

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 551

RIN 3206-AK89

Pay Administration Under the Fair Labor Standards Act

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) proposes to revise the regulations issued under the Fair Labor Standards Act of 1938, as amended ("FLSA" or "Act") to update and harmonize OPM's regulations with revisions made to the Department of Labor's regulations. The revised regulations are intended to provide a clearer understanding of coverage under the Act. These regulations apply to all employees in agencies who are under OPM's jurisdiction for FLSA purposes.

DATES: Comments must be received on or before July 25, 2006.

ADDRESSES: There are multiple methods for submitting comments. Please submit only one set of comments via one of the methods described.

Preferred Method for Comments: Send comments by e-mail to fedclass@opm.gov, or send or deliver written comments to Mark Doboga, Deputy Associate Director for Talent and Capacity Policy, U.S. Office of Personnel Management, Room 6551, 1900 E Street, NW., Washington, DC 20415-9700; or fax comments to 202-606-4891. Comments received in electronic form besides e-mail (CDs, floppy disk, or other media) will not be accepted. All submissions received must include the RIN# 3206-AK89. If you are responding by e-mail the following should appear in the subject line: "Comments on Proposed FLSA Regulations—OPM RIN# 3206-AK89."

Please arrange and identify your comments on the regulatory text by subpart and section number. If your comments relate to the supplementary

information, refer to the heading and page number.

Ensure your comments are submitted within the specified open comment period. Before acting on this proposal, OPM will consider all comments received on or before the closing date. Comments received late will be considered only if it is possible to do so without incurring expense or delay.

FOR FURTHER INFORMATION CONTACT: Georgeanna Emery, Human Resources Specialist, by e-mail at fedclass@opm.gov, by telephone at 202-606-3600, or by fax at 202-606-4891.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is publishing a proposed rule to amend regulations to the Fair Labor Standards Act, as amended (referred to as "the Act" or "FLSA"). The purpose of this amendment is to update and harmonize OPM's regulations with certain changes made by the Department of Labor (DoL), Employment Standards Administration, Wage and Hour Division, 29 CFR part 541, RIN 1215-AA14, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (**Federal Register**, Vol. 69, No. 79, dated April 23, 2004).

As authorized by section 3(e)(2) of the Act, the provisions of the Act apply to any person employed by the Government of the United States, as specified in that Section. Section 4(f) of the Act authorizes OPM to administer provisions of the Act with respect to any person employed by an agency, with certain exceptions.

OPM's administration of the Act must comply with the terms of the Act and the law does not require OPM's regulations to mirror the DoL's FLSA regulations. OPM is revising its regulations to be consistent with DoL's administration of the Act only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the Act.

Structure and Organization of These Proposed Regulations

We will address only those sections of title 5, part 551—Pay Administration under the Fair Labor Standards Act, to which we propose changes. Changes have been made to subparts A, B, F, and G. For ease of discussion, comments regarding proposed changes/additions/

deletions will be found under the appropriate subpart and section headings.

Throughout the regulation we have inserted "or equivalent" to cover non-General Schedule white-collar positions.

Subpart A—General Provisions

Section 551.101 General

New paragraph (c) of the proposed regulation discusses OPM's requirement to be consistent with the DoL's administration of the Act only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the Act. For example, OPM does not apply the highly compensated employee criteria contained in 29 CFR 541.601 to determine FLSA exemption status to harmonize with title 5, United States Code, and other statutory Federal compensation pay level practices. (See also *Billings v U.S.*, 322 F.3d 1328, (Fed. Cir.2003)).

Section 551.102 Authority and Administration

We revised paragraph (c) to clarify that the DoL administers the Act for the Government of the District of Columbia.

Section 551.103 Coverage

No change.

Section 551.104 Definitions

The definitions of the following terms have not changed:

Act or FLSA

Claim period

Emergency

Employee

Employer

Exempt area

FLSA exempt

FLSA nonexempt

Hours of work

Nonexempt area

Perform in connection with an

emergency

Reckless disregard of the requirements

of the Act

Statute of limitations

Suffered or permitted work

Title 5 overtime pay

Volunteer

Willful violation

Workday

Worktime

The definitions of the following terms were deleted:

Discretion and independent judgment—concept is now addressed in revised § 551.206

Essential part of administrative or professional functions—concept is now covered by the definition of *directly and closely related*.

FLSA exemption status determination claim—concept is now addressed in § 551.702(a)

Foreign exemption—concept is now addressed in revised § 551.209.

Management or general business function—concept is now addressed in revised § 551.206.

Participation in the executive or administrative functions of a management official—concept is now addressed in revised § 551.206.

Situations 1 through 4—no longer needed because of the elimination of the 80 percent test, consistent with DoL changes.

Supervisory and closely related work—concept is now covered by the definition of *directly and closely related*.

Temporary work or duties—term is now covered in § 551.208.

Work of an intellectual nature—removed, consistent with DoL changes.

Work of a specialized or technical nature—removed, consistent with DoL changes.

The definitions of the following terms were revised:

Administrative employee

Agency

Claim

Claimant

Customarily and regularly

Employ

Executive employee

FLSA exemption status

FLSA overtime pay

FLSA pay claim

Formulation or execution of

management programs or policies

Preserve the claim period

Professional employee

Primary duty

Recognized organizational unit

Trainee

Worktime in a representative workweek

Workweek

Workweek basis

Definitions were added for the following terms:

Directly and closely related

Educational establishment

Filed

Management

Official position

Two or more other employees

Discussion of Selected Terms

Claim and *claimant* were revised and *filed* was added to clarify that someone

other than the employee to whom the claim applies may file a claim and preserve the claim period.

Directly and closely related now incorporates *supervisory and closely related work*. Additionally, examples of specific occupations were included in this definition to illustrate the proper use of this new definition.

Formulation or execution of management programs or policies was replaced with *formulate, affect, interpret, or implement management policies or operating practices* and the definition revised.

Primary duty was revised to clarify when a duty serves as the primary duty for exemption purposes even though it does not constitute the major part (over 50 percent) of the employee's work.

Rate of basic pay has been defined in revised § 551.203.

Recognized organizational unit was expanded to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function, and to harmonize with DoL.

Two or more other employees spells out that an employee, as used in this context, is equal to a full time equivalent (FTE) position.

Workweek was revised by changing the verb “shall” to “must” for added clarity and readability. We intend that this definition using the verb “must” has the same meaning and effect as the previous definition using “shall.”

Workweek basis was revised to insert the word “the” before the word “averaging.” The structure of the definition has been modified by putting the exception statement in parentheses to make it clear that averaging is not used except for firefighters and law enforcement employees.

Subpart B—Exemptions and Exclusions

Section 551.201 Agency Authority

The proposed revision clarifies that an employing agency must review and make a determination on each employee's exemption status.

Section 551.202 General Principles Governing Exemptions

This section was reorganized for clarity. We moved the discussion of the nonexemption of certain categories of employees from paragraph (e) of the current § 551.202 to proposed § 551.204.

Proposed paragraph (e) clarifies that the designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee. Occupational or organizational title alone is not

sufficient basis for an FLSA exemption status determination.

Section 551.203 Salary-Based Nonexemption

We deleted current § 551.203—Exemption of General Schedule employees, replaced it with a new section addressing salary-based nonexemption, and provided a definition for rate of basic pay. This brings OPM's regulations into closer harmony with DoL's approach in its final regulations to extending FLSA protection to employees paid below a certain level.

Section 551.204 Nonexemption of Certain Employees

This proposed section incorporates the nonexemption of certain nonsupervisory white-collar employees who do not meet any of the exemption criteria, and nonsupervisory employees in the Federal Wage System or in other comparable trades, crafts, and laboring wage systems.

Section 551.205 Executive Exemption Criteria

We changed the language to harmonize with DoL changes in the description of executive work and elimination of the 80-percent test for all employees.

Section 551.206 Administrative Exemption Criteria

Changes were made to harmonize with DoL changes in the description of administrative work and to add examples of specific types of work performed in the Federal Government.

Section 551.207 Professional Exemption Criteria

Changes were made to harmonize with DoL changes in the description of professional work. We moved the discussion of types of professional exemptions in current § 551.207 into new §§ 551.214, 551.215 and 551.216.

Section 551.208 Effect of Performing Temporary Work or Duties on FLSA Exemption Status

We clarified the “30-day test” to explain that performing different work or duties for 30 consecutive calendar days may affect that employee's exemption status. We also clarified the intent of § 551.208, and the protective purpose of the FLSA in general.

Section 551.209 Foreign Exemption Criteria

We moved the definition of foreign exemption from § 551.104 to this section as subject definition is only addressed in this section.

Section 551.210 Exemption of Employees Receiving Availability Pay

No change. While no changes were made, we wish to draw attention in this preamble to the fact that there are certain Criminal Investigators who may not be covered under availability pay provisions of 5 U.S.C. 5545a. As stated in § 550.181(b) “ * * * any Office of Inspector General that employs fewer than five criminal investigators may elect not to cover such criminal investigators under the availability pay provisions * * *.” Similarly, there are certain employees identified as Game Law Enforcement Officers, but because of the kind of work they perform these employees are not performing law enforcement work and therefore do not receive Law Enforcement Availability Pay. In both positions, the minimum wage and the hours of work and overtime pay provisions of the FLSA are applicable if the positions are designated as FLSA nonexempt.

Section 551.211 Statutory Exclusion

These proposed regulations adopt the Department of Homeland Security’s definition of “Customs Officer” (69 FR 35229 (2004)). In DHS’s regulations, 19 CFR 24.16(b)(7) reads as follows: *Customs Officer* means only those individuals assigned to position descriptions entitled “Customs Inspector,” “Supervisory Customs Inspector,” “Canine Enforcement Officer,” “Supervisory Canine Enforcement Officer,” “Customs and Border Protection Officer,” “Supervisory Customs and Border Protection Officer,” “Customs and Border Protection Agriculture Specialist,” or “Supervisory Customs and Border Protection Agriculture Specialist.”

Section 551.212 Fire Protection Activities and 7(k) Coverage for FLSA Pay and Exemption Determinations and § 551.213 Law Enforcement Activities and 7(k) Coverage for FLSA Pay and Exemption Determinations

We added two new sections to help identify activities subject to section 7(k) of the Act for FLSA pay and exemption determinations, provide examples of specific Federal occupations, and harmonize with DoL regulations.

Section 551.214 Learned Professionals, § 551.215 Creative Professionals, and § 551.216 Computer Employees

We added three new sections to address learned professionals, creative professionals, and computer employees to harmonize with DoL regulations. We provided examples of specific Federal occupations for the learned and creative

professionals, and examples of Federal work situations for computer employees.

Subpart F—Child Labor

Section 551.601 Minimum Age Standards

We added new paragraph (c) to define hazardous Federal fire protective activities for individuals under 18 years of age.

Section 551.602 Responsibilities

No change.

Subpart G—FLSA Claims and Compliance

Section 551.701 Applicability

No change.

Section 551.702 Time Limits

We clarified in paragraph (c) that the claimant is responsible for retaining documentation to establish when a claim is received.

Section 551.703 Avenues of Review

No change.

Section 551.704 Claimant’s Representative

No change.

Section 551.705 Filing an FLSA Claim

In paragraph (b), we corrected the reference from paragraph (b) to paragraph (c).

Section 551.706 Responsibilities

No change.

Section 551.707 Withdrawal or Cancellation of an FLSA Claim

We clarified that OPM may grant a request from a claimant to withdraw his or her claim.

Section 551.708 Finality and Effect of OPM FLSA Claim Decision

We clarified the reconsideration process, added a 45-day time limit for requests for reconsideration to be submitted, and clarified an agency’s compliance responsibility.

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

OPM has determined that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

E.O. 12988, Civil Justice Reform

This proposed regulation is consistent with the requirements of E.O. 12988. The regulation clearly specifies the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

E.O. 13132, Federalism

OPM has determined these proposed regulations would not have Federalism implications because they would apply only to Federal agencies and employees. The proposed regulations would not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

Unfunded Mandates

These proposed regulations would not result in the expenditure by State, local, or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

List of Subjects in 5 CFR Part 551

Government employees, and Wages.
U.S. Office of Personnel Management.
Linda M. Springer,
Director.

Accordingly, the Office of Personnel Management is proposing to amend title 5, Code of Federal Regulations, part 551, as follows:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

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

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

2. Revise Subpart A to read as follows:

Subpart A—General Provisions

Sec.

551.101 General.

551.102 Authority and administration.

551.103 Coverage.

551.104 Definitions.

§ 551.101 General.

(a) The Fair Labor Standards Act of 1938, as amended (referred to as “the Act” or “FLSA”), provides minimum standards for both wages and overtime entitlements, and administrative procedures by which covered worktime must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups of employees from the application of certain of its provisions and prescribes penalties for the commission of specifically prohibited acts.

(b) This part contains the regulations, criteria, and conditions set forth by the Office of Personnel Management (OPM) as prescribed by the Act, supplements and implements the Act, and must be read in conjunction with it.

(c) OPM’s administration of the Act must comply with the terms of the Act but the law does not require OPM’s regulations to mirror the Department of Labor’s FLSA regulations. OPM’s administration of the Act must be consistent with the Department of Labor’s administration of the Act only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the Act. For example, while OPM’s executive, administrative, and professional exemption criteria are consistent with the Department of Labor’s exemption criteria, OPM does not apply the highly compensated employee criteria in 29 CFR 541.601 to determine FLSA exemption status.

§ 551.102 Authority and administration.

Section 3(e)(2) of the Act authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section.

(a) *Office of Personnel Management.* Section 4(f) of the Act authorizes the Office of Personnel Management (OPM) to administer the provisions of the Act. OPM is the administrator of the provisions of the Act with respect to any person employed by an agency, except as specified in paragraphs (b), (c), and (d) of this section.

(b) *The Equal Employment Opportunity Commission* administers the equal pay provisions contained in section 6(d) of the Act.

(c) *The Department of Labor* administers the Act for the Government of the District of Columbia and the following United States Government entities:

- (1) The Library of Congress;
- (2) The United States Postal Service;
- (3) The Postal Rate Commission; and

(4) The Tennessee Valley Authority.

(d) *Office of Compliance.* The Congressional Accountability Act of 1995, as amended, sections 1301 *et seq.* of title 2, United States Code, extends rights and protections of the FLSA to employees of the following United States Government entities, and assigns certain administrative responsibilities to the Office of Compliance:

- (1) The United States House of Representatives;
- (2) The United States Senate;
- (3) The Capitol Guide Service;
- (4) The Capitol Police;
- (5) The Congressional Budget Office;
- (6) The Office of the Architect of the Capitol;
- (7) The Office of the Attending Physician; and
- (8) The Office of Compliance.

§ 551.103 Coverage.

(a) *Covered.* Any employee of an agency who is not specifically excluded by another statute is covered by the Act. This includes any person who is—

- (1) Defined as an employee in section 2105 of title 5, United States Code;
- (2) A civilian employee appointed under other appropriate authority; or
- (3) Suffered or permitted to work by an agency whether or not formally appointed.

(b) *Not covered.* The following persons are not covered by the Act:

- (1) A person appointed under appropriate authority without compensation;
- (2) A trainee;
- (3) A volunteer; or
- (4) A member of the Uniformed Services.

§ 551.104 Definitions.

In this part—

Act or FLSA means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*).

Administrative employee means an employee who meets the administrative exemption criteria in § 551.206.

Agency means any instrumentality of the United States Government, or any constituent element thereof acting directly or indirectly as an employer, as this term is defined in section 3(d) of the Act and in this section, but does not include the entities of the United States Government listed in § 551.102(c) for which the Department of Labor administers the Act or § 551.102(d)(1) through (8), whose employees are covered by the Congressional Accountability Act of 1995, as amended, which makes applicable the rights and protections of the FLSA and assigns certain administrative responsibilities to the Office of Compliance.

Claim means a written allegation regarding a current or former employee concerning the employee’s FLSA exemption status determination or entitlement to minimum wage or overtime pay for work performed under the Act. The term claim is used generically in subpart G and includes complaints under the child labor provisions of the Act.

Claim period means the time during which the cause or basis of the claim occurred.

Claimant means any party who files an FLSA claim.

Customarily and regularly means a frequency which must be greater than occasional but which may be less than constant. Tasks or work performed customarily and regularly includes work normally and recurrently performed every workweek. It does not include isolated or one-time tasks.

Directly and closely related means work that is *directly and closely related* to the performance of exempt work which is also considered exempt work. The phrase *directly and closely related* means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. *Directly and closely related* work may include typically nonexempt tasks that arise out of and are integral to exempt duties. Those nonexempt tasks must be performed by the exempt employee to perform his or her exempt work. Work *directly and closely related* to the performance of exempt duties may also include recordkeeping; maintaining various records pertaining to workload or employee performance; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work which both workers and supervisors are required to perform is considered to be closely related to the primary duty of the position (for example, physical training during tours of duty for firefighting and law enforcement personnel) and is exempt work. Work is not *directly and closely related* if the work is remotely related or completely unrelated to exempt duties. The following examples illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

- (1) Work is closely related to exempt supervisory work when it contributes to the effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. A supervisor who spot checks and examines the work of subordinates to determine whether they are performing

their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(2) Depending upon the nature of an organization, a supervisor who sets up a machine may be engaged in exempt work. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. In such cases, setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive employee and is directly and closely related to the executive employee's responsibility for the subordinates' work performance and for the adequacy of the final product. In addition, performing setup work that requires special skills typically is not performed by production employees in the occupation, and does not approach the volume that would justify hiring a specially trained employee to perform. Such closely related work may include performing infrequently recurring or one-time tasks which are impractical to delegate, because they would disrupt normal operations or take longer to explain than to perform. Under such circumstances, it is exempt work.

(3) A management analyst may take extensive notes recording the flow of work and materials through an organization; the analyst may personally use a computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would not be exempt. However, because this work is necessary for analyzing the data and making recommendations (which is exempt work), it is directly and closely related to exempt work.

(4) A traffic manager in charge of planning an organization's transportation function, including the most economical and quickest routes for shipping material to and from the activity, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to material, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If

the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(5) An example of work directly and closely related to exempt professional duties is a chemist performing nonexempt tasks such as cleaning a test tube in the middle of an original experiment, even though such tasks can be assigned to laboratory assistants.

(6) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

Educational establishment means a nursery school, an elementary or secondary school system, an institution of higher education, other educational institutions, and in certain circumstances, training facilities. The term *other educational establishment* includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher.

Emergency means a temporary condition that poses a direct threat to human life or safety, serious damage to property, or serious disruption to the operations of an activity, as determined by the employing agency.

Employ means to engage a person in an activity that is for the benefit of an agency, including any hours of work that are suffered or permitted.

Employee means a person who is employed—

(1) As a civilian in an Executive agency, as defined in section 105 of title 5, United States Code;

(2) As a civilian in a military department, as defined in section 102 of title 5, United States Code;

(3) In a nonappropriated fund instrumentality of an Executive agency or a military department;

(4) In a unit of the judicial branch of the Government that has positions in the competitive service; or

(5) The Government Printing Office.

Employer, as defined in section 3(d) of the Act, means any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Executive employee means an employee who meets the executive exemption criteria in § 551.205.

Exempt area means any foreign country, or any territory under the jurisdiction of the United States, other than the following locations:

- (1) A State of the United States;
- (2) The District of Columbia;
- (3) Puerto Rico;
- (4) The U.S. Virgin Islands;
- (5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);
- (6) American Samoa;
- (7) Guam;
- (8) Midway Atoll;
- (9) Wake Island;
- (10) Johnston Island; and
- (11) Palmyra.

Filed means a claim has been properly submitted by the claimant. The claimant must deliver the claim to the appropriate office within the agency or OPM, whichever is deciding the FLSA claim. The claim must be postmarked or date-stamped in order to establish the time of delivery.

FLSA exempt means not covered by the minimum wage and overtime provisions of the Act.

FLSA exemption status means an employee's designation as either FLSA exempt or FLSA nonexempt from the minimum wage and overtime provisions of the Act.

FLSA nonexempt means covered by the minimum wage and overtime provisions of the Act.

FLSA overtime pay means overtime pay under this part.

FLSA pay claim means a claim concerning an employee's entitlement to minimum wage or overtime pay for work performed under the Act.

Formulate, affect, interpret, or implement management policies or operating practices means perform work that involves management policies or operating practices which range from specific objectives and practices of a small field office to broad national goals expressed in statutes or Executive orders. Employees performing such work make policy decisions or participate indirectly through developing or recommending proposals that are acted on by others. The work of employees who significantly affect the execution of management policies involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or making significant determinations furthering the operation of programs and accomplishment of program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (that is, planning, developing, promoting, coordinating, controlling, or

evaluating operating programs of the employing organization or of other organizations subject to regulation or other controls).

Hours of work means all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency. Hours of work are creditable for the purposes of determining overtime pay under subpart D of this part. Section 551.401 of subpart D further explains this term. However, whether time is credited as hours of work is determined by considering many factors, such as the rules in subparts D and E of this part, provisions of law, Comptroller General decisions, OPM decisions and policy guidance, agency policy, negotiated agreements, the rules in part 550 of this chapter (for hours of work for travel), and the rules in part 410 of this chapter (for hours of work for training).

Management means performing activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or financial records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Nonexempt area means any of the following locations:

- (1) A State of the United States;
- (2) The District of Columbia;
- (3) Puerto Rico;
- (4) The U.S. Virgin Islands;
- (5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);
- (6) American Samoa;
- (7) Guam;
- (8) Midway Atoll;
- (9) Wake Island;
- (10) Johnston Island; and
- (11) Palmyra.

Official position means the position to which the employee is officially assigned by means of a personnel action authorized by the agency.

Perform work in connection with an emergency means to perform work that is directly related to resolving or coping with an emergency, or its immediate aftermath, as determined by the employing agency.

Preserve the claim period means to establish the period of possible entitlement to back pay by filing a written claim. The date the agency or OPM receives the claim preserves the claim period and is the date that determines the period of possible entitlement to back pay.

Primary duty typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of an employee's work (alternative primary duty) may be credited as the primary duty for exemption purposes provided that duty—

(1) Constitutes a substantial, regular part of the work assigned and performed;

(2) Is the reason for the existence of the position; and

(3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment as discussed in § 551.206, and the significance of the decisions made.

Professional employee means an employee who meets the professional exemption criteria in § 551.207.

Reckless disregard of the requirements of the Act means failure to make adequate inquiry into whether conduct is in compliance with the Act.

Recognized organizational unit means an established and defined organizational entity which has regularly assigned employees and for which a supervisor is responsible for planning and accomplishing a continuing workload. This distinguishes supervisors from leaders of temporary groups formed to perform assignments of limited duration.

(1) The term *recognized organizational unit* is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A recognized organizational unit must have a permanent status and a continuing function. For example, a large human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and recruitment and placement, each of which has a permanent status and function.

(2) A recognized organizational unit may move from place to place. The mere

fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized organizational unit with a continuing function in the organization.

(3) Continuity of the same subordinates is not essential to the existence of a recognized organizational unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized organizational units, if other factors are present that indicate the employee is in charge of a recognized organizational unit with a continuing function.

Statute of limitations means the time frame within which an FLSA pay claim must be filed, starting from the date the right accrued. All FLSA pay claims filed on or after June 30, 1994, are subject to a 2-year statute of limitations, except in cases of willful violation where the statute of limitations is 3 years.

Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

Title 5 overtime pay, for the purpose of § 551.208, means overtime pay under part 550 of this chapter.

Trainee means a person who does not meet the definition of employee in this section and who is assigned or attached to a Federal activity primarily for training. A person who attends a training program under the following conditions is considered a trainee and is not a Federal employee for purposes of the Act:

(1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;

(2) The training is for the benefit of the individual;

(3) The trainee does not displace regular employees, but is supervised by them;

(4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not

entitled to the payment of wages from the agency for the time spent in training.

Two or more other employees means the equivalent of two or more full-time employees. For the purpose of this definition, an employee is equal to a full-time equivalent (FTE). For example, one full-time and two half-time employees are equivalent to two full-time employees.

Volunteer means a person who does not meet the definition of employee in this section and who volunteers or donates his or her service, the primary benefit of which accrues to the performer of the service or to someone other than the agency. Under such circumstances there is neither an expressed nor an implied compensation agreement. Services performed by such a volunteer include personal services that, if left unperformed, would not necessitate the assignment of an employee to perform them.

Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

Workday means the period between the commencement of the principal activities that an employee is engaged to perform on a given day and the cessation of the principal activities for that day. The term is further explained in § 551.411.

Worktime, for the purpose of determining FLSA exemption status, means time spent actually performing work. This excludes periods of time during which an employee performs no work, such as standby time, sleep time, meal periods, and paid leave.

Worktime in a representative workweek means the average worktime over a period long enough to even out normal fluctuations in workloads and is representative of the job as a whole.

Workweek means a fixed and recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of a day. For employees subject to part 610 of this chapter, the workweek must be the same as the administrative workweek defined in § 610.102 of this chapter.

Workweek basis means the unit of time used as the basis for applying overtime standards under the Act and, for employees under flexible or compressed work schedules, under 5 U.S.C. 6121(6) or (7). The Act takes a single workweek as its standard (except

for employees engaged in fire protection or law enforcement activities under section 7(k) of the Act) and does not permit the averaging of hours over two or more weeks, except for employees engaged in fire protection or law enforcement activities under section 7(k) of the Act.

3. Revise Subpart B to read as follows:

Subpart B—Exemptions and Exclusions

Sec.

- 551.201 Agency authority.
- 551.202 General principles.
- 551.203 Salary-based nonexemption.
- 551.204 Nonexemption of certain employees.
- 551.205 Executive exemption criteria.
- 551.206 Administrative exemption criteria.
- 551.207 Professional exemption criteria.
- 551.208 Effect of performing different work or duties for a temporary period of time on FLSA exemption status.
- 551.209 Foreign exemption criteria.
- 551.210 Exemption of employees receiving availability pay.
- 551.211 Statutory exclusion.
- 551.212 Fire protection activities and 7(k) coverage for FLSA pay and exemption determinations.
- 551.213 Law enforcement activities and 7(k) coverage for FLSA pay and exemption determinations.
- 551.214 Learned professionals.
- 551.215 Creative professionals.
- 551.216 Computer employees.

§ 551.201 Agency authority.

The employing agency must review and make a determination on each employee's exemption status.

§ 551.202 General principles.

In all exemption determinations, the agency must observe the following principles:

(a) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets the requirements of one or more of the exemptions of this subpart and such supplemental interpretations or instructions issued by OPM. The agency must designate an employee FLSA exempt when the agency correctly determines that the employee meets the requirements of one or more of the exemptions of this subpart and such supplemental interpretations or instructions issued by OPM.

(b) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(c) The burden of proof rests with the agency that asserts the exemption.

(d) An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a

reasonable doubt as to whether an employee meets the criteria for exemption, the employee will be designated FLSA nonexempt.

(e) While established position descriptions and titles may assist in making initial FLSA exemption determinations, the designation of an employee as FLSA exempt or nonexempt must ultimately rest on the duties actually performed by the employee.

(f) Although separate criteria are provided for the exemption of executive, administrative, and professional employees, those categories are not mutually exclusive. All exempt work, regardless of category, must be considered. The only restriction is that, when the requirements of one category are more stringent, the combination of exempt work must meet the more stringent requirements.

(g) Failure to meet the criteria for exemption under what might appear to be the most obvious criteria does not preclude exemption under another category. For example, an engineering technician who fails to meet the professional exemption criteria may be performing exempt administrative work, or an administrative officer who fails to meet the administrative criteria may be performing exempt executive work.

(h) Although it is normally feasible and more convenient to identify the exemption category, this is not essential. An exemption may be based on a combination of functions, no one of which constitutes the primary duty, or the employee's primary duty may involve two categories which are intermingled and difficult to segregate. This does not preclude designating an employee FLSA exempt, provided the work as a whole clearly meets the other exemption criteria.

§ 551.203 Salary-based nonexemption.

(a) An employee, including a supervisory employee, whose annual rate of basic pay is less than \$23,660 is nonexempt, unless—

(1) The employee is subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status); or

(2) The employee is subject to § 551.209 (the foreign exemption); or

(3) The employee is a professional engaged in the practice of law or medicine as prescribed in paragraphs (c) and (d) of § 551.214.

(b) For the purpose of this section, *rate of basic pay* means the rate of pay fixed by law or administrative action for the position held by an employee, including any applicable locality payment under 5 CFR part 531, subpart

F; special rate supplement under 5 CFR 530, subpart C; or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind, such as premium payments, differentials, and allowances.

§ 551.204 Nonexemption of certain employees.

(a) Certain nonsupervisory white-collar employees are FLSA nonexempt (unless the employees are subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or § 551.209 (the foreign exemption)) because they do not fit any of the exemption categories. They include:

(1) Employees in equipment operating and protective occupations, and most clerical occupations;

(2) Employees performing technician work in positions properly classified below GS-9 (or the equivalent level in other white-collar pay systems) and many, but not all, of those positions properly classified at GS-9 or above (or the equivalent level in other white-collar pay systems); and

(3) Employees at any grade or equivalent level, in occupations requiring highly specialized, technical skills and knowledges that can be acquired only through prolonged job training and experience, such as in the Air Traffic Control series, or in the Aircraft Operations series unless such employees are performing predominantly administrative functions rather than the technical work of the occupation.

(b) Nonsupervisory employees in the Federal Wage System or in other comparable wage systems are nonexempt, unless the employees are subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or § 551.209 (the foreign exemption).

§ 551.205 Executive exemption criteria.

(a) An *executive employee* is an employee whose primary duty is management (as defined in section 551.104) of a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and who:

(1) Customarily and regularly directs the work of two or more other employees. However, an employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement. In addition, hours worked by an employee cannot be credited more than once for different

executives. This takes into consideration those organizations that use matrix management, i.e., a system of "shared" leadership, where supervision cuts across product and service lines in terms of accessing activities and advising top management on business operations, but where the supervisor/leader does not have the operating authority over all employees. Thus, a shared responsibility for the supervision of the same two employees in the same recognized organizational unit does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor will be credited as a half-time employee for both supervisors; and

(2) Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees, are given particular weight.

(b) *Particular weight.* Criteria to determine whether an employee's suggestions and recommendations are given particular weight by higher-level management include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. Particular weight does not include consideration of an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have *particular weight* even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

§ 551.206 Administrative exemption criteria.

An *administrative employee* is an employee whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the

evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term *matters of significance* refers to the level of importance or consequence of the work performed.

(b) The phrase *discretion and independent judgment* must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to, whether the employee—

(1) Has authority to formulate, affect, interpret, or implement management policies or operating practices;

(2) Carries out major assignments in conducting the operations of the organization;

(3) Performs work that affects the organization's operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the organization;

(4) Has authority to commit the employer in matters that have significant financial impact;

(5) Has authority to waive or deviate from established policies and procedures without prior approval;

(6) Has authority to negotiate and bind the organization on significant matters;

(7) Provides consultation or expert advice to management;

(8) Is involved in planning long- or short-term organizational objectives;

(9) Investigates and resolves matters of significance on behalf of management; and

(10) Represents the organization in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, an employee can exercise discretion and independent judgment even if the employee's decisions or recommendations are reviewed at a higher level. Thus, the term *discretion and independent judgment* does not require that decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon

occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

(d) An organization's workload may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

(f) The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exemption status. However, employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances will be nonexempt.

(g) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

(h) Employees in certain occupations typically assist and support line managers and assume facets of the overall management function. Neither the location of the work nor the number of employees performing the same or similar work turns such work into a production function. For example,

independent agencies or agency components often provide centralized human resources, information systems, procurement and acquisition, or financial management services as support services to other agencies or agency components. However, this does not change the inherent administrative nature of the work performed to line or production work. Similarly, employees who develop, interpret, and oversee agency or Governmentwide policy are performing management support functions. Some of these activities may be performed by employees who would otherwise qualify under another exemption.

(i) An employee who leads a team of other employees assigned to complete major projects (such as acquisitions; negotiating real estate transactions or collective bargaining agreements; designing and implementing productivity improvements; oversight, compliance, or program reviews; investigations) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(j) An executive assistant or administrative assistant to a high-level manager or senior executive generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(k) Human resources employees who formulate, interpret or implement human resources management policies generally meet the duties requirements for the administrative exemption. In addition, when interviewing and screening functions are performed by the human resources employee who makes the hiring decision or makes recommendations for hiring from a pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(l) Management analysts who study the operations of an organization and propose changes in the organization, program analysts who study program operations and propose changes to the program, and other management advisors generally meet the duties requirements for the administrative exemption.

(m) Acquisition employees with authority to bind the organization to significant purchases generally meet the duties requirements for the administrative exemption even if they

must consult with higher management officials when making a commitment.

(n) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

§ 551.207 Professional exemption criteria.

To qualify for the professional exemption, an employee's primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. The learned professionals, creative professionals, and computer employees are described in §§ 551.214, 551.215, and 551.216.

§ 551.208 Effect of performing different work or duties for a temporary period of time on FLSA exemption status.

(a) *Applicability.* Performing different work or duties for a temporary period of time may affect an employee's exemption status.

(1) *When applicable.* This section applies only when an employee must perform work or duties that are not consistent with the employee's primary duties for an extended period, that is, for more than 30 consecutive calendar days—the *30-day test*. The period of performing different work or duties may or may not involve a different geographic duty location. The exemption status of an employee temporarily performing different work or duties must be determined as described in this section.

(2) *When not applicable.* This section does not apply when an employee is detailed to an identical additional position as the employee's position or to a position at the same level with the same basic duties and exemption status as the employee's position.

(b) An agency generally may not change an employee's exemption status based on a "snapshot" of the employee's duties during a particular week, unless the week involves emergency work under paragraph (f) of this section. An agency must—

(1) Assess an employee's temporary work or duties over a reasonable period of time (the 30-day test), compare them with the primary duties upon which the employee's exemption status is based, and determine the employee's exemption status as described in §§ 551.203 through 551.207; and

(2) Ensure that it does not avoid reassessing, and perhaps changing, an employee's exemption status by breaking up periods of temporary work or duties with periods of having the employee perform his or her regular work or duties. For example, an agency may not assign exempt employees to perform nonexempt work or duties for 29 consecutive calendar days, return them to their exempt duties for 2 or 3 days, and assign them again to perform nonexempt work for another 29 days.

(c) Aggregation of more than 30 nonconsecutive calendar days over an extended period does not meet the 30-day test and may not be used to change an employee's exemption status. For example, if an exempt employee performs nonexempt duties 4 days in one week, 2 days in the following week, and so on over a period of weeks or months, the days of nonexempt work may not be aggregated for the purpose of changing the employee's exemption status.

(d) *Effect on nonexempt employees.*

(1) A nonexempt employee who must temporarily perform work or duties that are different from the employee's primary duties remains nonexempt for the entire period of temporary work or duties unless both of the following conditions are met:

(i) The period of temporary work or duties exceeds 30 consecutive calendar days; and

(ii) The employee's primary duties for the period of temporary work are exempt as defined in this part.

(2) If a nonexempt employee becomes exempt under the criteria in paragraph (d)(1) of this section—

(i) The employee must be considered exempt for the entire period of temporary work or duties; and

(ii) If the employee received FLSA overtime pay for work performed during the first 30 calendar days of the temporary work or duties, the agency must recalculate the employee's total pay retroactive to the beginning of that period because the employee is no longer entitled to the FLSA overtime pay received but may be owed title 5 overtime pay, or its equivalent.

(e) *Effect on exempt employees.* (1) An exempt employee who must temporarily perform work or duties that are different from the employee's primary duties remains exempt for the

entire period of temporary work or duties unless both of the following conditions are met:

(i) The period of temporary work or duties exceeds 30 consecutive calendar days; and

(ii) The employee's primary duties for the period of temporary work or duties are *not* exempt as defined in this part.

(2) If an exempt employee becomes nonexempt under the criteria in paragraph (e)(1) of this section—

(i) The employee must be considered nonexempt for the entire period of temporary work or duties; and

(ii) If the employee received title 5 overtime pay or its equivalent for work performed during the first 30 consecutive calendar days of the temporary work or duties, the agency must recalculate the employee's total pay retroactive to the beginning of that period because the employee may no longer be entitled to some or all of the title 5 or equivalent overtime pay received but may be owed FLSA overtime pay.

(f) *Emergency situation.*

Notwithstanding any other provision of this section, and regardless of an employee's grade or equivalent level, the agency may determine that an emergency situation exists that directly threatens human life or safety, serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to temporarily perform work or duties in connection with the emergency. In such a designated emergency—

(1) *Nonexempt employee.* The exemption status of a nonexempt employee remains nonexempt whether the employee performs nonexempt work or exempt work during the emergency; and

(2) *Exempt employee.* The exemption status of an exempt employee must be determined on a workweek basis. The exemption status determination of exempt employees will result in the employee either remaining exempt or becoming nonexempt for that workweek, as described in paragraphs (f)(2)(i) and (f)(2)(ii) of this section.

(i) *Remain exempt.* An exempt employee remains exempt for any workweek in which the employee's primary duties for the period of emergency work are exempt as defined in this part.

(ii) *Become nonexempt.* An exempt employee becomes nonexempt for any workweek in which the employee's primary duties for the period of emergency work are nonexempt as defined in this part.

§ 551.209 Foreign exemption criteria.

Foreign exemption means a provision of the Act under which the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area.

(a) *Application.* When the *foreign exemption* applies, the minimum wage, overtime, and child labor provisions of the Act do not apply to *any* employee who spends *all* hours of work in a given workweek in an exempt area. When an employee meets one of the two criteria in paragraph (b) of this section, the foreign exemption applies until the employee spends *any* hours of work in any nonexempt area as defined in § 551.104.

(b) *Foreign exemption applies.* If an employee meets one of the two following criteria, the employee is subject to the foreign exemption of the Act and the minimum wage, overtime, and child labor provisions of the Act do not apply:

(1) The employee is permanently stationed in an exempt area and spends *all* hours of work in a given workweek in one or more exempt areas; or

(2) The employee is not permanently stationed in an exempt area, but spends *all* hours of work in a given workweek in one or more exempt areas.

(c) *Foreign exemption does not apply.* For any given workweek, the minimum wage, overtime, and child labor provisions of the Act apply to an employee permanently stationed in an exempt area who spends *any* hours of work in any nonexempt area. For that workweek, the employee is not subject to the foreign exemption, and the agency must determine the exemption status of such an employee as described in paragraphs (c)(1) and (c)(2) of this section. The foreign exemption does not resume until the employee again meets one of the criteria in paragraph (b) of this section.

(1) *Same duties.* If the duties performed during that workweek are consistent with the primary duties of the employee's official position, the agency must designate the employee the same FLSA exemption status as if the employee were permanently stationed in any nonexempt area.

(2) *Different duties.* If the duties performed during that workweek are not consistent with the primary duties of the employee's official position—

(i) The agency must first designate the employee the same FLSA exemption status as the employee would have been designated based on the duties included in the employee's official position if the

employee were permanently stationed in any nonexempt area; and

(ii) The agency must determine the employee's exemption status for that workweek by applying § 551.208.

(d) *Resumption of foreign exemption.* When an employee returns to any exempt area from performing any hours of work in any nonexempt area, the employee is not subject to the foreign exemption until the employee meets one of the criteria in paragraph (b) of this section.

§ 551.210 Exemption of employees receiving availability pay.

The following employees are exempt from the hours of work and overtime pay provisions of the Act:

(a) A criminal investigator receiving availability pay under § 550.181(a) of this chapter; and

(b) A pilot employed by the United States Customs Service or its successor who is a law enforcement officer as defined in section 5541(3) of title 5, United States Code, and who receives availability pay under section 5545a(i) of title 5, United States Code.

§ 551.211 Statutory exclusion.

A customs officer who receives overtime pay under subsection (a) or premium pay under subsection (b) of section 267 of title 19, United States Code, for time worked may not receive pay or other compensation for that work under any other provision of law. As provided in 19 CFR 24.16, the term *customs officer* means only those individuals assigned to position descriptions entitled "Customs Inspector," "Supervisory Customs Inspector," "Canine Enforcement Officer," "Supervisory Canine Enforcement Officer," "Customs and Border Protection Officer," "Supervisory Customs and Border Protection Officer," "Customs and Border Protection Agriculture Specialist," or "Supervisory Customs and Border Protection Agriculture Specialist."

§ 551.212 Fire protection activities and 7(k) coverage for FLSA pay and exemption determinations.

(a) The Office of Personnel Management may determine that the provisions of section 7(k) of the Act apply to certain categories of fire protection employees based on appropriate factors, such as the type of premium payments they receive (see §§ 551.501(a)(1) and 551.541).

(b) *Fire protection activities.* Fire protection activities involve the performance of functions directly concerned with the response to and the control and extinguishment of fires; or

performance of inspection of facilities and equipment for the primary purpose of reducing or eliminating fire hazards; or provision of the primary (*i.e.*, the first called) rescue and ambulance service in connection with fire protection functions.

(c) *Engaged in fire protection activities.* The following employees are engaged in fire protection activities for the purpose of pay under section 7(k) of the Act as provided for in §§ 551.501(a)(5) and 551.541:

(1) Employees in positions properly classified in the Fire Protection and Prevention series, including any qualified firefighter who is assigned to perform support functions (*e.g.*, communications or dispatching functions, equipment maintenance or repair) or who is transferred to an administrative or supervisory position within the fire protection activity, except when such administrative or supervisory work exempts the employee under executive, administrative, and professional considerations;

(2) Employees in positions properly classified in other series, such as Forestry Technician, for whom fire protection functions constitute substantially full-time assignments throughout the year, or for the duration of a specified "fire season" within the year;

(3) Temporary employees hired solely to perform fire suppression work on an as-needed basis;

(4) Any other employee in any workweek in which the employee performs fire control or suppression work for 80 percent or more of the total hours worked; and

(5) Members of rescue and ambulance crews in any unit (whether part of a fire department or not) which is designated as the unit first called upon to provide such services in actual or potential fire emergencies, provided that:

(i) Crew members have received intensive training in specialized rescue and first aid procedures applicable to fire emergencies, and

(ii) The crew does, in fact, respond to actual or potential fire emergencies on a regular and recurring basis.

(d) *Not engaged in fire protection activities.* The following employees are not engaged in fire protection activities for the purpose of pay under section 7(k) of the Act as provided for in §§ 551.501(a)(5) and 551.541:

(1) Professional engineers, engineering technicians, and similar employees involved in fire protection research or in the design and development of fire protection and prevention equipment and materials;

(2) Employees who perform functions that support fire protection activities but who are *not* trained, qualified firefighters eligible for reassignment to fire control and suppression or prevention duties. Supporting functions (such as maintenance of fire apparatus, equipment, alarm systems, etc., or communications and dispatching work or preparation of records and reports) are included when performed by firefighters but are *not* included when performed by mechanics, communications systems and radio operators, clerks, or other employees;

(3) Employees whose primary duties are *not* related to fire protection but who perform fire suppression work on an as needed basis, *provided* that the fire suppression work constitutes less than 80 percent of the employees' hours of work within any workweek; and

(4) Employees on rescue and ambulance crews that provide those services in support of fire protection activities only in unusual situations (*e.g.*, when the primary crews are unavailable or when an emergency situation requires more crews than can be provided by the primary services).

§ 551.213 Law enforcement activities and 7(k) coverage for FLSA pay and exemption determinations.

(a) The Office of Personnel Management may determine that the provisions of section 7(k) of the Act apply to certain categories of law enforcement employees based on appropriate factors, such as the type of premium payments they receive (see §§ 551.501(a)(1) and 551.541).

(b) *Law enforcement activities.* Law enforcement activities involve work directly and primarily concerned with:

(1) Patrol and control functions that include patrolling an area to enforce law and order and to protect the lives, property, and civil rights of individuals through the prevention and detection of criminal acts; responding to complaints, violations, accidents, and emergencies; investigating for clues at the scene of a crime, interviewing witnesses, and evaluating evidence to locate suspects; and apprehending and arresting persons suspected of, or wanted for, criminal violations under a statutorily prescribed arrest authority; or

(2) Executing the orders of a Federal court, including serving civil writs and criminal warrants issued by Federal courts; tracing and arresting persons wanted by warrants; and seizing and disposing of property under court orders; or

(3) Planning and conducting investigations relating to alleged or suspected violations of criminal laws,

including the arrest of suspected or wanted persons under a statutorily prescribed arrest authority; or

(4) Security functions in a correctional institution involving direct custody and safeguarding of inmates charged with or convicted of violations of criminal laws; or

(5) Rescue and ambulance functions that provide the primary (i.e., the first called) service in connection with law enforcement activities described above.

(c) *Engaged in law enforcement activities.* The following employees are engaged in law enforcement activities for the purpose of pay under section 7(k) of the Act as provided for in §§ 551.501(a)(5) and 551.541:

(1) Employees in positions properly classified to the 0083 Police series, and employees in positions that would be otherwise classifiable in that series if covered by classification criteria of chapter 51 of title 5;

(2) Employees in positions properly classified as Border Patrol Agents, Customs Patrol Officers, and other employees whose primary duties involve similar patrol and control functions performed for the purpose of detecting and apprehending persons suspected of violating criminal laws;

(3) Employees in positions properly classified in the U.S. Marshal series;

(4) Employees in positions properly classified in the Criminal Investigating series, and other employees performing criminal investigation as their primary duty, except as provided for in § 551.210 (the exemption of employees receiving availability pay);

(5) Employees in positions properly classified in the Correctional Officer series, Guard series, or other series, whose primary duty is to maintain custody of inmates of a correctional institution; and

(6) Employees on rescue and ambulance crews that provide the primary service in connection with law enforcement functions, provided that crew members have received intensive training in specialized rescue and first aid procedures applicable to law enforcement emergencies (e.g., gunshot wounds, riot and accident victims) and the crew responds to actual or potential law enforcement emergencies on a regular and recurring basis.

(d) *Not engaged in law enforcement activities.* The following employees are not engaged in law enforcement activities for the purpose of pay under section 7(k) of the Act as provided for in §§ 551.501(a)(5) and 551.541:

(1) Employees whose primary duties concern the protection of Government property from hazards such as sabotage, espionage, theft, fire, accidental or

willful damage and in so doing, control the movement of persons and protect the lives and property of persons on Government property (e.g., guards or other employees performing similar functions);

(2) Employees who perform work concerned with the determination of the applicability of or compliance with laws and regulations when the duties primarily involve—

(i) Examining or inspecting products, premises, property or papers of persons or firms to enforce or obtain compliance with laws and regulations (e.g., immigration and customs examining or inspecting; mine safety and health examining or inspecting; alcohol, tobacco and firearms examining or inspecting; plant protection and quarantine examining or inspecting); or

(ii) Planning and conducting investigations covering the character, practices, suitability or qualifications of persons or organizations seeking, claiming or receiving Federal benefits, permits, or employment (e.g., general investigations work);

(3) Employees who work within correctional institutions but who do *not* have direct custody and safeguarding of inmates as their primary duty; and

(4) Members of rescue or ambulance crews that provide those services in connection with law enforcement activities only in unusual situations (e.g., when the primary crews are unavailable or when an emergency situation requires more crews than can be provided by the primary service).

§ 551.214 Learned professionals.

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The work must include the following three elements:

(1) The employee must perform work requiring advanced knowledge. *Work requiring advanced knowledge* is predominantly intellectual in character, and includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level;

(2) The advanced knowledge must be in a field of science or learning. *Field of*

science or learning includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. *Customarily acquired by a prolonged course of specialized intellectual instruction* restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word “customarily” means that the exemption is appropriate for employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. For example, the learned professional exemption is appropriate in cases where a lawyer has not gone to law school, or a chemist does not possess a degree in chemistry. However, the learned professional exemption is not applicable to occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical, or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. The position of Engineering Technician is an example of such an occupation where the employee collects, observes, tests and records factual scientific data within the oversight of professional engineers, and performs work using knowledge acquired through on-the-job and classroom training rather than by acquiring the knowledge through prolonged academic study.

(b) *Expansion of professional exemption.* The areas in which the professional exemption may be applicable are expanding. As knowledge

is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in this section also may be created in the future. Such organizations may develop similar, specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

Specific Professions

(c) *Practice of law.* (1) This exemption applies to an employee in a professional legal position requiring admission to the bar and involved in preparing cases for trial and/or the trial of cases before a court or an administrative body or persons having quasi-judicial power; rendering legal advice and services; preparing interpretive and administrative orders, rules, or regulations; drafting, negotiating, or examining contracts or other legal documents; drafting, preparing formal comments, or otherwise making substantive recommendations with respect to proposed legislation; editing and preparing for publication statutes enacted by Congress and opinions or decisions of a court, commission, or board; and drafting and reviewing decisions for consideration and adoption by agency officials.

(2) Section 551.203 (the salary-based nonexemption) does not apply to the employees described in this section.

(d) *Practice of medicine.* (1) An employee who holds a valid license or certificate permitting the practice of medicine or any of its branches and is actually engaged in the practice of the profession is exempt. The exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term *physicians* includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(2) An employee who holds the required academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the

profession. Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(3) Section 551.203 (the salary-based nonexemption) does not apply to the employees described in this section.

(e) *Accounting.* Certified public accountants generally meet the duties requirements for the learned professional exemption. An employee performing similar professional work in a position with a positive educational requirement and requiring the application of accounting theories, concepts, principles, and standards may qualify as exempt learned professionals. However, accounting clerks and technicians and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(f) *Engineering.* Engineers generally meet the duties requirements for the learned professional exemption. Professional engineering work typically involves the application of a knowledge of such engineering fundamentals as the strength and strain analysis of engineering materials and structures, the physical and chemical characteristics of engineering materials such as elastic limits, maximum unit stresses, coefficients of expansion, workability, hardness, tendency to fatigue, resistance to corrosion, engineering adaptability, and engineering methods of construction and processing. Exempt professional engineering work includes equivalent work performed in any of the specialized branches of engineering (e.g., electrical, mechanical, or materials engineering). Engineering technicians performing work comparable to that performed by professional engineers on the basis of advanced knowledge may also be exempt. In such instances, the employee actually is performing the work of an occupation that generally requires a specialized academic degree and is performing substantially the same work as the degreed employee, but has gained the same advanced knowledge through a combination of work experience and intellectual instruction which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.

(g) *Architecture.* Architects generally meet the duties requirements for the learned professional exemption.

Professional architectural work typically requires knowledge of architectural principles, theories, concepts, methods, and techniques; a creative and artistic sense; and an understanding and skill to use pertinent aspects of the construction industry, as well as engineering and the physical sciences related to the design and construction of new, or the improvement of, existing buildings.

(h) *Teachers.* A teacher is any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed.

(1) A teacher performs exempt work when serving, for example, as a regular academic teacher; teacher of kindergarten or nursery school pupils; teacher of gifted or disabled children; teacher of skilled and semi-skilled trades and occupations; teacher engaged in automobile driving instruction; aircraft flight instructor; home economics teacher; or vocal or instrumental music instructor. A faculty member who is engaged as a teacher but also spends a considerable amount of time in extracurricular activities such as coaching athletic teams or acting as a moderator or advisor in such areas as drama, speech, debate, or journalism is engaged in teaching. Such activities are a recognized part of an educational establishment's responsibility in contributing to the educational development of the student. An instructor in an institution of higher education or another educational establishment whose primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge is also an exempt teacher.

(2) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by appropriate certifying entities. However, a teacher's certificate is not generally necessary for post-secondary educational establishment.

(3) Exempt teachers do not include teachers of skilled and semi-skilled trade, craft, and laboring occupations when the paramount knowledge is the knowledge of and the ability to perform the trade, craft, or laboring occupation. Conversely, if the primary requirement of the post-secondary education

instructor is the ability to instruct, as opposed to knowledge of and ability to perform a trade, craft, or laboring occupation, then the position may be exempt.

(4) Section 551.203 (the salary-based nonexemption) does not apply to the employees described in this section.

(i) *Medical technologists.* Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

(j) *Nurses.* Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(k) *Dental hygienists.* Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(l) *Physician assistants.* Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.

(m) *Paralegals.* Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced, specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is applicable to

paralegals who possess advanced, specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. In addition, a paralegal who fails to meet the professional exemption criteria may be performing exempt administrative work, e.g., overseeing a full range of support services for a large legal office.

§ 551.215 Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work. The work performed must be "in a recognized field of artistic or creative endeavor," including such fields as music, writing, acting and the graphic arts. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. The requirement of "invention, imagination, originality, or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Determination of exempt creative professional status must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; and writers who choose their own subjects and hand in a finished piece of work to their employers. This requirement generally is not met by a person who is employed as a retoucher of photographs, since such work is not properly described as creative in character.

(b) Federal employees engaged in the work of newspapers, magazines, television, or other media are not exempt creative professionals if they only collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. For example, employees who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Employees also do not qualify as exempt creative professionals if their work product is subject to substantial control by the organization. However,

when the work requires invention, imagination, originality, or talent, as opposed to work which depends primarily on intelligence, diligence, and accuracy, such employees may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns, or other commentary; or acting as a narrator or commentator. Work that does not fully meet the creative professional exemption criteria does not preclude exemption under another exemption category. For example, public affairs work under control of the organization that does not meet the creative professional exemption may meet the administrative exemption.

§ 551.216 Computer employees.

(a) Computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The exemption in section 13(a)(1) of the Act applies to any computer employee whose annual remuneration exceeds the salary-based nonexemption prescribed in § 551.203. The exemption in section 13(a)(17) applies to any computer employee compensated on an hourly basis at a rate not less than \$27.63 an hour. In addition, these exemptions apply only to computer employees whose primary duties consist of:

- (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) *Computer manufacture and repair.* The exemption for employees in computer occupations does not include

employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations as identified in paragraph (b) of this section, are also not exempt computer professionals.

(d) *Executive and administrative computer employees.* Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under this part. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the organization or the organization's customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized organizational unit, and whose recommendations regarding the hiring, firing, advancement, promotion, or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption. Alternatively, a senior or lead computer programmer who leads a team of other employees assigned to complete a major project that is directly related to the management or general business operations of the employer or the employer's customers generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

4. Revise Subpart F to read as follows:

Subpart F—Child Labor

Sec.
551.601 Minimum age standards.
551.602 Responsibilities.

§ 551.601 Minimum age standards.

(a) *16-year minimum age.* The Act, in section 3(l), sets a general 16-year minimum age, which applies to all employment subject to its child labor

provisions, with certain exceptions not applicable here.

(b) *18-year minimum age.* The Act, in section 3(l), also sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of individuals of such age or detrimental to their health or well-being.

(c) All work in fire suppression is deemed hazardous for the employment of individuals under 18 years of age. All work in fire protection and prevention is particularly hazardous for the employment of individuals between 16 and 18 years of age, except the following:

(1) Work in offices or in repair or maintenance shops without exposure to hazardous materials;

(2) Work in the construction, operation, repair, or maintenance of living and administrative quarters in firefighting camps without exposure to hazardous materials;

(3) Work in forest protection, such as clearing fire trails or roads, piling and burning slash, maintaining fire-fighting equipment, or acting as fire lookout or fire patrolman away from the actual logging operations, provided that this provision shall not apply to the felling or bucking of timber, the collecting or transporting of logs, the operation of power-driven machinery, the handling or use of explosives, and work on trestles;

(4) Work in the clean-up service outside of a structure after a fire has been declared by the fire official in charge to be under control; and

(5) Work assisting in the administration of first aid.

§ 551.602 Responsibilities.

(a) *Agencies* must remain cognizant of and abide by regulations and orders published in part 570 of title 29, Code of Federal Regulations, by the Secretary of Labor regarding the employment of individuals under the age of 18 years. These regulations and orders govern the minimum age at which persons under the age of 18 years may be employed and the occupations in which they may be employed. Persons under the age of 18 years must not be employed in occupations or engage in work deemed hazardous by the Secretary of Labor.

(b) *OPM* will decide complaints concerning the employment of persons under the age of 18 years. Complaints must be filed following the procedures set forth in subpart G of this part.

5. Revise Subpart G to read as follows:

Subpart G—FLSA Claims and Compliance

Sec.
551.701 Applicability.
551.702 Time limits.
551.703 Avenues of review.
551.704 Claimant's representative.
551.705 Filing an FLSA claim.
551.706 Responsibilities.
661.707 Withdrawal or cancellation of an FLSA claim.
551.708 Finality and effect of OPM FLSA claim decision.
551.709 Availability of information.
551.710 Where to file an FLSA claim with OPM.

§ 551.701 Applicability.

(a) *Applicable.* This subpart applies to FLSA exemption status determination claims, FLSA pay claims for minimum wage or overtime pay for work performed under the Act, and complaints arising under the child labor provisions of the Act.

(b) *Not applicable.* This subpart does not apply to claims or complaints arising under the equal pay provisions of the Act. The equal pay provisions of the Act are administered by the Equal Employment Opportunity Commission.

§ 551.702 Time limits.

(a) *Claims.* A claimant may at any time file a complaint under the child labor provisions of the Act or an FLSA claim challenging the correctness of his or her FLSA exemption status determination. A claimant may also file an FLSA claim concerning his or her entitlement to minimum wage or overtime pay for work performed under the Act; however, time limits apply to FLSA pay claims. All FLSA pay claims filed on or after June 30, 1994, are subject to a 2-year statute of limitations (3 years for willful violations).

(b) *Statute of limitations.* An FLSA pay claim filed on or after June 30, 1994, is subject to the statute of limitations contained in the Portal-to-Portal Act of 1947, as amended (section 255a of title 29, United States Code), which imposes a 2-year statute of limitations, except in cases of a willful violation where the statute of limitations is 3 years. In deciding a claim, a determination must be made as to whether the cause or basis of the claim was the result of a willful violation on the part of the agency.

(c) *Preserving the claim period.* A claimant or a claimant's designated representative may preserve the claim period by submitting a written claim either to the agency employing the claimant during the claim period or to OPM. The date the agency or OPM receives the claim is the date that determines the period of possible entitlement to back pay. The claimant is

responsible for proving when the claim was received by the agency or OPM and for retaining documentation to establish when the claim was received by the agency or OPM, such as by filing the claim using certified, return receipt mail, or by requesting that the agency or OPM provide written acknowledgment of receipt of the claim. If a claim for back pay is established, the claimant will be entitled to pay for a period of up to 2 years (3 years for a willful violation) back from the date the claim was received.

§ 551.703 Avenues of review.

(a) *Negotiated grievance procedure (NGP) as exclusive administrative remedy.* If at any time during the claim period, a claimant was a member of a bargaining unit covered by a collective bargaining agreement that did not specifically exclude matters under the Act from the scope of the negotiated grievance procedure, the claimant must use that negotiated grievance procedure as the exclusive *administrative* remedy for all claims under the Act. There is no right to further administrative review by the agency or by OPM. The remaining sections in this subpart (that is, §§ 551.704 through 551.710) do not apply to such employees.

(b) *Non-NGP administrative review by agency or OPM.* A claimant may file a claim with the agency employing the claimant during the claim period or with OPM, but not both simultaneously, regarding matters arising under the Act if, during the entire claim period, the claimant—

- (1) Was not a member of a bargaining unit, or
- (2) Was a member of a bargaining unit not covered by a collective bargaining agreement, or
- (3) Was a member of a bargaining unit covered by a collective bargaining agreement that specifically excluded matters under the Act from the scope of the negotiated grievance procedure.

(c) *Judicial review.* Nothing in this subpart limits the right of a claimant to bring an action in an appropriate United States court. Filing a claim with an agency or with OPM does not satisfy the statute of limitations governing FLSA claims filed in court. OPM will not decide an FLSA claim that is in litigation.

§ 551.704 Claimant's representative.

A claimant may designate a representative to assist in preparing or presenting a claim. The claimant must designate the representative in writing. A representative may not participate in OPM interviews unless specifically requested to do so by OPM. An agency

may disallow a claimant's representative who is a Federal employee in any of the following circumstances:

- (a) When the individual's activities as a representative would cause a conflict of interest or position;
- (b) When the designated representative cannot be released from his or her official duties because of the priority needs of the Government; or
- (c) When the release of the designated representative would give rise to unreasonable costs to the Government.

§ 551.705 Filing an FLSA claim.

(a) *Filing an FLSA claim.* A claimant may file an FLSA claim with either the agency employing the claimant during the claim period or with OPM, but a claimant cannot pursue the same claim with both at the same time. OPM encourages a claimant to obtain a decision on the claim from the agency before filing the claim with OPM. However, this is a matter of personal discretion and a claimant is not required to do this—a claimant may use either avenue. A claimant who receives an unfavorable decision on a claim from the agency may still file the claim with OPM. However, a claimant may not file the claim with the agency after receiving an unfavorable decision from OPM. An OPM decision on a claim is final and is not subject to further administrative review.

(b) *FLSA claim filed with agency.* An FLSA claim filed with an agency should be made according to appropriate agency procedures. At the request of the claimant, the agency may forward the claim to OPM on the claimant's behalf. The claimant is responsible for ensuring that OPM receives all the information requested in paragraph (c) of this section.

(c) *FLSA claim filed with OPM.* An FLSA claim filed with OPM must be made in writing and must be signed by the claimant or the claimant's representative. Relevant information may be submitted to OPM at any time following the initial submission of a claim to OPM and prior to OPM's decision on the claim. The claim must include the following:

- (1) The identity of the claimant (see § 551.706(a)(2) regarding requesting confidentiality) and any designated representative, the agency employing the claimant during the claim period, the position (job title, series, and grade or equivalent level) occupied by the claimant during the claim period, and the current mailing address, commercial telephone number, and facsimile machine number, if available, of the

claimant and any designated representative;

(2) A description of the nature of the claim and the specific issues or incidents giving rise to the claim, including the time period covered by the claim;

(3) A description of actions taken by the claimant to resolve the claim within the agency and the results of any actions taken;

(4) A copy of any relevant decision or written response by the agency;

(5) Evidence available to the claimant or the claimant's designated representative which supports the claim, including the identity, commercial telephone number, and location of other individuals who may be able to provide information relating to the claim;

(6) The remedy sought by the claimant;

(7) Evidence, if available, that the claim period was preserved in accordance with § 551.702. The date the claim is received by the agency or OPM becomes the date on which the claim period is preserved;

(8) A statement from the claimant that he or she was or was not a member of a collective bargaining unit at any time during the claim period;

(9) If the claimant was a member of a bargaining unit, a statement from the claimant that he or she was or was not covered by a negotiated grievance procedure at any time during the claim period, and if covered, whether that procedure specifically excluded the claim from the scope of the negotiated grievance procedure;

(10) A statement from the claimant that he or she has or has not filed an action in an appropriate United States court; and

(11) Any other information that the claimant believes OPM should consider.

§ 551.706 Responsibilities.

(a) *Claimant—(1) Providing information to OPM.* For all FLSA claims, the claimant or claimant's designated representative must provide any additional information requested by OPM within 15 workdays after the date of the request, unless the claimant or the claimant's representative requests additional time and OPM grants a longer period of time in which to provide the requested information. The disclosure of information by a claimant is voluntary. However, OPM may be unable to render a decision on a claim without the information requested. In such a case, the claim will be cancelled without further action being taken by OPM. In the case of an FLSA pay claim, it is the claimant's responsibility to provide

evidence that the claim period was preserved in accordance with § 551.702 and of the liability of the agency and the claimant's right to payment.

(2) *Requesting confidentiality.* If the claimant wishes the claim to be treated confidentially, the claim must specifically request that the identity of the claimant not be revealed to the agency. Witnesses or other sources may also request confidentiality. OPM will make every effort to conduct its investigation in a way to maintain confidentiality. If OPM is unable to obtain sufficient information to render a decision and preserve the requested confidentiality, OPM will notify the claimant that the claim will be cancelled with no further action by OPM unless the claimant voluntarily provides written authorization for his or her name to be revealed.

(b) *Agency.* (1) In FLSA exemption status determination claims, the burden of proof rests with the agency that asserts the FLSA exemption.

(2) The agency must provide the claimant with a written acknowledgment of the date the claim was received.

(3) Upon a claimant's request, and subject to any Privacy Act requirements, an agency must provide a claimant with information relevant to the claim.

(4) The agency must provide any information requested by OPM within 15 workdays after the date of the request, unless the agency requests additional time and OPM grants a longer period of time in which to provide the requested information.

§ 551.707 Withdrawal or cancellation of an FLSA claim.

(a) *Withdrawal.* OPM may grant a request from the claimant or claimant's representative to withdraw an FLSA claim at any time before OPM issues its decision. The claimant or the claimant's representative must submit the request in writing to OPM.

(b) *Cancellation.* OPM may, at its discretion, cancel an FLSA claim if the claimant or the claimant's representative fails to provide requested information within 15 workdays after the date of the request, unless the claimant or the claimant's representative requests additional time and OPM grants a longer period of time in which to provide the requested information. OPM may, at its discretion, reconsider a cancelled claim on a showing that circumstances beyond the claimant's control prevented pursuit of the claim.

§ 551.708 Finality and effect of OPM FLSA claim decision.

(a) OPM will send an FLSA claim decision to the claimant or the claimant's representative and the agency. An FLSA claim decision made by OPM is final. There is no further right of administrative appeal. However, at its discretion, OPM may reconsider its FLSA claim decision when material information was not considered or there was a material error of law, regulation, or fact in the original decision. The request must be submitted in writing and received by OPM within 45 calendar days after the date of the decision. At its unreviewable discretion, OPM may waive the time limit.

(b) A decision by OPM under the Act is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which OPM administers the Act.

(c)(1) Upon receipt of a decision, the agency employing the claimant during the claim period must take all necessary steps to comply with the decision, including adherence to compliance instructions provided with the decision. All compliance actions must be completed within the time specified in the decision, unless an extension of time is requested by the agency and granted by OPM.

(2) The agency should identify all similarly situated current and former employees to ensure that they are treated in a manner consistent with the decision on FLSA coverage, informing them in writing of their right to file an FLSA claim with the agency or OPM.

§ 551.709 Availability of information.

(a) Except when the claimant has requested confidentiality, the agency and the claimant must provide to each other a copy of all information submitted with respect to the claim.

(b) When a claimant has not requested confidentiality, OPM will disclose to the parties concerned the information contained in an FLSA claim file. When a claimant has requested confidentiality, OPM will delete any information identifying the claimant before disclosing the information in an FLSA claim file to the parties concerned. For the purposes of this subpart, *the parties concerned* means the claimant, any representative designated in writing, and any representative of the agency or OPM involved in the proceeding.

(c) Except when the claimant has requested confidentiality or the disclosure would constitute a clearly unwarranted invasion of personal privacy, OPM, upon a request which identifies the individual from whose file the information is sought, will disclose

the following information from a claim file to a member of the public:

- (1) Confirmation of the name of the individual from whose file the information is sought and the names of the other parties concerned;
- (2) The remedy sought;
- (3) The status of the claim;
- (4) The decision on the claim; and
- (5) With the consent of the parties concerned, other reasonably identified information from the file.

§ 551.710 Where to file an FLSA claim with OPM.

An FLSA claim must be filed with the OPM Classification Appeals and FLSA Program, 1900 E Street, NW., Washington, DC 20415-0001.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1218

[Doc. No. FV-06-702-Notice]

Blueberry Promotion, Research, and Information Order; Continuance Referendum

AGENCY: Agricultural Marketing Service, Agriculture.

ACTION: Notice of a Continuance Referendum.

SUMMARY: This notice directs that a referendum be conducted among the eligible producers and importers of blueberries to determine whether they favor continuance of the Blueberry Promotion, Research, and Information Order (Order).

DATES: This referendum will be conducted from August 1, 2006 through August 22, 2006. To vote in this referendum, producers and importers must have paid assessments on blueberries produced or imported during the representative period of November 1, 2004 through October 31, 2005.

ADDRESSES: Copies of the Order may be obtained from: Referendum Agent, Research and Promotion Branch (RP), Fruit and Vegetable Programs (FV), AMS, USDA, Stop 0244, Room 2535-S, 1400 Independence Avenue, SW., Washington, DC 20250-0244, telephone 888-720-9917 (toll free). Fax 202-205-2800, e-mail deborah.simmons@usda.gov.

SUPPLEMENTARY INFORMATION: Pursuant to the Commodity Promotion, Research, and Information Act of 1996 (Pub. L.