

Rules and Regulations

Federal Register

Vol. 72, No. 221

Friday, November 16, 2007

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 575

RIN 3206-AL41

Retention Incentives

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations to implement a provision of the Federal Workforce Flexibility Act of 2004 granting agencies additional flexibility to pay retention incentives. The final regulations permit an agency to pay a retention incentive to an employee who would be likely to leave for a different position in the Federal service before the closure or relocation of the employee's office, facility, activity, or organization. The final regulations provide agencies with additional flexibility to help retain employees critical to important agency missions and better meet strategic human capital needs.

DATES: *Effective Date:* The final regulations will become effective on December 17, 2007.

Applicability Date: The final regulations apply to retention incentives authorized under 5 U.S.C. 5754 and 5 CFR 575.315 on the first day of the first pay period beginning on or after December 17, 2007.

FOR FURTHER INFORMATION CONTACT:

Jeanne Jacobson by telephone at (202) 606-2858; by fax at (202) 606-0824; or by e-mail at pay-performance-policy@opm.gov.

SUPPLEMENTARY INFORMATION: On May 13, 2005, the U.S. Office of Personnel Management (OPM) published interim regulations (70 FR 25732) to implement section 101 of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108-411,

October 30, 2004). Section 101 amended 5 U.S.C. 5753 and 5754 by providing a new authority to make recruitment, relocation, and retention payments. The amended law replaced the former recruitment and relocation bonus and retention allowance authority provided by 5 U.S.C. 5753 and 5754. The 60-day comment period for the interim regulations ended on July 12, 2005.

The Supplementary Information for the interim regulations posed a number of questions about whether the final regulations should provide agencies with the authority to pay recruitment incentives to help recruit current employees (as authorized by 5 U.S.C. 5753(b) under conditions that would be described in OPM regulations) and to pay retention incentives to help retain employees likely to leave for a different position in the Federal service (as authorized by 5 U.S.C. 5754(b) under conditions that would be described in OPM regulations) and, if so, under what circumstances. This **Federal Register** notice addresses the comments we received in response to the questions regarding retention incentives. The comments we received in response to the questions regarding recruitment incentives are not addressed in these final regulations, but will be addressed in a future **Federal Register** notice.

These final regulations provide agencies with the discretionary authority to pay a retention incentive to an employee who, in the absence of such an incentive, would be likely to leave for a different position in the Federal service before the closure or relocation of the employee's office, facility, activity, or organization. The comments on the situations proposed in the interim regulations and the changes made in these final regulations relating to the use of retention incentives are discussed further in the following sections of this Supplementary Information.

Comments on Retention Incentives for Employees Likely to Leave for a Different Position in the Federal Service

Section 5754(b) of title 5, United States Code, allows OPM to authorize the head of an agency to pay retention incentives to employees who, in the absence of an incentive, would be likely to leave their positions for a different position in the Federal service under the conditions described in OPM's

regulations. In recognition that costly and inefficient interagency competition could occur if agencies are permitted to pay retention incentives in this manner, in the May 13, 2005, interim regulations, we asked for comments on the following circumstances in which agencies could grant a retention incentive to encourage employees to stay in their current position and not move to another Federal agency:

- Would it be desirable to allow an agency to offer a retention incentive to a current employee when the head of that agency determines that the loss of the employee's unique competencies (i.e., knowledge, skills, abilities, behaviors, and other characteristics) required for the position would adversely affect the successful accomplishment of an important agency mission or the completion of a critical project?

- Would it be desirable to allow an agency to offer a retention incentive to a current employee when the offered position is under a pay system that differs from the pay system of the employee's position before the move and the head of that agency determines that the loss of the employee in the current position would adversely affect the successful accomplishment of an important agency mission or the completion of a critical project?

- Would it be desirable to allow an agency to offer a retention incentive when the employee's position requires him or her to work under unusually severe or arduous working conditions (e.g., an extreme climate; unreliable essential services, such as basic utility or telecommunication services; or other harsh conditions) that the agency cannot control and the head of that agency has determined that these conditions have a significant negative effect on the agency's ability to retain that employee at the worksite?

- Would it be desirable to allow an agency to offer a retention incentive to a current employee in order to retain an employee who is likely to leave his or her position for another Federal position before the closure or relocation of the employee's office or facility and the head of that agency has determined that the employee's services are critical to the successful closure or relocation?

OPM also invited comments on whether the regulations should limit the payment of a retention incentive in any

of the circumstances listed above to only those employees whose rating of record is at the highest level under the applicable performance appraisal or evaluation system.

We received mixed reactions to the situations proposed in the previous bullets for paying a retention incentive to an employee who would be likely to leave for a different position in the Federal service in the absence of such an incentive. Some commenters expressed concerns about possible bidding wars and increased costs to the Government of the proposed retention incentive flexibility; controlling the use of the flexibility; and the need for adequate funding and specific payment criteria, accountability measures, and a trial period to prevent abuse. Finally, several agencies noted authorities already exist to compensate for working under difficult conditions, such as post differentials, hazardous duty pay, and environmental differential pay, and the proposed retention incentive authority is not needed for these purposes.

However, some commenters also stated the flexibility to pay retention incentives to employees who would be likely to leave for a different position in the Federal service would help agencies retain knowledgeable, skilled, and experienced employees to finish work on critical projects and train replacement employees. One agency stated the use of this flexibility would help avoid (1) the cost of recruiting for unique skill sets, (2) the inability to get the job done after the employee leaves and prior to a replacement coming on board, and (3) the risk of not being able to fill the position at all. Another agency noted, while there are concerns about bidding wars, it is a fact that agencies are in competition with one another as well as private sector employers for the most talented employees, and additional pay flexibility is desirable to meet these needs.

Commenters provided a number of suggestions for additional criteria to use when authorizing a retention incentive for an employee who would be likely to leave for a different position in the Federal service. Some stated any payment criteria should focus on the employee's unique competencies, and the type of pay system and working conditions should not be a deciding factor in determining whether to offer a retention incentive. One agency felt the payment criteria should be written broadly to cover any of the proposed situations, but acknowledged the nature of the relevant pay systems may be an issue for consideration in authorizing a retention incentive. Another stated payment of a retention incentive should

be based on staffing needs related to a "critical agency mission," rather than just an "important agency mission," and an agency should determine the critical agency mission or project would likely fail without the employee's services. Other suggestions for the regulations included requiring an employee to have an offer of other employment in hand before a retention incentive is paid, limiting the length of service agreements, ensuring service agreements make clear the retention incentive will be terminated when the critical project or program is complete, limiting the payment of a retention incentive to a lump-sum payment at the end of the service period (rather than biweekly or other installment payments), and establishing additional retention incentive flexibility for a trial period during which compliance with the regulations would be closely monitored.

Regarding the question as to whether the regulations should limit the payment of a retention incentive to only those employees whose rating of record is at the highest level under the applicable performance appraisal or evaluation system, commenters overwhelmingly objected to this proposed requirement. Commenters felt the needs of agencies and the employee's capabilities should be the determining factors in deciding whether to pay an incentive and that including such a limit in the regulations would be a disservice to the office attempting to meet a critical mission need or project. They pointed out that an employee with a "Fully Successful" rating might have the competencies or experience that are essential for the agency to attract or retain. Another commenter agreed an employee's performance level must be a factor when determining whether an incentive should be paid to an employee and suggested the performance level be limited to at least "Fully Successful" (or equivalent) consistent with other recruitment, relocation, and retention incentive provisions.

Response to Comments

Ensuring agencies have an effective civilian workforce to achieve their goals is one of the primary objectives of strategic human capital management in the Government. To meet this objective, agencies must have the necessary human resources tools to retain essential employees to perform mission-critical work. The retention incentive authority is one of several tools providing agencies substantial flexibility to pay additional compensation to help retain key employees.

We carefully considered the comments received on the circumstances proposed in the interim regulations under which agencies would be allowed to pay a retention incentive to an employee who would be likely to leave for a different position in the Federal service in the absence of an incentive. In determining whether to provide additional retention incentive flexibility, we must balance the workforce needs of a single agency with the workforce needs of other agencies. An employee providing valuable services to one agency also may possess the competencies that are valuable to another agency.

We also need to be cautious when establishing new flexibilities that have the potential to result in costly and inefficient interagency competition. We agree with several of the commenters who expressed concerns about controlling any increased retention incentive flexibility and possible bidding wars between agencies. The regulations must include the appropriate approval criteria, controls, and monitoring and reporting requirements to help ensure agencies continue to use the retention incentive authority judiciously and responsibly.

In light of these concerns and the issues identified by commenters, we have not amended the regulations to establish a broad authority to pay a retention incentive to an employee who would be likely to leave for a different position in the Federal service in the absence of the incentive. We understand interagency compensation already exists and some agencies are disadvantaged because other agencies have the flexibility to pay higher salaries. However, we must balance single agency needs against the Governmentwide interest of avoiding costly and inefficient interagency competition.

In this regard, these final regulations provide agencies with the authority to pay a retention incentive to an employee who would be likely to leave for a different position in the Federal service before the closure or relocation of the employee's office, facility, activity, or organization. The need to retain employees when facilities are closing or relocating is especially acute. Such employees may be more likely than others to seek other Federal employment, especially if they will otherwise be separated from Federal service when their office or facility closes or if they cannot relocate with their office or facility. At the same time, agencies typically must continue to perform mission-critical work at sites subject to closure and relocation.

Recruiting and training employees to replace those who leave may not be a viable or cost-effective option. While this final regulation does not provide agencies the flexibility to pay retention incentives in all the circumstances proposed in the interim regulations, it will provide OPM an opportunity to monitor the effects of such pay flexibility on interagency competition and compensation costs in narrow closure and relocation situations to determine if the flexibility should be expanded.

In addition, no commenters objected to providing the authority to pay retention incentives to employees who would be likely to leave for a different position in the Federal service before the closure or relocation of the employee's office or facility. Of those who commented on this specific proposal, all agreed such flexibility should be provided. Some commenters noted the importance of retaining employees with critical skills before a closure or relocation. One agency stressed the importance of maintaining operations and retaining needed expertise in such situations. Another recognized retention incentives alone may not be adequate to retain the services of employees facing eventual separation, but they might be of benefit in certain circumstances.

One agency stated the use of retention incentives for employees who would be likely to leave for a different position in the Federal service before the closure or relocation of the employee's office or facility would require coordination between the losing and gaining agencies to ensure the employee is not harmed. We do not agree that coordination between the gaining and losing agency is necessary. The service agreement signed by the employee will define the terms and conditions of the employee's retention incentive.

The same agency noted in closure and relocation situations, reduction in force procedures may be an issue and would have to be considered and followed. We agree. Allowing agencies to pay retention incentives to employees who would be likely to leave for a different position in the Federal service before the closure or relocation of the employee's office or facility does not affect any requirement for agencies to follow reduction in force procedures in appropriate circumstances.

Changes to the Regulations

This notice amends the retention incentive regulations at 5 CFR part 575, subpart C, by establishing a new § 575.315 to provide agencies with the authority to pay a retention incentive to

an employee who would be likely to leave for a different position in the Federal service before the closure or relocation of the employee's office, facility, activity, or organization. The regulations regarding this new flexibility are contained only in this section. However, § 575.315 includes numerous cross-references to provisions that must be followed in other sections of 5 CFR part 575, subpart C. While many of the provisions in § 575.315 are the same as the requirements for a retention incentive authorized for an employee likely to leave the Federal service, § 575.315 contains additional parameters. Under this final regulation, agencies will continue to have the authority to pay a retention incentive to an employee in a closure or relocation situation who would be likely to leave the Federal service in the absence of an incentive.

Under § 575.315(a)(1), an agency may approve a retention incentive for an individual employee when the agency determines—

- Given the agency's mission requirements and the employee's competencies, the agency has a special need for the employee's services that makes it essential to retain the employee in his or her current position during a period of time before the closure or relocation of the employee's office, facility, activity, or organization; and
- In the absence of a retention incentive, the employee would be likely to leave for a different position in the Federal service.

Section 575.315(a)(2) also provides an agency with the authority to approve a retention incentive for a group or category of employees if (1) the agency has a special need for the employees' services that makes it essential to retain the employees in their current positions during a period of time before a closure or relocation and (2) there is a high risk that a significant number of the employees in the group would be likely to leave for different positions in the Federal service in the absence of a retention incentive. An agency may not include an employee in a senior-level or scientific or professional, Senior Executive Service, or Executive Schedule position, or in certain other senior positions, in a group retention incentive authorization. (See §§ 575.315(a)(2) and 575.305(c).)

Agencies may use this new retention incentive flexibility for an employee in a position listed in § 575.303 (e.g., General Schedule or prevailing rate position) who is not excluded by § 575.304 (e.g., Presidential appointees). The employee must have a rating of record (or an official performance

appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of at least "Fully Successful" or equivalent. In addition, the employee must have received a general or specific written notice from the agency that his or her position may or would be affected by the closure or relocation of the employee's office, facility, activity, or organization (e.g., the employee's position may or would move to a new geographic location or the employee's position may or would be eliminated). (See § 575.315(b).)

Under § 575.315(c), an agency must include in its retention incentive plan established under § 575.307(a) the conditions and requirements governing the use of retention incentives for employees who would be likely to leave for a different position in the Federal service before the closure or relocation of the employee's office, facility, activity, or organization. The plan also must designate the authorized agency officials who may approve such retention incentives, consistent with the approval requirements in § 575.307(b).

For each determination to pay a retention incentive under new § 575.315, an agency must document in writing the basis for authorizing the incentive and for the amount and timing of approved incentive payments. (See § 575.315(d).) When documenting the determination to pay a retention incentive for an individual employee who would be likely to leave for a different Federal position, agencies must consider the factors in § 575.306(b), as applicable, and—

- The extent to which the employee's departure for a different position in the Federal service would affect the agency's ability to carry out an activity, perform a function, or complete a project the agency deems essential to its mission before and during the closure or relocation period (e.g., the agency's need (1) to retain the employee to ensure minimal disruption in the performance of mission-critical functions, continuity of key operations, or minimal disruption of service to the public before and during the closure or relocation; (2) to train new employees who will move with the organization to the new geographic location; (3) to assist with the actual closure or relocation of the office, facility, activity, or organization; or (4) to perform similar mission-essential functions before or during the closure or relocation);

- The competencies possessed by the employee that are essential to retain; and
- The agency (which may be in the executive, judicial, or legislative branch) for which the employee would be likely

to leave in the absence of the retention incentive (as required by the reporting requirements in section 101(c)(2) of Pub. L. 108–411).

Agencies must address similar factors in documenting each determination to pay a retention incentive to a group or category of employees. (See § 575.315(d)(3).) In addition, the agency must narrowly define a targeted category of employees. The factors that may be appropriate are described in § 575.306(c)(2), except that each group retention incentive authorized under new § 575.315 may cover no more than one occupational series.

Under § 575.315(e), the payment options, calculations, and limitations in § 575.309 apply to the payment of retention incentives to employees who would be likely to leave for a different position in the Federal service before the closure or relocation of the employees' office, facility, activity, or organization, except an agency may not pay retention incentives in biweekly installments at the full retention incentive percentage rate established for the employee under § 575.309(a).

Agencies will need to consider options to pay all or a significant portion of the retention incentive at the end of the full period of service required by the service agreement to maximize the effectiveness of the retention incentive. For example, an agency could pay the retention incentive in a single lump-sum payment at the end of the full period of service required by the service agreement. An agency also could pay the retention incentive in installment payments that are less than the full percentage retention incentive rate authorized. The agency could defer payment of a portion of the full payment (e.g., 50 percent or more) until the end of the full period of service required by the service agreement. Guidance on such strategic payment options is provided at <http://www.opm.gov/oca/pay/HTML/retpaycalc.asp>.

The service agreement provisions in §§ 575.310(b) through 575.310(e) apply to retention incentive service agreements for employees who would be likely to leave for a different position in the Federal service under this final regulation, subject to the additional requirements in § 575.315(f). The period of employment under such a service agreement may be of any length, not to exceed the date on which the employee's position is actually affected by the closure or relocation. The service agreement must include the conditions under which the agency must terminate the service agreement in § 575.310(d) and (e) and § 575.315(g), including the conditions under which the agency will

pay an additional retention incentive payment for partially completed service. The service agreement also must notify employees that the agency will review the retention incentive at least annually to determine if payment is still warranted.

Under § 575.315(f), the service agreement termination provisions in § 575.311 apply to retention incentive service agreements for employees who would be likely to leave for a different position in the Federal service in the absence of such an incentive. Section 575.315(f) also requires agencies to review each determination to pay a retention incentive under new § 575.315 at least annually to determine if payment is still warranted. In addition, § 575.315(g)(2) requires an agency to terminate a retention incentive service agreement when—

- The closure or relocation is cancelled and no longer affects the employee's position;
- The employee moves to another position not affected by the closure or relocation (including another position within the same agency);
- For relocation situations, the employee accepts the agency's offer to relocate with his or her the office, facility, activity, or organization and, thus, the employee is no longer likely to leave for a different position in the Federal service; or
- The employee moves to a different position in the same office, facility, activity, or organization subject to closure or relocation not covered by the employee's service agreement. (The agency may authorize a new retention incentive under § 575.315 for the employee, as appropriate.).

If an authorized agency official terminates a service agreement under the conditions specified above, the employee is entitled to keep any retention incentive installment payments already received. Under certain conditions, the employee also may receive a portion or all of any amount attributable to completed service, similar to the provisions under § 575.311.

Monitoring and Reporting Requirements

The Federal Workforce Flexibility Act of 2004 provided additional monitoring and reporting requirements for retention incentives authorized for employees who would be likely to leave for a different position in the Federal service in the absence of an incentive. Section 101(a)(3) provides a sense of Congress statement that OPM should be notified within 60 days after the date on which a retention incentive is paid to retain an

employee who might otherwise leave one Government agency for another within the same geographic area. This section also states OPM should monitor the payment of such retention incentives to ensure they are an effective use of the Federal Government's funds and have not adversely affected Government agencies' ability to carry out their mission. In addition, section 101(c)(2) requires OPM to include in its report to Congress on recruitment, relocation, and retention incentives information and data on the use of retention incentives to prevent individuals from moving between positions in different agencies but the same geographic area (including the names of the agencies involved).

The frequent notification provisions in section 101(a)(3) of the Federal Workforce Flexibility Act of 2004 for the new retention incentive flexibility would be administratively difficult for agencies to implement and follow. Retention incentive monitoring and recordkeeping requirements in § 575.312 and 575.313(a) are already in place, and OPM and agencies will apply them to retention incentives authorized under new § 575.315 for employees who would be likely to leave for a different position in the Federal service in the absence of an incentive.

In addition, consistent with the reporting requirements in section 101(c)(2) the Federal Workforce Flexibility Act of 2004, § 575.315(i) specifies an additional annual reporting requirement for such retention incentives. This annual report will allow OPM to monitor and evaluate the use of the new retention incentive flexibility. Section 575.315(i) requires each agency to submit a written report to OPM by March 31 of each year on the use of retention incentives under § 575.315. In each of the years 2008 through 2010, the written report may be included in the agency's written report for OPM's report to Congress under § 575.313(b). Each report must include—

- A description of how the authority to pay retention incentives under § 575.315 was used in the agency during the previous calendar year;
- The number and dollar amount of retention incentives paid during the previous calendar year to individuals under § 575.315 by occupational series and grade, pay level, or other pay classification;
- The agency (which may be in the executive, judicial, legislative branch) to which each individual employee would be likely to leave in the absence of a retention incentive;

- Each individual employee's official worksite and the geographic location of the agency (which may be in the executive, judicial, or legislative branch) to which each individual employee would be likely to leave in the absence of a retention incentive; and

- Other information, records, reports, and data as OPM may require.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget 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 575

Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Linda M. Springer,
Director.

■ Accordingly, OPM amends 5 CFR part 575 as follows:

PART 575—RECRUITMENT, RELOCATION, AND RETENTION INCENTIVES; SUPERVISORY DIFFERENTIALS; AND EXTENDED ASSIGNMENT INCENTIVES

■ 1. The authority citation for part 575 is revised to read as follows:

Authority: 5 U.S.C. 1104(a)(2) and 5307; subparts A and B also issued under 5 U.S.C. 5753 and sec. 101, Public Law 108–411, 118 Stat. 2305; subpart C also issued under 5 U.S.C. 5754 and sec. 101, Public Law 108–411, 118 Stat. 2305; subpart D also issued under 5 U.S.C. 5755; subpart E also issued under 5 U.S.C. 5757 and sec. 207 of Public Law 107–273, 116 Stat. 1780.

Subpart C—Retention Incentives

§ 575.301 [Amended]

■ 2. In § 575.301, remove “the Federal service” from the second sentence.

■ 3. Add a new § 575.315 to subpart C to read as follows:

§ 575.315 Retention incentives for employees likely to leave for a different position in the Federal service.

(a) *Authority.* (1) An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may approve a retention incentive for an individual employee under the conditions prescribed in this section when the agency determines that—

(i) Given the agency's mission requirements and employee's competencies, the agency has a special

need for the employee's services that makes it essential to retain the employee in his or her current position during a period of time before the closure or relocation of the employee's office, facility, activity, or organization; and

(ii) The employee would be likely to leave for a different position in the Federal service in the absence of a retention incentive.

(2) An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may approve a retention incentive for a group or category of employees (subject to the exclusions in § 575.305(c)) under the conditions prescribed in this section when the agency determines that—

(i) Given the agency's mission requirements and employees' competencies, the agency has a special need for the employees' services that makes it essential to retain the employees in their current positions during a period of time before the closure or relocation of the employees' office, facility, activity, or organization; and

(ii) There is a high risk that a significant number of the employees in the group would be likely to leave for different positions in the Federal service in the absence of a retention incentive.

(b) *Employee eligibility.* An agency may pay a retention incentive to an employee under this section when—

(1) The employee holds a position listed in § 575.303, and is not excluded by § 575.304;

(2) The employee's rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) is at least “Fully Successful” or equivalent; and

(3) The agency has provided a general or specific written notice to the employee that his or her position may or would be affected by the closure or relocation of the employee's office, facility, activity, or organization (e.g., the employee's position may or would move to a new geographic location or the employee's position may or would be eliminated).

(c) *Retention incentive plan and approval levels.* Before authorizing a retention incentive under this section, an agency must include in its retention incentive plan established under § 575.307(a) the conditions and requirements governing the use of retention incentives under this section for employees who would be likely to leave for a different position in the Federal service before the closure or relocation of the employees' office, facility, activity, or organization, including a designation of the

authorized agency officials who may approve retention incentives under this section, consistent with the approval requirements in § 575.307(b).

(d) *Approval criteria and written determination.* (1) For each determination to pay a retention incentive under this section, an agency must document in writing—

(i) The basis for determining the agency has a special need for the employee's (or group of employees') services that makes it essential to retain the employee(s), based on the agency's mission needs and the employee's (or group of employees') competencies, during a period of time before the closure or relocation of the employee's (or group of employees') office, facility, activity, or organization;

(ii) The basis for determining, in the absence of a retention incentive, the employee (or a significant number of employees in a group) would be likely to leave for a different position in the Federal service; and

(iii) The basis for establishing the amount and timing of the approved retention incentive payment and the length of the required service period.

(2) An agency must address the following factors when documenting the determination required by paragraph (a) of this section for an individual employee:

(i) The factors for authorizing a retention incentive for an individual employee described in § 575.306(b) as they relate to a determination made under paragraph (a)(1) of this section;

(ii) The extent to which the employee's departure for a different position in the Federal service would affect the agency's ability to carry out an activity, perform a function, or complete a project the agency deems essential to its mission before and during the closure or relocation period (e.g., the agency's need to retain the employee to ensure minimal disruption in the performance of mission-critical functions, continuity of key operations, or minimal disruption of service to the public before and during the closure or relocation; to train new employees who will move with the organization to the new geographic location; to assist with the actual closure or relocation of the office, facility, activity, or organization; or to perform similar mission-essential functions before or during the closure or relocation);

(iii) The competencies possessed by the employee that are essential to retain; and

(iv) The agency (which may be in the executive, judicial, or legislative branch) for which the employee would be likely

to leave in the absence of the retention incentive.

(3) An agency must address the following factors when documenting the determination required by paragraph (a) of this section for a group or category of employees:

(i) The factors for authorizing a retention incentive for a group or category of employees described in § 575.306(c) as they relate to the determination made under paragraph (a)(2) of this section; and

(ii) The factors in paragraphs (d)(2)(ii) through (d)(2)(iv) of this section as they relate to the determination made under paragraph (a)(2) of this section for the group or category of employees.

(4) An agency must narrowly define a targeted category of employees using factors that relate to the conditions described in paragraph (a)(2) of this section. The factors that may be appropriate are described in § 575.306(c)(2), except that each group retention incentive authorized under this section may cover no more than one occupational series.

(e) *Payment of retention incentives.*

(1) Except as provided in paragraph (e)(2) of this section, the provisions regarding computing and paying retention incentives under § 575.309 apply to computing and paying retention incentives under this section for employees who would be likely to leave for a different position in the Federal service before the closure or relocation of the their office, facility, activity, or organization.

(2) An agency may not pay retention incentives under this section in biweekly installments at the full retention incentive percentage rate established for the employee under § 575.309(a).

(f) *Service agreement requirements.*

(1) The service agreement provisions in §§ 575.310(b) through 575.310(e) apply to retention incentive service agreements under this section, subject to the additional requirements in paragraphs (f)(2) through (f)(5) of this section.

(2) Before paying a retention incentive under this section, an agency must require an employee, including each employee covered by a group retention incentive authorization, to sign a written service agreement to complete a specified period of employment with the agency.

(3) In no event, may the service period under a service agreement established under this paragraph extend past the date on which the employee's position is actually affected by the relocation or closure of the employee's office, facility, activity, or organization (e.g., the date

the employee's position moves to a new geographic location or the date the employee's position is eliminated).

(4) In addition to the terminating conditions in § 575.310(d) and (e), the service agreement must include the conditions under which the agency must terminate the service agreement under paragraph (g) of this section, including the conditions under which the agency will pay an additional retention incentive payment for partially completed service under § 575.311.

(5) The service agreement must include a notification to the employee that the agency will review the determination to pay the retention incentive at least annually to determine whether payment is still warranted, as required by paragraph (g) of this section.

(g) *Termination of retention incentives.* (1) The provisions in § 575.311 regarding termination of retention incentive service agreements and paragraphs (g)(2) through (g)(4) of this section apply to the termination of retention incentives authorized under this section. Each determination to pay a retention incentive under this section must be reviewed at least annually to determine if payment is still warranted. An authorized agency official must certify this determination in writing.

(2) In addition to the terminating conditions in § 575.311(a) and (b), an authorized agency official must terminate a retention incentive service agreement under this section if—

(i) The closure or relocation is cancelled or no longer affects the employee's position;

(ii) The employee moves to another position not affected by the closure or relocation (including another position within the same agency);

(iii) For relocation situations, the employee accepts the agency's offer to relocate with his or her the office, facility, activity, or organization and, thus, the employee is no longer likely to leave for a different position in the Federal service; or

(iv) The employee moves to a different position in the same office, facility, activity, or organization subject to closure or relocation that is not covered by the employee's service agreement. In this situation, the agency may authorize a new retention incentive for the employee under this section, as appropriate.

(3) If an authorized agency official terminates a service agreement under paragraph (g)(2)(ii) or (iv) of this section in cases in which the employee's movement to another position is by management action and not at the employee's request or under paragraph

(g)(2)(i) of this section, the employee is entitled to retain any retention incentive payments that are attributable to completed service and to receive any portion of a retention incentive payment owed by the agency for completed service.

(4) If an authorized agency official terminates a service agreement in termination actions under paragraph (g)(2) of this section that are not covered by paragraph (g)(3) of this section, the employee is entitled to retain retention incentive payments previously paid by the agency that are attributable to the completed portion of the service period. If the employee received retention incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agreed to such payment under the terms of the retention incentive service agreement.

(h) *Monitoring requirements.* The monitoring requirements in § 575.312 apply to retention incentives authorized under this section.

(i) *Records and reports.* (1) In addition to the recordkeeping requirements in § 575.313(a), each agency must submit a written report to OPM by March 31 of each year on the use of retention incentives under this section. Each report must include—

(i) A description of how the authority to pay retention incentives under this section was used in the agency during the previous calendar year;

(ii) The number and dollar amount of retention incentives paid during the previous calendar year to individuals under this section by occupational series and grade, pay level, or other pay classification;

(iii) The agency (which may be in the executive, judicial, legislative branch) to which each employee would be likely to leave in the absence of a retention incentive;

(iv) Each employee's official worksite and the geographic location of the agency (which may be in the executive, judicial, or legislative branch) for which each employee would be likely to leave in the absence of a retention incentive; and

(v) Other information, records, reports, and data as OPM may require.

(2) In each of the years 2008 through 2010, the written report required by paragraph (i)(1) of this section may be included in the agency's written report to OPM for OPM's report to Congress under § 575.313(b).

[FR Doc. E7-22490 Filed 11-15-07; 8:45 am]

BILLING CODE 6325-39-P