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## OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 532, 550, 551, and 610

RIN 3206-AH86

### Holidays and Premium Pay

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** In compliance with recent changes in law, the Office of Personnel Management (OPM) is issuing interim regulations on compensatory time off for prevailing rate (wage) employees, "in lieu of" holidays for employees on compressed work schedules, and premium pay for nonappropriated fund (NAF) wage employees on flexible or compressed work schedules.

**DATES:** The amendments made by section 1041 of The Department of Defense Authorization Act of 1996 and the interim regulation in revised § 532.513 of title 5, Code of Federal Regulations, are effective retroactively to February 10, 1996. The amendments made by sections 1610 and 1613 of The National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104-201) and the interim regulations in new § 532.504 and revised §§ 550.114, 551.531, and 610.202 of title 5, Code of Federal Regulations, are effective retroactively to September 23, 1996. Comments must be received on or before July 22, 1997.

**ADDRESSES:** Comments may be sent or delivered to Donald J. Winstead, Assistant Director for Compensation Policy, Human Resources Systems Service, Office of Personnel Management, Room 6H31, 1900 E Street NW., Washington, DC 20415. (FAX: (202) 606-0824 or Internet email: [payleave@opm.gov](mailto:payleave@opm.gov)).

**FOR FURTHER INFORMATION CONTACT:** James Weddel, (202) 606-2858, FAX:

(202) 606-0824, or Internet email: [payleave@opm.gov](mailto:payleave@opm.gov).

**SUPPLEMENTARY INFORMATION:** The regulatory changes set forth below are necessary to conform with provisions of law as a result of enactment of The Department of Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, February 10, 1996; and The National Defense Authorization Act for Fiscal Year 1997, Public Law 104-201, September 23, 1996.

### (1) Premium Pay for NAF Wage Employees Authorized to Work Under Flexible and Compressed Work Schedules

Section 1041 of The National Defense Authorization Act For Fiscal Year 1996 (Pub. L. 104-106) amended the definition of "employee" at 5 U.S.C. 6121 to extend the authority to establish flexible and compressed work schedules (subchapter II of chapter 61 of title 5, United States Code) to civilian employees of the Armed Services paid from nonappropriated funds. Consistent with this change in law, an OPM regulation stating that wage employees who are authorized to work flexible or compressed work schedules shall be paid premium pay in accordance with subchapter II of chapter 61 of title 5, United States Code, has been amended to delete superseded language stating that this paragraph does not apply to nonappropriated fund employees of the Armed Services, as defined in 5 U.S.C. 2105(c). See revised § 532.513. The authority granted to agency heads by section 1041 became effective on February 10, 1996.

### (2) Compensatory Time Off for Prevailing Rate (Wage) Employees

The new interim regulations on compensatory time off reflect amendments made by section 1610 of The National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104-201, September 23, 1996). The regulations are intended to be parallel to OPM's current regulations on compensatory time off under title 5, United States Code, and the FLSA to the maximum extent possible. Section 1610 amended 5 U.S.C. 5543 to permit the head of any agency to approve a prevailing rate employee's request for compensatory time off instead of overtime pay under either 5 U.S.C. 5544 or the FLSA for an

equal amount of time spent in irregular or occasional overtime work.

The new provision also permits the approval of requests from prevailing rate employees under compressed work schedules for compensatory time off instead of overtime pay in exchange for an equal amount of time spent in irregular or occasional overtime work. The law prohibits mandatory compensatory time off for all wage employees. The authority granted to agency heads by section 1610 became effective on September 23, 1996. This new authority is in addition to authority in section 6123(a)(1) of title 5, United States Code, which authorizes compensatory time off for prevailing rate employees who work under flexible work schedules. Although this previously existing authority has been included in the premium pay regulations at § 550.114(b), it has not previously been included in OPM's regulations in part 532 for prevailing rate systems. Therefore, part 532 has been revised to reflect this previously existing legal authority as well as the newly enacted legal authority for approval of requests from wage employees who are not under flexible work schedules for compensatory time off in lieu of overtime pay for irregular or occasional overtime work.

Part 532 has also been amended to reflect the legal prohibition against requiring that a prevailing rate employee be compensated for overtime work with an equivalent amount of compensatory time off. Finally, on the recommendation of the Federal Prevailing Rate Advisory Committee, part 532 has been amended to provide that prevailing rate employees may not be directly or indirectly intimidated, threatened, or coerced for the purpose of interfering with his or her rights to request or not to request compensatory time off. The regulation also states that the same prohibited actions may not be attempted. See new § 532.504.

The change in law authorizing approval of requests for compensatory time off is applicable to all prevailing rate employees, including those who are covered by the FLSA. We have revised the FLSA regulations to provide that an agency head (or designee) may approve a request from any nonexempt employee for compensatory time off in lieu of overtime pay for irregular or occasional overtime work. This is consistent with

the broad statutory language in 5 U.S.C. 5543, which provides that the head of an agency may grant a request for compensatory time off from an employee's scheduled tour of duty instead of payment under section 5542 or 5544 of title 5, United States Code, or section 7 of the FLSA for an equal amount of time spent in irregular or occasional overtime work. This change will, for example, permit the applicable agency heads to approve requests for compensatory time off for nonexempt members of the United States Secret Service Uniformed Division or nonexempt members of the United States Park Police.

The revised FLSA regulations also provide that no employee covered by the FLSA may be intimidated, threatened, or coerced to request or not to request compensatory time off. The FLSA regulations on compensatory time off already provide that compensatory time off may not be required for nonexempt employees. This is consistent with the new provisions in law on compensatory time off for prevailing rate employees. It is also consistent with 5 U.S.C. 6132(a)(1), which provides that an employee may not threaten, coerce, or intimidate any other employee under a flexible work schedule (or threaten to do so) for the purpose of interfering with such an employee's rights to request or not to request compensatory time off. See revised § 551.531.

Since regulatory requirements on compensatory time off for prevailing rate employees have been added to part 532 and part 551, the current language authorizing compensatory time off for prevailing rate employees under flexible work schedules has been deleted from part 550. Limits on the accumulation and timely use of compensatory time off are set by agency policy or negotiation with appropriate employee representatives, as permitted by new § 532.504(d).

### **(3) Designation of "In lieu of" Holidays for Employees on Compressed Work Schedules**

The interim regulations on "in lieu of" holidays reflect amendments made by section 1613 of The National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104-201, September 23, 1996). Section 1613 adds a new subsection (d) to 5 U.S.C. 6103 that allows an agency head to designate a different "in lieu of" holiday than would be required under 5 U.S.C. 6103(b) in certain circumstances—namely, for full-time employees on compressed work schedules when the head of the agency determines that a different "in lieu of"

holiday is necessary to prevent an "adverse agency impact." The phrase "adverse agency impact" is defined in 5 U.S.C. 6131(b) as "(1) a reduction of the productivity of the agency; (2) a diminished level of services furnished to the public by the agency; or (3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed work schedule)."

This new flexibility is applicable to all agencies covered by subchapters I and II of chapter 61 of title 5, United States Code, and is granted to an agency head notwithstanding any other provision of law or the terms of any collective bargaining agreement. However, a new paragraph (c) has been added to 5 CFR 610.202 to provide that the "in lieu of" holiday selected by the agency for an employee under a compressed work schedule must be a workday in the same biweekly pay period as the date of the actual holiday established by 5 U.S.C. 6103(a) or must be a workday in the pay period immediately preceding or following that pay period. This provision is intended to (1) preclude a long delay in providing an "in lieu of" holiday to an employee and (2) prevent accumulation of holiday hours as if they were paid hours of leave. The authority granted to agency heads by section 1613 became effective on September 23, 1996.

### **(4) Appropriations Limitations on the Payment of Sunday Premium Pay and Night Pay Differential in Certain Agencies**

Section 630 of The Treasury, Postal Service, and General Government Appropriations Act, 1997, as contained in section 101(f) of Public Law 104-208, The Omnibus Consolidated Appropriations Act, 1997, prohibits the use of funds appropriated under the Act for the payment of Sunday premium pay and night pay differential pay to employees who do not actually perform work during the time corresponding to such Sunday premium or night pay differential. This prohibition applies only to agencies whose appropriations are provided by The Treasury, Postal Service, and General Government Appropriations Act, 1997. Affected agencies should be aware that this change in law restricts their implementation of 5 CFR 532.505, 532.509, 550.122, and 550.171.

Within the covered agencies, this prohibition applies to any employee who is paid from funds appropriated by the Act, including but not limited to General Schedule and prevailing rate employees. This provision has the effect

of prohibiting the payment of Sunday premium pay or night pay differential to covered employees during any period when no work is performed, apparently including holidays and periods of paid leave, excused absence with pay, compensatory time off, credit hours when used (taken), or time off as an incentive or performance award. Paid leave includes all types of paid leave, including paid leave for jury or witness service under 5 U.S.C. 6322 and military leave under 5 U.S.C. 6323.

This prohibition also appears to preclude a covered agency from paying Sunday premium pay or night pay differential during a period of continuation of pay under the authority of the Federal Employees' Compensation Act (FECA) when the employee did not actually work on Sunday or at night. Similarly, this prohibition appears to preclude a covered agency from reimbursing the Department of Labor for FECA benefits paid to its employees to the extent that the employees have received FECA benefits that are based on Sunday premium pay or night pay differential that the employees would have earned had they worked, but did not earn because they did not actually work on Sunday or at night. The Department of Labor may be able to waive overpayments that occurred. OPM believes that is an issue to be worked out between affected agencies and the Department of Labor. Section 630 became effective on September 30, 1996.

A similar ban on the payment of Sunday premium pay was also in effect for employees of the Federal Aviation Administration (FAA) under The Transportation and Related Agencies Appropriations Acts for FY 1995, 1996, and 1997. This was included in the 1997 Transportation and Related Agencies Appropriation Act even though Congress has authorized FAA to implement its own personnel system. Since the application of these appropriations restrictions is limited and the restrictions may expire, we have not amended OPM regulations on payment of Sunday premium pay and night pay differential. Nevertheless, affected agencies must comply with these appropriations restrictions.

### **Waiver of Notice of Proposed Rule Making and Delay in Effective Date**

The authority for agencies to authorize flexible and compressed work schedules for NAF employees of the Armed Services, provided by section 1041 of The Department of Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106), became effective on February 10, 1996. Authority for

employer-employee agreements providing that commuting by use of a Government vehicle shall not create hours of work for the purpose of providing overtime pay under the FLSA is provided by The Employee Commuting Flexibility Act of 1996, as contained in sections 2101 through 2103 of The Small Business Job Protection Act of 1996 (Pub. L. 104-188), and became effective on August 20, 1996.

The authority granted to agency heads under section 1610 of The National Defense Authorization Act for Fiscal Year 1997 (Public Law 104-201) to approve requests from prevailing rate employees for compensatory time off in lieu of overtime pay for irregular or occasional overtime work became effective on September 23, 1996. Section 1613 of the same Act, which allows an agency head to designate a different "in lieu of" holiday than would be required under 5 U.S.C. 6103(b) for full-time employees on compressed work schedules, also became effective on September 23, 1996.

In order to implement these changes on the effective dates established for them by law, I find good cause to waive the general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(3)(B). Also, I find that good cause exists for making this rule effective retroactively. The retroactive effective dates are necessary in order to implement the changes in law on their statutory effective dates.

### Regulatory Flexibility Act

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

### List of Subjects in 5 CFR Parts 532, 550, 551, and 610

Administrative practice and procedure, Claims, Freedom of information, Government employees, Holidays, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

**James B. King,**  
Director.

Accordingly, OPM is amending parts 532, 550, 551, and 610 of title 5 of the Code of Federal Regulations as follows:

### PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

**Authority:** 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

### Subpart E—Premium Pay and Differentials

2. Section 532.504 is added to read as follows:

#### § 532.504 Compensatory time off.

(a) At the request of an employee, the head of an agency may grant compensatory time off from an employee's tour of duty instead of payment under § 532.503 or the Fair Labor Standards Act of 1938, as amended, for an equal amount of irregular or occasional overtime work.

(b) At the request of an employee, the head of an agency may grant compensatory time off from an employee's basic work requirement under a flexible work schedule under 5 U.S.C. 6122 instead of payment under § 532.503 or the Fair Labor Standards Act of 1938, as amended, for an equal amount of overtime work, whether or not irregular or occasional in nature.

(c) An agency may not require that an employee be compensated for overtime work with an equal amount of compensatory time off from the employee's tour of duty. An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any other employee for the purpose of interfering with such employee's rights to request or not to request compensatory time off in lieu of payment for overtime hours.

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

3. Section 532.513 is revised to read as follows:

#### § 532.513 Flexible and compressed work schedules.

Federal Wage System employees who are authorized to work flexible and compressed work schedules under sections 6122 and 6127 of title 5, United States Code, shall be paid premium pay in accordance with subchapter II of chapter 61 of title 5, United States Code. Subpart D of part 610 of this chapter supplements subchapter II and must be read together with it.

### PART 550—PAY ADMINISTRATION (GENERAL)

#### Subpart A—Premium Pay

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

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

5. In § 550.114, paragraphs (a) and (b) are revised to read as follows:

#### § 550.114 Compensatory time off.

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

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

\* \* \* \* \*

### PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

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

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

#### Subpart E—Overtime Pay Provisions

7. In § 551.531, paragraphs (a) and (c) are revised to read as follows:

#### § 551.531 Compensatory time off.

(a) At the request of an employee who is not exempt under subpart B of this part, the head of an agency (or designee) may grant compensatory time off from an employee's tour of duty instead of payment under § 551.501 for an equal amount of irregular or occasional overtime work.

\* \* \* \* \*

(c) An agency may not require that an employee be compensated for overtime work under this subpart with an equivalent amount of compensatory time off from the employee's tour of duty. An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any other employee for the purpose of interfering with such employee's rights to request or not to

request compensatory time off in lieu of payment for overtime hours.

\* \* \* \* \*

**PART 610—HOURS OF DUTY**

**Subpart B—Holidays**

8. The authority citation for subpart B of part 610 continues to read as follows:

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

9. In § 610.202, paragraph (b) is revised, and paragraph (c) is added, to read as follows:

**§ 610.202 Determining the holiday.**

\* \* \* \* \*

(b) When a holiday falls on a nonworkday outside an employee's basic workweek, the day to be treated as his or her holiday is determined in accordance with sections 6103 (b) and (d) of title 5, United States Code, and Executive Order 11582.

(c) When an agency determines the holiday in accordance with section 6103(d) of title 5, United States Code, for an employee under a compressed work schedule, the agency shall select a workday for the holiday that is in the same biweekly pay period as the date of the actual holiday designated under 5 U.S.C. 6103(a) or in the biweekly pay period immediately preceding or following that pay period.

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BILLING CODE 6325–01–P

**DEPARTMENT OF AGRICULTURE**

**Federal Crop Insurance Corporation**

**7 CFR Parts 401 and 457**

**General Crop Insurance Regulations, Rice Endorsement; and Common Crop Insurance Regulations, Rice Crop Insurance Provisions**

**AGENCY:** Federal Crop Insurance Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Federal Crop Insurance Corporation (FCIC) finalizes specific crop provisions for the insurance of rice. The provisions will be used in conjunction with the Common Crop Insurance Policy Basic Provisions, which contain standard terms and conditions common to most crops. The intended effect of this action is to provide policy changes to better meet the needs of the insured, include the current Rice Endorsement with the Common Crop Insurance Policy for ease of use and consistency of terms, and to

restrict the effect of the current Rice Endorsement to the 1997 and prior crop years.

**EFFECTIVE DATE:** June 23, 1997.

**FOR FURTHER INFORMATION CONTACT:** Linda Williams, Insurance Management Specialist, Research and Development, Product Development Division, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO 64131, telephone (816) 926–7730.

**SUPPLEMENTARY INFORMATION:**

**Executive Order 12866**

The Office of Management and Budget (OMB) has determined this rule to be exempt for the purposes of Executive Order 12866, and therefore, this rule has not been reviewed by OMB.

**Paperwork Reduction Act of 1995**

Following publication of the proposed rule, the public was afforded 60 days to submit written comments on information collection requirements previously approved by OMB under OMB control number 0563–003 through September 30, 1998. No public comments were received.

**Unfunded Mandates Reform Act of 1995**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for state, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

**Executive Order 12612**

It has been determined under section 6(a) of Executive Order No. 12612, Federalism, that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on states or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government.

**Regulatory Flexibility Act**

This regulation will not have a significant impact on a substantial number of small entities. New provisions included in this rule will not impact small entities to a greater extent than large entities. Under the current regulations, a producer is required to

complete an application and acreage report. If the crop is damaged or destroyed, the insured is required to give notice of loss and provide the necessary information to complete a claim for indemnity.

The insured must also annually certify to the previous years production if adequate records are available to support the certification. The producer must maintain the production records to support the certified information for at least three years. This regulation does not alter those requirements.

The amount of work required of the insurance companies delivering and servicing these policies will not increase significantly from the amount of work currently required. This rule does not have any greater or lesser impact on the producer. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605), and no Regulatory Flexibility Analysis was prepared.

**Federal Assistance Program**

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

**Executive Order 12372**

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with state and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

**Executive Order 12988**

This final rule has been reviewed in accordance with Executive Order 12988. The provisions of this rule will not have a retroactive effect prior to the effective date. The provisions of this rule will preempt state and local laws to the extent such state and local laws are inconsistent herewith. The administrative appeal provisions published at 7 CFR part 11 must be exhausted before any action for judicial review may be brought.

**Environmental Evaluation**

This action is not expected to have a significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

**National Performance Review**

This regulatory action is being taken as part of the National Performance Review Initiative to eliminate unnecessary or duplicative regulations and improve those that remain in force.