Federal Register

Tuesday
December 23, 1997

Part V

Office of Personnel Management

5 CFR Part 551

Pay Administration Under the Fair Labor Standards Act; Final Rule

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: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) amends the pay administration under the Fair Labor Standards Act (referred to as ''the Act'' or ''FLSA'') rules. We made text clearer, standardized terms, changed to the active voice, reorganized material for added clarity, inserted or revised headings to reflect content accurately, reduced internal cross-referencing, corrected typographical, punctuation, and grammatical errors, and used ''plain English.'' We included guidance published in the sunsetted Federal Personnel Manual, added certain work in the computer software field to the professional exemption criteria, added an exemption for certain pilots, added the statutory exclusion of customs officers, and included regulations on child labor and claims and compliance.

DATES: Effective December 23, 1997.

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: We received 15 submissions:

1 was from an individual and was not a comment;
4 were from individuals;
5 were from 3 agencies (3 were from 1 agency);
4 were from 5 labor organizations (1 was submitted jointly by 2 labor organizations); and
1 was from the Office of Compliance in the Legislative Branch.

General Comments

We inserted the word ''comparable'' after the word ''other'' in the phrase ''other white collar'' throughout the text to make the wording consistent.

An individual commended the clarity of the supplementary information introducing the proposed regulations as particularly intelligible.

Another individual suggested that the modified or added portions of the regulation published in the Code of Federal Regulations be shown in bold face. This cannot be done in the **Federal Register**. However, we will post on the OPM web site (www.opm.gov) a version of the final regulations in which changed or added material is shown in bold face. Individuals who do not have Internet access may request a copy by calling 202–606–2990 or by sending a request by e-mail to ADOMSOE@OPM.GOV.

One labor organization commented that it was not clear which portions of part 551 of title 5, Code of Federal Regulations, the proposed regulations amended. Subparts A and B are amended and subparts F and G are added. This final rule does not amend subparts C, D, or E.

The same labor organization pointed out that, in its opinion, many Federal employees are wrongfully denied FLSA overtime pay and recommended three guiding principles to address this problem.

First, an agency should not declare an employee to be exempt if there is reasonable doubt about whether an employee meets any exemption criteria.

Second, OPM's regulations should be designed to reduce ambiguity, thereby reducing the chances that agencies will incorrectly determine an employee to be FLSA exempt.

Third, OPM's regulations pertaining to exemptions should be consistent with the Department of Labor's administration of the Act and should not be susceptible to a more expansive interpretation than comparable Department of Labor regulations.

We believe the proposed regulations published on August 25, 1997, adequately addressed these concerns. Nonetheless, we kept these suggested principles in mind as we made revisions. For example, sections 551.201 and 551.202 in particular emphasize that an employee is presumed to be nonexempt unless the agency correctly determines that the work the employee performs clearly meets one or more of the exemption criteria.

Another labor organization asserted that the ''salary basis test'' that is included in the Department of Labor's FLSA regulations is applicable to Federal employees for whom OPM administers the Act.

The Department of Labor has determined that such tests do not apply to public employees (see section 541.5d of title 29, Code of Federal Regulations).

1. Section 551.102—Authority and Administration

The Office of Compliance in the Legislative Branch stated that OPM's description of its responsibilities was inaccurate in three respects.

First, the proposed regulations imply that the nine listed employing entities and their employees are covered by the FLSA. However, the employees of these entities are not included in the definition of ''employee'' under section 3(e)(2) of the Act. The Congressional Accountability Act of 1995 *extends the rights and protections* of the FLSA to the employees of these entities, so it is the Accountability Act, not the FLSA, that actually applies.

Second, the proposed regulations state that the Office of Compliance administers the law for the listed entities. However, while the Office of Compliance is assigned certain administrative responsibilities under the Accountability Act, that Act does not authorize the Office of Compliance to administer the law, as section 4(f) of the FLSA authorizes OPM to administer the FLSA.

Third, the proposed regulations refer to the Office of Technology Assessment. While it is included in the Accountability Act, the Office of Technology Assessment no longer exists and therefore should not be included in a description of the responsibilities of the Office of Compliance.

In response to these comments, we deleted the introductory language of proposed paragraph (d) and substituted in its place the language provided by the Office of Compliance to describe its responsibilities. We deleted proposed paragraph (d)(9) to omit mention of the Office of Technology Assessment.

2. Section 551.103—Coverage

An agency requested that the proposed regulations be amended to reflect that members of the Uniformed Services are not covered by the FLSA and ensuing regulations.

There are seven Uniformed Services. The four Uniformed Services that comprise the Military Departments include the United States Army, United States Navy, United States Marines, and the United States Air Force. Additionally, three of the Uniformed Services are in Executive Departments. The United States Coast Guard is in the Department of Transportation. The Commissioned Corps of the National Oceanic and Atmospheric Administration is in the Department of Commerce. The Commissioned Corps of the Public Health Service is in the Department of Health and Human Services.

Members of the Uniformed Services are not considered employees as defined in section 2105 of title 5, United States Code, or other statutes that address the pay, benefits, and duties of Federal employees. Further, officers of the

Uniformed Services are appointed by the President and, in many cases, by and with the consent of the Senate. The pay and benefits of members of the Uniformed Services are controlled by the provisions of title 37, United States Code.

Officers of the Uniformed Services are appointed to serve when and where needed to meet the needs of their respective Services. Therefore, rules regarding workweek requirements in the current and proposed regulations are inapplicable to members of all Uniformed Services.

We adopted the agency's recommendation. In proposed paragraph (a)(2), we inserted the words ''a civilian employee'' before the word ''appointed.'' To proposed paragraph (b), we added members of the Uniformed Services to the list of persons not covered by the Act. We revised proposed paragraph (b)(2) by deleting the ''or'' after the semicolon. We revised proposed paragraph (b)(3) by deleting the period and substituting a semicolon followed by ''or.''

3. Section 551.104—Definition of Agency

The Office of Compliance in the Legislative Branch suggested a revision of the definition of ''agency'' if OPM's final definition of ''agency'' includes a specific exclusion of the entities in the legislative branch whose employees are not covered under the FLSA.

The language is in keeping with the explanation of the responsibilities of the Office of Compliance discussed in item 1 and added to section 551.102(d), therefore, we adopted the revision.

4. Section 551.104—Definition of Claim

We added a sentence explaining that the term ''claim'' is used generically in subpart G to include complaints under the child labor provisions of the Act.

5. Section 551.104—Definition of De Minimis Activity or Worktime

One agency pointed out that section 785.47 of title 29, Code of Federal Regulations, requires an employer to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time the employee is regularly required to spend on assigned duties.

The two labor organizations pointed out that the actual amount of time involved is only one of three factors to be considered. The other two factors are the administrative difficulty of recording small amounts of time and whether the work is performed on a regular basis. In addition, one labor organization suggested that the definition be clarified to mean fewer than a total of ten minutes in the entire workday. The same labor organization stated that some agencies have argued that if an employee performs a work activity for a period of fewer than 10 minutes at the beginning of a workday and fewer than 10 minutes at the end of a workday, the *de minimis* doctrine can be applied even though the total combined time for the employee exceeds 10 minutes for the day. This labor organization outlined the three factors discussed by the court in *Lindow* v. *U.S.*, 738 F.2d 1057 (9th Cir. 1984).

In view of these comments, we deleted the proposed definition of *de minimis activity or worktime*. We may address the term at a later time.

6. Section 551.104—Definition of Discretion and Independent Judgment

One labor organization stated that the proposed definition appears to require less than is required under the Department of Labor's regulations and suggested that the definition be made more similar to the Department of Labor regulation at section 541.207(a) of title 29, Code of Federal Regulations. The labor organization also suggested that we add to proposed paragraph (3) the following sentence: ''The discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence.''

After carefully weighing this comment against the need for OPM to apply the letter and spirit of the Act in a public sector context, we decided not to revise the proposed definition. Our proposed definition acknowledges that in the public sector, with its responsibility and accountability to the general public, levels of review are frequently required. We believe that paragraph (3) of the definition, which states that decisions made independently must be significant and then amplifies what ''significant'' includes versus what it does not extend to, adequately addresses the commentor's concerns.

7. Section 551.104—Definition of Employee

The agency which in item 2 pointed out that members of the Uniformed Services are not covered by the FLSA recommended a change to the definition of employee to reflect this.

We adopted the recommendation. In proposed paragraph (1) of the definition of employee, we inserted the phrase ''as a civilian'' before the phrase ''in an executive agency.''

One individual and one agency pointed out that the definition of employee should include the Government Printing Office. The Congressional Accountability Act of 1995, Pub. L. 104–1, amended the FLSA at section 203(e)(2)(A) of title 29, United States Code, by deleting the reference to ''unit[s]'' in the legislative branch in clause (iii) and by adding a new clause (vi) identifying the Government Printing Office as a public agency whose employees are covered by the FLSA.

OPM's proposed regulations tracked the law's deletion, but not the addition. This omission was unintentional. We revised the definition of employee by deleting the ''or'' following proposed paragraph (3), substituting a semicolon and the word ''or'' for the period following proposed paragraph (4), and adding paragraph (5) naming the Government Printing Office.

8. Section 551.104—Definition of Hours of Work

One labor organization suggested that the definition of hours of work should state that all interpretations of the FLSA, including Comptroller General decisions, OPM guidance, and agency policy and regulations, must be consistent with the Act and Department of Labor regulations in order to be valid.

OPM is tasked with administering the Act consistent with the Department of Labor. Our regulations accomplish this. Therefore, we did not find it necessary to adopt this suggestion.

9. Section 551.104—Definition of Management or General Business Function or Supporting Service

We revised the first sentence of proposed paragraph (2) of the definition by deleting the words ''general management, business, or servicing functions'' and substituting in their place the words ''management or general business functions or supporting services'' to be consistent with wording elsewhere.

Two labor organizations contended that the proposed definition fails to clearly explain the type of work which falls under the administrative exemption.

One labor organization pointed out that the Department of Labor regulation at § 541.205(a) of title 29, Code of Federal Regulations, clearly distinguishes between work involving the administrative operations of an employer—which is exempt work—and ''production'' work which involves performing activities that carry out the day-to-day functions of the employer—which is nonexempt work.

The other labor organization suggested that to clarify the definition of *management or general business function or supporting service* and make it consistent with law, the following statement should be added: ''Employees who perform the day-to-day activities necessary for an agency to accomplish its mission do not qualify as performing 'management or general business functions or supporting services.'

We believe the proposed definition is legally correct.

10. Section 551.104—Definition of Supervisory and Closely Related Work

One labor organization stated that the paragraph (2) of the proposed definition of *supervisory and closely related work* is far more expansive than the Department of Labor regulation and perhaps more expansive than OPM intended. The labor organization suggested that we add the phrase ''closely related work'' to the definitions and adopt the definition used by the Department of Labor in § 541.108 of title 29, Code of Federal Regulations.

We believe the proposed definition is legally correct.

11. Section 551.104—Definition of Temporary Work or Duties

We had an inquiry from an agency personnelist who explained that the agency in question has a number of exempt employees whose official position descriptions include minor, nonexempt duties. The agency has correctly determined that the employees are exempt. The employees, however, are being required to perform the nonexempt work included in the official position description for a greater percentage of the time and on a long-term, but temporary, basis. Under our proposed regulations, the agency could argue that the work is not ''not consistent with the employee's official position description.''

We revised the definition by inserting the words ''the primary or grade-controlling duty of'' before the words ''the employee's official position description.'' We made conforming changes throughout § 551.208.

12. Section 551.201—Agency Authority

Two labor organizations commented on this section.

One labor organization suggested replacing the phrase ''makes a determination'' with ''properly determines'' to make it clear that the presumption of FLSA coverage can be rebutted only by a proper or correct determination that the exemption criteria have been met.

We adopted the suggestion. We revised the first sentence of proposed paragraph 551.201 by deleting ''All employees are'' and substituting ''Each employee is,'' deleting ''makes a determination'' and substituting ''correctly determines,'' deleting ''position'' and substituting ''employee clearly,'' and adding ''and such supplemental interpretations or instructions issued by OPM'' after ''subpart.'' The word ''clearly'' is used to make this principle consistent with those expressed in proposed paragraphs 551.202 (a) and (b). The sentence was then moved to § 551.202 as new paragraph (a).

The other labor organization stated that agencies do not need to be told to exempt employees because they already do so more often than is justified. The labor organization recommended that the second sentence in this section be deleted, or modified by inserting the word ''clearly'' in the phrase ''any employee who meets * * *'' to be consistent with proposed paragraphs (a) and (c) of § 551.202 which already use the word.

In this instance, we did not adopt the suggestion to use the word ''clearly.'' Instead, we modified the sentence to better reflect an agency's authority to designate an employee FLSA exempt. We revised the second sentence in proposed § 551.201 by deleting ''must exempt from the overtime provisions of the Act any employee who'' and substituting ''may designate an employee FLSA exempt only when the agency correctly determines that the employee,'' and inserting ''one or more of'' after ''meets.''

13. Section 551.202—General Principles Governing Exemptions

As mentioned in item 12, we revised the first sentence of proposed § 551.201 and added it as the first general principle under § 551.202. Accordingly, we redesignated proposed paragraphs (a) through (h) as paragraphs (b) through (i).

We revised the first sentence of proposed paragraph (c) (redesignated paragraph (d)) by deleting the words ''All employees who clearly meet'' and substituting ''An employee who clearly meets.''

One labor organization commented on proposed paragraph (d)(2) (redesignated paragraph (e)(2)). It is the labor organization's opinion that all nonsupervisory employees performing technician work who are not performing predominantly administrative functions are nonexempt, regardless of their grade level. The labor organization suggests that this paragraph be revised to state that all employees performing technician work are nonexempt.

Another labor organization commented on proposed paragraph (f) (redesignated paragraph (g)). The labor organization suggested that the example in the second sentence be changed because it has led agencies to incorrectly designate technicians as FLSA exempt when they should be FLSA nonexempt.

We did not adopt either suggestion. OPM has found that many higher-graded technical employees perform work fully comparable to work performed by professional engineers, particularly in the area of difficult, demanding, and original equipment and facilities design. Such employees are correctly determined to be FLSA exempt.

One individual stated that proposed paragraph (d)(3) (redesignated (e)(3)) concerning FLSA nonexempt status of employees in the Aircraft Operation, GS–2181, series is inconsistent with other OPM guidance in the ''Classifier's Handbook,'' ''Introduction to the Position Classification Standards,'' and the ''Guide to Personnel Data Standards.'' The individual pointed out that Appendix 1 of the ''Introduction to the Position Classification Standards'' lists the GS–2181 series as a series for which a two-grade interval pattern is normal and the GS–2181 classification standard indicates that this series is two-grade interval in a footnote. The individual expressed the opinion that if a position is considered to be technical and its occupational category is designated as technical, the position should not be identified as a two-grade interval series. The individual suggested that the GS–2181 position classification standard and Appendix 1 of ''The Introduction to the Position Classification Standards'' be revised to delete references to the GS–2181 series as two-grade interval.

Because this comment addressed classification, rather than FLSA, issues, we referred this comment to OPM's Office of Classification.

We revised the third sentence of proposed paragraph (g) (redesignated paragraph (h)) by deleting the phrase ''exempting the employee'' and substituting ''designating an employee FLSA exempt'' to be consistent with wording elsewhere.

14. Section 551.204(a)—Exemption of Federal Wage System Employees

We revised proposed paragraphs (a) and (b) by deleting the word ''under'' and substituting ''in'' to be consistent with § 551.203.

15. Section 551.205—Executive Exemption Criteria

Two labor organizations stated that it is a mistake to eliminate the requirement that in order to qualify under the executive exemption an employee must customarily and regularly direct the work of at least three subordinate employees. The labor organizations argued that agencies frequently classify employees who serve as lead workers as exempt under the executive exemption criteria and that the numerical requirement helps to clarify that employees who perform minimal supervisory duties do not fall under this exemption. They predict that agencies will claim the individual employees who work with other employees and who make recommendations regarding their work will qualify for the executive exemption simply if the employees exercise some independence in their own work. They state that this may arise if employees work in teams and have no direct supervisory authority over team members but instead one of the team members acts as a team leader. Even if the team leader assignment is rotated among members of the team, an agency may, under the proposed regulation, claim that the employee meets the executive exemption criteria. The labor organizations also stated that the numerical requirement is consistent with the Department of Labor regulations.

We did not adopt this suggestion. The original numerical requirement of at least three subordinate employees was based on the Supervisory Grade Evaluation Guide. That guide was replaced by the General Schedule Supervisory Guide which does not have a numerical requirement. We also recognized that OPM's requirement of three or more subordinate employees was inconsistent with Department of Labor's regulations. Instead of changing to an arbitrary number, we chose to use the plural ''employees'' which implies ''two or more.''

16. Section 551.206—Administrative Exemption Criteria

One agency commented that the criterion in proposed paragraph (a)(1) under the primary duty test could lead to an incorrect and overly broad application of the exemption and be inconsistent with Department of Labor's application of the Act to the private sector.

This comment addresses a well-established provision in the currently published regulations. Our experience is that the provision as currently published is sufficient.

We revised proposed paragraph (a)(2) by deleting the phrase ''general management or business functions'' and substituting in its place ''management or general business functions'' to be consistent with wording elsewhere.

We revised the headings of proposed paragraphs (b) and (c) by inserting the word ''test'' before the periods.

17. Section 551.207—Professional Exemption Criteria

Several commentors pointed out that proposed paragraph(a)(3) is more expansive than the law pertaining to employees in the computer software field (Public Law 101–583, 104 Stat. 2871, November 15, 1990).

One labor organization suggested that in order to clarify the limited scope of the exemption for work in computer-related occupations, OPM's proposed regulations should include a provision similar to § 541.303(c) of title 29, Code of Federal Regulations which provides that the professional exemption only applies to highly skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering.

The same labor organization also suggested that the proposed regulation should also include a provision analogous to § 541.303(d) of title 29, Code of Federal Regulations, which provides that the exemption does not include ''employees engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment'' or employees whose work is dependent on computers but who do not work in computer systems analysis or computer programming occupations.

The labor organization further suggested that the exemption does not include employees engaged in the operation of computers or in the manufacture of computer hardware and related equipment, or employees whose work is dependent on computers but who do not work in computer systems analysis or computer programming occupations.

Public Law 101–583 (104 Stat. 2871, November 15, 1990) provides that employees performing such work may be designated FLSA exempt as executive, administrative, or professional employees. The law also states that ''if such employees are paid on an hourly basis they shall be exempt only if their hourly rate of pay is at least 6½ times greater than the applicable minimum wage . . . .'' Section 13(a) of the Act was amended to read ''in the case of an employee who is compensated on an hourly basis, is compensated at a rate not less than $27.63 an hour.'' Proposed paragraph (a)(3) essentially restates the criteria in section 213(a)(17) of title 29, United States Code, for exempting from the FLSA certain employees who work with computers. The regulation does not include a salary-based test because the Department of Labor has determined that such tests do not apply to public employees (see § 541.5d of title 29, Code of Federal Regulations).

Commentors suggested that we further explain the scope of this exemption. We considered this suggestion, but concluded that the language in the proposed regulation is sufficient.

The citation in proposed paragraph (a)(3)(iv) was published as ''(a)(3)(i), (3)(ii), and (3)(iii).'' We revised the citation to read ''(a)(3)(i), (a)(3)(ii), and (a)(3)(iii)'' to be consistent with the citation in proposed paragraph 551.208(d)(2) which reads ''(d)(2)(i) and (d)(2)(ii).

We revised the heading of proposed paragraph (b) by deleting the words ''in nature'' and substituting in their place the words ''work test.''

We revised the heading of proposed paragraph (c) by inserting the word ''test'' before the period.

18. Section 551.208—Effect of Performing Temporary Work or Duties on FLSA Exemption Status

As explained in item 11, we inserted the words ''the primary or grade-controlling duty of'' in proposed paragraphs (a)(1), (b)(1), (c)(1), and (c)(3).

To avoid any possible confusion on the part of agencies or employees, we inserted the word ''calendar'' before the word ''days'' in proposed paragraphs (b)(1)(i), (b)(2)(ii), (c)(1)(i) and (c)(2)(ii).

One labor organization took issue with proposed paragraphs (b)(1)(i) and (b)(2)(i) which state that the period of temporary work or duties must exceed 30 days (now referred to as the ''30-day test''). The labor organization incorrectly believed the OPM was ignoring the workweek basis of the FLSA and suggested that OPM should provide that exemption determinations be made on a workweek basis for temporary assignments of 5 workdays or more. We did not adopt the suggestion.

We believe that this suggestion, if adopted, would place an extreme administrative burden on agencies. The Act takes a single workweek as its standard, that is, a workweek is the unit of time used as the basis for applying

overtime standards under the Act. It would be administratively burdensome for Federal agencies to have to make this determination each week. OPM adopted the 30-day test to ease this administrative burden on agencies but the weekly standard still applies for pay purposes. The 30-day test is well established and has been unchanged in regulation since January 1988. The revision of this section makes clear to agencies and employees agencies' responsibilities regarding an employee who must temporarily perform work or duties that are not consistent with the *primary or grade-controlling duty* of the employee's official position description.

In the heading of proposed paragraph (b)(1)(iii), we made the word ''situations'' singular to parallel proposed paragraph (c)(1)(iii).

In proposed paragraph (c)(1)(ii), we added the words ''or duty'' to the paragraph heading to parallel paragraph (b)(1)(ii).

We italicized the heading of proposed paragraph (c)(3).

19. Section 551.209—Foreign Exemption Criteria

In proposed paragraph (a), we italicized the words ''all'' and ''any.''

We changed the period at the end of the introductory language of proposed paragraph (b) to a colon.

20. Section 551.211—Statutory Exclusion

One labor organization pointed out that the statutory exclusion in proposed § 551.211 goes beyond the statutory provision on which it is based. The Customs Officers Pay Reform Act (Customs Pay Act), codified at section 267 of title 19, United States Code (U.S.C.), provides that ''a customs officer who receives overtime pay under subsection (a) of this section or premium pay under subsection (b) of this section for time worked may not receive pay or other compensation *for that work* under any other provision of law.'' (Emphasis added.) Under the statute, a customs officer cannot receive FLSA overtime pay for the same work for which the officer received overtime pay or premium pay under the Customs Pay Act. Proposed section 551.211 goes beyond the statute because it completely excludes customs officers from the overtime pay and hours of work provisions of the FLSA. The labor organization stated that there are a number of circumstances in which the Customs Pay Act does not provide overtime pay for particular work but the FLSA does. For example, under section 267(a)(1) of the Customs Pay Reform Act, an employee is entitled to overtime pay only when he or she is ''officially assigned to perform work.'' Unlike the FLSA, the Customs Pay Act does not provide overtime pay for work that an employee is suffered or permitted to perform. The labor organization further stated that the United States Customs Service has taken the position that the Customs Pay Act does not authorize overtime pay for training, even when such training is required by the agency. It is Customs' position that training is not ''work'' under section 267(a)(1). According to Customs, training time is compensable only for employees who are FLSA covered. Customs has also taken the position that certain travel time is not compensable under the Customs Pay Act. The FLSA, however, provides compensation for some travel time and for time spent in training when required by the agency (see section 410.402(d) of title 5, Code of Federal Regulations). The labor organization pointed out that the Customs Pay Act does not exclude customs officers from compensation for these hours under the FLSA.

We revised proposed § 551.211 by quoting the Customs Pay Act. We deleted the first sentence and in its place is substituted ''A customs officer who receives overtime pay under subsection (a) or premium pay under subsection (b) of section 267 of title 19, United States Code, for time worked may not receive pay or other compensation for that work under any other provision of law.'' We revised the second sentence by deleting ''a customs inspector,'' inserting ''a United States Customs Service'' before ''supervisory,'' inserting ''or nonsupervisory'' after supervisory, deleting ''a canine enforcement officer'' before ''supervisory,'' and inserting ''or nonsupervisory'' after ''supervisory.''

21. Section 551.601—Minimum Age Standards

One agency suggested that the reference to section 3(l) in proposed paragraphs (a) and (b) be corrected to substitute a lower-case letter L for the Arabic numeral one inside the parentheses. We made this correction.

22. Section 551.602—Responsibilities

One agency suggested that it would be helpful to Federal agencies to provide a citation to the Department of Labor's child labor regulations.

We agree. We revised the first sentence of proposed paragraph (a) by inserting ''in part 570 of title 29, Code of Federal Regulations,'' before the phrase ''by the Secretary of Labor.''

One agency noted the reference to ''claims'' in subpart F and the inclusion of child labor ''claims'' in subpart G. The agency stated that this seems somewhat anomalous in that the enforcement mechanism for the child labor provisions of the FLSA is the assessment of civil money penalties pursuant to section 261(e) of title 29, United States Code, payable to the Federal Government by violating employers. This is in contrast to the assertion of wage claims under sections 16(b) and 16(c) of the FLSA by the Administrator or by an employee, resulting in the possible payment of back wages and liquidated damages to the employee.

We revised proposed paragraph (b) by deleting the word ''claims'' and substituting in its place the word ''complaints'' and we made conforming changes in §§ 551.701(a) and 551.702(a).

23. Section 551.701—Applicability

We revised proposed paragraph (a) by deleting the word ''claims'' from the phrase ''claims arising under the child labor provision'' and substituting the word ''complaints'' in its place. As explained in item 4, the term ''claim'' is used generically in subpart G to include complaints under the child labor provisions of the Act.

24. Section 551.702—Time Limits

We revised the first sentence of proposed paragraph (a) by deleting the words ''may file an FLSA claim at any time'' and substituting in their place the words ''may at any time file a complaint'' and inserting the words ''an FLSA claim'' before the word ''challenging.''

One labor organization argued that the applicable statute of limitations continues to be 6 years under the Barring Act (section 3702(b)(1) of title 31, United States Code), notwithstanding the enactment of Pub. L. 104–52 (109 Stat. 468–69 (1995)) and the decision in *Adams* v. *Bowsher,* 946 F.Supp. 37 (D.C.D.C. 1996).

It is OPM's position that the law and court decision established a 2-year statute of limitations (3-year for willful violations).

Another labor organization noted that proposed paragraph (c) permits a claimant to file a claim either with the agency employing the claimant during the claim period or with OPM. The labor organization stated that there should be a provision allowing the claimant the option to file the claim with OPM to resolve the claim if the agency fails to issue a decision on a claim filed with it within six months. This would preclude an agency from preventing an employee from receiving

compensation by simply refusing to process the claim.

We did not adopt this suggestion. Nothing in OPM's regulations precludes an employee from withdrawing a claim submitted to an agency and submitting the claim to OPM, if the employee believes the agency is taking too long to decide the claim.

25. Section 551.703—Avenues of Review

Two labor organizations noted that proposed paragraph (a) means that a claimant who is covered by a collective bargaining agreement that does not exclude FLSA matters for only part of a claim period, the claimant would be precluded from filing a claim with OPM for the period of time that the claimant was not covered by the agreement. The labor organizations suggested that the paragraph be rewritten to state that a claimant is limited to using the negotiated grievance procedure as the exclusive administrative remedy for only time periods in which he or she was a member of a bargaining unit and covered by a collective bargaining agreement which did not exclude FLSA matters.

We did not adopt the suggestion for two reasons. First, *Carter* v. *Gibbs,* 909 F.2d 1452 (Fed. Cir. 1990), *cert. denied,* 111 S.Ct. 46 (1990), established the principle that the negotiated grievance procedure is the only administrative avenue open to an employee covered by a collective bargaining agreement that does not exclude FLSA matters. Second, if a claimant were permitted to split the claim period between two avenues of review, different and conflicting decisions might be reached, neither binding on the other.

We revised the introductory language of proposed paragraph (b) by inserting the phrase ''but not both simultaneously'' before the word ''regarding'' to make it clear that an employee may not file the same claim with the agency and OPM simultaneously.

One labor organization stated that the regulations should make it clear that employees have a right to proceed to court with FLSA claims independently of their right to file a claim with OPM.

Proposed paragraph (c) states that nothing in subpart G limits the right of a claimant to bring an action in an appropriate United States court, and that OPM will not decide an FLSA claim that is in litigation. We believe the proposed paragraph is sufficient.

The same labor organization suggested that employees should be advised that the filing of a claim with OPM or an agency will not toll the statute of limitations governing FLSA claims filed in court.

We agree that this would be helpful to employees and added such language as the second sentence of proposed paragraph (c).

26. Section 551.704—Claimant's Representative.

Two labor organizations interpreted the third sentence of the introductory language to proposed § 551.704 (which states ''A representative has no right to participate in OPM fact-finding'') to mean that a claimant would be limited to self-representation and pointed out that this conflicts with the first sentence which permits the designation of a representative to assist in preparing or presenting a claim.

We intended to make the point that an employee representative may not be present or listen in on fact-finding interviews conducted by OPM as a matter of right. Rather OPM, at its discretion, may invite the employee representative to participate. We revised the sentence in question to make this clear.

27. Section 551.705—Form and Content of an FLSA Claim.

We deleted the heading of proposed section 551.705 and substituted in its place the heading ''Filing an FLSA claim.''

One individual remarked that according to proposed paragraph (a) ''a non-unit employee can file an FLSA claim with the agency, and the agency can either adjudicate it or forward it to OPM without taking any action.''

This is not what we intended. Therefore, we have revised the second sentence by deleting the phrase ''At the discretion of the agency'' and substituting ''At the request of the claimant.''

The individual also asked whether an employee may appeal to OPM if the agency adjudicates the claim.

We redesignated proposed paragraphs (a) and (b) as (b) and (c) and added new paragraph (a) which states that an employee may file a claim with either the agency or with OPM, but may not pursue the same claim simultaneously with the agency and OPM. We encourage, but do not require, claimants to obtain decisions on claims from their agency before filing a claim with OPM. We also explain that a claimant may file a claim with OPM after receiving an unfavorable decision from the agency but may not file a claim with the agency after getting an unfavorable decision from OPM.

Regarding the requirement in proposed paragraph (b)(7) (redesignated as paragraph(c)(7)) that a claim must include evidence that the claim period was preserved, one labor organization pointed out that claimants may not realize the importance of retaining such documentation. The labor organization recommended that the regulation include a statement that if the claimant does not have evidence showing the claim was filed, proof may be provided by documents in agency records.

We did not adopt this recommendation. Proposed paragraph 551.702(c) states clearly that the claimant is responsible for proving when the claim was received by the agency or OPM and that 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. The last sentence in proposed paragraph 551.702(c) explains why such documentation is important, that is, 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. Further, proposed paragraphs 551.709(a) and (b) provide for the release of information from an FLSA claim file to the parties concerned, that is, the claimant, any representative designated in writing by the claimant, and any representative of the agency or OPM involved in the proceeding. Thus, the claimant or the claimant's representative can obtain documents regarding the claim, including documentation of when the claim was received by the agency or OPM.

One labor organization suggested that in cases where the employee filed with an agency but withdrew the claim and submitted it to OPM, the date the claim was filed with the agency should be the relevant date for determining back pay.

This provision already exists in proposed paragraph (b)(7) (redesignated as paragraph (c)(7)).

28. Sections 551.706—Responsibilities

Two labor organizations argued that the time limit of 15 workdays in proposed paragraph (a)(1) is too restrictive. One of the labor organizations objected to the claimant being subject to a penalty (denial of the claim) if requested information is not received by OPM within 15 workdays without a corresponding penalty for the agency should the agency not provide requested information to OPM within 15 workdays. The labor organization pointed out that claimants may not realize that they need to request an

extension if they need more time to provide requested information.

We revised the first sentence of proposed paragraph (a)(1) by inserting ''the claimant or the claimant's representative requests additional time and'' after ''unless.'' We made corresponding changes in proposed § 551.707.

We revised the fourth sentence of proposed paragraph (a)(1) and the last sentence of proposed paragraph (b) by deleting the word ''denied'' and substituting in its place the word ''cancelled'' to be consistent with changes we made to proposed § 551.707.

One labor organization reasoned that much of the information necessary to support a claim is in the exclusive control of the agency. The labor organization suggested that OPM add a statement that upon request, and subject to any Privacy Act restrictions, agencies will provide a claimant with information relevant to the claimant's claim.

We agree that this would further impress upon agencies their responsibilities in FLSA claims and have added a such a statement as a new paragraph (b)(3). We redesignated proposed paragraph (b)(3) as paragraph (b)(4).

We revised proposed paragraph (b)(3) (redesignated as paragraph (b)(4)) by inserting the words ''the agency requests additional time and'' after the word ''unless'' to be consistent with wording elsewhere.

29. Section 551.707—Withdrawal or Denial of an FLSA Claim

We revised the section heading by deleting ''denial'' and substituting ''cancellation'' and revised proposed paragraph (b) by deleting ''denied'' and ''deny'' and substituting ''cancelled'' and ''cancel'' and inserting ''the claimant or the claimant's representative requests additional time and'' before ''OPM.'' With these changes, we believe the regulation states clearly enough that a claimant or claimant's representative can avoid cancellation of a claim by requesting and receiving an extension. Proposed paragraph (b) also states that a cancelled claim may be reconsidered by OPM if the claim shows that circumstances beyond the claimant's control prevented pursuit of the claim.

30. Section 551.708—Finality and Effect of OPM FLSA Claim Decision

One labor organization stated that the proposed regulations do not address the right of appeal from OPM FLSA claim determinations and suggests that the regulations should do so.

Proposed § 551.708 states that 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.

31. Section 551.709—Availability of Information

We added the words ''before disclosing the information contained in an FLSA claim file to the parties concerned'' to the end of the second sentence in proposed paragraph (b) to make clear that this sanitized information being released only to the parties concerned with the claim.

32. Section 551.710

Under the address of the OPM Washington, DC Oversight Division, the District of Columbia is indented.

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.

Janice R. Lachance,

Director.

For the reasons stated in the preamble, the Office of Personnel Management amends 5 CFR part 551 as follows:

1. The title and authority citation for part 551 continues to read as follows:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

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.

(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) *Office of Compliance.* The Congressional Accountability Act of 1995, as amended, sections 1301 *et seq.* of title 2, United States Code, extends rights and protections of the FLSA to employees of the following United States Government entities, and assigns certain administrative responsibilities to the Office of Compliance:

(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; and

(8) The Office of Compliance.

§ 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) A civilian employee 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;

(3) A volunteer; or

(4) A member of the Uniformed Services.

§ 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.

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(c) for which the Department of Labor administers the Act or § 551.102(d)(1) through (8), whose employees are covered by the Congressional Accountability Act of 1995, as amended, which makes applicable the rights and protections of the FLSA and assigns certain administrative responsibilities to the Office of Compliance.

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. The term ''claim'' is used generically in subpart G of this part to include complaints under the child labor provisions of 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) will be met by an employee who normally and recurrently exercises discretion and independent judgment in the day-to-day performance of duties.

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) As a civilian 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;

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

(5) The Government Printing Office.

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 § 551.205.

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, 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 subpart. 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 subpart, 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 management or general business functions or supporting services 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 § 551.207.

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 primary or grade-controlling duty of 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, 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.

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.

The employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria 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) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria of this subpart and such supplemental interpretations or instructions issued by OPM.

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

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

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

(e) 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 comparable 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 comparable 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.

(f) 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.

(g) 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.

(h) 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 designating an employee FLSA exempt, provided the work as a whole clearly meets the other exemption criteria.

(i) 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 comparable 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 comparable 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 in 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 in 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 comparable 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 management or general 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 test.* 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 test.* 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 comparable 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), (a)(3)(ii), and (a)(3)(iii) of this section, the performance of which requires the same level of skills.

(b) *Intellectual and varied work test.* 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 test.* 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 comparable 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 primary or grade-controlling duty of 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 primary or grade-controlling duty of 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 calendar 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 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 comparable 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 calendar 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 primary or grade-controlling duty of 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 calendar days; and

(ii) *Not exempt work or duty*. 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 comparable 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 calendar 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 the primary or grade-controlling duty of 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 comparable 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) *Nonexempt employee.* The exemption status of a nonexempt employee remains nonexempt whether the employee performs nonexempt work or exempt work during the emergency; and

(2) *Exempt employee.* 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.

(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 primary or grade-controlling duties of 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 primary or grade-controlling duties of 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 § 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.

A customs officer who receives overtime pay under subsection (a) or premium pay under subsection (b) of section 267 of title 19, United States Code, for time worked may not receive pay or other compensation for that work under any other provision of law. As used in section 5, the term ''customs officer'' means a United States Customs Service supervisory or nonsupervisory customs inspector or a supervisory or nonsupervisory 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.

§ 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(l), 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 in part 570 of title 29, Code of Federal Regulations, 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 complaints concerning the employment of persons under the age of 18 years. Complaints 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 Filing an FLSA claim.
551.706 Responsibilities.
551.707 Withdrawal or cancellation 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.

§ 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 complaints 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 at any time file a complaint under the child labor provisions of the Act or an FLSA claim 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 551.710) 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, but not both simultaneously, 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. Filing a claim with an agency or with OPM does not satisfy the statute of limitations governing FLSA claims filed in 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 may not participate in OPM interviews unless specifically requested to do so by OPM. 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 Filing an FLSA claim.

(a) *Filing an FLSA claim.* A claimant may file an FLSA claim with either the agency employing the claimant during the claim period or with OPM, but a claimant cannot pursue the same claim with both at the same time. OPM encourages a claimant to obtain a decision on the claim from the agency before filing the claim with OPM. However, a claimant is not required to do this. This a matter of personal discretion and a claimant may use either avenue. A claimant who receives an unfavorable decision on a claim from the agency may still file the claim with OPM. However, a claimant may not file the claim with the agency after receiving an unfavorable decision from OPM. An OPM decision on a claim is final and is not subject to further administrative review.

(b) *FLSA claim filed with agency.* An FLSA claim filed with an agency should be made according to appropriate agency procedures. At the request of the claimant, 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.

(c) *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 the claimant or the claimant's representative requests additional time and 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 cancelled 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 cancelled 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) Upon a claimant's request, and subject to any Privacy Act requirements, an agency must provide a claimant with information relevant to the claim.

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

§ 551.707 Withdrawal or cancellation 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) *Cancellation.* OPM may, at its discretion, cancel 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 the claimant or the claimant's representative requests additional time and OPM grants a longer period of time in which to provide the requested information. OPM may, at its discretion, reconsider a cancelled 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 before disclosing the information in an FLSA claim file to the parties concerned. 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

llinois, 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.

[FR Doc. 97–33429 Filed 12–22–97; 8:45 am]

BILLING CODE 6325–01–P