

Rules and Regulations

Federal Register

Vol. 67, No. 76

Friday, April 19, 2002

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

RIN 3206-AJ56

Premium Pay Limitations

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to implement recent statutory amendments dealing with the premium pay limitations for Federal employees. Those amendments raise the premium pay caps for most employees, provide authority to use an annual cap instead of a biweekly cap in additional circumstances, and make certain other changes.

DATES: *Effective Date:* The interim regulations are effective on April 27, 2002.

Applicability Date: The interim regulations apply on the first day of the first pay period beginning on or after April 27, 2002.

Comments Date: Comments must be received on or before June 18, 2002.

ADDRESSES: Send or deliver comments to Donald J. Winstead, Assistant Director for Compensation Administration, Workforce Compensation and Performance Service, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415, FAX: (202) 606-4264, or e-mail them to payleave@opm.gov.

FOR FURTHER INFORMATION CONTACT: Bryce Baker by telephone at (202) 606-2858; by fax at (202) 606-4264; or by e-mail to payleave@opm.gov.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing interim regulations to implement the new premium pay

limitations established by section 1114 of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107, December 28, 2001). Section 1114 amended 5 U.S.C. 5547, which establishes biweekly or annual limitations on the premium pay that a covered Federal employee may receive.

The law provides that the section 1114 amendments will become effective on the first day of the first pay period beginning on or after the 120th day following enactment. The 120th day falls on Saturday, April 27, 2002. Since biweekly pay periods for Federal employees begin on a Sunday, these provisions begin to apply on either April 28 or May 5, 2002, depending on the employing agency's payroll cycle.

Description of Prior Law

Prior to the amendments made by section 1114, the following premium pay limitations applied under 5 U.S.C. 5547:

- Federal employees were generally subject to a biweekly cap on premium pay. For all employees other than law enforcement officers, premium pay was capped to the extent that it caused the sum of the employee's basic pay and premium pay in a biweekly pay period to exceed the applicable biweekly rate of basic pay for GS-15, step 10.

- For employees who perform work in connection with an emergency involving a direct threat to life or property (except law enforcement officers), premium pay in an affected pay period was not subject to a biweekly cap. However, the employee could not receive premium pay to the extent it caused him or her to receive an aggregate total of basic pay and premium pay in the calendar year in excess of the applicable annual rate of basic pay for GS-15, step 10.

- Law enforcement officers were subject to a biweekly cap equal to the lesser of (1) 150 percent of the applicable rate of basic pay for GS-15, step 1, or (2) the rate for level V of the Executive Schedule. In recent years, the level V rate was the lesser rate in all locations and thus served as the cap. By law, the annual cap for emergency situations was not applicable to law enforcement officers. (See 5 U.S.C. 5547(c).) (As of January 2002, the level V cap fell below the GS-15, step 10, cap in nine locality pay areas with the largest locality pay percentages.)

Summary of Statutory Changes

Section 1114 makes the following changes in the premium pay limitations established by 5 U.S.C. 5547:

- Section 1114 removes the separate premium pay limitation for law enforcement officers. Law enforcement officers will be covered by the same premium pay limitations that apply to other Federal employees.

- Section 1114 ties the premium pay limitations to the higher of two rates: (1) The rate of basic pay for GS-15, step 10 (including any applicable locality payment, special rate, or similar adjustment), or (2) the rate payable for level V of the Executive Schedule. For most employees, this results in a higher premium pay cap.

- Section 1114 makes clear that an agency may apply an annual limitation for employees performing work in the aftermath of an emergency involving a direct threat to life or property. For example, work performed by Federal emergency workers in the immediate aftermath of a hurricane or a forest fire would qualify.

- Section 1114 adds a discretionary authority under which an agency head may approve the use of an annual cap whenever he or she determines that the work in question is critical to the mission of the agency and that an annual cap is needed.

- Section 1114 provides that OPM must prescribe regulations to govern how the annual limitation applies to employees receiving certain forms of regularly recurring premium payments. These payments are availability pay for criminal investigators under 5 U.S.C. 5545a, administratively uncontrollable overtime (AUO) pay under 5 U.S.C. 5545(c)(2), standby premium pay under 5 U.S.C. 5545(c)(1), and regular overtime pay for firefighters covered by 5 U.S.C. 5545b. Generally, these forms of premium pay are paid as regular salary supplements and are creditable as basic pay for retirement purposes.

Description of New Regulatory Provisions

Under 5 U.S.C. 5548, OPM has general authority to issue regulations necessary to administer the premium pay provisions in subchapter V of chapter 55 of title 5, United States Code. The newly amended sections 5547(b)(3) and (c) also provide specific authority to regulate certain matters related to the

premium pay limitation provisions. These regulations revise sections 550.105 through 550.107 in subpart A of part 550, United States Code.

Section 550.105—We are revising this section (dealing with the biweekly limitation) to incorporate the new premium pay cap amounts and to provide that these caps now apply to law enforcement officers. In addition, we are adding a paragraph to make clear that, in applying the biweekly cap, agencies must pay certain types of premium pay before paying other types of premium pay.

Section 550.106—We are revising this section (dealing with the annual limitation) to be consistent with the section 1114 amendments by (1) incorporating the new premium pay cap amounts; (2) adding language to make clear that work performed in the aftermath of an emergency qualifies as emergency work; (3) adding a provision regarding the use of an annual cap when an agency determines that employees are performing mission-critical work; and (4) noting that certain types of premium pay remain subject to a biweekly cap, as provided in § 550.107.

The new authority to apply an annual cap when employees are performing work the agency determines to be mission-critical may be used at the sole discretion of the agency head (or designee). As with the annual cap for emergency work, this annual cap would allow premium payments in excess of the normal biweekly cap only in pay periods during which covered work is performed. If an employee ceases to perform approved mission-critical work, the agency must apply the normal biweekly cap in future pay periods. In that circumstance, the annual cap would continue to operate only to ensure that total premium pay for the calendar year does not cause the annual cap to be exceeded.

In addition, we are adding several new paragraphs to § 550.106 to address various issues under our broad regulatory authority:

- Paragraph (d) provides that the end-of-year rates of basic pay used to determine the annual cap must be computed using hourly rates of pay and taking into account the number of paychecks in the calendar year. Thus, in calendar years in which there are 27 paychecks, the annual cap would be increased to reflect payment for an additional pay period.

- Paragraph (e) provides agencies with authority to delay payment of the additional premium pay payable to an employee because of an annual cap until the end of the calendar year. This would prevent overpayments that

would otherwise result because of erroneous projections of basic pay. (For example, an unanticipated quality step increase or promotion could cause an employee's annual total of basic pay to be greater than expected.)

- Paragraph (f) clarifies that a retroactive payment that corrects an underpayment of premium pay in a previous calendar year must be treated as being made in the previous calendar year for the purpose of applying the annual cap.

Section 550.107—We are replacing the former section 550.107 (which dealt with the special premium pay cap for law enforcement officers) with a new section to address the treatment of certain types of regular and recurring premium pay: (1) Standby pay under 5 U.S.C. 5545(c)(1); (2) AUO pay under 5 U.S.C. 5545(c)(2); (3) availability pay under 5 U.S.C. 5545a; and (4) regular overtime pay for firefighters covered by 5 U.S.C. 5545b. Generally, these types of premium pay are creditable as basic pay for retirement purposes. (AUO pay is retirement creditable for law enforcement officers only. Also, only the straight-time portion of a firefighter's regular overtime pay is retirement creditable.)

As authorized by 5 U.S.C. 5547(c) (as amended by section 1114), the interim regulations provide that these types of regular and recurring premium pay remain subject to a biweekly cap, even while other types of premium pay are simultaneously subject to an annual cap. In other words, in any pay period during which an annual cap has been invoked, these types of premium pay are paid first, subject to the biweekly cap. Then, the agency may pay any additional types of premium pay under the annual cap provisions. This ensures that the above-cited types of premium payments remain as stable salary supplements that employees can count on from pay period to pay period, as intended by the law. An annual cap would cause an employee's regular pay to vary dramatically over the course of a year.

In addition, a biweekly cap is appropriate for the above-cited types of premium payments because they are generally creditable as basic pay for retirement purposes. Various anomalies would result if retirement-creditable forms of premium pay were subjected to an annual cap. Employees could experience a reduction in their Thrift Savings Plan deposits as non-retirement creditable premium payments are paid in lieu of retirement-creditable premium payments. Also, irregular retirement-creditable premium payments could affect employees' high-three average

salaries positively or negatively, thus resulting in unwarranted increases or decreases in employees' annuity payments. By continuing to apply a biweekly cap to retirement-creditable premium pay, we ensure that employees are treated fairly and consistently.

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

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists to waive the general notice of proposed rulemaking. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective in less than 30 days. These regulations implement section 1114 of Public Law 107–107, which takes effect on the first day of the first pay period beginning on or after April 27, 2002. Certain provisions cannot be applied, however, unless OPM issues implementing regulations. The waiver of the requirements for proposed rulemaking and a delay in effective date are necessary to ensure timely implementation of the law as intended by Congress.

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 agencies and employees.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 550

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

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, OPM is amending part 550 of title 5 of the Code of Federal Regulations as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart A—Premium Pay

1. Revise the authority citation for subpart A of part 550 to read as follows:

Authority: 5 U.S.C. 5304 note, 5305 note, 5541(2)(iv), 5545a(h)(2)(B) and (i), 5547(b) and (c), 5548, and 6101(c); sections 407 and 2316, Pub. L. 105–277, 112 Stat. 2681–101 and 2681–828 (5 U.S.C. 5545a); E.O. 12748, 3 CFR, 1992 Comp., p. 316.

2. Revise § 550.105 to read as follows:

§ 550.105 Biweekly maximum earnings limitation.

(a) Except as provided in paragraph (c) of this section, an employee may receive premium pay under this subpart only to the extent that the payment does not cause the total of his or her basic pay and premium pay for any biweekly pay period to exceed the greater of—

(1) The maximum biweekly rate of basic pay payable for GS-15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law); or

(2) The biweekly rate payable for level V of the Executive Schedule.

(b) In applying the biweekly limitation under this section, premium pay of the types listed in § 550.107(a) must be paid before paying any other type of premium pay.

(c) This section does not apply to—

(1) Any pay period during which an employee is subject to an annual limitation as provided in § 550.106;

(2) An employee of the Federal Aviation Administration or the Department of Defense who receives premium pay under 5 U.S.C. 5546a.

3. Revise § 550.106 to read as follows:

§ 550.106 Annual maximum earnings limitation.

(a)(1) For any pay period in which the head of an agency (or designee), or the Office of Personnel Management on its own motion, determines that an emergency exists, the agency must pay an affected employee premium pay under the limitations described in paragraph (c) of this section and § 550.107 instead of under the biweekly limitation described in § 550.105(a). An employee is affected if he or she has been determined by the head of the agency (or designee) to be performing work in connection with the emergency or its aftermath. (See definition of "emergency" in § 550.103.)

(2) The head of an agency (or designee) must make the determination under paragraph (a)(1) of this section as soon as practicable after the work in connection with the emergency or its aftermath begins. Entitlement to premium pay under this annual limitation becomes effective on the first day of the pay period in which such work began.

(b)(1) For any pay period in which the head of an agency (or designee), in his or her sole discretion, determines that an employee is needed to perform work that is critical to the mission of the agency, the agency may pay premium pay under the limitations described in

paragraph (c) of this section and § 550.107 instead of under the biweekly limitation described in § 550.105(a).

(2) Entitlement to premium pay under this annual limitation becomes effective on the first day of the pay period designated by the head of the agency (or designee).

(c) In any calendar year during which an employee has been determined to be performing emergency or mission-critical work as provided in paragraphs (a) or (b) of this section, the employee may receive premium pay under this subpart (excluding the types of premium pay identified in § 550.107) only to the extent that the payment does not cause the total of his or her basic pay and premium pay for the calendar year to exceed the greater of—

(1) The maximum annual rate of basic pay payable for GS-15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law) in effect on the last day of the calendar year; or

(2) The annual rate payable for level V of the Executive Schedule in effect on the last day of the calendar year.

(d) The annual rates under paragraphs (c)(1) and (2) of this section must be computed as follows:

(1) Compute an hourly rate by dividing the published annual rate of basic pay by 2,087 hours and rounding the result to the nearest cent;

(2) Compute a biweekly rate by multiplying the hourly rate from paragraph (d)(1) of this section by 80 hours;

(3) Compute an annual rate by multiplying the biweekly rate from paragraph (d)(2) of this section by the number of pay periods for which a paycheck is issued in the given calendar year under the agency's payroll cycle (i.e., either 26 or 27).

(e) An agency may defer payment of the additional premium pay owed an employee as a result of the annual limitation until the end of the calendar year.

(f) Any payment made in the current calendar year that corrects an underpayment of premium pay in a previous calendar year must be treated as being made in the previous calendar year for the purpose of applying the annual cap under this section.

4. Revise § 550.107 to read as follows:

§ 550.107 Premium payments capped on a biweekly basis when an annual limitation otherwise applies.

(a) The following types of premium pay remain subject to a biweekly limitation when other premium

payments are subject to an annual limitation under § 550.106:

(1) Standby duty pay under 5 U.S.C. 5545(c)(1);

(2) Administratively uncontrollable overtime pay under 5 U.S.C. 5545(c)(2);

(3) Availability pay for criminal investigators under 5 U.S.C. 5545a; and

(4) Overtime pay for hours in the regular tour of duty of a firefighter covered by 5 U.S.C. 5545b.

(b) An employee must receive premium pay of the types identified in paragraph (a) of this section before receiving any other type of premium pay.

(c) In any pay period during which an employee is subject to an annual limitation under § 550.106, the employee may receive the types of premium pay identified in paragraph (a) of this section only to the extent that the payment does not cause the total of his or her basic pay and such premium pay for the pay period to exceed the greater of—

(1) The maximum biweekly rate of basic pay payable for GS-15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law); or

(2) The biweekly rate payable for level V of the Executive Schedule.

(d) Premium pay paid, or projected to be paid, under this section is included in determining whether the sum of the employee's basic pay and premium pay would exceed the annual limitation under § 550.106.

[FR Doc. 02-9537 Filed 4-11-02; 8:45 am]

BILLING CODE 6325-39-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**Office of Federal Housing Enterprise Oversight****12 CFR Part 1750****Risk-Based Capital**

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to Part 1750 of the Code of Federal Regulations for the regulation on the process used to determine the capital classification of the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae).

EFFECTIVE DATE: April 19, 2002.