

Guidance on Overtime Pay and Other Premium Pay For Federal Employees Working in Support of the Department of Health and Human Services (HHS) Unaccompanied Children (UC) Program

Volunteers continue to be in paid duty status during their volunteer assignment in support of the HHS UC Program. Employees will continue to be paid by their home agency while they are on the assignment, but the participation costs (e.g., basic pay, premium pay, travel, and per diem) will be reimbursed according to the provisions of the memorandum of agreement between HHS and the home agency.

Employees generally remain covered by the compensation rules applicable to their permanent position of record while on the detail assignment. Most Federal employees receive overtime pay and other premium pay under title 5, United States Code, and related OPM regulations. Employees who are not exempt from the Fair Labor Standards Act (FLSA) receive overtime compensation according to OPM's regulations contained within 5 CFR Part 551. The guidance below pertains to employees covered by OPM-administered provisions found within title 5 or OPM's FLSA regulations.

Premium Pay Limitations under Title 5

- Laws and regulations: 5 U.S.C. 5547 and 5 CFR 550.105-550.107; see also definition of “premium pay” in 5 CFR 550.103.
- OPM website:
 - <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/#url=Biweekly-Pay-Caps>
 - <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/premium-pay-title-5/>
- Various types of title 5 premium pay (e.g., overtime pay, night pay, Sunday pay) are normally subject to a biweekly premium pay cap. Under the biweekly cap, an employee may receive premium pay only to the extent that it does not cause the sum of basic pay and premium pay for the biweekly pay period to exceed the greater of the biweekly rate for level V of the Executive Schedule (EX-V) or the applicable GS-15, step 10, adjusted rate of basic pay (including any locality pay or special rate supplement). For employees stationed in the United States, the GS-15, step 10, adjusted rate of basic pay is always the higher rate and thus is the cap.
- An *annual* premium pay cap may be applied when employees perform work (1) in connection with an emergency or the aftermath of such an emergency or (2) that is critical to the mission of an agency. Work in support of the HHS UC Program is a qualifying emergency for this purpose. The annual cap is based on annualized rates for EX-V or the applicable GS-15, step 10, as shown on the OPM website. Basic pay and premium pay must be projected for the entire calendar year in order to apply the annual

cap. An agency may defer payment of additional premium pay owed as a result of the annual premium pay cap until the end of the calendar year. To use the annual premium pay cap, OPM regulations require: (1) a determination that a qualifying emergency exists and (2) a determination that an employee is performing work in connection with such a qualifying emergency or its aftermath (5 CFR 550.106(a)(1)). These determinations are generally made by the agency head or his/her designee. However, OPM may, on its own motion, make a determination that a qualifying emergency exists. (The Acting OPM Director has made such a determination with respect to work performed in support of the HHS UC Program.)

- The following types of premium pay remain subject to the biweekly premium pay cap even if the annual premium pay cap is invoked: standby duty pay, administratively uncontrollable overtime pay, law enforcement availability pay, regular overtime for firefighters, and within-tour overtime pay for Border Patrol agents (5 CFR 550.107).
- FLSA overtime pay received by FLSA-nonexempt employees does not count as “premium pay” in applying the biweekly or annual premium pay caps. Nor does the value of FLSA compensatory time off count toward those caps. Thus, pay (or compensatory time off hours earned) for overtime work performed by an FLSA-nonexempt employee is not affected by the premium pay caps. However, an FLSA-nonexempt employee may receive other premium pay (e.g., night pay and Sunday pay) that is subject to the cap.

Emergency Work and the FLSA

- During an emergency, employees may be temporarily required to perform duties different from their regular duties, as documented within their permanent position description.
- A special FLSA regulation addresses the FLSA exemption status of employees during an emergency situation 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” (5 CFR 551.211(f)). A determination that an emergency is qualifying for the purpose of this regulation is made by the employing agency. Under this regulation, during a qualifying emergency:
 - Employees normally designated as FLSA-exempt may maintain this exemption during an emergency if they are continuing to perform exempt work. However, employees who are normally exempt, but who engage in primary duties that are nonexempt during the emergency, become temporarily FLSA nonexempt, measured on a workweek basis.
 - Employees normally designated as FLSA-nonexempt maintain this nonexempt designation even if they primarily perform exempt work during the emergency.
- Because overtime pay rules and compensation differ substantially between the FLSA and title 5, agencies should take heed of the type and character of the work that will be assigned during the emergency and how an employee’s FLSA status, for pay purposes,

can temporarily change, even within a pay period. Agencies should follow the procedures contained within the Guide to Processing Personnel Actions, Chapter 28, to document the change in the FLSA category for classification and pay purposes.