

PART 540—PERFORMANCE MANAGEMENT AND RECOGNITION SYSTEM

16. The authority citation for part 540 continues to read as follows:

Authority: 5 U.S.C. chapters 43 and 54.

§ 540.102 [Amended]

17. In § 540.102, the definition of "rating of record" is amended by replacing the comma after "circumstances" with a period and removing the remainder of the sentence.

[FR Doc. 91-10549 Filed 5-2-91; 8:45 am]

BILLING CODE 6325-01-M

5 CFR Part 530

Pay Rates and Systems (General); Special Salary Rate Schedules for Recruitment and Retention

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to implement provisions of the Federal Employees Pay Comparability Act of 1990 (FEPCA) related to the Government's special pay authority. Section 5305 of title 5, United States Code, as amended by FEPCA, substantially increases the Government's flexibility to authorize special salary rates, as compared with the statutory authority formerly contained in 5 U.S.C. 5303. These flexibilities became effective on February 3, 1991, under Executive Order 12748 of February 1, 1991. The interim regulations (1) Allow OPM to approve special salary rates when the Government is experiencing, or is likely to experience, recruitment or retention problems caused by higher private sector pay (the only reason permitted under the prior provision of law), as well as by a number of other circumstances; and (2) allow those rates to be established at higher levels than previously permitted.

DATES: The interim regulations set forth below are effective on May 4, 1991. Comments must be received on or before July 2, 1991.

ADDRESSES: Send or deliver written comments to Barbara L. Fiss, Assistant Director for Pay and Performance Management, room 7H28, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: William M. Gualtieri, (202) 606-1413 or (FTS) 266-1413.

SUPPLEMENTARY INFORMATION: The Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509, November 5, 1990) gives the Government permanent authority to establish special salary rates under a wider variety of circumstances than was previously allowed. The following are the significantly expanded flexibilities permitted under FEPCA:

- Special salary rates may be established based on actual or anticipated staffing problems for any civilian position under any pay system established by or under Federal statute within the executive branch.

- Special salary rates may be established when the staffing problem is caused by higher non-Federal pay rates, remote location or area, undesirable working conditions, or any other circumstances. The interim regulations also allow for consideration of higher Federal pay rates established under independent statutory authority.

- The highest rate at which the minimum rate of a special rate schedule may be set has been increased to 30 percent above the maximum rate of a grade. Previously, the limit was the maximum rate of a grade.

- The GS-10, step 1, limitation on the computation of overtime pay now includes all special rates of pay established for that grade. The interim regulations set forth the criteria OPM will use for establishing a GS-10 special salary rate for overtime pay computation and other related purposes when one would otherwise not have been established to alleviate staffing problems.

The criteria OPM considers when establishing or adjusting special salary rates have been expanded to take into account (1) The new pay flexibilities created by FEPCA, including recruitment and relocation bonuses and retention allowances; and (2) long-standing pay flexibilities, such as hazard pay and remote worksite allowances.

In addition, the requirement to change the existing special salary rate regulations to conform with FEPCA has given OPM an opportunity to update other provisions of the existing regulations. The updated provisions are as follows:

- Agency certification levels for approving special salary rate requests have been changed. Individuals designated to act on behalf of the agency head may now approve special salary rate requests covering fewer than 1,000 positions or costing less than \$4 million. This change means that involvement of an agency head will be required only in the highest impact

special rate requests and should thereby reduce the time needed to process such requests.

- The rules concerning the effect of a statutory pay increase on special salary rate schedules have been changed. The interim regulations require that special salary rate schedules be automatically aligned with the rates on new statutory pay schedules (or with "constructed" rates above the maximum rate of the grade). The previous regulation, which provided that changes in statutory pay schedules would have no automatic effect on special salary rate schedules, was found to be inappropriate by the United States Court of Appeals for the Federal Circuit (*National Treasury Employees Union v. Horner*, 869 F.2d 571 (Fed. Cir. 1989)).

Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

Pursuant to section 553(b)(3)(B) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to section 553(d)(3) of title 5, United States Code, I find that good cause exists for making this rule effective in less than 30 days. The special salary rate provisions of FEPCA must be made effective no sooner than 90 days and not later than 180 days after enactment. The notice is being waived and the regulation is being made effective immediately to enable OPM to implement the expanded special rate authority established by FEPCA at the earliest practicable date.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 530

Government employees, Wages, Administrative practice and procedure.

U.S. Office of Personnel Management.
Constance Berry Newman,
Director.

PART 530—PAY RATES AND SYSTEMS (GENERAL)

1. The authority citation for 5 CFR part 530 is revised to read as follows:

Authority: 5 U.S.C. 5305; E.O. 12748, 56 FR 4521.

2. Section 530.301 is revised to read as follows:

§ 530.301 Applicability.

This subpart applies to agencies having positions paid under—

- (a) A statutory pay system; or
- (b) Any other pay system established by or under Federal statute for civilian positions within the executive branch.

3. Section 530.302 is revised to read as follows:

§ 530.302 Authority.

In lieu of the pay schedules identified in § 530.301 of this part, the Office of Personnel Management (OPM) may establish, and agencies shall pay, special salary rates under section 5305 of title 5, United States Code, Executive Order 12748, and this subpart.

4. Section 530.303 is revised to read as follows:

§ 530.303 Establishing and adjusting special salary rate schedules.

(a) OPM may increase the minimum rates otherwise payable under the pay schedules identified in § 530.301 of this part in one or more areas or locations to the extent it considers necessary to overcome existing or likely significant handicaps in the recruitment and retention of well-qualified personnel when these handicaps are due to any of the circumstances described in paragraph (b) of this section. When a minimum rate is increased under this authority, increases may also be made in one or more of the remaining rates of the affected grade or level. In no event may an increased minimum rate exceed the maximum rate prescribed by law for the grade or level by more than 30 percent, and no rate may be established under this section in excess of the rate of basic pay payable for level V of the Executive Schedule.

(b) The circumstances referred to in paragraph (a) of this section are the following:

- (1) Rates of pay offered by non-Federal employers are significantly higher than those payable by the Government within the area, location, occupational group, or other class of positions under the pay system involved;
- (2) The remoteness of the area or location involved;
- (3) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or
- (4) Any other circumstances OPM considers appropriate.

(c) An agency may propose to OPM that special salary rates be established

or adjusted. The agency initiating such a request and all other agencies wishing to be included are responsible for submitting complete supporting data, as specified by OPM, including, after consulting with OPM, a survey of prevailing non-Federal pay rates in the relevant labor market.

(d) All requests to establish or adjust special salary rate schedules must be transmitted directly to OPM's central office by the agency's headquarters. Each request must include a certification by the head of the agency that special salary rates are necessary to ensure staffing adequate to the accomplishment of the agency's mission and that funds are available to cover the increased expenditures for salaries and benefits that would result from the approval of the request. If the special salary rate request covers fewer than 1,000 employees or would increase annual salary costs by less than \$4 million, this certification may be provided by a headquarters official designated to act on behalf of the head of the agency.

(e) In establishing or adjusting special salary rate schedules, OPM shall consider—

- (1) The number of existing or likely vacant positions and the length of time they have been vacant, including evidence to support the likelihood that a recruiting problem will develop if one does not already exist;
- (2) The number of employees who have or are likely to quit for comparable positions, including the number quitting for higher paying non-Federal positions and evidence to support the likelihood that employees will quit;
- (3) The number of vacancies the agency tried to fill, compared with the number of hires and offers made;
- (4) The nature of the existing labor market;
- (5) The degree to which the agency has considered and used other pay flexibilities available to the agency to alleviate its staffing problems, including above-minimum entry rates, recruitment and relocation bonuses, and retention allowances;
- (6) The degree to which the agency has considered relevant non-pay solutions to the staffing problems, such as conducting an aggressive recruiting program, using appropriate appointment authorities, redesigning jobs, establishing training programs, and improving working conditions;
- (7) The impact of the staffing problem on the agency's mission; and
- (8) The level of non-Federal rates paid for comparable positions. (Data on non-Federal salary rates may be supplemented, if appropriate, by data on Federal salary rates for comparable

positions established under independent statutory authority.)

(f) In determining at which level to set special salary rates, OPM shall consider—

- (1) The level of rates it believes necessary to recruit or retain an adequate number of well-qualified employees;
- (2) The dollar costs that will be incurred if special salary rate schedules are not authorized; and
- (3) The level of pay for comparable positions.

(g) No one factor or combination of factors specified in paragraph (e) or (f) of this section requires special salary rate schedules to be established at or adjusted to any given level. Each agency request to establish or adjust special salary rate schedules shall be judged on its own merits based on the extent to which it meets these criteria.

(h) For newly established or existing special salary rate authorizations, OPM may establish GS-10 special salary rates for the purpose of computing overtime pay and annual premium pay for standby duty and for the purpose of applying the provisions of 5 U.S.C. 5543 governing compensatory time off. In determining the minimum special rate for grade GS-10 to be established for these purposes, OPM shall consider the following factors, as appropriate in each situation:

- (1) The need to provide for a reasonable progression in basic pay rates from lower grade levels to higher grade levels; and
- (2) The need to avoid pay alignment problems that would result from applying the two-step promotion rule in 5 U.S.C. 5334(b).

5. Section 530.304 is revised to read as follows:

§ 530.304 Annual review.

(a) OPM shall review special salary rate schedules annually to determine whether there is a continuing need for them.

(b) In conducting the annual review, OPM shall designate lead agencies for assistance in coordinating the collection of relevant data. All agencies are responsible for submitting complete supporting data upon request to OPM or the lead agency, as appropriate.

(c) When special rates are adjusted as a result of the annual review, an employee's pay shall be fixed in the same manner as provided in § 530.307(b) of this part.

6. In § 530.306, paragraph (c)(2) is amended by removing "§ 531.203(d)(3)" and replacing it with "§ 531.203(d)(2)(vi)," and paragraph (e)

is amended by removing the first occurrence of the word "at" and replacing it with the word "within."

7. A new § 530.307 is added to read as follows:

§ 530.307 Effect of an adjustment in scheduled rates of pay.

(a) At the time of an adjustment in the scheduled rates of pay for one or more grades or levels for which special rates have been authorized under 5 U.S.C. 5305, special rates shall be terminated or adjusted as follows:

(1) If the minimum rate of the special rate range is less than the new minimum scheduled rate of the grade or level concerned, special rates shall be terminated.

(2) If the minimum rate of the special rate range is greater than the new minimum scheduled rate of the grade or level concerned, but less than the new maximum scheduled rate of that grade or level, the minimum rate of the special rate range shall be increased to the lowest scheduled rate of that grade or level that exceeds the former minimum rate of the special rate range, and corresponding increases shall be made in the remaining special rates of that grade or level.

(3) If the minimum rate of the special rate range is greater than the new maximum scheduled rate of the grade or level concerned, the new special rates shall be determined by—

(i) Constructing new step rates above the maximum scheduled rate of the grade or level concerned in relationship to the increment(s) between the scheduled rates of that grade or level;

(ii) Increasing the minimum rate of the special rate range to the lowest constructed rate that exceeds the former minimum rate of the special rate range; and

(iii) Making corresponding increases in the remaining special rates of that grade or level.

(b) Except as provided in paragraphs (c) and (d) of this section, when an employee was receiving a special rate immediately before the effective date of an adjustment in scheduled rates of pay, the employee shall receive on that effective date the rate of basic pay for the numerical rank in the new special rate range established under paragraph (a) of this section for the employee's grade or level that corresponds to the numerical rank of the special rate the employee was receiving immediately before that effective date.

(c) If a special rate range is terminated under paragraph (a) of this section, an employee who was receiving a special rate immediately before the effective date of an adjustment in scheduled rates

of pay shall receive on that effective date the numerical rank in the new statutory pay schedule for the employee's grade or level that corresponds to the numerical rank of the special rate the employee was receiving immediately before that effective date.

(d) In the case of an employee in a position under the Performance Management and Recognition System who was receiving a special pay rate immediately before the effective date of an adjustment in scheduled rates of pay, the employee shall receive on that effective date a rate of basic pay determined under § 540.106 of this chapter.

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5 CFR Parts 531 and 575

RIN 3206-AE35

Pay Under the General Schedule; Supervisory Differentials

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to implement supervisory differentials under section 211 of the Federal Employees Pay Comparability Act of 1990 (FEPCA). Section 211 of FEPCA also provides for the repeal of 5 U.S.C. 5333(b) upon the effective date of these regulations. These regulations authorize the payment of a supervisory differential to an employee under the General Schedule who has supervisory responsibility for one or more civilian employees not under the General Schedule who, in the absence of such a differential, would be paid more than the supervisory employee.

DATES: The amendments made by section 211 of FEPCA and the interim regulations set forth below are effective on May 4, 1991. Comments must be received on or before July 2, 1991.

ADDRESSES: Send or deliver written comments to Barbara L. Fiss, Assistant Director for Pay and Performance, U.S. Office of Personnel Management, room 7H28, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Donald J. Winstead, (202) 606-2818 or (FTS) 266-2818.

SUPPLEMENTARY INFORMATION: Section 211 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509) replaced the previous authority, 5 U.S.C. 5333(b), to adjust the pay of a

General Schedule employee who supervises one or more prevailing rate employees with a new authority, 5 U.S.C. 5755, to establish supervisory differentials for certain supervisors paid under the General Schedule. The repeal of 5 U.S.C. 5333(b) is effective on the date the supervisory differential becomes effective. No further adjustments may be made under that authority on or after that date.

The two authorities differ in several respects. First, the former authority permitted the adjustment of a supervisor's rate of basic pay, while the new authority permits the payment of a differential that is not considered part of basic pay. Second, the former authority applied to a General Schedule employee who supervises one or more prevailing rate employees. The new authority applies to a General Schedule employee who supervises one or more civilian employees not covered by the General Schedule. Third, the former authority limited the supervisor's adjusted pay to one of the rates of the supervisor's grade. The new authority does not contain a statutory limit other than that the differential may not cause the supervisor's pay to exceed the pay of the highest paid subordinate by more than 3 percent.

Delegation of authority. The interim regulations delegate authority to agencies to pay a supervisory differential to an employee who meets each of the following criteria: (1) The employee is in a General Schedule position, including a position under the Performance Management and Recognition System; (2) the employee is a supervisor, as defined in 5 U.S.C. 7103(a)(10); and (3) the employee is responsible for providing direct, technical supervision over the work of one or more civilian employees whose positions are not under the General Schedule if one or more of the subordinates would, in the absence of the differential, be paid more than the supervisory employee. However, the interim regulations do not permit the payment of a supervisory differential based on supervising a civilian employee whose rate of basic pay exceeds the maximum rate of basic pay established for grade GS-15 of the General Schedule.

Payment of differential. The interim regulations require that a supervisory differential be paid in the same manner and at the same time as the supervisor's basic pay. That is, the differential is paid at an hourly rate for each hour during which the supervisor receives basic pay. The authority to pay a supervisory differential is discretionary.

and the interim regulations permit an agency to reduce or terminate the differential at any time the agency determines it is appropriate to do so.

Amount of differential. The interim regulations provide that the amount of a supervisory differential may not cause the continuing pay of the supervisor to exceed the continuing pay of the highest paid subordinate by more than 3 percent. Continuing pay is defined in the interim regulations as the aggregate of all continuing payments and annual premium pay received by an employee at any one time. "Continuing payments" consist of basic pay and other forms of pay that are paid in the same manner and at the same time as basic pay—i.e., for periods during which an employee receives basic pay. Examples of "continuing payments" include, but are not limited to, cost-of-living allowances, post differentials, remote worksite allowances, physicians comparability allowances, and retention allowances.

The methods for determining the amount of continuing pay for both the supervisor and subordinate are described in the interim regulations. Because it is not considered part of basic pay, the amount of a supervisory differential, when combined with the supervisor's rate of basic pay, may cause the total to exceed the maximum rate of basic pay of the supervisor's grade.

The interim regulations require that a supervisory differential be terminated whenever the continuing pay of a supervisor (not including the supervisory differential) exceeds that of the highest paid subordinate. In addition, the interim regulations require that a supervisory differential be reduced or terminated, as appropriate, whenever the continuing pay of a supervisor (including the supervisory differential) exceeds that of the highest paid subordinate by more than 3 percent. This may occur, for example, when the supervisor receives an increase in his or her rate of basic pay, such as an annual pay adjustment, a merit increase, a within-grade increase, or a quality step increase. Reduction or termination of a supervisory differential also may be required when a subordinate employee leaves his or her position or is reduced in pay. The interim regulations provide that the effective date of such a reduction or termination in a supervisory differential shall be not later than 30 days after the date on which the continuing pay of the supervisor exceeds the continuing pay of the highest paid subordinate by more than 3 percent. Effecting such changes at the beginning of a pay period would

simplify administration by personnel and payroll staffs.

Because of the potential for frequent changes in a supervisor's eligibility for a supervisory differential (based on annual pay adjustments and other predictable changes in basic pay rates for both supervisors and subordinates at different times of the year), agencies are encouraged to authorize supervisory differentials only when there is a significant pay disparity. In addition, the amount of a supervisory differential (computed as a percentage of the supervisor's rate of basic pay or as a dollar amount) should be set so as to minimize the necessity for frequent adjustments because of predictable changes in basic pay rates.

Basis for comparing continuing pay of supervisors and subordinates. The interim regulations list the components of continuing pay for both supervisors and subordinates that must be included in making a comparison. For supervisors, continuing pay includes basic pay (including retained rates of pay), locality-based comparability payments or interim geographic adjustments, staffing differentials (when authorized by OPM), retention allowances, other "continuing payments" (except night, Sunday, or holiday premium pay and hazardous duty differentials), and premium pay paid on an annual basis. For subordinates, continuing pay includes basic pay (except retained rates of pay and night or environmental differentials), locality-based payments, other "continuing payments" (except Sunday or holiday pay and retention allowances), and premium pay paid on an annual basis. A retained rate of pay is excluded because it is not related to the subordinate's current position. A retention allowance is excluded to remove any incentive for the supervisor to benefit by virtue of obtaining approval of such an allowance for a subordinate.

Documentation requirements. The interim regulations require that each determination to establish or adjust a supervisory differential be made in writing, include the basis for determining the amount of the differential, and contain sufficient information to allow reconstruction of the action.

Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists to make this amendment effective in less than 30

days. The supervisory differential authority must be made effective no sooner than 90 days and no later than 180 days after enactment.

The notice is being waived and the regulation is being made effective in less than 30 days to make this new authority effective on the earliest practicable date.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will affect only Federal agencies and employees.

List of Subjects in 5 CFR Parts 531 and 575

Administrative practice and procedure, Government employees, Wages.

U.S. Office of Personnel Management.
Constance Berry Newman,
Director.

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

PART 531—PAY UNDER THE GENERAL SCHEDULE

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

Authority: 5 U.S.C. 5115, 5338, and chapter 54; E.O. 12748; subpart A issued under sec. 302 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), 104 Stat. 1462, and E.O. 12736; subpart B also issued under 5 U.S.C. 5333, 5402, and 7701(b)(2); subpart D also issued under 5 U.S.C. 7701(b)(2); subpart E also issued under 5 U.S.C. 5336.

§§ 531.301 through 531.305 [Removed and Reserved]

2. Subpart C (§§ 531.301–531.305) is removed and reserved.

3. In Subpart D, § 531.407 is amended by revising paragraph (c)(3) to read as follows:

Subpart D—Within-Grade Increases

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§ 531.407 Equivalent increase determinations

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(c) * * *

(3) The establishment of higher minimum rates under section 5305 of title 5, United States Code, or an increase in such rates;

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PART 575—RECRUITMENT AND RELOCATION BONUSES; RETENTION ALLOWANCES; SUPERVISORY DIFFERENTIALS

4. The authority citation for part 575 continues to read as follows:

Authority: 5 U.S.C. 1104(a)(2), 5753, 5754, 5755; E.O. 12748.

5. A new subpart D is added to read as follows:

Subpart D—Supervisory Differentials

Sec.

- 575.401 Purpose.
- 575.402 Delegation of authority.
- 575.403 Definitions.
- 575.404 Use of authority.
- 575.405 Calculation and payment of supervisory differential.
- 575.406 Adjustment or termination of supervisory differential.
- 575.407 Records.

Subpart D—Supervisory Differentials

§ 575.401 Purpose.

This subpart provides regulations to implement 5 U.S.C. 5755, which authorizes payment of a supervisory differential to an employee under the General Schedule who has supervisory responsibility for one or more civilian employees not under the General Schedule if one or more of the subordinate civilian employees would, in the absence of such a differential, be paid more than the supervisory employee.

§ 575.402 Delegation of authority.

(a) The head of an agency may pay a supervisory differential to a supervisor who is—

(1) In a General Schedule position paid under 5 U.S.C. 5332, including a position under the Performance Management and Recognition System established under chapter 54 of title 5, United States Code; and

(2) Responsible for providing direct, technical supervision over the work of one or more civilian employees whose positions are not under the General Schedule if one or more of the subordinates would, in the absence of such a differential, be paid more than the supervisor.

(b) A supervisory differential may not be paid on the basis of supervising a civilian employee whose rate of basic pay exceeds the maximum rate of basic pay established for grade GS-15 of the General Schedule (including any applicable locality-based comparability payment under 5 U.S.C. 5304 or interim geographic adjustment under section 302 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509) and any applicable special rate of

pay under 5 U.S.C. 5305 or similar authority).

§ 575.403 Definitions

In this subpart:

Agency has the meaning given that term in 5 U.S.C. 5102.

Continuing pay means the aggregate of all continuing payments and annual premium pay received by an employee at any one time.

Continuing payment means basic pay and any other form of pay that is paid in the same manner and at the same time as basic pay—i.e., for periods during which an employee receives basic pay.

Employee has the meaning given that term in 5 U.S.C. 5102.

Head of agency means the head of an agency or an official who has been delegated the authority to act for the head of the agency in the matter concerned.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, before deductions and exclusive of additional pay of any kind, such as locality-based comparability payments under 5 U.S.C. 5304 or interim geographic adjustments under section 302 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509).

Supervisor has the meaning given that term in 5 U.S.C. 7103(a)(10).

§ 575.404 Use of authority.

(a) Each determination to pay a supervisory differential shall be made in writing under procedures established by each agency.

(b) The procedures established by each agency under paragraph (a) of this section shall provide that—

(1) Each determination to pay a supervisory differential, including the amount of such differential, shall be reviewed and approved by an official of the agency who is at higher level than the official who made the initial decision, unless there is no official at a higher level in the agency; and

(2) In determining whether to use the authority under 5 U.S.C. 5755 and this subpart and in determining the amount of such differential, the relationship in pay among supervisors under the General Schedule in the same organizational component of the agency shall be considered, as well as the relationship in pay between the supervisor and his or her subordinate(s).

(3) Each determination to pay a supervisory differential shall be documented.

§ 575.405 Calculation and payment of supervisory differential.

(a) A supervisory differential shall be calculated as a percentage of the supervisor's rate of basic pay or as a dollar amount and shall be paid in the same manner and at the same time as the supervisor's basic pay—i.e., the differential shall be paid at an hourly rate for each hour during which the supervisor receives basic pay.

(b) The amount of a supervisory differential shall not cause the supervisor's continuing pay, as determined under paragraph (c) of this section, to exceed the continuing pay of the highest paid subordinate not under the General Schedule, as determined under paragraph (d) of this section, by more than 3 percent.

(c) For purposes of comparing the continuing pay of a supervisor whose position is under the General Schedule with the continuing pay of a subordinate whose position is not under the General Schedule, the following payments shall be included in determining the amount of continuing pay received by the supervisor:

(1) Basic pay, including a retained rate of pay under 5 U.S.C. 5363 and part 536 of this chapter or other similar authority;

(2) A locality-based comparability payment under 5 U.S.C. 5304 or interim geographic adjustment under section 302 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509);

(3) A staffing differential under section 209 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509);

(4) A retention allowance under 5 U.S.C. 5754;

(5) Any other continuing payment, except night, Sunday, or holiday premium pay or a hazardous duty differential under chapter 55 of title 5, United States Code; and

(6) Premium pay paid on an annual basis under 5 U.S.C. 5545(c).

(d) For purposes of comparing the continuing pay of a supervisor whose position is under the General Schedule with the continuing pay of a subordinate whose position is not under the General Schedule, the following payments shall be included in determining the amount of continuing pay received by the subordinate:

(1) Basic pay, excluding a night or environmental differential under 5 U.S.C. 5343(f) or part 532 of this chapter, respectively, or other similar authority and a retained rate of pay under 5 U.S.C. 5363 and part 536 of this chapter or other similar authority;

(2) A locality-based comparability payment under 5 U.S.C. 5304, an interim geographic adjustment under section 302 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), or another locality-based payment under similar authority;

(3) Any other continuing payment, except Sunday or holiday pay or another similar payment under title 5, United States Code, or other similar authority and a retention allowance under 5 U.S.C. 5754 or other similar authority; and

(4) Premium pay paid on an annual basis under an authority similar to 5 U.S.C. 5545(c).

(e) Payment of a supervisory differential is subject to the aggregate limitation on pay under 5 U.S.C. 5307 and subpart B of part 530 of this chapter.

(f) A supervisory differential shall not be considered part of the supervisor's rate of basic pay for any purpose.

§ 575.406 Adjustment or termination of supervisory differential.

(a) An agency may establish procedures that allow for adjusting or terminating a supervisory differential at any time the agency determines it is appropriate to do so.

(b) A supervisory differential shall be terminated when the continuing pay of the supervisor (not including the supervisory differential) exceeds the continuing pay of the highest paid subordinate whose position is not under the General Schedule.

(c) A supervisory differential shall be reduced or terminated, as appropriate, when the continuing pay of the supervisor (including the supervisory differential) exceeds the continuing pay of the highest paid subordinate whose position is not under the General Schedule by more than 3 percent.

(d) The effective date of a reduction or termination of a supervisory differential under paragraph (b) or (c) of this section shall be not later than 30 calendar days after the date on which the event that necessitates the reduction or termination occurs.

(e) Each determination to adjust a supervisory differential shall be made in writing under procedures established by each agency similar to those established under § 575.404 of this part.

(f) The reduction or termination of a supervisory differential may not be appealed. However, the preceding sentence shall not be construed to extinguish or lessen any right or remedy under subchapter II of chapter 12 of title 5, United States Code, or under any of the laws referred to in 5 U.S.C. 2302(d).

§ 575.407 Records.

(a) Each agency shall keep a record of each determination required by §§ 575.404(a) and 575.406(e) of this part. Each record shall contain sufficient information to allow reconstruction of the action, including the basis for determining the amount of the differential and the comparison of continuing pay required by § 575.405(b) of this part.

(b) Each agency shall promptly submit a report of each determination made to establish, adjust, or terminate a supervisory differential as a part of its regular submission to OPM's Central Personnel Data File.

[FR Doc. 91-10551 Filed 5-2-91; 8:45 am]

BILLING CODE 6325-01-M

5 CFR Parts 532, 550, and 551

RIN 3026-AE29

Pay Administration Under the Fair Labor Standards Act; Overtime Pay Provisions

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to implement section 210 of the Federal Employees Pay Comparability Act of 1990 (FEPCA). The amendments made by section 210 eliminate the requirement to perform overtime computations for employees who are covered by the Fair Labor Standards Act of 1938 (FLSA) under both title 5, United States Code, and the FLSA and provide that, for the purpose of calculating overtime pay under the FLSA, hours in a paid nonwork status shall be deemed to be hours of work. Henceforth, overtime pay for nonexempt employees will be computed and paid only under the FLSA.

DATES: The amendments made by section 210 of FEPCA and the interim regulations set forth below are effective on May 4, 1991. Comments must be received on or before July 2, 1991.

ADDRESSES: Send or deliver written comments to Barbara L. Fiss, Assistant Director for Pay and Performance, Personnel Systems and Oversight Group, U.S. Office of Personnel Management, room 7H28, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: James R. Weddel, (202) 606-2858 or (FTS) 266-2858.

SUPPLEMENTARY INFORMATION: Section 210 of the Federal Employees Pay

Comparability Act of 1990 eliminates the need to calculate and compare an FLSA nonexempt employee's overtime pay entitlement under two laws in order to pay the greater overtime benefit. Instead, employees who are nonexempt under the Fair Labor Standards Act of 1938, as amended, will always receive overtime pay under the FLSA, as provided in part 551 of title 5, Code of Federal Regulations.

Federal employees who are exempt from the FLSA, but covered by the overtime pay provisions of title 5, United States Code, will continue to have their overtime pay benefit calculated and paid under the title 5 provisions, as provided in part 532 (for prevailing rate employees) or part 550 of title 5, Code of Federal Regulations.

The rules for determining hours of work for the purpose of calculating overtime pay will depend upon whether the legal authority for the hours of work determination is found in title 5, United States Code, or in the Fair Labor Standards Act. Specifically, hours of work for FLSA exempt employees will continue to be determined under part 532 or part 550, with no consideration given to the rules for determining hours of work under part 551. The same will be true for determining hours of work in excess of 8 hours in a day for nonexempt employees, even though overtime pay for work in excess of 8 hours in a day will be calculated and paid under part 551. This is true because FEPCA amended sections 5542 and 5544 of title 5, United States Code, not the FLSA. On the other hand, agencies will apply the rules on hours of work under part 532 or 550, as applicable, and part 551 for the purpose of determining the overtime entitlement for work in excess of 40 hours in a week for nonexempt employees. In summary, to determine hours of work for overtime pay entitlement purposes, agencies must apply 5 CFR 410.602, 5 CFR part 532 and 5 U.S.C. 5544, and/or 5 CFR part 500, as appropriate, for each employee; for nonexempt employees only, agencies must also identify any additional hours of work under 5 CFR part 551, but only for the purpose of determining the overtime pay entitlement for hours of work in excess of 40 hours in a week.

The regulations governing pay under prevailing rate systems have been revised to provide that overtime pay for prevailing rate (wage) employees will be paid under either 5 U.S.C. 5544 and part 532 (for FLSA exempt employees) or part 551 (for nonexempt employees). The requirement to provide the greater overtime benefit under title 5, United