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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

RIN 3206-AK74

Pay Administration (General)

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations on compensatory time off for time spent in a travel status away from the official duty station when such time is not otherwise compensable.

DATES: The regulations are effective May 17, 2007.

FOR FURTHER INFORMATION CONTACT: Vicki Draper by telephone at (202) 606-2858, by fax at (202) 606-0824, or by e-mail at pay-performance-policy@opm.gov.

SUPPLEMENTARY INFORMATION: On January 27, 2005, the Office of Personnel Management (OPM) published interim regulations (70 FR 3855) in 5 CFR part 550, subpart N, to implement section 203 of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108-411, October 30, 2004), hereafter referred to as "the Act." Section 203 of the Act amended 5 U.S.C. chapter 55, subchapter V, by adding a new section 5550b, which established a new form of compensatory time off for time spent by an employee in a travel status away from the employee's official duty station when such time is not otherwise compensable. The 60-day comment period for the interim regulations ended on March 28, 2005. During the comment period, OPM received comments from 16 Federal agencies, 7 unions, and 81 individuals, all of which are addressed in this final rule. In addition, in March 2006, we issued additional guidance, including questions and answers, to

address many of the comments we received on the interim regulations. We encourage agencies and employees to review these materials on OPM's Web site at http://www.opm.gov/oca/pay/HTML/compensatory_time.asp. We will continue to provide additional guidance on the administration of compensatory time off for travel, as necessary.

Effective Date

Two individuals suggested the new provision be applied retroactively to cover previous travel times that were not compensable under title 5, United States Code. Section 203(c) of the Act provided that the new form of compensatory time off for travel would take effect on the earlier of (1) the effective date of the implementing regulations or (2) the 90th day after the date of the law's enactment (January 28, 2005). The interim regulations became effective on January 28, 2005, and apply prospectively from that date.

Covered Employees

Several commenters requested clarification on the categories of employees covered by the new compensatory time off provision, while others objected to omissions of certain categories of employees in OPM's regulations at 5 CFR 550.1402. Because the law authorizing the new compensatory time off provision is in 5 U.S.C. chapter 55, subchapter V, the new provision applies to an "employee" as defined in 5 U.S.C. 5541(2), who is employed in an "Executive agency," as defined in 5 U.S.C. 105, without regard to whether the employee is exempt from or covered by the overtime pay provisions of the Fair Labor Standards Act of 1938 (FLSA), as amended. OPM cannot broaden coverage to include additional employee groups. The definition includes employees in senior-level (SL) and scientific or professional (ST) positions, but not members of the Senior Executive Service, Senior Foreign Service, Foreign Service officers, or prevailing rate (wage grade) employees.

The compensatory time off for travel provision also does not apply to employees of Non-Appropriated Fund Instrumentalities (NAFI). NAFI employees are not covered by the laws administered by OPM, with a few narrow exceptions, which are listed in 5 U.S.C. 2105(c). Although title 38 employees are not specifically excluded

from the definition of "employee" in 5 U.S.C. 5541(2), the title 38 employment system is administered by the Department of Veterans Affairs (VA) under its own legal authority and any determinations as to coverage under 5 U.S.C. 5541(2) would be made by VA. A commenter noted that the Department of Justice (DOJ) has determined the compensatory time off for travel statute does not apply to attorneys at DOJ. Congress recently enacted legislation (Pub. L. 109-425, December 20, 2006) which provides that attorneys at DOJ shall be eligible for compensatory time off for travel under section 5550b of title 5, United States Code.

Employees who are on intermittent work schedules are not eligible to earn and use compensatory time off for travel because they do not have a scheduled tour of duty for leave purposes. Under 5 CFR 550.1406(b), compensatory time off for travel may be used by an employee when the employee is granted time off from his or her scheduled tour of duty established for leave purposes. Finally, a part-time employee may be entitled to compensatory time off for travel if the travel time does not qualify as compensable hours of work under 5 U.S.C. 5542(b)(2)(B) and 5 CFR 550.112(g)(2) and meets the other requirements in 5 CFR part 550, subpart N.

Definitions

Many commenters recommended the addition or revision of certain definitions in § 550.1403. One agency recommended adding a definition of *accrued compensatory time off*, which is used in § 550.1406. We agree and have added a definition to § 550.1403. In addition, we have added a definition of *authorized agency official* to mean the head of the agency or an official who is authorized to act for the head of the agency in the matter concerned.

Two individuals recommended that OPM define *time the employee would have spent in normal home-to-work or work-to-home commuting*. We do not believe this is necessary, since agencies may use procedures already in place for deducting commuting time from travel hours as required by 5 CFR 550.112(j)(2) and 5 CFR 551.422(b). One agency recommended that OPM establish a minimum commute time for an employee whose residence is considered his or her official duty

station. We are not adopting this recommendation because an employee whose residence is his or her official duty station does not spend time commuting to work.

Two individuals recommended revising the definition of *official duty station* to be consistent with the term *official station* as defined in the Federal Travel Regulation (41 CFR 300–3.1) issued by the General Services Administration. *Official duty station* in § 550.1403 means the geographic area surrounding an employee's regular work site that is the same as the area designated by the employing agency for the purpose of determining whether travel time is compensable for the purpose of determining overtime pay, consistent with the regulations in 5 CFR 550.112(j) and 551.422(d). The term *official station* prescribes the geographic limits of an employee's permanent work station for the purpose of determining the employee's entitlement to subsistence allowances (per diem). We are not adopting the recommendation because the geographic area an agency designates for the purpose of determining whether an employee is entitled to overtime pay for a period of travel may be different than the geographic area covered by *official station* as defined in 41 CFR 300–3.1.

One agency recommended that the definition of *travel status* be stated exactly as it is in § 550.1404(b), and one individual recommended clarifying the definition. We do not believe it is necessary to revise the definition because it refers directly to § 550.1404(b).

Compensable Travel Time

Several commenters recommended clarifying whether travel under certain circumstances is *compensable*. Under § 550.1403, *compensable* refers to periods of time that are creditable as hours of work for the purpose of determining a specific pay entitlement, even when that work time may not actually generate additional compensation because of applicable pay limitations. One agency and an individual recommended clarifying whether an employee who receives administratively uncontrollable overtime (AUO) pay under 5 U.S.C. 5545(c)(2) is eligible to receive compensatory time off for travel. An employee receiving AUO pay may be entitled to compensation for travel time during (1) nonovertime hours, (2) AUO hours (i.e., irregular or occasional overtime hours), or (3) regularly scheduled overtime hours—if the travel hours meet one of the conditions in 5 CFR 550.112(g) or 5 CFR 551.422, as

applicable. If an AUO employee has other qualifying travel time that does not meet the applicable conditions to be treated as compensable hours of work, such travel time may be used to earn compensatory time off under 5 CFR part 550, subpart N.

One agency recommended clarifying an employee is not eligible for compensatory time off for travel when the time spent traveling has been compensated under the FLSA. Overtime hours compensated under the FLSA clearly meet the definition of *compensable* in § 550.1403. Therefore, we believe no clarification in the regulations is necessary. One union recommended clarifying that a class of accommodations, such as business class, does not influence whether the travel time is *compensable*. We agree. Allowing an employee to upgrade his or her travel to business class does not eliminate his or her eligibility to earn compensatory time off for travel.

One individual and one agency recommended clarifying whether an employee is eligible to earn compensatory time off for any portion of a period of travel under 5 CFR 550.112(g)(2) which may not be compensable because of the biweekly cap on premium pay. One union and one agency recommended that such an employee should be eligible. We disagree. Even though an employee may not be paid overtime pay for all of his or her travel hours because of the biweekly premium pay cap, all of the travel time is still considered to be compensable under 5 CFR 550.112(g)(2). Under these circumstances, therefore, the employee has been compensated fully under the law for all of the travel hours; the employee may not earn compensatory time off for any portion of such travel.

Earning Compensatory Time Off for Travel

Two unions and one individual recommended an employee should be able to earn compensatory time off when he or she travels while performing union representational duties. We are not adopting this recommendation. The term *travel* is defined at 5 CFR 550.1403 to mean officially authorized travel—i.e., travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies. The term “travel for work purposes” is intended to mean travel for agency-related work purposes. The Federal Labor Relations Authority (FLRA) has held that the performance of representational duties does not involve the performance of work as used in the phrase “technology

of performing work” under 5 U.S.C. 7106(b)(1). See *AFGE, Council 214, AFL–CIO*, 31 FLRA 1259, 1261–62 (1988). The FLRA has similarly held that the performance of representational activities does not involve “work” within the meaning of 5 U.S.C. 7106(a)(2)(B). See *AAFES, Dallas*, 53 FLRA at 24. Finally, the FLRA also has determined that, under 5 U.S.C. chapter 43, job performance encompasses the performance of agency-assigned duties and does not include duties performed on behalf of a union. See *United States Department of Health and Human Services, Soc. Sec. Admin., Office of Hearings & Appeals*, 48 FLRA 357, 364 (1993). Thus, employees who travel while performing union activities are not entitled to earn compensatory time off because they are traveling for the benefit of the union and not for agency-related work purposes. We have revised the definition of *travel* in § 550.1403 to clarify that time spent traveling in connection with union activities is not creditable for the purpose of earning compensatory time off for travel.

One union and four individuals objected to an employee not being entitled to compensatory time off for travel when he or she is required to travel on a Federal holiday (or “in lieu of” holiday) during his or her basic (non-overtime) hours. Although most employees do not receive holiday premium pay for time spent traveling on a holiday (or an “in lieu of” holiday), an employee continues to be entitled to pay for the holiday in the same manner as if the travel were not required. Thus, an employee may not earn compensatory time off for travel during basic (non-overtime) holiday hours because the employee is entitled to his or her rate of basic pay for those hours. Compensatory time off for travel may be earned by an employee only for time spent in a travel status away from the employee's official duty station when such time is not otherwise compensable.

Some commenters requested clarification regarding an employee's *travel status* as described in § 550.1404(b). Under § 550.1404(b), creditable travel time for the purpose of earning compensatory time off for travel includes the time an employee actually spends traveling between the official duty station and a temporary duty station, or between two temporary duty stations, and the usual waiting time that precedes or interrupts such travel (subject to certain exclusions). One union recommended revising § 550.1404(b)(1) to include situations where an employee may depart from his or her residence. We do not believe this is necessary, since travel to and from

home is addressed in § 550.1404(c). One agency recommended clarifying compensatory time off for travel requires travel orders and it is not appropriate when travel is within an employee's normal commuting area. We are not adopting these recommendations. Agencies are already required to process travel orders for officially authorized travel. In addition, § 550.1404(a) already requires an employee to travel away from (i.e., outside the limits of) his or her official duty station in order to earn compensatory time off.

Under § 550.1404(b)(1), time spent at a temporary duty station between arrival and departure is not time in a travel status. One individual recommended clarifying whether the arrival and departure are from the temporary duty worksite or lodging. We agree and have revised § 550.1404(b)(1) to clarify arrival and departure times. Time in a travel status ends when the employee arrives at the temporary duty worksite or his or her lodging in the temporary duty station, wherever the employee arrives first. Time in a travel status resumes when an employee departs from the temporary duty worksite or his or her lodging in the temporary duty station, from whichever the employee departs last.

One agency recommended clarifying whether travel in connection with a permanent change of station (PCS) is considered time spent in a *travel status*, and one individual recommended that it should be. Although PCS travel is officially authorized travel, it is not travel between an official duty station and a temporary duty station or between two temporary duty stations. Therefore, it is not considered time in a travel status for the purpose of earning compensatory time off for travel. The law applies to travel "away from the official duty station of the employee," not travel to a new official duty station. We believe that the regulation limiting application to temporary duty travel is consistent with the law and the intent of Congress. We have revised § 550.1404(b)(1) to clarify that travel time in connection with an employee's PCS is not time in a travel status for the purpose of earning compensatory time off.

Six individuals requested clarification of how travel is calculated when an employee travels between different time zones. We have added a new paragraph (e) to § 550.1404 to provide clarification regarding the calculation of an employee's travel time when the employee's travel involves two or more time zones. Under 5 CFR 550.1404(b)(1), time in a travel status includes the time

an employee "actually spends traveling" and the usual waiting time that precedes or interrupts the travel, subject to certain exclusions as specified in section 550.1404 of the regulations. When an employee's travel involves two or more time zones, the time zone from the point of first departure must be used to determine how many hours (i.e., elapsed time) the employee actually spent in a travel status for the purpose of accruing compensatory time off.

We received a number of comments on § 550.1404(b)(1) concerning the employing agency's sole and exclusive discretion to determine what is creditable as "usual waiting time." One agency, one union, and two individuals objected to providing agencies with this authority. The agency recommended establishing an upper and lower range of what is considered acceptable "usual waiting time." The union recommended including examples of "usual waiting times." The two individuals suggested defining "usual waiting time" to include the time it takes to get service at ticket counters, security, baggage claim, and transportation counters or using waiting times determined by the airlines or travel agencies. One individual commented that there may be different determinations of "usual waiting time" within an agency. We are not adopting any of these recommendations. The concept of "usual waiting time" is currently used in determining overtime hours of work under title 5 and the FLSA, and agencies are knowledgeable and experienced in applying this concept. In addition, we believe it is appropriate to give agencies the flexibility to make this determination.

Several commenters recommended removing § 550.1404(b)(2), which states that bona fide meal periods during actual travel time or waiting time are not creditable as time spent in a travel status. An agency stated it was absurd to subtract bona fide meal periods from creditable travel time but allow time periods for making telephone calls, dozing, chatting, wandering through terminals, etc., to be considered creditable travel time. Another agency commented that the results of making distinctions between employees who choose to eat at a terminal restaurant and employees who choose to eat while walking to or waiting at the gate are so anomalous that consistent application of the regulation cannot be expected. OPM included this limitation in the interim regulations because it is consistent with the requirement to subtract bona fide meal periods from an employee's creditable overtime hours of work under 5 CFR 550.112(m) and 551.432(c).

However, we agree that agencies should not try to make distinctions in the employee's activities during waiting time. Further, we agree it is not efficient or cost-effective to try to track employees' bona fide meal periods during travel time or waiting time solely for the purpose of crediting compensatory time off for travel, and we have removed § 550.1404(b)(2) accordingly.

Many commenters requested clarification of, or objected to, § 550.1404(b)(3), which states that extended waiting time is not creditable as time in a travel status. Under § 550.1404(b)(3), if an employee experiences an extended (i.e., not usual) waiting time between the periods of actual travel during which the employee is free to rest, sleep, or otherwise use the time for his or her own purposes, the extended waiting time is not creditable as time in a travel status. Three agencies recommended providing guidance on a range of acceptable hours for "extended waiting time," how much discretion an agency has in determining extended waiting times, or where to draw the line between "usual" and "extended" waiting times. Another agency recommended permitting an employee to earn compensatory time off for situations beyond the control of the employee, though not a large amount of compensatory time off. Three agencies and a union recommended revising § 550.1404(b)(3) to limit extended waiting time to any period during which an employee must obtain overnight lodging. We are not adopting any of these recommendations. Under § 550.1404(b)(1), determinations regarding what is creditable as usual waiting time are within the sole and exclusive discretion of the agency. The concept of excluding extended waiting time is currently used in determining creditable overtime hours of work under title 5 and the FLSA, and agencies are experienced in applying this limitation. Agencies should not establish a policy to credit compensatory time off for travel beyond the usual waiting time applied under title 5 and the FLSA.

We received several comments about subtracting commuting time from creditable travel time under § 550.1404(c)(1) and § 550.1404(d). Under § 550.1404(c)(1), an agency must deduct the hours the employee would have spent in normal home-to-work or work-to-home commuting from travel between the employee's home and a temporary duty station. Under § 550.1404(d), if a transportation terminal (such as an airport) is located within the limits of the employee's official duty station, the employee's

travel time to and from the airport (outside regular working hours) is considered to be equivalent to commuting time and is not creditable time in a travel status. If the airport is located outside the limits of the employee's official duty station, the travel time to and from the airport (outside regular working hours) is creditable time in a travel status, but it is subject to an offset for the time the employee would have spent in normal home-to-work or work-to-home commuting.

Several commenters objected to deducting normal commuting time on non-workdays as required by § 550.1404(d). An agency recommended deleting § 550.1404(d) entirely. Another agency and a union recommended revising § 550.1404(d) to make travel to and from a transportation terminal within an employee's official duty station official travel time rather than equivalent commuting time. The union also objected to subtracting an employee's normal commuting time under § 550.1404(c)(1). One individual recommended making an exception for employees who reside outside the local commuting area or to limit the amount of normal commuting time the agency deducts for such employees. We are not adopting any of these recommendations. The requirement in OPM's regulations in § 550.1404(c) and (d) regarding the deduction of normal commuting time is consistent with the requirement to deduct normal commuting time from an employee's travel time in determining creditable overtime hours of work under 5 CFR 550.112(j)(2) and 5 CFR 551.422(b).

An individual expressed concern regarding how § 550.1404(c) might be applied by his agency. In particular, he was concerned his agency might define "official duty station" to encompass an unreasonably large area so that an employee could not be credited for travel from home to a temporary duty station. It is true that, under the regulations, travel to a temporary duty station within an employee's official duty station is not creditable for the purpose of accruing compensatory time off for travel. However, as explained in an earlier paragraph regarding comments on the definition of "official duty station," an agency is required to use the same geographic area that is used for determining whether travel time is compensable under the overtime pay provisions. (See 5 CFR 550.112(j) and 551.422(d).) Thus, agency discretion is limited. We have no information indicating that the agencies have defined "official duty station" for overtime pay purposes in an

unreasonable way. Therefore, we decline to make any change in the regulations in this regard.

In the case of an employee who is offered one mode of transportation and who is permitted to use an alternative mode of transportation, or who travels at a time or by a route other than that selected by the agency, the agency must determine the estimated amount of time in a travel status the employee would have had if the employee had used the mode of transportation offered by the agency or traveled at the time or by the route selected by the agency under § 550.1404(c)(2). As recommended by an agency, we made a minor editorial correction to § 550.1404(c)(2) and replaced "traveled at the time and by the route selected by the agency" with "traveled at the time *or* by the route selected by the agency" [emphasis added].

One agency and an individual asked if compensatory time off for travel may be authorized when the employee returns a day earlier than planned. In such cases, the agency must credit an employee with the lesser of the estimated time in travel status the employee would have had if the employee had traveled on the day selected by the agency, or the employee's actual travel hours on a day other than that selected by the agency.

One individual commented an alternative mode of transportation may save the agency money and recommended imposing a daily limit on the amount of compensatory time off for travel rather than crediting the lesser travel time. We do not agree. The cost of travel may influence how an agency schedules an employee's travel, but it does not have any impact on an employee's entitlement to compensatory time off for travel.

Another individual asked if crediting the lesser travel time when an employee uses an alternative mode of transportation discriminates against employees with documented special needs and/or disabilities, such as a fear of flying, by not allowing the employee to earn compensatory time off for travel for the extra time spent traveling using the alternative mode of transportation. The regulatory requirement in § 550.1404(c)(2) regarding how to credit time when an employee uses an alternative mode of transportation, or travels at another time or by a route other than that selected by the agency, is consistent with the same requirement in determining creditable overtime hours of work under 5 CFR 551.422(c). In addition, an alternative mode of transportation or alternative route or time period may influence an agency's

authorization of official travel but does not have an impact on an employee's entitlement to compensatory time off for travel. Therefore we have not changed the regulation.

Two agencies recommended clarifying whether an agency may change an employee's work schedule for travel purposes. An agency may not adjust the regularly scheduled administrative workweek that normally applies to an employee (part-time or full-time) solely for the purpose of including planned travel time that would not otherwise be considered compensable hours of work. One individual recommended clarifying whether time spent traveling would be creditable as credit hours or compensatory time off for travel for an employee who is authorized to earn credit hours under an alternative work schedule. Credit hours are hours an employee elects to work, with supervisory approval, in excess of the employee's basic work requirement under a flexible work schedule. Under certain conditions, an agency may permit an employee to earn credit hours by performing productive and essential work while in a travel status. See OPM's Handbook on Alternative Work Schedules at http://www.opm.gov/oca/worksch/HTML/Cred_hrs.htm#travel for the conditions that must be met. If those conditions are met and the employee does earn credit hours for travel, the time spent traveling would be compensable and the employee would not be eligible to earn compensatory time off for travel. If the conditions are not met, the employee would be eligible to earn compensatory time off for travel.

One agency, one union, and one individual expressed concerns about the provision in § 550.1405(a) which allows the employing agency to credit an employee's earned compensatory time off in increments of one-tenth of an hour (6 minutes) or one-quarter of an hour (15 minutes). The agency recommended mandating the use of either 6-minute or 15-minute increments, rather than providing the choice, for payroll consistency. The union recommended permitting agencies to continue their established minimum charges to leave rather than modifying the payroll systems. The requirement to credit and use compensatory time off for travel in increments of 6 or 15 minutes is consistent with OPM's standardized policy for charging annual and sick leave in the same increments. In addition, agency time and attendance and payroll processing systems have already been modified to accommodate this change as a result of the interim

regulations issued in January 2005 on compensatory time off for travel.

Under § 550.1405(b), an employee must comply with his or her agency's procedures for requesting credit of the employee's compensatory time off and file such requests within the time period specified by the agency. An agency recommended adding a requirement that an employee's request for credit of compensatory time off for travel may be denied if the request is not filed within the time periods established by agency policy or guidelines. We agree and have added this requirement to § 550.1405(b). One union recommended that an agency should approve a request to earn compensatory time off for travel at the same time the travel authorization is issued. Another agency recommended setting a specific time period within which employees must submit requests for credit of compensatory time off for travel. We are not adopting these recommendations. We do not believe it is necessary to limit an agency's discretionary authority to prescribe such procedures and time limitations in its internal policies.

An agency recommended modification of OPM Form 71, *Request for Leave or Approved Absence*, or develop a new form, for employee requests to earn or use compensatory time off for travel. We do not believe it is necessary or desirable to mandate the use of a Governmentwide form for this purpose. However, an agency may choose to develop a form as part of its internal policies and procedures for requesting and using compensatory time off for travel.

Three agencies recommended establishing a limit on the number of hours of compensatory time off for travel an employee may earn. Establishing a cap on the amount of compensatory time off for travel an employee may earn would require a legislative change. A union and an individual recommended not limiting compensatory time off to domestic travel. These regulations are not limited to domestic travel; OPM's regulations apply to both domestic and foreign travel.

Using Compensatory Time Off for Travel

Under § 550.1406(a), an employee must request permission from his or her supervisor to schedule the use of his or her accrued compensatory time off in accordance with agency-established policies and procedures. One agency recommended requiring agencies to charge compensatory time off for travel on a first-in, first-out basis. We agree and have revised § 550.1406(b) to

require agencies to charge compensatory time off in the chronological order in which it was earned, with compensatory time off earned first being charged first. One individual recommended compensatory time off for travel should be redeemable at the rate of 1.5 times the number of hours spent traveling. No legal authority exists to permit an employee to be absent from his or her scheduled tour of duty on the basis of 1.5 hours for each hour of creditable travel time. In addition, the hour-for-hour rule in the interim regulation is consistent with the policy for earning and using compensatory time off in lieu of overtime pay under 5 CFR 550.114 and 551.531.

Under § 550.1406(b), earned compensatory time off may be used when an employee is granted time off from his or her scheduled tour of duty for leave purposes. One agency and two individuals requested clarification of how the use of earned compensatory time off for travel relates to "use-or-lose" annual leave. ("Use or lose" annual leave is accrued annual leave in excess of the maximum leave ceilings (i.e., 30, 45, or 90 days) that is subject to forfeiture at the end of the leave year.) Section 6304(d) of title 5, United States Code, prescribes the conditions under which an employee's forfeited annual leave may be restored to an employee. There is no legal authority to restore an employee's forfeited annual leave because the employee elected to use earned compensatory time off for travel instead of using his or her excess annual leave.

Forfeiting Unused Compensatory Time Off for Travel

We received several comments on § 550.1407(a)(1), which requires employees to forfeit unused compensatory time off if it is not used by the end of the 26th pay period after the pay period during which it was credited, except as provided in § 550.1407(a)(2) (e.g., when an employee separates or is placed in a leave without pay status to perform service in the uniformed services with restoration rights or who has suffered an on-the-job injury with entitlement to injury compensation under 5 U.S.C. chapter 81 and who later returns to service.). Two agencies recommended clarifying whether the forfeiture of unused compensatory time off occurs within 26 pay periods after it has been earned or credited to their payroll account. We agree and have revised § 550.1407(a)(1) to clarify that an employee must use his or her accrued compensatory time off within 26 pay periods after it is earned or forfeit such compensatory time off.

One agency recommended giving agencies discretionary authority to provide a time limit for an employee to use compensatory time off for travel in the same way agencies are allowed to provide time limitations for the use of other compensatory time off. Another agency recommended establishing a specific date for using earned compensatory time off for travel. A union recommended an employee be allowed to use his or her earned compensatory time off for travel from the date earned until the end of the next leave year. Two individuals expressed concerns that agencies would not allow their employees to use their earned compensatory time for travel within 26 pay periods. One union and an individual recommended establishing a longer period of time, such as 52 pay periods, before requiring forfeiture of compensatory time off for travel. Several commenters recommended providing agencies discretionary authority to extend the time limit for using earned compensatory time off for travel in emergency situations or when employees are required to complete mission-critical assignments.

While the use of compensatory time off for travel is subject to agency work demands, we believe 26 pay periods is a sufficient amount of time for most employees to use their earned compensatory time off. However, we believe exceptions may be warranted in exceptional situations, for example, during emergency situations, to complete mission-critical assignments, or when employees are deployed to perform work directly related to a military operation. Therefore, we have added a new paragraph (e) to § 550.1407 to permit an authorized agency official, at his or her sole and exclusive discretion, to extend the time limit for using earned compensatory time off for travel if an employee's failure to use the compensatory time off within 26 pay periods is due to an exigency of the service beyond the employee's control.

Section 550.1407(a)(2) extends the period for using earned compensatory time off for travel for an employee who separates from Federal service or is placed in a leave without pay status to perform service in the uniformed services with restoration rights or who has suffered an on-the-job injury with entitlement to injury compensation under 5 U.S.C. chapter 81 and who later returns to service in the same (or successor) agency. In these circumstances, the employee must use his or her earned compensatory time off by the end of the 26th pay period following the pay period in which the employee returns to duty. One agency

objected to allowing the 26 pay periods to start over from the beginning upon an employee's return to duty. We believe it is reasonable to provide an employee, under these circumstances, a full 26 pay periods following his or her return to duty within which to use earned compensatory time off for travel.

An agency recommended allowing agencies to consider unused compensatory time off when determining an employee's separation date. We are not adopting this recommendation. An agency has the authority under § 550.1406(a) to approve or disapprove an employee's request to use his or her accrued compensatory time off in accordance with agency-established policies and procedures.

Two individuals objected to the provision in § 550.1408 which prohibits an individual from receiving payment under any circumstances for any unused compensatory time off for travel that he or she earned. However, the law explicitly prohibits payment for unused compensatory time off. (See 5 U.S.C. 5550b(b).)

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

Office of Personnel Management.

Linda M. Springer, Director.

Accordingly, the interim rule amending 5 CFR part 550, which was published at 70 FR 3855 on January 27, 2005, is adopted as final with the following changes:

PART 550—PAY ADMINISTRATION (GENERAL)

1. The authority citation for part 550 continues to read as follows:

Authority: 5 U.S.C. 5304 note, 5305 note, 5541(2)(iv), 5545a(h)(2)(B) and (i), 5547(b) and (c), 5548, and 6101(c); sections 407 and 2316, Pub. L. 105-277, 112 Stat. 2681-101 and 2681-828 (5 U.S.C. 5545a); E.O. 12748, 3 CFR, 1992 Comp., p. 316.

Subpart N—Compensatory Time Off for Travel

2. Revise the first sentence of § 550.1401 to read as follows:

§ 550.1401 Purpose.

This subpart contains OPM regulations implementing 5 U.S.C. 5550b, which establishes a separate type of compensatory time off. * * *

3. In § 550.1403, add the definitions of *accrued compensatory time off* and *authorized agency official* and revise the definition of *travel* to read as follows:

§ 550.1403 Definitions.

Accrued compensatory time off means the compensatory time off earned by an employee that has not been used or forfeited.

Authorized agency official means the head of the agency or an official who is authorized to act for the head of the agency in the matter concerned.

Travel means officially authorized travel—i.e., travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies. Time spent traveling in connection with union activities is excluded.

4. In § 550.1404, revise paragraph (b)(1), remove paragraph (b)(2), redesignate paragraph (b)(3) as paragraph (b)(2), revise the first sentence of paragraph (c)(2), and add paragraph (e) to read as follows:

§ 550.1404 Creditable travel time.

(b)(1) *Travel status.* Time in a travel status includes the time an employee actually spends traveling between the official duty station and a temporary duty station, or between two temporary duty stations, and the usual waiting time that precedes or interrupts such travel, subject to the exclusion specified in paragraph (b)(2) of this section and the requirements in paragraph (c), (d) and (e) of this section. Time spent at a temporary duty station between arrival and departure is not time in a travel status. Time in a travel status ends when the employee arrives at the temporary duty worksite or his or her lodging in the temporary duty station, wherever the employee arrives first. Time in a travel status resumes when an employee departs from the temporary duty worksite or his or her lodging in the temporary duty station, from whichever the employee departs last. Travel time in connection with an employee's permanent change of station

is not time in a travel status. Determinations regarding what is creditable as "usual waiting time" are within the sole and exclusive discretion of the employing agency.

(c) * * *

(2) In the case of an employee who is offered one mode of transportation and who is permitted to use an alternative mode of transportation, or who travels at a time or by a route other than that selected by the agency, the agency must determine the estimated amount of time in a travel status the employee would have had if the employee had used the mode of transportation offered by the agency or traveled at the time or by the route selected by the agency. * * *

(e) *Travel involving two or more time zones.* When an employee's travel involves two or more time zones, the time zone from the point of first departure must be used to determine how many hours the employee actually spent in a travel status for the purpose of accruing compensatory time off.

5. In § 550.1405, paragraph (b) is revised to read as follows:

§ 550.1405 Crediting compensatory time off.

(b) An employee must comply with his or her agency's procedures for requesting credit of compensatory time off under this section. Employees must file such requests within the time period required by the agency. An employee's request for credit of compensatory time off for travel may be denied if the request is not filed within the time period required by the agency.

6. In § 550.1406, revise the section heading and paragraph (b) to read as follows:

§ 550.1406 Use of accrued compensatory time off.

(b) Compensatory time off may be used when the employee is granted time off from his or her scheduled tour of duty established for leave purposes. An employee must use earned compensatory time off under this subpart in increments of one-tenth of an hour (6 minutes) or one-quarter of an hour (15 minutes). Agencies must charge compensatory time off in the chronological order in which it was earned, with compensatory time off earned first being charged first.

7. In § 550.1407, revise paragraph (a)(1) and add a new paragraph (e) to read as follows:

§ 550.1407 Forfeiture of unused compensatory time off.

(a) *After 26 pay periods.* (1) Except as provided in paragraphs (a)(2) and (e) of this section, an employee must use accrued compensatory time off by the end of the 26th pay period after the pay period during which it was earned. If an employee fails to use the compensatory time off within 26 pay periods after it was earned, he or she must forfeit such compensatory time off.

* * * * *

(e) *Exception due to an exigency.* If an employee fails to use his or her compensatory time earned under § 550.1404(a) by the end of the 26th pay period after the pay period during which it was earned due to an exigency of the service beyond the employee's control, an authorized agency official, at his or her sole and exclusive discretion, may extend the time limit for using such compensatory time off for travel for up to an additional 26 pay periods.

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**OFFICE OF PERSONNEL
MANAGEMENT**
5 CFR Part 890
RIN 3206-A162
Waiver of Requirements for Continued Coverage During Retirement

AGENCY: Office of Personnel Management.

ACTION: Final Rule.

SUMMARY: Under current Federal Employees Health Benefits (FEHB) Program regulations, the Office of Personnel Management (OPM) may waive the eligibility requirements for health benefits coverage as an annuitant for an individual when, in its sole discretion, it determines that it would be against equity and good conscience not to allow a person to be enrolled in the FEHB Program as an annuitant. The regulations state that an individual's failure to satisfy eligibility requirements must be due to exceptional circumstances. They also list specific situations where a waiver will not be granted by OPM such as when an individual's retirement is based on a disability or an involuntary separation, or when an individual was misadvised by his/her employing office. This final regulation eliminates these specific situations from the regulation. This final regulation provides OPM with more flexibility when granting waivers.

EFFECTIVE DATE: May 17, 2007.

ADDRESSES: This document is available for viewing at the U.S. Office of Personnel Management, 1900 E Street, NW., Washington DC 20415. Send all comments to Michael Kaszynski, Insurance Policy, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3415, Washington DC 20415.

FOR FURTHER INFORMATION CONTACT: Michael Kaszynski, Policy Analyst, at 202-606-0004.

SUPPLEMENTARY INFORMATION: Under 5 U.S.C. 8905(b), OPM may waive the eligibility requirements for health benefits coverage as an annuitant for an individual when, in its sole discretion, it determines that it would be against equity and good conscience not to allow a person to be enrolled in the FEHB Program as an annuitant. Under 5 CFR 890.108, an individual's failure to satisfy eligibility requirements must be due to exceptional circumstances. An individual requesting a waiver must provide OPM with evidence that (1) the individual intended to have FEHB coverage as an annuitant (retiree); (2) the circumstances that prevented the individual from meeting the requirements of 5 U.S.C. 8905(b) were beyond the individual's control; and (3) the individual acted reasonably to protect his or her right to continue coverage into retirement.

Section 890.108 lists specific situations where a waiver will not be granted by OPM such as when an individual's retirement is based on a disability or an involuntary separation, or an individual was misadvised by his/her employing office. This final regulation eliminates these specific situations from 5 CFR 890.108 to provide more flexibility to the waiver process.

On August 7, 2006, a proposed regulation was published in the **Federal Register** at 71 FR 44592. We received no comments on the proposed rule. We have made no changes to this rule from its proposed version.

Collection of Information Requirement

This final rule does not impose information collection and recordkeeping requirements that meet the definition of the Paperwork Reduction Act of 1995's term "collection of information" which means obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on ten or more

persons, other than agencies, instrumentalities, or employees of the United States; or answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies with revenues of \$11.5 million or less in any one year. This final rulemaking affects FEHB Program health insurance eligibility requirements which do not impact the dollar threshold. Therefore, I certify that this final regulation will not have a significant economic impact on a substantial number of small entities.

Regulatory Impact Analysis

We have examined the impact of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the RFA (September 16, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995, (Pub. L. 104-4), and Executive Order 13132. Executive Order 12866 (as amended by Executive Order 13258, which merely assigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects (\$100 million or more in any one year). This rule is not considered a major rule, as defined in section 804(2) of title 5, United States Code, because we estimate its impact will only affect federal government employment offices. Any resulting economic impact would not be expected to exceed the dollar threshold.

Executive Order 12866, Regulatory Review

This final rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.