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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 531, 550, and 591

RIN 3206-AF38

#### Pay Administration (General); Lump-Sum Payments for Annual Leave

**AGENCY:** Office of Personnel Management.

**ACTION:** Final regulation.

**SUMMARY:** The Office of Personnel Management is issuing final regulations to establish a uniform Governmentwide policy for calculating lump-sum payments for accumulated and accrued annual leave for employees who separate from the Federal service.

**EFFECTIVE DATE:** September 7, 1999.

**FOR FURTHER INFORMATION CONTACT:** Brenda Roberts, (202) 606-2858, FAX (202) 606-0824, or email to [payleave@opm.gov](mailto:payleave@opm.gov).

**SUPPLEMENTARY INFORMATION:** The Technical and Miscellaneous Civil Service Amendments Act of 1992 (Pub. L. 102-378, October 2, 1992) added section 5553 to title 5, United States Code, to give the Office of Personnel Management (OPM) regulatory authority for the administration of lump-sum payments for accumulated and accrued annual leave. Under 5 U.S.C. 5551 and 5552, an agency must make a lump-sum payment for annual leave when an employee separates from the Federal service or enters on active duty in the armed forces and elects to receive a lump-sum payment. The lump-sum payment must equal the pay the employee would have received had he or she remained employed until expiration of the period of annual leave. Section 6306 of title 5, United States Code, provides that when an employee is reemployed in the Federal service prior to the expiration of the period of annual leave (i.e., the lump-sum leave

period), he or she must refund the portion of the lump-sum payment that represents the period between the date of reemployment and the expiration of the lump-sum period. An agency must recredit to the employee an amount of annual leave equal to the days or hours of work remaining between the date of reemployment and the expiration of the lump-sum leave period.

OPM acknowledges that some of these regulatory provisions involve items not expressly provided for by statute. However, OPM would emphasize in this regard that an administrative agency may determine matters within its expertise that have not been specifically addressed by statute. Indeed, administrative agencies formulate policy and make appropriate rules as needed to carry out their regulatory responsibilities consistent with statutory authority. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) and *United States v. Grimaud*, 220 U.S. 506, 517 (1911), as cited in Davis, K., *Administrative Law Treatise, Third Edition*, § 2.6, pp. 70-71. The construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed over a long period of time. *United States v. Clark*, 454 U.S. 555, 565 (1982) and *Rosete v. OPM*, 48 F.3d 514, 518-519 (Fed. Cir. 1995).

On July 29, 1997, OPM published proposed regulations (62 FR 40475) to establish a Governmentwide policy for calculating lump-sum payments for accumulated and accrued annual leave for employees who separate from Federal service. OPM received comments from 7 agencies, 1 labor organization, 1 employee association, and 4 individuals, for a total of 13 comments. The majority of the agencies and the labor organization agreed that regulations are needed to provide consistency throughout the Federal Government. The labor organization stated that the development of one set of rules will ensure that employees are aware of the lump-sum payment policy and are familiar with their rights to receive payment for unused annual leave when they separate from the Federal service. The labor organization further stated that the adoption of one Governmentwide policy eliminates inequities that necessarily result from

agency-specific policies. A summary of the comments received and the changes made in the regulations is presented below.

#### Employees Eligible for a Lump-Sum Payment

The proposed regulations stated that an agency must not make a lump-sum payment for accumulated or accrued annual leave to an employee whom the agency determines to be in a continuing employment program under which the employee is required to work a mixed tour of duty (i.e., the employee works full-time or part-time for a limited portion of the year and intermittently for the remainder). Since an employee working intermittent duty cannot accrue or use leave, the proposed regulations required the agency to hold any accrued leave in abeyance during the time the employee is working intermittent duty and to recredit the annual leave when the employee returns without a break in service to full-time or part-time employment. In addition, the proposed regulations required the agency to hold in abeyance any of the employee's fractional pay periods for leave accrual purposes and recredit the pro-rata leave as provided in § 630.204 when the employee returns to full-time or part-time employment.

One agency recommended that the final regulations allow each agency the discretion to determine whether to pay a lump-sum payment for annual leave when an employee changes to intermittent duty or to hold the employee's accrued annual leave in abeyance until he or she returns to a part-time or full-time position. The agency disagrees with the proposed regulations and believes that requiring an agency to hold leave in abeyance results in additional leave being available for use during periods of part-time and full-time employment when the agency needs its employees at work the most. The agency believes mission requirements, staffing needs, and sources of available funds vary greatly from one organization to another and that applying the same rule universally may have a negative financial impact on one or more agencies or organizations. In addition, the agency stated that the proposed rule would eliminate the financial cushion (i.e., lump-sum payment) that many employees working mixed tours of duty have become

accustomed to receiving during non-work periods.

Another agency commented on the administrative burden of paying lump-sum payments during short periods of intermittent work. The agency requested approval to hold accrued annual leave in abeyance so that an employee would have annual leave available at the beginning of his or her part-time or full-time employment. Under this approach, an employee also would not lose any fractional hours of creditable service for purposes of leave accrual when the employee's tour changes to intermittent.

Upon further review, we believe it would be in the best interest of the Government to permit more flexibility. Therefore, § 550.1203(i) of the final regulations permits each agency to prescribe its own policy for paying lump-sum payments for employees on mixed tours of duty. Each agency's policy must ensure that employees are treated in a fair and equitable manner. In developing its policy, we encourage each agency to consider the likelihood that an employee will return to work, as well as the agency's mission requirements and staffing needs.

An agency requested clarification as to whether an employee on a mixed tour of duty is entitled to continue to accrue leave on a prorated basis during periods of intermittent employment. If an employee is assigned intermittent duty and does not have an established regular tour of duty each week, he or she cannot accrue or use leave during the intermittent period. (See 5 U.S.C. 6301(2).)

A commenter requested clarification about entitlement to a lump-sum payment when an employee who had annual leave restored under 5 U.S.C. 6304(d)(3) transfers to a component of the Department of Defense (DOD) that is not undergoing closure or realignment. Section 1611 of Pub. L. 104-201 (September 23, 1996), added paragraph (c) to 5 U.S.C. 5551 to require DOD to pay a lump-sum payment to an employee for any unused annual leave that was restored under 5 U.S.C. 6304(d)(3) when the employee (1) transfers to a position in any other department or agency of the Federal Government or (2) moves to a position within DOD not located at an installation undergoing closure or realignment. The entitlement to a lump-sum payment for affected DOD employees became effective on September 23, 1996, and applies only to employees transferring from a DOD component undergoing closure or realignment at the time of transfer. Further questions on this provision should be directed to DOD's Civilian

Personnel Management Service, Field Advisory Services, 1400 Key Boulevard, Arlington, VA 22209-5144 (telephone: (703) 696-6301).

The proposed regulations stated that when an employee enters active duty, any annual leave previously restored under 5 U.S.C. 6304(d) may not remain to the employee's credit and may be paid in a lump-sum payment. An agency commented that this statement is confusing, since 5 U.S.C. 6304(d)(2) requires an agency to make a lump-sum payment for restored annual leave when an employee enters on active duty. We agree and have revised § 550.1203(c) of the final regulations to require an agency to make a lump-sum payment for any annual leave previously restored under 5 U.S.C. 6304(d) when an employee enters active duty. The agency may not recredit the restored leave when the employee returns to Federal service.

#### **Employees Not Eligible for a Lump-Sum Payment**

Under the proposed regulations, if an employee transfers to a position that is not covered by subchapter I of chapter 63 of title 5, United States Code (e.g., a position in the U.S. Postal Service), and only a portion of his or her accumulated and accrued annual leave may be transferred, the losing agency would hold in abeyance the annual leave that could not be transferred. The agency would then recredit the annual leave that had been held in abeyance once the employee is reemployed without a break in service in a position to which his or her accumulated and accrued annual leave may be transferred. An agency suggested that OPM seek a statutory change in 5 U.S.C. 5551 to allow for the immediate lump-sum payment of any annual leave in excess of the amount accepted by the gaining agency (e.g., the U.S. Postal Service). The agency believes this change would preclude the need for establishing and tracking a separate leave account for non-transferrable leave and result in quicker settlement of the matter for the employee. The agency stated that this change would, in effect, be identical to the lump-sum payment provisions in 5 U.S.C. 5551(c) for employees affected by base realignment or closure (Pub. L. 104-201).

We agree with the substance of the agency's recommendation, but have determined that this can be accomplished by regulation rather than legislation. Therefore, § 550.1203(f) of the final regulations provides that when an employee transfers to a position that is not covered by subchapter I of chapter 63 of title 5, United States Code, the

losing agency must make a lump-sum payment under § 550.1205 for the amount of annual leave that cannot be transferred to the gaining agency. This does not apply to an employee transferring to an excepted position under 5 U.S.C. 6301(2)(x)-(xiii), (e.g., a member of the Senior Executive Service who accepts a Presidential appointment).

Under the proposed regulations, an employee who was concurrently employed in more than one part-time position in more than one agency, and who separated from one of the part-time positions, would have had the annual leave that accrued in the agency from which he or she separated transferred to the current employing agency. An agency recommended that the agency pay a lump-sum payment to an employee who separates from any of the part-time appointments. The agency believes the annual leave should not be transferred because (1) such transfer would place a financial burden on the gaining agency in terms of a future lump-sum payment if the employee later separates from Federal service, (2) the employee would receive an unintended increase or loss in the value of annual leave if the multiple part-time appointments are at different grades or levels, and (3) the employee may be absent for extended periods in the gaining agency and/or may be forced to forfeit annual leave in excess of the maximum annual leave limitation.

We agree that these are all important factors for employees to consider when separating from a part-time position. However, the law provides that an employee is entitled to a lump-sum payment only when he or she separates from Federal service (or goes on military duty) or when unused annual leave cannot be transferred or credited at a gaining agency. Since an employee who is employed in a second part-time position is not separated from Federal service and could have his or her accumulated annual leave transferred to a gaining agency, he or she is not entitled to a lump-sum payment. Therefore, OPM made no changes in § 550.1203(h)(4) of the final regulations.

#### **Projecting the Lump-Sum Leave Period**

An agency asked whether "use or lose" or restored annual leave should be included in the projected lump-sum leave period if the leave is scheduled to be forfeited within a few days after separation. The answer is yes. Under 5 U.S.C. 5551, an employee is entitled to receive a lump-sum payment for accumulated and currently accrued annual leave to which an employee is entitled by statute on the date of

separation. This includes all "use or lose" and restored annual leave to the employee's credit on the date of separation. Annual leave that has not yet been forfeited must be included in a lump-sum payment.

The proposed regulations required an agency to project the lump-sum leave period so that annual leave restored under 5 U.S.C. 6304(d) in a separate leave account must be used before using any accumulated annual leave in the employee's regular annual leave account. This was done so that if an employee returned to Federal service prior to the expiration of the lump-sum leave period, the restored annual leave would have already been used and would not be recredited to the employee. We have revised the proposed regulations on recrediting annual leave so that there is no longer any requirement to identify restored annual leave and recredit it upon reemployment. Therefore, § 550.1204(c) of the final regulations does not require agencies to project the lump-sum leave period so that restored annual leave is used before using regular annual leave.

Section 550.1204(a) of the final regulations states that the period of leave used for calculating the lump-sum payment may not be extended by compensatory time off earned under 5 U.S.C. 5543 and §§ 550.114(d) or 551.531 or by credit hours accumulated under an alternative work schedule under 5 U.S.C. 6126. The employee association expressed concern that agencies may misinterpret this regulation to mean that they do not have to pay a separating employee for any earned compensatory time off or credit hours. Section 550.1204(a) merely ensures that compensatory time off and credit hours, which are not types of leave under chapter 63 of title 5, United States Code, are not identified and included in the calculation of a lump-sum payment for annual leave. Since agencies are responsible for ensuring that compensatory time off and credit hours (credit hours not in excess of 24 hours) remaining to an employee's credit at the time of separation are paid separately as part of a final salary payment under existing law and regulations, we do not believe any change is necessary. (See §§ 550.114(d) and 551.531(d) and 5 U.S.C. 6126.)

#### **Pay Received Prior to Separation**

Throughout the regulations, we use the phrases "immediately prior to separation, death, or transfer" and "immediately prior to the date the employee becomes/became eligible for a lump-sum payment under § 550.1203" interchangeably. An agency

recommended that OPM consistently use the phrase "immediately prior to the date the employee becomes/became eligible for a lump-sum payment under § 550.1203" throughout the regulations. The agency believes this change would eliminate any confusion and ensure coverage of all intended employees, including those who choose to receive a lump-sum payment upon entering active duty in the armed forces. We agree and have modified the final regulations as suggested.

#### **Calculating the Lump-Sum Payment**

Under 5 U.S.C. 5551, a lump-sum payment must equal the pay an employee would have received had he or she remained in Federal service until expiration of the period of annual leave (excluding any differential under section 5925 and any allowance under section 5928). The term "pay" is not further defined in law. In the final regulations, we have interpreted this term to mean the pay the employee would have received on a biweekly basis had he or she remained in Federal service on annual leave. For example, an employee's rate of basic pay, any applicable locality payment, and availability pay for law enforcement officers (where applicable) are included in a lump-sum payment, while hazardous duty pay, environmental differentials, and Sunday premium pay are excluded. Also excluded are allowances that are paid in addition to a rate of basic pay for the sole purpose of encouraging an employee to remain in Government service, such as retention allowances and physicians comparability allowances.

Under § 550.1205(a) of the final regulations, an agency calculates a lump-sum payment by multiplying the number of hours of accumulated and accrued annual leave by the employee's applicable hourly rate of pay, including the types of pay listed in § 550.1205(b). An algebraically equivalent method that an agency may also use is to multiply the weeks of annual leave by the employee's applicable weekly rate of pay.

One agency believes the phrase "including types of pay" could be misconstrued and recommended it be changed to "plus other applicable types of pay" so as to limit the additional types of pay to those applicable to the employee. To clarify our intent, we have revised § 550.1205(a) to state that a lump-sum payment must be calculated by multiplying the number of hours of accumulated and accrued annual leave by the applicable hourly rate of pay, including other applicable types of pay listed in § 550.1205(b).

For an employee on an uncommon tour of duty (as defined in § 630.201), an agency may choose to calculate the lump-sum payment based on the applicable weekly rate and convert the annual leave balance to a 40-hour workweek basis. For example, to determine the number of weeks to use in computing a lump-sum payment for an employee who normally works an uncommon tour of duty of 72 hours each week, the agency may convert the employee's annual leave balance from a 72-hour workweek basis to a 40-hour workweek basis by multiplying the total hours of annual leave by the fraction 40/72 and dividing the result by 40.

The proposed regulations listed the types of basic pay that must be included in a lump-sum payment. An agency suggested that OPM include a retained rate authorized under 5 U.S.C. 5363 and 5 CFR part 536, subpart B, in the list. We agree and have added a retained rate of pay to the list in § 550.1205(b)(1)(i). In addition, we have added supervisory differentials paid under 5 U.S.C. 5755 to the list of the types of pay to be included in a lump-sum payment, since an employee who was receiving such a differential would have received supervisory differential payments on a biweekly basis had he or she remained in Federal service on annual leave. (See § 550.1205(b)(7).)

#### **General Pay Adjustments**

The proposed regulations stated that in the case of a Federal Wage System (FWS) employee, a lump-sum payment must include the rate of pay established under 5 U.S.C. 5343. In addition, such an employee would receive any applicable adjustments in prevailing rates that become effective during the lump-sum leave period if the employee separated after issuance of an official order to conduct a wage survey for his or her applicable wage area. The lump-sum payment would be adjusted to reflect the increased prevailing rate beginning on the effective date of the rate adjustment. Since a prevailing rate employee who separated from Federal service prior to the issuance of an official order to conduct a wage survey in his or her applicable wage area would not be entitled to the FWS pay adjustment in that wage area for that year, we proposed that the FWS pay adjustment should not be included in the employee's lump-sum payment for annual leave.

An agency recommended that prevailing rate employees be treated the same as General Schedule employees under § 550.1205(b)(2). Only those pay adjustments approved before the date of separation must be included in a lump-

sum payment. The agency noted that because FWS surveys are ordered 9 weeks before the survey results take effect, the agency would have to establish temporary payroll files whenever a retroactive recomputation of a lump-sum payment would be necessary.

We agree that the proposed regulations were unnecessarily complicated with respect to inclusion of pay adjustments after separation and would have caused administrative burdens for the agencies, including the need for additional individual calculations of lump-sum payments. Because of the concerns we received from agencies about the complexity in determining an employee's entitlement to a pay adjustment in his or her lump-sum payment after the employee separates from Federal service, we have simplified the final regulations. Section 550.1205(b)(2) and (3) provide that lump-sum payments for all covered Federal employees must include any general pay adjustment and locality pay adjustment that becomes effective during the employee's lump-sum leave period. The lump-sum leave period is the employee's annual leave projected forward for all workdays the employee would have worked if he or she had remained in Federal service, including holidays (even though they are typically nonworkdays) as required by 5 U.S.C. 5551(a), until the expiration of the employee's accumulated and accrued annual leave. The lump-sum payment will be adjusted to reflect the increased rate on and after the effective date of the pay schedule adjustment. We do not believe these changes to simplify the calculation of lump-sum payments will significantly increase costs for Federal agencies, since many employees separate after the official approval or authorization of a pay adjustment and/or do not have large amounts of accumulated and accrued annual leave that extend beyond the effective date of a pay adjustment.

#### **Night Differential and Night Pay**

Under § 550.1205(b)(5)(i) of the final regulations, a lump-sum payment includes a night differential under 5 U.S.C. 5343(f) for regularly scheduled nonovertime hours at the percentage rate received by a prevailing rate employee for the last full workweek immediately prior to the date the employee becomes eligible for a lump-sum payment. An agency recommended that the night differential be based on the average received during a 12-week period, since a single week could reflect an unusual or anomalous situation. Under 5 U.S.C. 5343(f), a night

differential for a prevailing rate employee is considered part of basic pay and is included in all regularly scheduled nonovertime periods of night shift duty, including periods of paid leave. The language in OPM's proposed regulations was adopted from the Federal Wage System (FWS) Operating Manual. The FWS Operating Manual comprises long-standing policies, practices, and recommendations adopted by the Federal Prevailing Rate Advisory Committee, a labor and management committee that reports to the Director of OPM. The FWS Operating Manual states that a night shift differential is included in a lump-sum payment and is paid at the percentage rate received by the employee for the last full workweek immediately prior to separation. Therefore, OPM made no changes in § 550.1205(b)(5)(i).

The proposed regulations provided that a lump-sum payment includes night pay under 5 U.S.C. 5545 for regularly scheduled nonovertime hours based on the average amount of night pay received by a General Schedule (GS) employee during the 12 workweeks immediately prior to the date the employee becomes eligible for a lump-sum payment. Two agencies objected to including night pay in a lump-sum payment, since night pay is not considered part of basic pay for GS employees. In addition, the agencies noted that 5 U.S.C. 5545(a)(2) prohibits the payment of night pay for any hours of leave between 6 a.m. and 6 p.m. whenever the total amount of leave in the pay period equals or exceeds 8 hours. The agencies believe the proposed regulations would result in an employee receiving more than he or she would have received had he or she remained in Federal service. One agency objected to the requirement for 12-week averaging, since such a requirement would force timekeepers to compute an average amount of night pay manually. The same agency recommended that OPM treat night pay for GS employees the same as night differentials for prevailing rate employees by calculating the amount of night pay to be included in a lump-sum payment based on the rate the employee received for regularly scheduled nonovertime hours in the workweek immediately prior to becoming eligible for a lump-sum payment.

We agree that night pay is not part of basic pay for GS employees and that the proposed regulations would have provided such employees with a greater benefit than they would have received if they had remained in Federal service. Therefore, the final regulations do not

include night pay for GS employees among the types of pay that must be included in a lump-sum payment.

#### **Sunday Premium Pay**

The proposed regulations provided that a lump-sum payment includes Sunday premium pay for nonovertime hours on Sunday based on the average amount of Sunday premium pay received by the employee during the 12 workweeks immediately prior to the date the employee became eligible for a lump-sum payment. An agency recommended that Sunday premium pay be excluded from a lump-sum payment because it is not considered part of basic pay for retirement purposes. Two agencies recommended that the amount of Sunday premium pay included in a lump-sum payment be based solely on the employee's workweek immediately prior to eligibility for a lump-sum payment. Another agency added that if OPM wishes to use an average amount received during a 12-week period, the computation should be based on the average number of hours worked on Sunday rather than on the amount of Sunday premium pay received. The agency noted that the actual amount of Sunday premium pay received during an earlier work period could have been paid at a lower rate if, for example, an employee received a within-grade increase or promotion during the latter part of the 12-week period.

Section 636 of the Treasury and General Government Appropriations Act, 1998 (Pub. L. 105-61, October 10, 1997), permanently restricts the payment of Sunday premium pay for all employees Governmentwide who are paid from appropriated funds and who do not actually perform work on Sunday. In addition, section 624 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277, October 21, 1998), expanded the permanent restriction on the payment of Sunday premium pay to cover employees who are paid from any Act (including payments from revolving funds). Consistent with these laws, we removed Sunday premium pay from the types of pay that must be included in a lump-sum payment.

#### **Overtime Pay**

Under the proposed regulations, a lump-sum payment included overtime pay under the Fair Labor Standards Act of 1938, as amended (FLSA), for overtime work that is regularly scheduled during an employee's established uncommon tour of duty (as defined in § 630.201 and established under § 630.210) for which the

employee receives standby duty pay under 5 U.S.C. 5545(c)(1) if the uncommon tour of duty was applicable to the employee immediately prior to the date the employee became eligible for a lump-sum payment. The lump-sum payment included the amount of FLSA overtime pay for regularly scheduled overtime work ordered or approved at the time the employee became eligible for a lump-sum payment. (This provision applied to most firefighters and some emergency medical technicians.)

On June 18, 1997, OPM issued an Interagency Advisory Group Memorandum that encouraged agencies to include in a lump-sum payment all FLSA overtime pay for overtime hours that are regularly scheduled during an employee's established uncommon tour of duty if the uncommon tour of duty was in effect for the employee immediately prior to the date the employee became eligible for a lump-sum payment under § 550.1203. OPM based this advice on the results of two lawsuits—*James Calhoun v. The United States* (Fed. Cl. No. 95-840C, December 21, 1995) and *Theodore Abbott, et al., v. The United States* (Fed. Cl. No. 90-756C, January 31, 1994). In these cases, the Federal Government conceded that FLSA overtime pay for regularly scheduled overtime hours that occur during an uncommon tour of duty must be included in an employee's lump-sum payment for accumulated and accrued annual leave under 5 U.S.C. 5551.

Two agencies disagreed with the inclusion of FLSA overtime pay in a lump-sum payment. One suggested that hours of work that are used for the purpose of determining entitlement to FLSA overtime pay should not be used for determining entitlement to other payments under title 5, United States Code. The other agency believes such inclusion would be contrary to the intent of Congress' prohibition on the payment of premium pay during periods of paid leave. An employee association agreed with the inclusion of FLSA overtime pay, but suggested that the amount be based on the average number of hours worked during the preceding 12 weeks.

On October 21, 1998, legislation was enacted that changes the method of computing basic pay, overtime pay, and other entitlements for Federal firefighters who are classified in the GS-081 classification series (Fire Protection and Prevention) and who have regular tours of duty averaging at least 53 hours

per week (or 106 hours biweekly). (See section 628 of the Treasury and General Government Appropriations Act, 1999, as incorporated in Division A, section 101(h) of Pub. L. 105-277, October 21, 1998.) The new law eliminates the use of standby duty pay for firefighters and provides that firefighters are paid solely on an hourly rate basis using a special "firefighter hourly rate." Both FLSA-covered (nonexempt) and FLSA-exempt firefighters will receive time-and-one-half overtime pay for all overtime hours—i.e., hours in excess of 53 hours per week (or 106 hours biweekly).

On November 23, 1998, OPM issued interim regulations (63 FR 64589) that included a revised definition of "uncommon tour of duty" in § 630.201(b)(2) to incorporate a reference to firefighters compensated under the new law. Also, a new paragraph (c) was added to § 630.210 to require that agencies establish an uncommon tour of duty for leave purposes for firefighters with regular tours of duty that generally consist of 24-hour shifts. An agency may also establish an uncommon tour of duty under § 630.210(a) for leave purposes for firefighters with a regular tour of duty that includes a basic 40-hour workweek, plus regularly scheduled overtime hours. Existing regulations (§ 550.1306(c)) require that in computing a lump-sum payment for firefighters with an uncommon tour of duty established under § 630.210 for leave purposes, an agency must use the rates of pay for the position held by the firefighter that apply to hours in that uncommon tour of duty, including regular overtime pay for such hours.

As a result of these changes, a new paragraph (iv) has been added to § 550.1205(b)(5) of the final regulations to provide that overtime pay for overtime hours within a firefighter's regular tour of duty is used in computing a lump-sum payment for annual leave, since those overtime hours are part of an uncommon tour of duty established under § 630.210 for leave purposes. Section 550.1205(b)(6) continues to apply to an employee who receives FLSA overtime pay for overtime work that is regularly scheduled during an established uncommon tour of duty as defined in § 630.201(b)(1), for which the employee receives standby duty pay under 5 U.S.C. 5545(c)(1) (e.g., emergency medical technicians).

We believe the amount of overtime pay to be included in a lump-sum

payment should reflect the amount the employee would have received had he or she remained employed in the Federal service. In addition, it is not our intent to require agencies to establish new methodologies for calculating overtime pay for lump-sum payment purposes. Therefore, in response to agency comments that overtime pay in a lump-sum payment for firefighters should be limited to the normal amount of overtime work performed in each pay period—i.e., after meeting the overtime weekly standard of 53 hours (or 106 hours biweekly), we have added a sentence to §§ 550.1205(b)(5)(iv) and 550.1205(b)(6) of the final regulations to state that a lump-sum payment must be calculated using the same methodology used by the employing agency to calculate the firefighter's entitlement to regular overtime pay for the pay period immediately prior to the date the firefighter became eligible for a lump-sum payment. Therefore, if an agency calculates overtime on a biweekly basis, the amount of overtime pay to be included in a lump-sum payment will be determined after the employee meets the overtime standard of 106 hours each biweekly pay period. If an agency calculates overtime pay on a weekly basis, the amount of overtime pay to be included in a lump-sum payment will be determined after the employee meets the overtime standard of 53 hours each week.

#### Sample Calculation

The following example shows how an agency should calculate the overtime pay component of a lump-sum payment for a firefighter with an uncommon tour of duty established under § 630.210(c). In the example, a firefighter who normally works 144 hours each pay period (three 24-hour tours of duty in each administrative workweek) separates at the end of a pay period with 400 hours of accumulated and accrued annual leave. The firefighter receives a "firefighter hourly rate" (as established in 5 CFR 550.1303) for all 400 hours of annual leave, plus 1/2 of the "firefighter hourly rate" for all overtime hours in the employee's uncommon tour of duty. The agency determines the firefighter's entitlement to overtime pay based on a 106-hour biweekly overtime standard. Thus, in each full 144-hour biweekly pay period, the firefighter is entitled to overtime pay for 38 regularly scheduled overtime hours (144 - 106 = 38) within his or her uncommon tour of duty.

## EXAMPLE OF LUMP-SUM PAYMENT FOR A FIREFIGHTER

	Pay Period 1=144 hours ... Annual leave remaining: 256 hours. (400-144=256) .....	Pay Period 2=144 hours ... Annual leave remaining: 112 hours. (256-144=112) .....	Pay Period 3=112 hours ... Annual leave remaining: ... 0 hours .....	Total=400 hours of annual leave.
Projecting the lump-sum leave period for 400 hours of annual leave.				
Firefighter hourly rate .....	144 hours .....	144 hours .....	112 hours .....	400 hours.
Firefighter overtime rate ....	38 hours .....	38 hours .....	6 hours .....	82 hours.

Although each agency has the right to establish the work schedules of its employees, this authority may not be used to change an employee's work schedule just prior to separation or retirement for the sole purpose of circumventing OPM's regulation requiring agencies to include FLSA overtime pay in a lump-sum payment. We have added a provision to §§ 550.1205(b)(5)(iv) and 550.1205(b)(6) to prevent such an outcome.

#### Air Traffic Controllers

An employee recommended that OPM include the "5 percent operational differential" or "controller pay" for Federal Aviation Authority Air Traffic Controllers in the calculation of lump-sum payments. Pub. L. 104-50 (November 15, 1995), authorized the Administrator of the Federal Aviation Administration (FAA) to develop and implement a personnel management system that addresses the unique demands on that agency's workforce. The compensation provisions in title 5, United States Code, no longer apply to FAA employees, and OPM has no authority to prescribe regulations for lump-sum payments to FAA employees.

#### Refund of a Lump-Sum Payment

Under 5 U.S.C. 6306, when an employee who receives a lump-sum payment for accumulated and accrued annual leave under 5 U.S.C. 5551 is reemployed in the Federal service prior to the end of the period covered by the lump-sum payment, the employee must refund to the employing agency an amount equal to the payment covering the period between the date of reemployment and the expiration of the lump-sum period. This rule applies whether an employee is reemployed in a position covered by chapter 63 of title 5, United States Code, or under a different formal leave system. The refund is based on the pay used to compute the lump-sum payment; e.g., an employee who received a lump-sum payment based on the pay for a GS-11 position must refund the lump-sum payment based on the same GS-11 pay, even if he or she is reemployed at a lower or higher grade level. The refund is deposited in the Treasury of the

United States to the credit of the employing agency.

In the final regulations, § 550.1206(a) states that an agency may permit an employee to refund a lump-sum payment for annual leave in installments. If an agency permits the lump-sum to be paid in installments, the employee must pay the refund in full within 1 year after the date of reemployment. A component of an agency recommended that the agency require a full refund of a lump-sum payment before an employee returns to the Federal Government. The component further advised that if this cannot be implemented, employees should be required to sign an installment agreement before entering on duty. OPM's regulations at § 550.1206(a) provide agencies with discretionary authority to establish a policy for refunding lump-sum payments for annual leave. The only restriction is that the lump-sum refund must be paid in full within 1 year after the date of reemployment. Agencies may establish internal policies to require an employee to sign an installment agreement for refunding a lump-sum payment. In addition, we have added a statement that an agency may not waive the refund of a lump-sum payment.

We recently received inquiries about whether a refund for a lump-sum payment is required from a retired Federal employee who is reemployed under a temporary appointment of less than 90 days. If an employee retires from the Federal Government and is immediately reemployed on the next work day, he or she is not entitled to a lump-sum payment because this is not a separation from Federal service. However, if an employee retires from the Federal Government and has a break in service of 1 or more workdays, he or she is entitled to a lump-sum payment. If an annuitant is reemployed in the Federal Government prior to the expiration of the lump-sum period in a temporary appointment of less than 90 days, he or she must refund to the employing agency an amount equal to the pay covering the period between the date of reemployment and the expiration of the lump-sum period. In addition, the reemploying agency must

recredit to the reemployed annuitant an amount of leave equal to the leave represented by the refund, and the employee may use the recredited leave during the temporary appointment. We added a new paragraph (e) to § 550.1206 of the final regulations to reflect these outcomes, which are required by law.

#### Recredit of Annual Leave

The final regulations include a new § 550.1207, Recredit of Annual Leave. Paragraphs (b), (c), (d), (g) and (h) of § 550.1206 of the proposed regulations were moved to the new § 550.1207 and renumbered.

An agency requested clarification of the proposed regulations, which provided that if any part of a lump-sum refund reflects annual leave restored under 5 U.S.C. 6304(d), the annual leave must be restored in a separate account using the expiration date originally established for using the restored annual leave. If the expiration date originally established for using the restored annual leave occurs before the date of reemployment, a refund is required for all of the unexpired portion, but none of the restored annual leave may be recredited. The agency does not believe this is the intent of the law. Another agency asked whether a refund must reflect all remaining annual leave, including "use or lose" annual leave, and whether the "use or lose" annual leave should be recredited to the employee's leave account. A third agency recommended that an employee should not be required to pay back any portion of a lump-sum payment that reflects leave that cannot be recredited to the employee's leave account.

OPM's proposed regulations were intended to ensure that an employee's leave would be treated the same upon reemployment as it would have been treated had the employee remained employed. Restored annual leave and leave in excess of the maximum limitation in 5 U.S.C. 6304(b) would be subject to forfeiture if the employee did not use the leave within the time periods prescribed. However, when an employee who receives a lump-sum payment for accumulated and accrued annual leave under 5 U.S.C. 5551 is reemployed in the Federal service prior to the end of the period covered by the

lump-sum payment, the employee must refund to the employing agency an amount equal to the payment covering the period between the date of reemployment and expiration of the projected lump-sum period. (See 5 U.S.C. 6306.) In addition, an amount of annual leave equal to the days or hours of work remaining between the date of reemployment and the expiration of the lump-sum leave period must be recredited to the employee by the employing agency.

Thus, both the lump-sum refund and the recredit of annual leave are based on the date of reemployment and the end of the lump-sum period, not the amount or type of leave included in the lump-sum payment. We believe the intent of the law is to recredit any and all annual leave that is equivalent to the refund of the lump-sum payment. In addition, former OPM guidance stated that restored annual leave included in a lump-sum payment is not subject to refund and may not be recredited if the employee is reemployed prior to the expiration of the lump-sum leave period. (See attachment to former FPM Letter 630-22, January 11, 1974).

Therefore, we have revised § 550.1206(a) of the final regulations to provide that an agency should not include restored annual leave in a lump-sum refund and must subtract restored annual leave from the lump-sum leave period if an employee is reemployed

prior to the expiration of the lump-sum leave period. In addition, we have revised § 550.1207(a)(3) to provide that an agency will not recredit restored annual leave to an employee if the employee is reemployed prior to the expiration of the lump-sum leave period.

The proposed regulations provided that if annual leave recredited to an employee is in excess of the maximum annual leave limitation established under 5 U.S.C. 6304(a), (b), (c), or (f), as appropriate, for the position in which reemployed, and the employee was subject to a higher maximum annual leave limitation in the former position, the employee's maximum annual leave limitation must be determined based on the amount of annual leave to be recredited. Two agencies expressed concern that this provision would allow an employee's maximum annual leave limitation to be set below the 240-hour maximum limitation established by 5 U.S.C. 6304(a). Another agency noted that there were no rules for setting an employee's personal leave ceiling when the amount of annual leave to be recredited is in excess of the maximum limitation for the position in which reemployed and the maximum annual leave limitation for the former position is less than the current maximum annual leave limitation.

The proposed regulations would have applied only when the annual leave to

be recredited was in excess of the maximum annual leave limitation for the position in which reemployed and the employee was subject to a higher maximum annual leave limitation in the former position. Therefore, it would be impossible to set the employee's maximum annual leave limitation below the 240-hour maximum limitation established by 5 U.S.C. 6304(a). If the amount of annual leave the agency is to recredit is less than or equal to the maximum annual leave limitation for the position in which the employee is reemployed, § 550.1207(b) of the final regulations requires the agency to set the employee's maximum annual leave limitation at the maximum annual leave limitation for the position in which the employee is reemployed.

In response to these comments and additional questions we have received, we have clarified (§ 550.1207(c) and (d)) of the final regulations as follows.

First, if the amount of annual leave to be recredited is more than the maximum annual leave limitation for the new position, and the employee's former maximum annual leave limitation was established under 5 U.S.C. 6304(a), (b), (c), or (f), as appropriate, the agency must establish the employee's new maximum annual leave limitation on the date of reemployment as a personal leave ceiling equal to the amount of annual leave to be recredited.

#### EXAMPLES OF RECREDITING ANNUAL LEAVE

Annual leave to be recredited	Former maximum leave ceiling	New maximum leave ceiling	New personal leave ceiling
300	360	240	300
400	360	240	400
900	1000*	240	900
1200	1000*	720 (SES)	1200

\*SES Personal Leave Ceiling established under § 630.306(d).

Second, if the amount of annual leave to be recredited is more than the maximum annual leave limitation for the new position, and the employee's former maximum annual leave

limitation was established under an authority other than 5 U.S.C. 6304(a), (b), (c), or (f), as appropriate, the agency must establish the employee's new maximum annual leave limitation on

the date of reemployment as a personal leave ceiling equal to the employee's former maximum annual leave limitation.

#### EXAMPLE OF RECREDITING ANNUAL LEAVE UPON TRANSFER FROM USPS

Annual leave to be recredited	Former maximum leave ceiling	New maximum leave ceiling	New personal leave ceiling
540	440*	240	440

\*Maximum Annual Leave Limitation for U.S. Postal Service.

Under 5 U.S.C. 6304(c), an employee's personal leave ceiling will be reduced if more annual leave is used than earned in a leave year until it equals the maximum annual leave limitation established for the position in which

reemployed. In addition, an employee must use the annual leave earned in a leave year or it becomes subject to forfeiture at the end of the leave year.

#### Income Taxes and Deductions

Under 5 U.S.C. 5551, a lump-sum payment for annual leave is considered pay for income tax purposes. A number of agencies requested guidance on whether a nonforeign area cost-of-living

allowance (COLA) that is included in a lump-sum payment is subject to income tax. Under section 912 of title 26, United States Code, a COLA paid under 5 U.S.C. 5941(a)(1) to an employee stationed in a nonforeign area outside of the contiguous United States (48 States) is not included as gross income and is not subject to income tax. OPM posed the agencies' question to the Internal Revenue Service (IRS).

In a letter to OPM dated March 12, 1998, IRS stated that a nonforeign area COLA authorized under 5 U.S.C. 5941(a)(1) that is paid in connection with a lump-sum payment for annual leave is not subject to Federal income tax. Therefore, in calculating an employee's taxable Federal income for a lump-sum payment for annual leave, agencies must first subtract any nonforeign area COLA authorized under 5 U.S.C. 5941(a)(1). Similarly a post allowance in a foreign area authorized under 5 U.S.C. 5924(1) is not subject to Federal income tax, and the agency must subtract it from a lump-sum payment when determining taxable Federal income. However, nonforeign area post differentials authorized under 5 U.S.C. 5941(a)(2) that are included in a lump-sum payment for annual leave are included as gross income and are subject to Federal income tax.

An agency asked about the treatment of lump-sum payments in relation to deductions for the Federal Insurance Contributions Act (FICA) and Medicare. The agency stated that some types of pay included in a lump-sum payment are subject to deductions for FICA/Medicare, while others are not. The agency requested clarification as to whether the lump-sum payment should be considered as one separate payment or whether each type of pay should be considered separately when computing deductions for FICA/Medicare. The agency also requested that OPM state in the regulations that (1) if a lump-sum payment is repaid in the same calendar year, the employee is required to pay back the gross amount of the lump-sum payment, minus Federal and State income taxes and FICA/Medicare; and (2) if the employee repays the lump-sum payment in a subsequent year, he or she must repay the gross amount reduced only by FICA/Medicare. The agency stated that IRS has ruled that corrections of earnings for Federal, State, or local withholding taxes cannot be made for a prior year.

OPM referred these questions and comments to IRS. In a letter to OPM dated April 22, 1998, IRS responded that it is appropriate to divide a lump-sum payment into that portion (i.e., different types of pay) that is subject to

FICA taxes and that which is not. In addition, IRS stated that repayment of a lump-sum payment made in the same year it is paid affects the treatment of Federal income tax withholding and FICA taxes, but that a repayment in a subsequent year affects only FICA taxes. IRS stated that employers should refer to Publication 15, Circular E, Employers Tax Guide, for additional information on Federal employment tax consequences and reporting requirements. General information on Federal income tax forms and instructions can be found on the Internet at [http://www.irs.ustreas.gov/prod/forms\\_pubs/index.html](http://www.irs.ustreas.gov/prod/forms_pubs/index.html). Any questions on State and local tax implications should be referred to the appropriate State and local taxing authority.

OPM received a comment from the labor organization recommending that employees be afforded some flexibility in choosing when to receive their lump-sum payment. The labor organization encouraged OPM to permit employees to defer a lump-sum payment for a reasonable period of time so that their tax liability may be mitigated. We referred this comment to IRS. In its letter to OPM dated April 22, 1998, IRS advised that such a choice would result in the lump-sum being included for income tax purposes in the taxable year it is first made available, without regard to whether an employee chose to receive it immediately or defer the payment.

#### Effective Date of Regulations

The final regulations apply only to lump-sum payments made by an agency on or after the effective date of the final regulations. The final regulations on lump-sum payments for annual leave are not retroactive. The issuance of retroactive regulations is neither the preferred nor usual method for rulemaking. See *Alaskan Arctic Gas Pipeline v. United States*, 831 F.2d 1043, 1045-8 (Fed. Cir. 1987). Retroactivity in rulemaking is permissible where Congress has expressly authorized it in law, but that is not the case here. See *Landgraf v. USI Film Products*, 511 U.S. 244, 255-257 (1984). This is a new rule that standardizes inconsistent agency practices. The determinations made by agencies prior to the effective date of the final regulations are not subject to change based on the provisions of the final regulations.

Two agencies requested additional time to implement the final rules in order to modify their payroll systems and operating procedures. We agree. The final regulations will become effective 60 days after the date of

publication in the **Federal Register**. The delayed effective date will also provide additional time for those agencies responsible for pay authorities outside of title 5 to review their policies and issue regulations for the administration of lump-sum payments for annual leave.

#### Miscellaneous Comments

The components of two large agencies commented that any pay excluded from retirement basic pay should also be excluded from lump-sum payments for annual leave. In effect, this would limit a lump-sum payment to basic pay and certain types of premium pay, such as annual premium pay under 5 U.S.C. 5545(c)(1) and (2) and 5545a. One of the agencies stated that it would support a final regulation limiting lump-sum payments to basic pay, excluding FLSA overtime pay. In addition, an individual commented that a lump-sum payment should not be adjusted to include any extra pay or benefits such as Sunday premium pay, night pay, or any general pay adjustments or within-grade increases that become effective after the employee separates from Federal service.

Under 5 U.S.C. 5551, a lump-sum payment "must equal the pay (excluding any differential under section 5925 and any allowance under section 5928) the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave." Issuing final regulations to limit lump-sum payments to those that are basic pay for retirement purposes would be contrary to the lump-sum payment law.

The labor organization recommended that OPM consider approaches to expedite lump-sum payments to employees. In addition, the labor organization recommended that OPM simplify and expedite the process of recrediting annual leave when employees are reemployed in the Federal service. Agencies are responsible for administering lump-sum payments, consistent with the law and OPM's regulations. A universal rule is not feasible, since it cannot possibly accommodate the requirements and complexities of the numerous agency payroll systems that administer lump-sum payments.

An agency asked whether implementation of the final regulations on lump-sum payments would be subject to collective bargaining and inquired about the date by which such bargaining must be completed. Certain provisions may be subject to collective bargaining—e.g., whether an agency permits employees to refund a lump-



sum payment in installments. Additional questions on this matter should be addressed to the agency's labor relations office.

An agency commented that agencies responsible for administering other kinds of pay outside of title 5 should be permitted the greatest latitude possible and that each agency should decide whether its regulations should be consistent with OPM's regulations. In contrast, another agency recommended that such agencies not be permitted to determine the types of pay to be included in a lump-sum payment because this would result in the exact situation that OPM is trying to correct—i.e., inconsistent payment practices and inequities among Federal employees.

Under 5 U.S.C. 5553, OPM has regulatory authority for the administration of lump-sum payments for annual leave. Section 550.1205(c) delegates authority to the head of each agency to determine other kinds of pay authorized in statutes outside of title 5 that should be included in a lump-sum payment. We continue to believe such agencies are in the best position to determine the types of pay under their authority that should be included in a lump-sum payment consistent with 5 U.S.C. 5551, 5552, and 6306. If inconsistencies and inequities arise, OPM will reconsider the delegation of these authorities.

### Conforming Amendments

In many parts of title 5, Code of Federal Regulations, there are existing references to lump-sum payments for annual leave. Because there is now a new subpart on lump-sum payments in part 550, there is no further need for these separate references. Therefore, we are removing these references and reserving the following sections: § 531.304(d) (special law enforcement officer adjusted rate of pay), § 531.606(d) (locality rate of pay), § 531.703(c) (continued rate of pay), and § 550.186(c) (availability pay). In § 591.210(c)(1) (allowances and differentials in nonforeign areas), we are deleting the last sentence. However, the references to lump-sum payments for annual leave in part 532 will need to be reviewed by the Federal Prevailing Rate Advisory Committee before we make any similar changes.

### 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 affect only Federal employees and agencies.

### List of Subjects

#### 5 CFR Part 531

Government employees, Law enforcement officers, Wages.

#### 5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

#### 5 CFR Part 591

Government employees, Travel and transportation expenses, Wages.

Office of Personnel Management

**Janice R. Lachance,**

*Director.*

Accordingly, OPM is amending parts 531, 550, and 591 of title 5 of the Code of Federal Regulations as follows:

### PART 531—PAY UNDER THE GENERAL SCHEDULE

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

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

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

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

2. In § 531.304, paragraph (d) is revised to read as follows:

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

\* \* \* \* \*

(d) A special law enforcement adjusted rate of pay is paid only for those hours for which a law enforcement officer is in a pay status.

\* \* \* \* \*

3. In § 531.606, paragraph (d) is revised to read as follows:

#### § 531.606 Administration of locality rates of pay.

\* \* \* \* \*

(d) A locality rate of pay is paid only for those hours for which an employee is in a pay status.

\* \* \* \* \*

4. In § 531.703, paragraph (c) is revised to read as follows:

#### § 531.703 Administration of continued rates of pay.

\* \* \* \* \*

(c) A continued rate of pay is paid only for those hours for which an employee is in a pay status.

\* \* \* \* \*

### PART 550—PAY ADMINISTRATION (GENERAL)

#### Subpart A—Premium Pay

5. 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), 5545b, 5548, 5553, and 6101(c); E.O. 12748, 3 CFR, 1992 Comp., p. 316.

#### § 550.186 [Amended]

6. In § 550.186, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

7. Subpart L is added to part 550 to read as follows:

#### Subpart L—Lump-Sum Payment for Accumulated and Accrued Annual Leave

Sec.

550.1201 Purpose, applicability, and administration.

550.1202 Definitions.

550.1203 Eligibility.

550.1204 Projecting the lump-sum leave period.

550.1205 Calculating a lump-sum payment.

550.1206 Refunding a lump-sum payment.

550.1207 Recrediting annual leave.

#### Subpart L—Lump-Sum Payment for Accumulated and Accrued Annual Leave

**Authority:** 5 U.S.C. 5553, 6306, and 6311.

#### § 550.1201 Purpose, applicability, and administration.

(a) *Purpose.* This subpart provides regulations to implement sections 5551, 5552, and 6306 of title 5, United States Code, and must be read together with those sections. Sections 5551 and 5552 provide for the payment of a lump-sum payment for accumulated and accrued annual leave when an employee:

- (1) Separates from Federal service; or
- (2) Enters on active duty in the armed forces and elects to receive a lump-sum payment for accumulated and accrued annual leave. Section 6306 requires that when an employee is reemployed in the Federal service prior to the expiration of the lump-sum period, he or she must refund an amount equal to the pay covering the period between the date of reemployment and the expiration of the period of annual leave (i.e., the lump-sum leave period).

(b) *Applicability.* This subpart applies to—

- (1) Any employee who separates, dies, or transfers under the conditions prescribed in § 550.1203; and
- (2) Any employee or individual employed by a territory or possession of the United States who enters on active

duty in the armed forces and who elects to receive a lump-sum payment for accumulated and accrued annual leave.

(c) *Administration*. The head of an agency having employees subject to this subpart is responsible for the proper administration of this subpart.

#### § 550.1202 Definitions.

In this subpart—

*Accumulated and accrued annual leave* means any annual leave accumulated and accrued, as these terms are defined in § 630.201 of this chapter, plus any annual leave credited to an employee under 5 U.S.C. 6304(c) and § 630.301(d) of this chapter and any annual leave restored under 5 U.S.C. 6304(d). Accumulated and accrued annual leave does not include annual leave received by a leave recipient under the voluntary leave transfer or leave bank programs established under subchapters III and IV of chapter 63 of title 5, United States Code, or annual leave advanced to an employee under 5 U.S.C. 6302(d).

*Administrative workweek* has the meaning given that term in § 610.102 of this chapter.

*Agency* means—

(1) An executive agency and a military department as defined in sections 105 and 102 of title 5, United States Code, respectively; and

(2) A legislative or judicial agency or a unit of the legislative or judicial branch of the Federal Government that has positions in the competitive service.

*Employee* has the meaning given that term in 5 U.S.C. 2105.

*Lump-sum payment* means a final payment to an employee for accumulated and accrued annual leave.

*Mixed tour of duty* means a condition of employment for positions in which a fluctuating workload requires an employee to work full-time or part-time for a limited portion of the year and on an intermittent basis for the remainder of the year.

*Rate of basic pay* means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind.

*Transfer* means the movement of an employee to another position without a break in service of 1 workday or more.

#### § 550.1203 Eligibility.

(a) An agency must make a lump-sum payment for accumulated and accrued annual leave when an employee—

(1) Separates or retires from the Federal service;

(2) Dies; or

(3) Transfers to a position that is not covered by subchapter I of chapter 63 of

title 5, United States Code, and his or her accumulated and accrued annual leave cannot be transferred, except as provided in paragraphs (c), (d), and (e) of this section.

(b) The Department of Defense (DOD) must make a lump-sum payment to an employee who has unused annual leave that was restored under 5 U.S.C. 6304(d)(3) when he or she transfers from a DOD installation undergoing closure or realignment to a position in any other department or agency of the Federal Government or moves to a position within DOD not located at an installation undergoing closure or realignment.

(c) An employee who enters on active duty in the armed forces may elect to receive a lump-sum payment for accumulated and accrued annual leave or may request to have the annual leave remain to his or her credit until return from active duty. However, an agency must make a lump-sum payment for any annual leave previously restored under 5 U.S.C. 6304(d) when the employee enters active duty. The agency may not recredit the restored leave when the employee returns to Federal service.

(d) An employee who transfers to a position in a public international organization under 5 U.S.C. 3582 may elect to retain accumulated and accrued annual leave to his or her credit at the time of transfer or receive a lump-sum payment for such annual leave under 5 U.S.C. 3582(a)(4). However, the agency must make a lump-sum payment for any annual leave previously restored under 5 U.S.C. 6304(d) when the employee transfers to the public international organization. The agency may not recredit the leave under these circumstances.

(e) An agency must make a lump-sum payment to an employee who transfers to a position excepted from subchapter I of chapter 63 of title 5, United States Code, by 5 U.S.C. 6301(2)(x)–(xiii) for any annual leave restored under 5 U.S.C. 6304(d) upon transfer to an excepted position. However, the agency may not make a lump-sum payment for any annual leave in the employee's regular leave account upon transfer to the excepted position. The agency must hold such annual leave in abeyance for recredit if the employee is subsequently reemployed without a break in service in a position to which his or her accumulated and accrued annual leave may be transferred. If the employee later becomes eligible for a lump-sum payment under the conditions specified in this section, the current employing agency must make a lump-sum payment for the annual leave held in abeyance. The agency must compute the lump-

sum payment under § 550.1205(b) based on the pay the employee was receiving immediately before the date of the transfer to the position excepted by 5 U.S.C. 6301(2)(x)–(xiii). An employee who elects to retain his or her leave benefits upon accepting a Presidential appointment, as permitted by 5 U.S.C. 3392(c), is not entitled to receive a lump-sum payment.

(f) In the case of an employee who transfers to a position that is not covered by subchapter I of chapter 63 of title 5, United States Code, and to which only a portion of his or her accumulated and accrued annual leave may be transferred, the agency must make a lump-sum payment for any remaining annual leave that cannot be transferred. The agency must compute the lump-sum payment under § 550.1205(b) based on the pay the employee was receiving immediately before the date of the transfer to the position not covered by subchapter I of chapter 63 of title 5, United States Code. This does not apply to an employee transferring to an excepted position covered by paragraph (e) of this section.

(g) An agency must make a lump-sum payment for accumulated and accrued annual leave to an employee in a missing status (as defined in 5 U.S.C. 5561(5)) on or after January 1, 1965, or the employee may elect to have such leave restored in a separate leave account under 5 U.S.C. 6304(d)(2) upon his or her return to Federal service. The agency must compute the lump sum payment under § 550.1205(b) based on the rate of pay in effect at the time the annual leave became subject to forfeiture under 5 U.S.C. 6304(a), (b), or (c).

(h) An agency may not make a lump-sum payment for accumulated or accrued annual leave to—

(1) An employee who transfers between positions covered by subchapter I of chapter 63 of title 5, United States Code;

(2) An employee who transfers to a position not covered by subchapter I of chapter 63 of title 5, United States Code, but to which all of his or her accumulated and accrued annual leave may be transferred;

(3) An employee who transfers to the government of the District of Columbia or the U.S. Postal Service;

(4) A nonappropriated fund employee of the Department of Defense or the Coast Guard who moves without a break in service of more than 3 days to an appropriated fund position within the Department of Defense or the Coast Guard, respectively, under 5 U.S.C. 6308(b); or

(5) An employee who is concurrently employed in more than one part-time position and who separates from one of the part-time positions. Instead, the former employing agency must transfer the employee's accumulated and accrued annual leave to the current agency (if the part-time positions are in different agencies) or credit the employee's annual leave account in the current position (if the part-time positions are in the same agency).

(6) An employee who elects to retain his or her leave benefits upon accepting a Presidential appointment, as permitted by 5 U.S.C. 3392(c).

(i) An agency must establish a policy for determining when an employee in a continuing employment program with a mixed tour of duty will receive a lump-sum payment for annual leave. The agency may choose to pay an employee a lump-sum payment when he or she is assigned intermittent duty or hold the employee's annual leave in abeyance during intermittent duty and recredit it when the employee returns without a break in service to full-time or part-time employment. If the agency decides to hold the employee's annual leave in abeyance, it must also hold in abeyance the credit for any fractional pay period earned and recredit the annual leave on a pro rata basis, as provided in § 630.204 of this chapter, when the employee returns to full-time or part-time employment. In developing its policy, each agency must consider the likelihood that the employee will return to work, as well as the agency's mission requirements and staffing needs. The agency's policy must ensure that employees are treated in a fair and equitable manner.

**§ 550.1204 Projecting the lump-sum leave period.**

(a) A lump-sum payment must equal the pay an employee would have received had he or she remained in the Federal service until the expiration of the accumulated and accrued annual leave to the employee's credit. The agency must project the lump-sum period leave beginning on the first workday (counting any holiday) occurring after the date the employee becomes eligible for a lump-sum payment under § 550.1203 and counting all subsequent workdays and holidays until the expiration of the period of annual leave. The period of leave used for calculating the lump-sum payment must not be extended by any holidays under 5 U.S.C. 6103 (or applicable Executive or administrative order) which occur immediately after the date the employee becomes eligible for a lump-sum payment under § 550.1203;

annual leave donated to an employee under the leave transfer or leave bank programs under subparts I and J of part 630 of this chapter; compensatory time off earned under 5 U.S.C. 5543 and § 550.114(d) or § 551.531(d) of this chapter; or credit hours accumulated under an alternative work schedule established under 5 U.S.C. 6126.

(b) For employees whose annual leave was held in abeyance immediately prior to becoming eligible for a lump-sum payment, the agency must project the lump-sum payment beginning on the first workday occurring immediately after the date the employee becomes eligible for a lump-sum payment under § 550.1203, consistent with paragraph (a) of this section.

**§ 550.1205 Calculating a lump-sum payment.**

(a) An agency must compute a lump-sum payment based on the types of pay listed in paragraph (b) of this section, as in effect at the time the affected employee becomes eligible for a lump-sum payment under § 550.1203 and any adjustments in pay included in paragraphs (b)(2), (3), and (4) of this section. The agency must calculate a lump-sum payment by multiplying the number of hours of accumulated and accrued annual leave by the applicable hourly rate of pay, including other applicable types of pay listed in paragraph (b) of this section, or by using a mathematically equivalent method, such as multiplying weeks of annual leave by the applicable weekly rate of pay. If the agency calculates a lump-sum payment using weekly rates, the number of weeks of annual leave must be rounded to the fourth decimal place (e.g., 0.4444). The agency must convert an annual rate of pay to an hourly rate of pay by dividing the annual rate of pay by 2,087 (or 2,756 for firefighters, if applicable) and rounding it to the nearest cent, counting one-half cent and over as the next higher cent.

(b) The agency must compute a lump-sum payment using the following types of pay and pay adjustments, as applicable:

(1) The greatest of the following rates of pay:

(i) An employee's rate of basic pay, including any applicable special salary rate established under 5 U.S.C. 5305 or similar provision of law or a special rate for law enforcement officers under section 403 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101-509, 104 Stat. 1465, or a retained rate of pay under subpart B of part 536 of this chapter;

(ii) A locality rate of pay under subpart F of part 531 of this chapter or

similar provision or law, where applicable;

(iii) A special law enforcement adjusted rate of pay under subpart C of part 531 of this chapter, where applicable, including a rate continued under § 531.307 of this chapter; or

(iv) A continued rate of pay under subpart G of part 531 of this chapter.

(2) Any statutory adjustments in pay or any general system-wide increases in pay, such as adjustments under sections 5303, 5304, 5305, 5318, 5362, 5363, 5372, 5372a, 5376, 5382, or 5392 of title 5, United States Code, that become effective during the lump-sum leave period. The agency must adjust the lump-sum payment to reflect the increased rate on and after the effective date of the pay adjustment.

(3) In the case of a prevailing rate employee, the agency must include in the lump-sum payment the scheduled rate of pay under 5 U.S.C. 5343, 5348, or 5349 and any applicable adjustments in rates that are determined under 5 U.S.C. 5343, 5348, or 5349 that become effective during the lump-sum leave period. The agency must adjust the lump-sum payment to reflect the increased prevailing rate on and after the effective date of the rate adjustment.

(4) A within-grade increase under 5 U.S.C. 5335 or 5343(e)(2) if the employee has met the requirements of § 531.404 or § 532.417 of this chapter prior to the date the employee becomes eligible for a lump-sum payment under § 550.1203.

(5) The following types of premium pay (to the extent such premium pay was actually payable to the employee):

(i) Night differential under 5 U.S.C. 5343(f) for nonovertime hours at the percentage rate received by a prevailing rate employee for the last full workweek immediately prior to separation, death, or transfer;

(ii) Premium pay under 5 U.S.C. 5545(c) or 5545a if the employee was receiving premium pay for the pay period immediately prior to the date the employee became eligible for a lump-sum payment under § 550.1203. The agency must base the lump-sum payment on the percentage rate received by the employee for the pay period immediately prior to the date the employee became eligible for a lump-sum payment under § 550.1203. In cases where the amount of premium pay actually payable in the final pay period was limited by a statutory cap, the agency must base the lump-sum payment on a reduced percentage rate that reflects the actual amount of premium pay the employee received in that pay period; and

(iii) Overtime pay under 5 U.S.C. 5545b and § 550.1304 of this chapter for overtime hours in an employee's uncommon tour of duty (as defined in § 630.201 of this chapter), established in accordance with § 630.210 of this chapter. The uncommon tour of duty must be applicable to the employee for the pay period immediately prior to the date the employee became eligible for a lump-sum payment under § 550.1203. The agency must calculate overtime pay using the same methodology it used to calculate the employee's entitlement to overtime pay as provided in § 550.1304 of this chapter in the pay period immediately prior to the date the employee became eligible for a lump-sum payment under § 550.1203. An agency may not change an employee's work schedule for the sole purpose of avoiding or providing payment of premium pay under § 550.1205(b)(5)(i)-(iv) in a lump-sum payment.

(6) Overtime pay under the Fair Labor Standards Act of 1938, as amended (FLSA), for overtime work that is regularly scheduled during an employee's established uncommon tour of duty, as defined in § 630.201(b)(1) of this chapter and established under § 630.210(a) of this chapter, for which the employee receives standby duty pay under 5 U.S.C. 5545(c)(1). The agency must include FLSA overtime pay in a lump-sum payment if an uncommon tour of duty was applicable to the employee for the pay period immediately prior to the date the employee became eligible for a lump-sum payment under § 550.1203. The agency must calculate FLSA overtime pay using the same methodology it used to calculate the employee's entitlement to FLSA overtime pay for the pay period immediately prior to the date the employee became eligible for a lump-sum payment under § 550.1203. An agency may not change an employee's work schedule for the sole purpose of avoiding or providing payment of FLSA overtime pay in a lump-sum payment.

(7) A supervisory differential under 5 U.S.C. 5755 based on the percentage rate (or dollar amount) received by the employee for the pay period immediately prior to the date the employee became eligible for a lump-sum payment under § 550.1203.

(8) A cost-of-living allowance and/or post differential in a nonforeign area under 5 U.S.C. 5941 if the employee's official duty station is in the nonforeign area when he or she becomes eligible for a lump-sum payment under § 550.1203.

(9) A post allowance in a foreign area under 5 U.S.C. 5924(1) and the *Standardized Regulations* (Government Civilians, Foreign Areas) if the

employee's official duty station is in the foreign area when he or she becomes eligible for a lump-sum payment under § 550.1203.

(c) The head of an agency must prescribe regulations or standards for the inclusion of any other kinds of pay authorized in statutes other than title 5, United States Code, in a lump-sum payment. Such regulations or standards must be consistent with 5 U.S.C. 5551, 5552, 6306, and other applicable provisions of law.

(d) A lump-sum payment may not include any other pay not specifically listed in paragraph (b) of this section, except as provided in paragraph (c) of this section.

(e) An employee may not earn leave for the period covered by a lump-sum payment.

(f) A lump-sum payment is not subject to deductions for retirement under the Civil Service Retirement System or the Federal Employees' Retirement System established by chapters 83 and 84 of title 5, United States Code, respectively; health benefits under the Federal Employees Health Benefits program established by chapter 89 of title 5, United States Code; life insurance under the Federal Employees' Group Life Insurance program established by chapter 87 of title 5, United States Code; and savings under the Thrift Savings Plan established by subchapter III of chapter 84 of title 5, United States Code.

(g) For a reemployed annuitant who becomes eligible for a lump-sum payment under § 550.1203, the agency must compute the lump-sum payment using the annuitant's pay before any reductions required under § 831.802 of this chapter.

(h) A lump-sum payment is subject to garnishment under parts 581 and 582 of this chapter and to administrative offset (for recovery of debts to the Federal Government) under 31 U.S.C. chapter 37.

#### **§ 550.1206 Refunding a lump-sum payment.**

(a) When an employee who received a lump-sum payment for accumulated and accrued annual leave under 5 U.S.C. 5551 is reemployed in the Federal service prior to the end of the period covered by the lump-sum payment, the employee must refund to the employing agency an amount equal to the pay included in the lump-sum payment under § 550.1205(b) that covers the period between the date of reemployment and the expiration of the lump-sum leave period, except as provided in paragraphs (b) and (c) of this section. The agency must compute the refund based on the pay used to

compute the lump-sum payment under § 550.1205(b). However, annual leave restored under 5 U.S.C. 6304(d) that was included in a lump-sum payment is not subject to refund if an agency reemploys the employee prior to the expiration of the lump-sum leave period. The agency must subtract such restored annual leave from the lump-sum leave period before calculating the refund. An agency may permit an employee to refund the lump-sum payment for annual leave in installments, but may not waive collection. If an agency permits the lump-sum refund to be paid in installments, the employee must refund the lump-sum payment in full within 1 year after the date of reemployment.

(b) An employee who is reemployed in a position listed in 5 U.S.C. 6301(2)(ii), (iii), (vi), or (vii) is not required to refund a lump-sum payment under paragraph (a) of this section.

(c) An employee who is reemployed in a position that has no leave system to which annual leave can be recredited is not required to refund a lump-sum payment under paragraph (a) of this section, except that individuals reemployed as Presidential appointees must refund a lump-sum payment and the annual leave will be held in abeyance, as provided in § 550.1207(e).

(d) An individual first hired by the District of Columbia government on or after October 1, 1987, who received a lump-sum payment upon separation from the District of Columbia government and who is employed by the Federal Government prior to the expiration of the lump-sum leave period must refund the lump-sum payment, and the agency must recredit the annual leave under § 550.1207.

(e) An employee who retired from the Federal Government and received a lump-sum payment under § 550.1203 of this chapter, and who is reemployed under a temporary appointment of less than 90 days prior to the expiration of the lump-sum leave period, is required to refund the lump-sum payment, and the agency must recredit the annual leave under § 550.1207. The employee may use the recredited annual leave during the temporary appointment.

#### **§ 550.1207 Recrediting annual leave.**

(a) When an employee pays a full refund to an agency under § 550.1206(a), the agency must recredit to the employee an amount of annual leave equal to the days or hours of work (including holidays) remaining between the date of reemployment and the expiration of the lump-sum period. The recredited annual leave is available for use by the employee on and after the date the annual leave is recredited. The

agency must recredit annual leave as follows:

(1) When an employee is reemployed in the Federal service in a position covered by subchapter I of chapter 63 of title 5, United States Code, the employing agency must recredit an amount of annual leave equal to the days or hours of work (including holidays) remaining between the date of reemployment and the expiration of the lump-sum period.

(2) When an employee is reemployed in the Federal service in a position that is not covered by subchapter I of chapter 63 of title 5, United States Code, but is covered by a different leave system, the employing agency must recredit to the employee an amount of annual leave representing the days or hours of work (including holidays) remaining between the date of reemployment and the expiration of the lump-sum period, as determined under § 630.501(b) of this chapter. If the unexpired period of leave covers a larger amount of leave than can be recredited under the different leave system, the employee must refund only the amount that represents the leave that can be recredited.

(3) When an employee is reemployed prior to the expiration of the lump-sum leave period, the agency may not recredit to the employee the annual leave restored under 5 U.S.C. 6304(d) that was included in a lump-sum payment. The agency must subtract such restored annual leave from the lump-sum leave period before it determines the amount of annual leave to recredit under paragraph (a)(1) of this section.

(b) Any annual leave the agency recredits to the employee under paragraph (a) of this section is subject at the beginning of the next leave year to the maximum annual leave limitation established by 5 U.S.C. 6304(a), (b), (c), or (f), as appropriate, for the position in which the employee is reemployed, except as provided in paragraphs (c) and (d) of this section.

(c) If the amount of annual leave to be recredited under paragraph (a) of this section is more than the maximum annual leave limitation for the position in which reemployed, and the employee's former maximum annual leave limitation was established under 5 U.S.C. 6304(a), (b), (c), or (f), as appropriate, the agency must establish the employee's new maximum annual leave limitation on the date of reemployment as a personal leave ceiling equal to the amount of annual leave to be recredited under paragraph (a) of this section. The new maximum annual leave limitation is subject to reduction in the same manner as

provided in 5 U.S.C. 6304(c) until the employee's accumulated annual leave is equal to or less than the maximum annual leave limitation for the position in which reemployed.

(d) If the amount of annual leave to be recredited under paragraph (a) of this section is more than the maximum annual leave limitation for the position in which the employee is reemployed, and the employee's former maximum annual leave limitation was established under an authority other than 5 U.S.C. 6304(a), (b), (c), or (f), as appropriate, the agency must establish the employee's new maximum annual leave limitation on the date of reemployment as a personal leave ceiling equal to the employee's former maximum annual leave limitation. The new maximum annual leave limitation is subject to reduction in the same manner as provided in 5 U.S.C. 6304(c) until the employee's accumulated annual leave is equal to or less than the maximum annual leave limitation for the position in which reemployed.

(e) When an employee is reemployed in a position listed in 5 U.S.C. 6301(2)(x)-(xiii), the agency must recredit and hold in abeyance the amount of annual leave that would have been recredited under paragraph (a) of this section. The agency must include unused annual leave in a lump-sum payment when the employee becomes eligible for a lump-sum payment under § 550.1203. If the employee transfers from a position listed in 5 U.S.C. 6301(2)(x)-(xiii) to a position covered by subchapter I of chapter 63 of title 5, United States Code, or to a position under a different formal leave system to which his or her annual leave can be recredited, the employing agency must recredit the annual leave to the employee's credit as provided in paragraph (a) of this section.

(f) An agency must document the calculation of an employee's lump-sum payment as provided in § 550.1205(b) so as to permit the subsequent calculation of any refund required under § 550.1206(a) and any recredit of annual leave required under this section.

#### **PART 591—ALLOWANCES AND DIFFERENTIALS**

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

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

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

#### **§ 591.210 [Amended]**

9. In § 591.210, the last sentence of paragraph (c)(1) is removed.

[FR Doc. 99-16992 Filed 7-7-99; 8:45 am]

BILLING CODE 6325-01-P

### **DEPARTMENT OF AGRICULTURE**

#### **Animal and Plant Health Inspection Service**

#### **9 CFR Part 78**

[Docket No. 99-051-1]

#### **Brucellosis in Cattle; State and Area Classifications; Kansas**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

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

**SUMMARY:** We are amending the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Kansas from Class A to Class Free. We have determined that Kansas meets the standards for Class Free status. This action relieves certain restrictions on the interstate movement of cattle from Kansas.

**DATES:** This interim rule was effective July 1, 1999. We invite you to comment on this docket. We will consider all comments that we receive by September 7, 1999.

**ADDRESSES:** Please send your comment and three copies to: Docket No. 99-051-1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road, Unit 118, Riverdale, MD 20737-1238.

Please state that your comment refers to Docket No. 99-051-1.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS rules, are available on the Internet at <http://www.aphis.usda.gov/ppd/rad/webrepor.html>.

**FOR FURTHER INFORMATION CONTACT:** Dr. Valerie Ragan, Senior Staff Veterinarian, National Animal Health Programs, VS,