pay."

Paragraph (a) addresses the exemption of criminal investigators receiving availability pay.

Paragraph (b) addresses the exemption of pilots employed by the United States Customs Service who are law enforcement officers and also receive availability pay. Pub. L. 104-19, July 27, 1995, amended section 5545a of title 5, United States Code (U.S.C.), and provided that the provisions of subsections (a)-(h) providing for availability pay apply to a pilot employed by the United States Customs Service who is a law enforcement officer as defined under 5 U.S.C. 5541(3). For the purposes of 5 U.S.C. 5545a, 5 U.S.C. 5542(d) and section 13(a)(16) and (b)(30) of the FLSA (29 U.S.C. 213(a)(16) and (b)(30)), such pilots are deemed to be criminal investigators as defined in 5 U.S.C. 5545a.

19. Subpart F—Child Labor

This new subpart sets forth the minimum age standards and delineates the respective responsibilities of an agency and OPM regarding the child labor provisions of the Act.

20. Subpart G—FLSA Claims and Compliance

This new subpart describes the applicability of OPM's FLSA claims regulations, time limits that must be observed, avenues of review, the claimant's right to designate a representative, the form and content of

an FLSA claim, responsibilities of claimants and agencies, the circumstances under which an FLSA claim may be withdrawn or denied, the finality and effect of an OPM FLSA claim decision, the availability of information from an FLSA claim file, and where to file an FLSA claim with OPM.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 551

Government employees, Wages.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is proposing to amend 5 CFR part 551 as follows:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

1. 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).

2. Subpart A is revised to read as follows:

Subpart A—General Provisions

Sec.

551.101 General.
551.102 Authority and administration.
551.103 Coverage.
551.104 Definitions.

Subpart A—General Provisions

§ 551.101 General.

(a) The Fair Labor Standards Act of 1938, as amended (referred to as “the Act” or “FLSA”), provides for minimum standards for both wages and overtime entitlement, and delineates administrative procedures by which covered worktime must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups of employees from the application of certain of its provisions. It prescribes penalties for the commission of specifically prohibited acts.

(b) This part contains the regulations, criteria, and conditions that the Office of Personnel Management has prescribed for the administration of the Act. This part supplements and

implements the Act, and must be read in conjunction with it.

§ 551.102 Authority and administration.

(a) *Office of Personnel Management.* Section 3(e)(2) of the Act authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section. Section 4(f) of the Act authorizes the Office of Personnel Management (OPM) to administer the provisions of the Act. OPM is the administrator of the provisions of the Act with respect to any person employed by an agency, except as specified in paragraphs (b), (c), and (d) of this section.

(b) *The Equal Employment Opportunity Commission* administers the equal pay provisions contained in section 6(d) of the Act.

(c) *The Department of Labor* administers the Act for the following United States Government entities:

- (1) The Library of Congress;
- (2) The United States Postal Service;
- (3) The Postal Rate Commission; and
- (4) The Tennessee Valley Authority.

(d) *The Office of Compliance* administers the Act for the following United States Government entities:

- (1) The United States House of Representatives;
- (2) The United States Senate;
- (3) The Capitol Guide Service;
- (4) The Capitol Police;
- (5) The Congressional Budget Office;
- (6) The Office of the Architect of the Capitol;
- (7) The Office of the Attending Physician;
- (8) The Office of Compliance; and
- (9) The Office of Technology Assessment.

§ 551.103 Coverage.

(a) *Covered.* Any employee of an agency who is not specifically excluded by another statute is covered by the Act. This includes any person who is—

- (1) Defined as an employee in section 2105 of title 5, United States Code;
- (2) Appointed under other appropriate authority; or
- (3) Suffered or permitted to work by an agency whether or not formally appointed.

(b) *Not covered.* The following persons are not covered under the Act:

- (1) A person appointed under appropriate authority without compensation;
- (2) A trainee; or
- (3) A volunteer.

§ 551.104 Definitions.

In this part—
Act or *FLSA* means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*).

Administrative employee means an employee who meets the criteria in § 551.206 of this part.

Agency, for purposes of OPM’s administration of the Act, means any instrumentality of the United States Government, or any constituent element thereof acting directly or indirectly as an employer, as this term is defined in section 3(d) of the Act and in this section, but does not include the entities of the United States Government listed in § 551.102 for which the Department of Labor or the Office of Compliance administer the Act.

Claim means a written allegation from a current or former employee concerning his or her FLSA exemption status determination or entitlement to minimum wage or overtime pay for work performed under the Act.

Claim period means the time during which the cause or basis of the claim occurred.

Claimant means a current or former employee who files an FLSA claim.

Customarily and regularly means a frequency which must be greater than occasional but which may be less than constant. For example, the requirement in § 551.205(a)(2) of this part will be met by an employee who normally and recurrently exercises discretion and independent judgment in the day-to-day performance of duties.

De minimis activity or worktime means an activity or worktime of less than 10 minutes a day.

Discretion and independent judgment means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering the various possibilities.

However, firm commitments or final decisions are not necessary to support exemption. The “decisions” made as a result of the exercise of independent judgment may consist of *recommendations for action* rather than the actual taking of action. The fact that an employee’s decisions are subject to review, and that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption. Work reflective of discretion and independent judgment must meet the three following criteria:

- (1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill

in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee's action.

(2) The employee must have the authority to make such determinations during the course of assignments. This precludes exempting trainees who are in a line of work which requires discretion but who have not been given authority to decide discretionary matters independently.

(3) The decisions made independently must be significant. The term "significant" is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee's own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria.

Emergency means a temporary condition that poses a direct threat to human life or safety, serious damage to property, or serious disruption to the operations of an activity, as determined by the employing agency.

Employ means to engage a person in an activity that is for the benefit of an agency, and includes any hours of work that are suffered or permitted.

Employee means a person who is employed—

(1) In an executive agency as defined in section 105 of title 5, United States Code;

(2) As a civilian in a military department as defined in section 102 of title 5, United States Code;

(3) In a nonappropriated fund instrumentality of an executive agency or a military department; or

(4) In a unit of the judicial branch of the Government that has positions in the competitive service.

Employer, as defined in section 3(d) of the Act, means any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Essential part of administrative or professional functions means work that is included as an integral part of administrative or professional exempt work. This work is identified by examining the processes involved in performing the exempt function. For example, the processes involved in evaluating a body of information

include collecting and organizing information; analyzing, evaluating, and developing conclusions; and frequently, preparing a record of findings and conclusions. Often collecting or compiling information and preparing reports or other records, if divorced from the evaluative function, are nonexempt tasks. When an employee who performs the evaluative functions also performs some or all of these related steps, all such work (for example, collecting background information, recording test results, tabulating data, or typing reports) is included in the employee's exempt duties.

Executive employee means an employee who meets the criteria in section 551.205 of this part.

Exempt area means any foreign country, or any territory under the jurisdiction of the United States other than the following locations:

- (1) A State of the United States;
- (2) The District of Columbia;
- (3) Puerto Rico;
- (4) The U.S. Virgin Islands;
- (5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);
- (6) American Samoa;
- (7) Guam;
- (8) Midway Atoll;
- (9) Wake Island;
- (10) Johnston Island; and
- (11) Palmyra.

FLSA exempt means not covered by the minimum wage and overtime provisions of the Act.

FLSA exemption status means an employee's designation by the employing agency as either FLSA exempt or FLSA nonexempt from the minimum wage and overtime provisions of the Act.

FLSA exemption status determination claim means a claim from a current or former employee challenging the correctness of his or her FLSA exemption status determination.

FLSA nonexempt means covered by the minimum wage and overtime provisions of the Act.

FLSA overtime pay, for the purpose of § 551.208 of this part, means overtime pay under this part.

FLSA pay claim means a claim from a current or former employee concerning his or her entitlement to minimum wage or overtime pay for work performed under the Act.

Foreign exemption means a provision of the Act under which the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area.

Formulation or execution of management programs or policies means work that involves management programs and policies which range from broad national goals expressed in statutes or Executive orders to specific objectives of a small field office. Employees make policy decisions or participate indirectly, through developing or recommending proposals that are acted on by others. Employees significantly affect the execution of management programs or policies typically when the work involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or making significant determinations furthering the operation of programs and accomplishment of program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (that is, planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the employing organization or of other organizations subject to regulation or other controls).

Hours of work means all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency. Hours of work are creditable for the purposes of determining overtime pay under subpart D of this part. Section 551.401 of subpart D further explains this term. However, whether time is credited as hours of work is determined by considering many factors, such as the rules in subparts D and E of this part, provisions of law, Comptroller General decisions, OPM policy guidance, agency policy and regulations, negotiated agreements, the rules in part 550 of this chapter (for hours of work for travel), and the rules in part 410 of this chapter (for hours of work for training).

Management or general business function or supporting service, as distinguished from production functions, means the work of employees who provide support to line managers.

(1) These employees furnish such support by—

(i) Providing expert advice in specialized subject matter fields, such as that provided by management consultants or systems analysts;

(ii) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting and financial management;

(iii) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or

(iv) Providing supporting services, such as automated data processing, communications, or procurement and distribution of supplies.

(2) Neither the organizational location nor the number of employees performing identical or similar work changes general management, business, or servicing functions into production functions. The work, however, must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.

Nonexempt area means any of the following locations:

- (1) A State of the United States;
- (2) The District of Columbia;
- (3) Puerto Rico;
- (4) The U.S. Virgin Islands;
- (5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);
- (6) American Samoa;
- (7) Guam;
- (8) Midway Atoll;
- (9) Wake Island;
- (10) Johnston Island; and
- (11) Palmyra.

Participation in the executive or administrative functions of a management official means the participation of employees, variously identified as secretaries, administrative or executive assistants, aides, etc., in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such employees must be delegated and exercise substantial authority to act for the supervisor in the absence of specific instructions or procedures, and take actions which significantly affect the supervisor's effectiveness.

Perform work in connection with an emergency means to perform work that is directly related to resolving or coping with an emergency, or its immediate aftermath, as determined by the employing agency.

Preserve the claim period means to establish the period of possible entitlement to back pay by filing a written claim with either the agency employing the claimant during the claim period or with OPM. The date the agency or OPM receives the claim is the date that determines the period of possible entitlement to back pay.

Primary duty typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty—

(1) Constitutes a substantial, regular part of a position;

(2) Governs the classification and qualification requirements of the position; and

(3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

Professional employee means an employee who meets the criteria in section 551.207 of this part.

Reckless disregard of the requirements of the Act means failure to make adequate inquiry into whether conduct is in compliance with the Act.

Recognized organizational unit means an established and defined organizational entity which has regularly assigned employees and for which a supervisor is responsible for planning and accomplishing a continuing workload. This distinguishes supervisors from leaders who head temporary groups formed to perform assignments of limited duration.

Situations 1 through 4 means the four basic situations described under Factor I, Nature of Supervisory Responsibility, in the *Federal Wage System Job Grading Standard for Supervisors*. The situations depict successively higher levels of supervisory responsibility and authority for scheduling work operations, planning use of resources to accomplish work, directing subordinates in performing work assignments, and carrying out administrative duties.

Statute of limitations means the time frame within which an FLSA pay claim must be filed, starting from the date the right accrued. All FLSA pay claims filed on or after June 30, 1994, are subject to a 2-year statute of limitations, except in cases of willful violation where the statute of limitations is 3 years.

Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

Supervisory and closely related work means work that is included in the calculation of exempt work for supervisory positions.

(1) Work is considered closely related to exempt supervisory work if it contributes to the effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. Examples of closely related work include the following:

(i) Maintaining various records pertaining to workload or employee performance;

(ii) Performing setup work that requires special skills, typically is not performed by production employees in the occupation, and does not approach the volume that would justify hiring a specially trained employee to perform; and

(iii) Performing infrequently recurring or one-time tasks which are impractical to delegate because they would disrupt normal operations or take longer to explain than to perform.

(2) Activities in which both workers and supervisors are required to engage themselves are considered to be closely related to the primary duty of the position, for example, physical training during tours of duty for firefighting and law enforcement personnel.

Temporary work or duties means work or duties an employee must temporarily perform that are not consistent with the employee's official position description. The period of temporary work or duties may or may not involve a different geographic duty location.

Title 5 overtime pay, for the purpose of § 551.208 of this part, means overtime pay under part 550 of this chapter.

Trainee means a person who does not meet the definition of employee in this section and who is assigned or attached to a Federal activity primarily for training. A person who attends a training program under the following conditions is considered a trainee and, therefore, is not an employee of the Government of the United States for purposes of the Act:

(1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;

(2) The training is for the benefit of the individual;

(3) The trainee does not displace regular employees, but, rather, is supervised by them;

(4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training.

Volunteer means a person who does not meet the definition of employee in this section and who volunteers or

donates his or her service, the primary benefit of which accrues to the performer of the service or to someone other than the agency. Under such circumstances there is neither an expressed nor an implied compensation agreement. Services performed by such a volunteer include personal services that, if left unperformed, would not necessitate the assignment of an employee to perform them.

Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

Work of an intellectual nature means work requiring general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work requiring mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized application of established procedures or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting, or innovating techniques and procedures, interpreting findings, and selecting and recommending the best alternative from among a broad range of possible actions.

Work of a specialized or technical nature means work which requires substantial specialized knowledge of a complex subject matter and of the principles, techniques, practices, and procedures associated with that subject matter field. This knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject matter field, as distinguished from professional knowledge characteristically acquired through specialized academic education.

Workday means the period between the commencement of the principal activities that an employee is engaged to perform on a given day and the cessation of the principal activities for that day. The term is further explained in § 551.411 of this part.

Worktime, for the purpose of determining FLSA exemption status, means time spent actually performing work. This excludes periods of time during which an employee performs no work, such as standby time, sleep time, meal periods, and paid leave.

Worktime in a representative workweek means the average percentages of worktime over a period long enough to even out normal fluctuations in workloads and be representative of the job as a whole.

Workweek means a fixed and recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of a day. For employees subject to part 610 of this chapter, the workweek shall be the same as the administrative workweek defined in § 610.102 of this chapter.

Workweek basis means the unit of time used as the basis for applying overtime standards under the Act and, for employees under flexible or compressed work schedules, under 5 U.S.C. 6121(6) or (7). The Act takes a single workweek as its standard and does not permit averaging of hours over two or more weeks, except for employees engaged in fire protection or law enforcement activities under section 7(k) of the Act.

3. Subpart B is revised to read as follows:

Subpart B—Exemptions and Exclusions

Sec.

- 551.201 Agency authority.
- 551.202 General principles governing exemptions.
- 551.203 Exemption of General Schedule employees.
- 551.204 Exemption of Federal Wage System employees.
- 551.205 Executive exemption criteria.
- 551.206 Administrative exemption criteria.
- 551.207 Professional exemption criteria.
- 551.208 Effect of performing temporary work or duties on FLSA exemption status.
- 551.209 Foreign exemption criteria.
- 551.210 Exemption of employees receiving availability pay.
- 551.211 Statutory exclusion.

Subpart B—Exemptions and Exclusions

§ 551.201 Agency authority.

All employees are presumed to be FLSA nonexempt unless the employing agency makes a determination that the position meets one or more of the exemption criteria of this subpart. The employing agency must exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions issued by OPM.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency must observe the following principles:

(a) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

(d) There are groups of General Schedule employees who are FLSA nonexempt because they do not fit any of the exemption categories. These groups include the following:

(1) Nonsupervisory General Schedule employees in equipment operating and protective occupations, and most clerical occupations (see the definition of *participation in the executive or administrative functions of a management official* in subpart A of this part);

(2) Nonsupervisory General Schedule employees performing technician work in positions properly classified below GS-9 (or the equivalent level in other white-collar pay systems) and many, but not all, of those positions properly classified at GS-9 or above (or the equivalent level in other white-collar pay systems); and

(3) Nonsupervisory General Schedule employees at any grade level in occupations requiring highly specialized technical skills and knowledges that can be acquired only through prolonged job training and experience, such as the Air Traffic Control series, GS-2152, or the Aircraft Operations series, GS-2181, unless such employees are performing predominantly administrative functions rather than the technical work of the occupation.

(e) Although separate criteria are provided for the exemption of executive, administrative, and professional employees, those categories are not mutually exclusive. All exempt work, regardless of category, must be considered. The only restriction is that, when the requirements of one category are more stringent, the combination of exempt work must meet the more stringent requirements.

(f) Failure to meet the criteria for exemption under what might appear to be the most appropriate criteria does not preclude exemption under another category. For example, an engineering technician who fails to meet the professional exemption criteria may be performing exempt administrative work, or an administrative officer who fails to

meet the administrative criteria may be performing exempt executive work.

(g) Although it is normally feasible and more convenient to identify the exemption category, this is not essential. An exemption may be based on a combination of functions, no one of which constitutes the primary duty, or the employee's primary duty may involve two categories which are intermingled and difficult to segregate. This does not preclude exempting the employee, provided the work as a whole clearly meets the other exemption criteria.

(h) The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee.

§ 551.203 Exemption of General Schedule employees.

(a) *GS-4 or below.* Any employee in a position properly classified at GS-4 or below (or the equivalent level in other white-collar pay systems) is nonexempt, unless the employee is subject to the foreign exemption in § 551.209.

(b) *GS-5 or above.* Any employee in a position properly classified at GS-5 or above (or the equivalent level in other white-collar pay systems) is exempt only if the employee is an executive, administrative, or professional employee as defined in this subpart, unless the employee is subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or § 551.209 (the foreign exemption).

§ 551.204 Exemption of Federal Wage System employees.

(a) *Nonsupervisory.* A nonsupervisory employee in the Federal Wage System or under other comparable wage systems is nonexempt, unless the employee is subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or § 551.209 (the foreign exemption).

(b) *Supervisory.* A supervisory employee in the Federal Wage System or under other comparable wage systems is exempt only if the employee is an executive employee as defined in § 551.205, unless the employee is subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or § 551.209 (the foreign exemption).

§ 551.205 Executive exemption criteria.

An *executive employee* is a supervisor or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and customarily and regularly

directs the work of subordinate employees and meets both of the following criteria:

(a) *Primary duty test.* The primary duty test is met if the employee—

(1) Has authority to make personnel changes that include, but are not limited to, selecting, removing, advancing in pay, or promoting subordinate employees, or has authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) *80-percent test.* In addition to the primary duty test that applies to all employees, the following employees must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work to meet the 80-percent test:

(1) Employees in positions properly classified in the General Schedule at GS-5 or GS-6 (or the equivalent level in other white-collar pay systems);

(2) Firefighting or law enforcement employees in positions properly classified in the General Schedule at GS-7, GS-8, or GS-9 who are subject to section 207(k) of title 29, United States Code; and

(3) Supervisors in positions properly classified in the Federal Wage System below situation 3 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors* (or the equivalent level in other comparable wage systems).

§ 551.206 Administrative exemption criteria.

An *administrative employee* is an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service and meets all four of the following criteria:

(a) *Primary duty test.* The primary duty test is met if the employee's work—

(1) Significantly affects the formulation or execution of management programs or policies; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) *Nonmanual work.* The employee performs office or other predominantly nonmanual work which is—

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) *Discretion and independent judgment.* The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) *80-percent test.* In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other white-collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions to meet the 80-percent test.

§ 551.207 Professional exemption criteria.

A *professional employee* is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) *Primary duty test.* The primary duty test is met if the employee's work consists of—

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee; or

(3) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems, analysis, programming, and software engineering or other similar work in the computer software field.

The work must consist of one or more of the following:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or

(ii) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or

(iii) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(iv) A combination of the duties described in paragraphs (a)(3)(i), (3)(ii), and (3)(iii) of this section, the performance of which requires the same level of skills.

(b) *Intellectual and varied in nature.* The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance.

(c) *Discretion and independent judgment.* The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) *80-percent test.* In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other white-collar pay systems), must spend 80 percent or more of the worktime in a representative workweek on professional functions and work that is an essential part of those functions to meet the 80-percent test.

§ 551.208 Effect of performing temporary work or duties on FLSA exemption status.

(a) *Applicability.*—(1) *When applicable.* This section applies only when an employee must temporarily perform work or duties that are not consistent with the employee's official position description. The period of temporary work or duties may or may not involve a different geographic duty location. The FLSA exemption status of employees during a period of temporary work or duties must be determined as described in this section.

(2) *When not applicable.* This section does not apply when an employee is detailed to an identical additional position as the employee's position or to a position of the same grade, series code, basic duties, and FLSA exemption status as the employee's position.

(b) *Effect on nonexempt employees.*

(1) A nonexempt employee who must

temporarily perform work or duties that are not consistent with the employee's official position description remains nonexempt for the entire period of temporary work or duties unless all three of the following conditions are met:

(i) *30-day test.* The period of temporary work or duties exceeds 30 days; and

(ii) *Exempt work or duty.* The employee's primary duty for the period of temporary work or duties is exempt work or duty as defined in this part; and

(iii) *Positions at GS-7 or above, or at situations 3 or 4.* The employee's position (including a position to which the employee is temporarily promoted) is properly classified in the General Schedule at GS-7 or above (or the equivalent level in other white-collar pay systems) or properly classified in the Federal Wage System as a supervisor at situation 3 or 4 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors* (or the equivalent level in other comparable wage systems).

(2) If a nonexempt employee becomes exempt under the criteria in paragraph (b)(1) of this section—

(i) The employee must be considered exempt for the entire period of temporary work or duties; and

(ii) If the employee received FLSA overtime pay for work performed during the first 30 days of the temporary work or duties, the agency must recalculate the employee's total pay retroactive to the beginning of that period because the employee is now not entitled to the FLSA overtime pay received but may be owed title 5 overtime pay.

(c) *Effect on exempt employees.* (1) An exempt employee not covered by the special provision of paragraph (c)(3) of this section who must temporarily perform work or duties that are not consistent with the employee's official position description remains exempt for the entire period of temporary work or duties unless all three of the following conditions are met:

(i) *30-day test.* The period of temporary work or duties exceeds 30 days; and

(ii) *Not exempt work.* The employee's primary duty for the period of temporary work or duties is *not* exempt work or duty as defined in this part; and

(iii) *Positions at GS-7 or above, or at situation 3 or 4.* The employee's position (including a position to which the employee is temporarily promoted) is properly classified in the General Schedule at GS-7 or above (or the equivalent level in other white-collar pay systems) or properly classified in the Federal Wage System as a supervisor

at situation 3 or 4 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors* (or the equivalent level in other comparable wage systems).

(2) If an exempt employee becomes nonexempt under the criteria in paragraph (c)(1) of this section—

(i) The employee must be considered nonexempt for the entire period of temporary work or duties; and

(ii) If the employee received title 5 overtime pay for work performed during the first 30 days of the temporary work or duties, the agency must recalculate the employee's total pay retroactive to the beginning of that period because the employee may now not be entitled to some or all of the title 5 overtime pay received but may be owed FLSA overtime pay.

(3) Special provision for exempt employees at GS-5 or GS-6, or below situation 3: The exemption status of certain exempt employees who must temporarily perform work or duties that are not consistent with their official position description must be determined on a workweek basis for the period of temporary work or duties. Such employees are exempt employees whose positions (including a position to which the employee is temporarily promoted) are properly classified in the General Schedule at GS-5 or GS-6 (or the equivalent level in other white-collar pay systems), or are properly classified in the Federal Wage System below situation 3 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors* (or the equivalent level in other comparable wage systems). The exemption status determination of these employees will result in the employee either remaining exempt or becoming nonexempt for that workweek, as described in paragraphs (c)(3)(i) and (c)(3)(ii) of this section.

(i) *Remain exempt.* An exempt employee remains exempt for a given workweek *only* if the employee performs exempt work or duties for 80 percent or more of the worktime in that workweek.

(ii) *Become nonexempt.* An exempt employee becomes nonexempt for a given workweek *only* if the employee performs nonexempt work or duties for more than 20 percent of the worktime in that workweek.

(d) *Emergency situation.*

Notwithstanding any other provisions of this section, and regardless of an employee's grade level, the agency may determine that an emergency situation exists that directly threatens human life or safety, serious damage to property, or serious disruption to the operations of an activity, and there is no recourse

other than to assign qualified employees to temporarily perform work or duties in connection with the emergency. In such a designated emergency—

(1) The exemption status of a nonexempt employee remains nonexempt whether the employee performs nonexempt work or exempt work during the emergency; and

(2) The exemption status of an exempt employee must be determined on a workweek basis. The exemption status determination of exempt employees will result in the employee either remaining exempt or becoming nonexempt for that workweek, as described in paragraphs (d)(2)(i) and (d)(2)(ii) of this section.

(i) *Remain exempt.* An exempt employee remains exempt for any workweek in which the employee performs exempt work or duties for 80 percent or more of the worktime in a given workweek.

(ii) *Become nonexempt.* An exempt employee becomes nonexempt for any workweek in which the employee performs nonexempt work or duties for more than 20 percent of the worktime in a given workweek.

§ 551.209 Foreign exemption criteria.

(a) *Application.* When the *foreign exemption* applies, the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area. When an employee meets one of the two criteria in paragraph (b) of this section, the foreign exemption applies until the employee spends any hours of work in any nonexempt area as defined in § 551.102 of this part.

(b) *Foreign exemption applies.* If an employee meets one of the two following criteria, the employee is subject to the foreign exemption of the Act and the minimum wage, overtime, and child labor provisions of the Act do not apply.

(1) The employee is permanently stationed in an exempt area and spends *all* hours of work in a given workweek in one or more exempt areas; or

(2) The employee is not permanently stationed in an exempt area, but spends *all* hours of work in a given workweek in one or more exempt areas.

(c) *Foreign exemption does not apply.* For any given workweek, the minimum wage, overtime, and child labor provisions of the Act apply to an employee permanently stationed in an exempt area who spends *any* hours of work in any nonexempt area. For that workweek, the employee is not subject to the foreign exemption, and the agency must determine the exemption status of such an employee as described

paragraphs (c)(1) and (c)(2) of this section. The foreign exemption does not resume until the employee again meets one of the criteria in paragraph (b) of this section.

(1) *Same duties.* If the duties performed during that workweek are consistent with the employee's official position description, the agency must designate the employee the same FLSA exemption status as if the employee were permanently stationed in any nonexempt area.

(2) *Different duties.* If the duties performed during that workweek are not consistent with the employee's official position description—

(i) The agency must first designate the employee the same FLSA exemption status as the employee would have been designated based on the duties included in the employee's official position description if the employee were permanently stationed in any nonexempt area; and

(ii) The agency must determine the employee's exemption status for that workweek by applying § 551.208.

(d) *Resumption of foreign exemption.* When an employee returns to any exempt area from performing any hours of work in any nonexempt area, the employee is not subject to the foreign exemption until the employee meets one of the criteria in paragraph (b) of this section.

§ 551.210 Exemption of employees receiving availability pay.

The following employees are exempt from the hours of work and overtime pay provisions of the Act:

(a) A criminal investigator receiving availability pay under section 550.181 of this chapter; and

(b) A pilot employed by the United States Customs Service who is a law enforcement officer as defined in section 5541(3) of title 5, United States Code, and who receives availability pay under section 5545a(i) of title 5, United States Code.

§ 551.211 Statutory exclusion.

Customs officers whose exclusive entitlement to overtime pay is governed by section 5 of the Act of Feb. 13, 1911, as amended (19 U.S.C. 261 and 267), are excluded from the hours of work and overtime pay provisions of the FLSA. As used in section 5, the term "customs officer" means a customs inspector, a supervisory customs inspector, a canine enforcement officer, or a supervisory canine enforcement officer.

4. Subpart F is added to read as follows:

Subpart F—Child Labor

Sec.

- 551.601 Minimum age standards.
- 551.602 Responsibilities.

Subpart F—Child Labor

§ 551.601 Minimum age standards.

(a) *16-year minimum age.* The Act, in section 3(l), sets a general 16-year minimum age, which applies to all employment subject to its child labor provisions, with certain exceptions not applicable here.

(b) *18-year minimum age.* The Act, in section 3(1), also sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being.

§ 551.602 Responsibilities.

(a) *Agencies* must remain cognizant of and abide by regulations and orders published by the Secretary of Labor regarding the employment of individuals under the age of 18 years. These regulations and orders govern the minimum age at which persons under the age of 18 years may be employed and the occupations in which they may be employed. Persons under the age of 18 years must not be employed in occupations or engage in work deemed hazardous by the Secretary of Labor.

(b) *OPM* will decide claims concerning the employment of persons under the age of 18 years. Claims must be filed following the procedures set forth in subpart G of this part.

5. Subpart G is added to read as follows:

Subpart G—FLSA Claims and Compliance

Sec.

- 551.701 Applicability.
- 551.702 Time limits.
- 551.703 Avenues of review.
- 551.704 Claimant's representative.
- 551.705 Form and content of an FLSA claim.
- 551.706 Responsibilities.
- 551.707 Withdrawal or denial of an FLSA claim.
- 551.708 Finality and effect of OPM FLSA claim decision.
- 551.709 Availability of information.
- 551.710 Where to file an FLSA claim with OPM.

Subpart G—FLSA Claims and Compliance

§ 551.701 Applicability.

(a) *Applicable.* This subpart applies to FLSA exemption status determination claims, FLSA pay claims for minimum wage or overtime pay for work performed under the Act, and claims

arising under the child labor provisions of the Act.

(b) *Not applicable.* This subpart does not apply to claims or complaints arising under the equal pay provisions of the Act. The equal pay provisions of the Act are administered by the Equal Employment Opportunity Commission.

§ 551.702 Time limits.

(a) *Claims.* A claimant may file an FLSA claim at any time under the child labor provisions of the Act or challenging the correctness of his or her FLSA exemption status determination. A claimant may also file an FLSA claim concerning his or her entitlement to minimum wage or overtime pay for work performed under the Act; however, time limits apply to FLSA pay claims. All FLSA pay claims filed on or after June 30, 1994, are subject to a 2-year statute of limitations (3 years for willful violations).

(b) *Statute of limitations.* An FLSA pay claim filed on or after June 30, 1994, is subject to the statute of limitations contained in the Portal-to-Portal Act of 1947, as amended (section 255a of title 29, United States Code), which imposes a 2-year statute of limitations, except in cases of a willful violation where the statute of limitations is 3 years. In deciding a claim, a determination must be made as to whether the cause or basis of the claim was the result of a willful violation on the part of the agency.

(c) *Preserving the claim period.* A claimant or a claimant's designated representative may preserve the claim period by submitting a written claim either to the agency employing the claimant during the claim period or to OPM. The date the agency or OPM receives the claim is the date that determines the period of possible entitlement to back pay. The claimant is responsible for proving when the claim was received by the agency or OPM. The claimant should retain documentation to establish when the claim was received by the agency or OPM, such as by filing the claim using certified, return receipt mail, or by requesting that the agency or OPM provide written acknowledgment of receipt of the claim. If a claim for back pay is established, the claimant will be entitled to pay for a period of up to 2 years (3 years for a willful violation) back from the date the claim was received.

§ 551.703 Avenues of review.

(a) *Negotiated grievance procedure (NGP) as exclusive administrative remedy.* If at any time during the claim period, a claimant was a member of a bargaining unit covered by a collective bargaining agreement that did not

specifically exclude matters under the Act from the scope of the negotiated grievance procedure, the claimant must use that negotiated grievance procedure as the exclusive administrative remedy for all claims under the Act. There is no right to further administrative review by the agency or by OPM. The remaining sections in this subpart (that is, §§ 551.704 through 551.711) do not apply to such employees.

(b) *Non-NGP administrative review by agency or OPM.* A claimant may file a claim with the agency employing the claimant during the claim period or with OPM regarding matters arising under the Act if, during the entire claim period, the claimant—

- (1) Was not a member of a bargaining unit, or
- (2) Was a member of a bargaining unit not covered by a collective bargaining agreement, or
- (3) Was a member of a bargaining unit covered by a collective bargaining agreement that specifically excluded matters under the Act from the scope of the negotiated grievance procedure.

(c) *Judicial review.* Nothing in this subpart limits the right of a claimant to bring an action in an appropriate United States court. OPM will not decide an FLSA claim that is in litigation.

§ 551.704 Claimant's representative.

A claimant may designate a representative to assist in preparing or presenting a claim. The claimant must designate the representative in writing. A representative has no right to participate in OPM fact-finding. An agency may disallow a claimant's representative who is a Federal employee in any of the following circumstances:

- (a) When the individual's activities as a representative would cause a conflict of interest or position;
- (b) When the designated representative cannot be released from his or her official duties because of the priority needs of the Government; or
- (c) When the release of the designated representative would give rise to unreasonable costs to the Government.

§ 551.705 Form and content of an FLSA claim.

(a) *FLSA claim filed with agency.* An FLSA claim filed with an agency should be made according to appropriate agency procedures. At the discretion of the agency, the agency may forward the claim to OPM on the claimant's behalf. The claimant is responsible for ensuring that OPM receives all the information requested in paragraph (b) of this section.

(b) *FLSA claim filed with OPM.* An FLSA claim filed with OPM must be

made in writing and must be signed by the claimant or the claimant's representative. Relevant information may be submitted to OPM at any time following the initial submission of a claim to OPM and prior to OPM's decision on the claim. The claim must include the following:

(1) The identity of the claimant (see § 551.706(a)(2) regarding requesting confidentiality) and any designated representative, the agency employing the claimant during the claim period, the position (job title, series, and grade) occupied by the claimant during the claim period, and the current mailing address, commercial telephone number, and facsimile machine number, if available, of the claimant and any designated representative;

(2) A description of the nature of the claim and the specific issues or incidents giving rise to the claim, including the time period covered by the claim;

(3) A description of actions taken by the claimant to resolve the claim within the agency and the results of any actions taken;

(4) A copy of any relevant decision or written response by the agency;

(5) Evidence available to the claimant or the claimant's designated representative which supports the claim, including the identity, commercial telephone number, and location of other individuals who may be able to provide information relating to the claim;

(6) The remedy sought by the claimant;

(7) Evidence, if available, that the claim period was preserved in accordance with § 551.702. The date the claim is received by the agency or OPM becomes the date on which the claim period is preserved;

(8) A statement from the claimant that he or she was or was not a member of a collective bargaining unit at any time during the claim period;

(9) If the claimant was a member of a bargaining unit, a statement from the claimant that he or she was or was not covered by a negotiated grievance procedure at any time during the claim period, and if covered, whether that procedure specifically excluded the claim from the scope of the negotiated grievance procedure;

(10) A statement from the claimant that he or she has or has not filed an action in an appropriate United States court; and

(11) Any other information that the claimant believes OPM should consider.

§ 551.706 Responsibilities.

(a) *Claimant.*— (1) *Providing information to OPM.* For all FLSA claims, the claimant or claimant's designated representative must provide any additional information requested by OPM within 15 workdays after the date of the request, unless OPM grants a longer period of time in which to provide the requested information. The disclosure of information by a claimant is voluntary. However, OPM may be unable to render a decision on a claim without the information requested. In such a case, the claim will be denied without further action being taken by OPM. In the case of an FLSA pay claim, it is the claimant's responsibility to provide evidence that the claim period was preserved in accordance with § 551.702 and of the liability of the agency and the claimant's right to payment.

(2) *Requesting confidentiality.* If the claimant wishes the claim to be treated confidentially, the claim must specifically request that the identity of the claimant not be revealed to the agency. Witnesses or other sources may also request confidentiality. OPM will make every effort to conduct its investigation in a way to maintain confidentiality. If OPM is unable to obtain sufficient information to render a decision and preserve the requested confidentiality, OPM will notify the claimant that the claim will be denied with no further action by OPM unless the claimant voluntarily provides written authorization for his or her name to be revealed.

(b) *Agency.* (1) In FLSA exemption status determination claims, the burden of proof rests with the agency that asserts the FLSA exemption.

(2) The agency must provide the claimant with a written acknowledgment of the date the claim was received.

(3) The agency must provide any information requested by OPM within 15 workdays after the date of the request, unless OPM grants a longer period of time in which to provide the requested information.

§ 551.707 Withdrawal or denial of an FLSA claim.

(a) *Withdrawal.* A claimant or the claimant's representative may withdraw a claim at any time prior to the issuance of an OPM FLSA claim decision by providing written notice to the OPM office where the claim was filed.

(b) *Denial.* OPM may, at its discretion, deny an FLSA claim if the claimant or the claimant's designated representative fails to provide requested information within 15 workdays after the date of the

request, unless OPM grants a longer period of time in which to provide the requested information. OPM may, at its discretion, reconsider a denied claim on a showing that circumstances beyond the claimant's control prevented pursuit of the claim.

§ 551.708 Finality and effect of OPM FLSA claim decision.

OPM will send an FLSA claim decision to the claimant or the claimant's representative and the agency. An FLSA claim decision made by OPM is final. There is no further right of administrative appeal. At its discretion, OPM may reconsider a decision upon a showing that material information was not considered or there was a material error of law, regulation, or fact in the original decision. A decision by OPM under the Act is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which OPM administers the Act. Upon receipt of a decision, the agency employing the claimant during the claim period must take all necessary steps to comply with the decision, including adherence with compliance instructions provided with the decision. All compliance actions must be completed within the time specified in the decision, unless an extension of time is requested by the agency and granted by OPM. The agency should identify all similarly situated current and, to the extent possible, former employees, ensure that they are treated in a manner consistent with the decision, and inform them in writing of their right to file an FLSA claim with the agency or OPM.

§ 551.709 Availability of information.

(a) Except when the claimant has requested confidentiality, the agency and the claimant must provide to each other a copy of all information submitted with respect to the claim.

(b) When a claimant has not requested confidentiality, OPM will disclose to the parties concerned the information contained in an FLSA claim file. When a claimant has requested confidentiality, OPM will delete any information identifying the claimant. For the purposes of this subpart, *the parties concerned* means the claimant, any representative designated in writing, and any representative of the agency or OPM involved in the proceeding.

(c) Except when the claimant has requested confidentiality or the disclosure would constitute a clearly unwarranted invasion of personal privacy, OPM, upon a request which identifies the individual from whose file the information is sought, will disclose

the following information from a claim file to a member of the public:

- (1) Confirmation of the name of the individual from whose file the information is sought and the names of the other parties concerned;
- (2) The remedy sought;
- (3) The status of the claim;
- (4) The decision on the claim; and
- (5) With the consent of the parties concerned, other reasonably identified information from the file.

§ 551.710 Where to file an FLSA claim with OPM.

An FLSA claim must be filed with the OPM office serving the area where the cause or basis of the claim occurred. Following are OPM addresses and service areas.

OPM Atlanta Oversight Division

75 Spring Street SW., Suite 972, Atlanta, GA 30303-3109.

Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Virginia (except the Virginia locations listed under the Washington, DC Oversight Division).

OPM Chicago Oversight Division

230 S. Dearborn Street, DPN 30-6, Chicago, IL 60604-1687.

Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, West Virginia, Wisconsin.

OPM Dallas Oversight Division

1100 Commerce Street, Room 4C22, Dallas, TX 75242-9968.

Arizona, Arkansas, Colorado, Louisiana, Montana, New Mexico, Oklahoma, Texas, Utah, Wyoming.

OPM Philadelphia Oversight Division

600 Arch Street, Room 3400, Philadelphia, PA 19106-1596.

Connecticut, Delaware, Maine, Maryland (except the Maryland locations listed under the Washington, DC Oversight Division), Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Puerto Rico, Virgin Islands.

OPM San Francisco Oversight Division

120 Howard Street, Room 760, San Francisco, CA 94105-0001.

Alaska, California, Hawaii, Idaho, Nevada, Oregon, Washington, Pacific Ocean Area

OPM Washington, DC Oversight Division

1900 E Street NW., Room 7675, Washington, DC 20415-0001.

The District of Columbia

In Maryland: the counties of Charles, Montgomery, and Prince George's.

In Virginia: the counties of Arlington, Fairfax, King George, Loudoun, Prince William, and Stafford; the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park; and any overseas area

not listed in the service area of another
Oversight division.

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