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Federal Executive Agencies: Selected Pay Flexibilities for COVID-19 Response

On January 31, 2020, Secretary of Health and Human Services Alex Azar declared a public health emergency for the United States in response to Coronavirus Disease 2019 (COVID-19). To assist the federal government in responding to the emergency, Congress passed legislation that provides exemptions from certain pay limitations for employees in certain executive departments. In addition, the U.S. Office of Personnel Management (OPM) notified executive agency heads about the procedures for requesting a salary offset (dual compensation) waiver for the reemployment of individuals in emergencies or other unusual circumstances without reduction or termination of annuity. OPM also reiterated long-standing guidance on executive agency pay flexibilities that are codified in Title 5 of the *United States Code* and Title 5 of the *Code of Federal Regulations*.

Exemptions from Pay Limitations

Generally, federal agencies must abide by limitations on the dollar amount employees may receive in compensation for work performed during a pay period or on an annual basis. Under Title 5, Section 5547(a), of the *U.S. Code*, the combination of an employee's basic pay and premium pay for any pay period cannot exceed the rate of basic pay for GS-15, step 10 (including any locality pay, special pay, or similar pay rate) or the rate for Level V of the Executive Schedule (currently, \$160,100), whichever is greater. OPM regulations codified at Title 5, Section 550.103, of the *Code of Federal Regulations* define *premium pay* as the dollar value of earned hours of compensatory time off (i.e., comp time) and additional pay authorized by Title 5, Chapter 55, Subchapter V, of the *U.S. Code* and Title 5, Part 550, Subpart A, of the *Code of Federal Regulations* for overtime, night, Sunday, or holiday work or for standby duty, administratively uncontrollable overtime work, or availability duty. Overtime pay is pay for hours of work officially ordered or approved in excess of eight hours in a day or 40 hours in an administrative workweek. Premium pay does not include overtime pay under the Fair Labor Standards Act and compensatory time off earned in lieu of such overtime pay.

Under recent legislation enacted in response to COVID-19, additional pay flexibilities were provided to the Department of Homeland Security (DHS). Division B, Title VI of P.L. 116-136, the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as enacted on March 27, 2020, applies to the activities of DHS. Section 16003 in that title provides an exemption from the limitation on the combination of basic and premium pay that is codified at Title 5, Section 5547(a), of the *U.S. Code* and any other provision of law limiting the aggregate amount of premium pay that is payable on a biweekly or calendar year basis.

This provision of additional flexibility is effective as if enacted on January 1, 2020, and applies to any premium pay that is funded, either directly or through reimbursement, by the Federal Emergency Management Agency (FEMA). For the exemption to be applied, the agency head must determine that services performed by an employee during FY2020 are related primarily to preparation, prevention, or response to coronavirus. In addition, any overtime that is funded by FEMA for such services, either directly or through reimbursement, is to be exempted from any annual limitation on the amount of overtime that is payable in a calendar year or fiscal year.

In addition to providing exemptions from certain pay limitations, the CARES Act increases caps set for annual pay earned by DHS employees. In determining whether an employee's pay exceeds the applicable limitation on the annual rate of basic pay payable under Title 5, Section 5307, of the *U.S. Code*, the agency head is not to include pay exempted under Section 16003. Pay exempted from the otherwise applicable limitations on basic and premium pay shall not cause the aggregate pay earned for the calendar year in which the exempted pay is earned to exceed the rate of basic pay payable for Level II of the Executive Schedule (currently \$197,300).

Division B, Title VIII of P.L. 116-136 involves the activities of the Departments of Labor, Health and Human Services, and Education. Section 18110 of that title provides the same exemptions from the pay limitations as Section 16003 (but does not include the stipulation related to FEMA funding). The law provides that:

If services performed by an employee during fiscal year 2020 are determined by the head of the agency to be primarily related to preparation, prevention, or response to coronavirus, any premium pay for such services shall be disregarded in calculating the aggregate of such employee's basic pay and premium pay for purposes of a limitation under section 5547(a) of title 5, *United States Code*, or under any other provision of law, whether such employee's pay is paid on a biweekly or calendar year basis.

If application of the section results in the payment of additional premium pay to an employee of a type that is normally creditable as basic pay for retirement or any other purpose, the additional pay is not to be considered basic pay for any purpose or be used in computing a lump-sum payment for accumulated and accrued annual leave under Title 5, Sections 5551 or 5552, of the *U.S. Code*. The provision took effect as if enacted on February 2, 2020.

Salary Offset (Dual Compensation) Waiver

OPM regulations that are codified at Title 5, Section 553.202, of the *Code of Federal Regulations* provide for the reemployment of individuals in emergencies or other unusual circumstances without reduction or termination of annuity. On March 20, 2020, OPM issued a memorandum to executive agency heads inviting them to request a delegation of authority to waive salary offset (dual compensation) to reemploy individuals because of a hiring need resulting from COVID-19. Under the delegation, an agency would be granted authority to approve individual exceptions on a case-by-case basis in specific circumstances.

OPM sets out the conditions for use of each delegated authority in a delegation agreement. The agreement remains in effect without time limit unless OPM specifies a termination date or withdraws the delegated authority when it finds that the circumstances justifying the delegation have changed substantially or that the agency has failed to manage the authority in accordance with law, regulations, and the agreement. The memorandum advised that OPM's waiver template should be used to request a delegation. The regulations provide that an agency's request must include:

- (1) A description of the situation for which the authority is requested. The situation must result from emergencies posing immediate and direct threat to life or property or from other unusual circumstances.
- (2) An identification of the occupations, grades, and position locations that might be filled under the delegated authority.
- (3) A statement of the expected duration of the reemployment to be approved under the requested authority (5 C.F.R. §553.202(b)).

OPM guidance further explained the delegation authority.

Selected Title 5 Pay Flexibilities

On February 7, 2020, OPM reiterated long-standing guidance on human resources flexibilities related to recruitment, relocation, and retention bonuses. OPM regulations refer to the bonuses as incentives and provide detailed information on procedures for their authorization and payment. In addition, fact sheets and templates on the incentives are available on the agency's website.

Recruitment Bonus (5 U.S.C. §5753; 5 C.F.R. Part 575, Subpart A). OPM may authorize an agency head to pay a recruitment bonus to a newly appointed employee if the agency head determines that it would be difficult to fill a position without such a bonus. A written service agreement that commits an employee to work for up to four years is required. A bonus cannot exceed 25% of the employee's annual rate of basic pay multiplied by the number of years in the required service period. Based on critical agency need, OPM may authorize the agency head to waive the limitation on the size of the bonus, but in no event can a

bonus exceed 100% of the employee's annual rate of basic pay. A bonus is not part of an employee's basic pay.

Relocation Bonus (5 U.S.C. §5753; 5 C.F.R. Part 575, Subpart B). OPM may authorize an agency head to pay a relocation bonus to a current employee who moves to a new position in the same geographic area or who must relocate to accept a position in a different geographic area if the agency head determines that it would be difficult to fill a position without such a bonus. Establishing and maintaining residency and a written service agreement of up to four years are required. A bonus cannot exceed 25% of the employee's annual rate of basic pay multiplied by the number of years in the required service period. Based on critical agency need, OPM may authorize the agency head to waive the limitation on the size of the bonus, but in no event can a bonus exceed 100% of the employee's annual rate of basic pay. A bonus is not part of an employee's basic pay. Generally, a relocation bonus is approved on a case-by-case basis.

Retention Bonus (5 U.S.C. §5754; 5 C.F.R. Part 575, Subpart C). OPM may authorize an agency head to pay a retention bonus to a current employee if the agency head determines that the individual's unusually high or unique qualifications, or a special need for the individual's services, makes it essential to retain the employee. A bonus cannot exceed 25% of an employee's basic pay. Based on a critical agency need, an agency head may request that OPM waive the limitation on the size of the bonus and authorize a bonus of up to 50% of an employee's basic pay. A group of employees may be authorized to receive bonuses of up to 10% of basic pay if there is a high risk that a significant portion of the employees would likely leave if the bonuses were not provided. Generally, a written service agreement is required. A bonus is not part of an employee's basic pay.

Premium Pay Limitation for Emergency Work or Mission Critical Work (5 U.S.C. §5547(b); 5 C.F.R. §550.106; 5 C.F.R. §550.107). For an employee's work in connection with an emergency involving a direct threat to life or property, including work performed in the aftermath of such an emergency, the limitation on premium pay is to be determined on a calendar year (rather than a pay period) basis. For an employee's work that is critical to an agency's mission, the agency head may determine that the limitation on premium pay should also be determined on a calendar year basis. Under both circumstances, the total of an employee's basic pay and premium pay in a calendar year cannot exceed the greater of the annual rate of pay for GS-15, step 10 (including any locality pay rate or special pay rate), or Level V of the Executive Schedule. Certain types of premium pay, such as standby duty pay and administratively uncontrollable overtime pay, remain subject to biweekly limitation when other premium pay is subject to annual limitation.

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