

# Rules and Regulations

Federal Register

Vol. 70, No. 17

Thursday, January 27, 2005

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 550

RIN 3206-AK74

#### Pay Administration (General)

**AGENCY:** Office of Personnel Management.

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

**SUMMARY:** The Office of Personnel Management is issuing interim regulations to implement a provision of the Federal Workforce Flexibility Act of 2004, which established a new form of compensatory time off for time spent by an employee in a travel status away from the employee's official duty station when such time is not otherwise compensable.

**DATES:** *Effective Date:* The interim regulations will become effective on January 28, 2005.

*Comment Date:* Comments must be received on or before March 28, 2005.

**ADDRESSES:** Send or deliver written comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415, by FAX at (202) 606-0824, or by e-mail at [pay-performance-policy@opm.gov](mailto:pay-performance-policy@opm.gov).

**FOR FURTHER INFORMATION CONTACT:** Vicki Draper by telephone at (202) 606-2858; by fax at (202) 606-0824; or by e-mail at [pay-performance-policy@opm.gov](mailto:pay-performance-policy@opm.gov).

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management (OPM) is issuing interim regulations to implement a new compensatory time off provision established by section 203 of the Federal Workforce Flexibility Act of 2004 (Public Law 108-411, October 30, 2004). Section 203 amended subchapter V of chapter 55 of title 5, United States

Code, by adding a new section 5550b, which establishes a new form of compensatory time off for time spent by an employee in a travel status away from the employee's official duty station when such time is not otherwise compensable. 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. These regulations amend part 550 of title 5, Code of Federal Regulations, by adding a new subpart N, Compensatory Time Off for Travel.

Section 203(c) provides that this new form of compensatory time off for travel takes effect on the earlier of (1) the effective date of implementing regulations or (2) the 90th day after the date of the law's enactment (January 28, 2005). These regulations are effective on January 28, 2005.

In § 550.1403, we provide definitions of various terms used in subpart N. For example, the term "travel" is defined to mean officially authorized travel—that is, travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies. The term "travel status" is defined to mean travel as described in § 550.1404 that is creditable for the purpose of accruing compensatory time off under subpart N. To make clear that an employee may not receive double compensation for travel hours, the term "travel status" as used in subpart N does not include travel time that is otherwise compensable as hours of work. For example, travel hours outside an employee's regular working hours that are compensable hours of work under 5 U.S.C. 5542(b)(2)(B) and 5 CFR 550.112(g)(2), may not also be credited as time in a travel status under subpart N.

The term "compensable" is defined to make clear what periods of time are "not otherwise compensable" and thus potentially creditable for the purpose of compensatory time off for travel under subpart N. Time is considered compensable if the time is creditable as hours of work for the purpose of determining a specific pay entitlement. This is true even when that work time does not result in additional compensation due to the application of pay limitations. For example, under the availability pay provisions in 5 U.S.C. 5545a, all unscheduled duty hours

(including any hours in excess of the minimum hours necessary in a 12-month period to justify the payment of availability pay) are considered "compensable" hours, since availability pay represents full compensation for all unscheduled duty hours. In addition, even though a criminal investigator may not receive the full 25-percent availability pay because of the biweekly premium pay limitation in 5 U.S.C. 5547, all hours of a type that are creditable as unscheduled duty hours for the purpose of availability pay are considered to be compensable. Thus, with respect to any hours of a type that is creditable as unscheduled duty hours for availability pay purposes, any travel time during such hours are not creditable under subpart N.

In § 550.1404(b), we clarify that time in travel status includes only the time actually spent traveling between the official duty station and a temporary duty station, or between two temporary duty stations, and the "usual waiting time" that precedes or interrupts such travel. Generally, passengers are required to arrive at a transportation terminal (e.g., airport or train station) at a designated pre-departure time (e.g., 1 to 2 hours prior to the scheduled departure time of an airplane, depending on whether it is a domestic or international flight). Such waiting time at the transportation terminal is considered usual waiting time and is creditable time in a travel status. The concept of "usual waiting time" is currently used in determining creditable overtime hours of work under title 5 and the Fair Labor Standards Act of 1938, as amended.

In addition, when an employee's travel is interrupted (i.e., the employee travels to an intervening transportation terminal and has to wait for a connecting flight to continue traveling to a temporary duty station), usual waiting time at the intervening transportation terminal also is creditable time in a travel status, subject to exclusions for bona fide meal periods. If the employee experiences an extended (i.e., not usual) waiting time during which he or she is free to use the time for his or her own purposes (e.g., rest or sleep), the extended waiting time that is outside the employee's regular working hours is not creditable time in a travel status. Once the employee arrives at a temporary duty station, he or she is not

considered to be in a travel status just because he or she is away from the official duty station. In other words, the time spent at a temporary duty station between arrival and departure cannot be credited as time in a travel status.

In § 550.1404(c) and (d), we clarify when it is appropriate to offset creditable time in a travel status by the amount of time the employee spends in normal commuting between home and work. For example, such an offset applies to an employee who travels directly between his or her home and a temporary duty station outside the limits of the employee's official duty station. Also, the commuting time offset applies if an employee is required to travel between home and a transportation terminal outside the limits of his or her official duty station.

Section 550.1405 addresses the crediting of compensatory time off for travel. Qualifying compensatory time off for travel must be credited and used in increments of one-tenth of an hour (6 minutes) or one-quarter of an hour (15 minutes). This is consistent with OPM's standardized policy for charging annual and sick leave in increments of one-tenth or one-quarter of an hour. An employee must comply with his or her agency's procedures for requesting credit of compensatory time off and the employee must file such requests within the time period required by the agency.

Section 550.1406 addresses the usage of accrued compensatory time off for travel. An employee must submit a request to his or her supervisor to schedule time off from his or her normal tour of duty for the purpose of using accrued compensatory time off.

In an effort to give employees sufficient time to use their accumulated compensatory time off and to enhance the efficiency and effectiveness of standardized payroll policies and processes, § 550.1407(a) provides that an employee must use his or her accrued compensatory time off within 26 pay periods after it is earned or forfeit such compensatory time off, except in certain circumstances (*e.g.*, when an employee separates or is placed in a leave without pay status to perform service in the uniformed services with restoration rights).

Section 550.1407(b) provides that, upon voluntary transfer to another agency, an employee's unused compensatory time off balance must be forfeited.

Section 550.1407(c) provides that an employee must forfeit any unused compensatory time off when he or she separates from Federal service, except in the circumstances described in § 550.1407(a)(2).

Section 550.1407(d) provides that an employee must forfeit any unused compensatory time off when he or she moves to a Federal position not covered by subpart N. However, this requirement does not prevent an agency from using another legal authority to give the employee credit for compensatory time off for travel equal to the forfeited amount.

Section 550.1408 restates the statutory prohibition on paying employees for unused compensatory time off for travel earned under this subpart.

Section 550.1409 makes clear that compensatory time off for travel earned under this subpart is not considered in applying the biweekly and annual premium pay limitations in 5 U.S.C. 5547 or the aggregate pay limitation on pay in 5 U.S.C. 5307.

In exercising our broad regulatory authority under 5 U.S.C. 5548, we have deliberately taken a conservative approach with respect to the time limit on the use of earned compensatory time off. We are mindful that we are dealing with a new type of employee benefit which presents new issues and administrative challenges for agencies. We believe it is appropriate to approach this new benefit without imposing overly burdensome administrative procedures.

#### **Waiver of Notice of Proposed Rulemaking**

Pursuant to section 553(b)(3)(B) of title 5 of the United States Code, I find that good cause exists for waiving 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 a provision of Public Law 108-411 that becomes effective on the effective date of these regulations. The waiver of the requirements for proposed rulemaking and a delay in the effective date are necessary to ensure timely implementation of the law as intended by Congress.

#### **E.O. 12866, Regulatory Review**

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

#### **Regulatory Flexibility Act**

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

#### **List of Subjects in 5 CFR Part 550**

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

Office of Personnel Management.

**Kay Coles James,**  
*Director.*

■ Accordingly, OPM is amending 5 CFR part 550 as follows:

#### **PART 550—PAY ADMINISTRATION (GENERAL)**

■ 1. The authority citation for part 550 continues 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. A new subpart N is added to read as follows:

#### **Subpart N—Compensatory Time Off for Travel**

Sec.

- 550.1401 Purpose.
- 550.1402 Coverage.
- 550.1403 Definitions.
- 550.1404 Creditable travel time.
- 550.1405 Crediting compensatory time off.
- 550.1406 Usage of accrued compensatory time off.
- 550.1407 Forfeiture of unused compensatory time off.
- 550.1408 Prohibition against payment for unused compensatory time off.
- 550.1409 Inapplicability of premium pay and aggregate pay caps.

#### **Subpart N—Compensatory Time Off for Travel**

##### **§ 550.1401 Purpose.**

This subpart contains OPM regulations implementing 5 U.S.C. 5550b, which establishes a new type of compensatory time off. Subject to the conditions specified in this subpart, an employee is entitled to earn, on an hour-for-hour basis, compensatory time off for time in a travel status away from the employee's official duty station when the travel time is not otherwise compensable.

##### **§ 550.1402 Coverage.**

This subpart applies to an employee as defined in 5 U.S.C. 5541(2) who is employed by an agency.

##### **§ 550.1403 Definitions.**

In this subpart:

*Agency* means an Executive agency as defined in 5 U.S.C. 105.

*Compensable* refers to periods of time that are creditable as hours of work for the purpose of determining a specific pay entitlement, even when that work

time may not actually generate additional compensation because of applicable pay limitations.

*Compensatory time off* means compensatory time off for travel that is credited under the authority of this subpart.

*Official duty station* means the geographic area surrounding an employee's regular work site that is the same as the area designated by the employing agency for the purpose of determining whether travel time is compensable for the purpose of determining overtime pay, consistent with the regulations in 5 CFR 550.112(j) and 551.422(d).

*Regular working hours* means the days and hours of an employee's regularly scheduled administrative workweek established under 5 CFR part 610.

*Scheduled tour of duty for leave purposes* means an employee's regular hours for which he or she may be charged leave under 5 CFR part 630 when absent. For full-time employees, it is the 40-hour basic workweek as defined in 5 CFR 610.102. For employees with an uncommon tour of duty as defined in 5 CFR 630.201, it is the uncommon tour of duty.

*Travel* means officially authorized travel—i.e., travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies.

*Travel status* means travel time as described in § 550.1404 that is creditable in accruing compensatory time off for travel under this subpart, excluding travel time that is otherwise compensable under other legal authority.

#### **§ 550.1404 Creditable travel time.**

(a) *General.* Subject to the conditions specified in this subpart, an agency must credit an employee with compensatory time off for time in a travel status if—

(1) The employee is required to travel away from the official duty station; and

(2) The travel time is not otherwise compensable hours of work under other legal authority.

(b) *Travel status.* (1) Time in a travel status includes the time an employee actually spends traveling between the official duty station and a temporary duty station, or between two temporary duty stations, and the usual waiting time that precedes or interrupts such travel, subject to the exclusions specified in paragraphs (b)(2) and (b)(3) of this section and the requirements in paragraphs (c) and (d) of this section. Time spent at a temporary duty station between arrival and departure is not

time in a travel status. Determinations regarding what is creditable as “usual waiting time” are within the sole and exclusive discretion of the employing agency.

(2) Bona fide meal periods during actual travel time or waiting time are not creditable as time in a travel status.

(3) If an employee experiences an extended (i.e., not usual) waiting time between actual periods of travel during which the employee is free to rest, sleep, or otherwise use the time for his or her own purposes, the extended waiting time is not creditable as time in a travel status.

(c) *Travel between home and a temporary duty station.* (1) If an employee is required to travel directly between his or her home and a temporary duty station outside the limits of the employee's official duty station, the travel time is creditable as time in a travel status if otherwise qualifying under this subpart. However, the agency must deduct from such travel hours the time the employee would have spent in normal home-to-work or work-to-home commuting.

(2) In the case of an employee who is offered one mode of transportation and who is permitted to use an alternative mode of transportation, or who travels at a time or by a route other than that selected by the agency, the agency must determine the estimated amount of time in a travel status the employee would have had if the employee had used the mode of transportation offered by the agency or traveled at the time and by the route selected by the agency. In determining time in a travel status under this subpart, the agency must credit the employee with the lesser of the estimated time in a travel status or the actual time in a travel status.

(3) In the case of an employee who is on a multiple-day travel assignment and who chooses, for personal reasons, not to use temporary lodgings at the temporary duty station, but to return home at night or on a weekend, only travel from home to the temporary duty station on the 1st day and travel from the temporary duty station to home on the last day that is otherwise qualifying as time in a travel status under this subpart is mandatorily creditable (subject to the deduction of normal commuting time). Travel to and from home on other days is not creditable travel time unless the agency, at its discretion, determines that credit should be given based on the net savings to the Government from reduced lodging costs, considering the value of lost labor time attributable to compensatory time off. The dollar value of an hour of compensatory time off for

this purpose is equal to the employee's hourly rate of basic pay as defined in § 550.103.

(d) *Time spent traveling to or from a transportation terminal as part of travel away from the official duty station.* If an employee is required to travel between home and a transportation terminal (e.g., airport or train station) within the limits of his or her official duty station as part of travel away from that duty station, the travel time outside regular working hours to or from the terminal is considered to be equivalent to commuting time and is not creditable time in a travel status. If the transportation terminal is outside the limits of the employee's official duty station, the travel time to or from the terminal outside regular working hours is creditable as time in a travel status, but is subject to an offset for the time the employee would have spent in normal home-to-work or work-to-home commuting. If the employee travels between a worksite and a transportation terminal, the travel time outside regular working hours is creditable as time in a travel status, and no commuting time offset applies.

#### **§ 550.1405 Crediting compensatory time off.**

(a) Upon a request filed in accordance with the procedures established under paragraph (b) of this section, an employee is entitled to credit for compensatory time off for travel under the conditions specified in this subpart. The employing agency must credit an employee with compensatory time off for creditable time in a travel status as provided in § 550.1404. The agency may authorize credit in increments of one-tenth of an hour (6 minutes) or one-quarter of an hour (15 minutes). Agencies must track and manage compensatory time off granted under this subpart separately from other forms of compensatory time off.

(b) An employee must comply with his or her agency's procedures for requesting credit of compensatory time off under this section. Employees must file such requests within the time period required by the agency.

#### **§ 550.1406 Usage of accrued compensatory time off.**

(a) An employee must request permission from his or her supervisor to schedule the use of his or her accrued compensatory time off in accordance with agency-established policies and procedures.

(b) Compensatory time off may be used when the employee is granted time off from his or her scheduled tour of duty established for leave purposes. An

employee must use earned compensatory time off under this subpart in increments of one-tenth of an hour (6 minutes) or one-quarter of an hour (15 minutes).

**§ 550.1407 Forfeiture of unused compensatory time off.**

(a) *After 26 pay periods.* (1) Except as provided in paragraph (a)(2) of this section, an employee must use accrued compensatory time off by the end of the 26th pay period after the pay period during which it was credited. If an employee fails to use the compensatory time off within 26 pay periods after it was credited, he or she must forfeit such compensatory time off.

(2) If an employee with unused compensatory time off separates from Federal service or is placed in a leave without pay status in the following circumstances and later returns to service with the same (or successor) agency, the employee must use all of the compensatory time off by the end of the 26th pay period following the pay period in which the employee returns to duty, or such compensatory time off will be forfeited:

(i) The employee separates or is placed in a leave without pay status to perform service in the uniformed services (as defined in 38 U.S.C. 4303 and 5 CFR 353.102) and later returns to service through the exercise of a reemployment right provided by law, Executive order, or regulation; or

(ii) The employee separates or is placed in a leave without pay status because of an on-the-job injury with entitlement to injury compensation under 5 U.S.C. chapter 81 and later recovers sufficiently to return to work.

(b) *Upon transfer to another agency.* When an employee voluntarily transfers to another agency (including a promotion or change to lower grade action), he or she must forfeit his or her unused compensatory time off.

(c) *Upon separation.* (1) When an employee separates from Federal service, any unused compensatory time off is forfeited, except as provided in paragraph (c)(2) of this section.

(2) Unused compensatory time off will not be forfeited but will be held in abeyance in the case of an employee who separates from Federal service and later returns to service with the same (or successor) agency under the circumstances described in paragraph (a)(2) of this section.

(d) *Upon movement to a noncovered position.* When an employee moves to a Federal position not covered by this subpart, he or she forfeits any unused compensatory time off. This requirement does not prevent an agency

from using another legal authority to give the employee credit for compensatory time off equal to the forfeited amount.

**§ 550.1408 Prohibition against payment for unused compensatory time off.**

As provided by 5 U.S.C. 5550b(b), an individual may not receive payment under any circumstances for any unused compensatory time off he or she earned under this subpart. This prohibition against payment applies to surviving beneficiaries in the event of the individual's death.

**§ 550.1409 Inapplicability of premium pay and aggregate pay caps.**

Accrued compensatory time off under this subpart is not considered in applying the premium pay limitations established under 5 U.S.C. 5547 and 5 CFR 550.105 through 550.107 or the aggregate limitation on pay established under 5 U.S.C. 5307 and 5 CFR part 530, subpart B.

[FR Doc. 05-1457 Filed 1-26-05; 8:45 am]

BILLING CODE 6325-39-P

**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Part 576**

**RIN 3206-AJ76**

**Voluntary Separation Incentive Payments**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations on Voluntary Separation Incentive Payments (generally known as "VSIPs" or "buyouts"). These final regulations explain how an agency requests authority from OPM to offer Voluntary Separation Incentive Payments under the Chief Human Capital Officers Act of 2002, which applies to most executive branch agencies.

These final regulations also explain how agencies must inform employees returning from military leave of any Voluntary Separation Incentive Payment offers they may have missed while on military leave. Finally, these regulations explain how in exceptional circumstances an agency that is hiring a former employee who previously received a Voluntary Separation Incentive Payment may request that OPM waive the general requirement that the individual repay the incentive if

reemployed in the Government within 5 years of receiving the incentive.

**DATES:** These regulations are effective January 27, 2005.

**FOR FURTHER INFORMATION CONTACT:** Sharon K. Ginley at (202) 606-0960, fax at (202) 606-2329, TTY at (202) 418-3134, or e-mail at [sharon.ginley@opm.gov](mailto:sharon.ginley@opm.gov).

**SUPPLEMENTARY INFORMATION:** Section 1313(a) of the Chief Human Capital Officers Act of 2002 (Public Law 107-296; 116 Stat. 2135) added new sections 3521 through 3525 to title 5, United States Code, to allow executive branch agencies, at their option, to offer Voluntary Separation Incentive Payments to employees who separate by voluntary retirement or by resignation. On February 4, 2003, OPM issued interim regulations to revise part 576 of title 5, Code of Federal Regulations, with a request for public comments. These final regulations incorporate public comments and make clarifying revisions.

To offer buyouts, an agency must submit a plan for OPM approval. The plan must describe how the agency will use Voluntary Separation Incentive Payments as a tool to facilitate its restructuring goals. OPM will review each agency's plan and, in consultation with the Director of the Office of Management and Budget (OMB), may make any appropriate modifications to the agency's plan for Voluntary Separation Incentive Payments. The review may include a consideration of costs and benefits associated with using the authority. OPM will issue supplemental guidance for agency use in preparing a VSIP implementation plan. The agency must have OPM approval before using this flexibility.

A former employee who accepts any employment with the Government of the United States for compensation within 5 years after the date of separating for a Voluntary Separation Incentive Payment must repay the entire amount of the incentive payment before the first day of reemployment in the Federal service. Under exceptional circumstances, and at the request of the hiring agency, the OPM Director may waive the repayment requirement for former executive branch employees.

**Comments Received**

OPM received five comments from agencies concerning the interim regulations. One agency pointed out that the interim regulations contained the words " \* \* \* to offer Voluntary Separation Incentive Payments to surplus or displaced employees." The agency pointed out that the words