

# Proposed Rules

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

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 550

RIN 3206-AM08

#### Pay for Sunday Work

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management is issuing proposed regulations that would implement the ruling in the case of *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009). In this decision the United States Court of Appeals for the Federal Circuit ruled that part-time employees are covered under the provisions of 5 U.S.C. 5546(a), the statute governing the payment of Sunday premium pay for work performed on Sundays. The revised Sunday premium pay regulations would eliminate references to “full-time” employees, which will permit Sunday premium payments to part-time employees, pursuant to 5 U.S.C. 5546(a). Prevailing rate employees are entitled to payment of Sunday premium pay, pursuant to 5 U.S.C. 5544(a). Consistent with the reasoning in the *Fathauer* decision, OPM has determined that part-time prevailing rate employees are covered under the provisions of 5 U.S.C. 5544(a).

**DATES:** Comments must be received on or before June 8, 2010.

**ADDRESSES:** You may submit comments, identified by RIN number “3206-AM08,” using either of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail:* Jerome D. Mikowicz, Deputy Associate Director, Employee Services, Pay and Leave, U.S. Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200.

**FOR FURTHER INFORMATION CONTACT:** David Barash by telephone at (202) 606-

2858; by fax at (202) 606-0824; or by e-mail at [pay-performance-policy@opm.gov](mailto:pay-performance-policy@opm.gov).

**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management (OPM) is issuing proposed regulations that would implement the decision in *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009), in which the court determined that part-time employees are employees covered under the provisions of 5 U.S.C. 5546(a).

#### Background

Under the *Fathauer* decision, the United States Court of Appeals for the Federal Circuit held that the definition of “employee” in 5 U.S.C. 5546(a) is unambiguous under the plain language of the statute and concluded that part-time employees are covered under the Sunday premium pay statute at 5 U.S.C. 5546(a). OPM issued a compensation policy memorandum (CPM-2009-21, December 8, 2009) to inform departments and agencies of the *Fathauer* decision and to provide guidance for processing administrative claims for back pay. The guidance covers General Schedule employees covered by 5 U.S.C. 5546(a) and 5 CFR 550.171(a) and prevailing rate employees (wage grade employees) covered by 5 U.S.C. 5544(a) and 532.509. Based on the *Fathauer* decision, eligible part-time employees are entitled to Sunday premium pay under 5 U.S.C. 5546(a) effective as of May 26, 2009.

#### Change to Regulations

OPM’s proposed regulations would amend §§ 550.103 and 550.171(a) to remove references to “full-time” employee. The intent is to eliminate the restriction on the payment of Sunday premium pay to full-time employees only. Therefore, the proposed regulations would clarify, in accordance with the *Fathauer* decision, that part-time employees who are regularly scheduled to perform work on a Sunday are entitled to Sunday premium pay for the non-overtime hours worked. However, intermittent employees will continue to be excluded from earning Sunday premium pay because of the nature of their appointment and irregular work schedule. Sunday premium pay may be paid only to full-time and part-time employees who have

Sundays as part of their non-overtime regularly scheduled tour of duty.

Although OPM applied the reasoning in the *Fathauer* decision to determine that part-time prevailing rate employees are covered under the Sunday premium pay provisions under 5 U.S.C. 5544(a) (also effective as of May 26, 2009), there is no need for a change in the current regulations covering prevailing rate employees. Under § 532.509, a wage employee whose regular work schedule includes an 8-hour period of service which is not overtime work, a part of which is on Sunday, is entitled to additional pay under the provisions of 5 U.S.C. 5544. Since § 532.509 does not reference either part-time or full-time employees, there is no need to change this current regulation.

#### E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget 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.

**John Berry,**

*Director, U.S. Office of Personnel Management.*

Accordingly, OPM is proposing to amend 5 CFR part 550 as follows:

#### PART 550—PAY ADMINISTRATION (GENERAL)

##### Subpart A—Premium Pay

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

**Authority:** 5 U.S.C. 5304 note, 5305 note, 5504(d), 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.

2. In § 550.103, revise the definition of *Sunday work* to read as follows:

##### § 550.103 Definitions.

\* \* \* \* \*

*Sunday work* means nonovertime work performed by an employee during

a regularly scheduled daily tour of duty when any part of that daily tour of duty is on a Sunday. For any such tour of duty, not more than 8 hours of work are Sunday work, unless the employee is on a compressed work schedule, in which case the entire regularly scheduled daily tour of duty constitutes Sunday work.

\* \* \* \* \*

3. In § 550.171, revise paragraph (a) to read as follows:

**§ 550.171 Authorization of pay for Sunday work.**

(a) An employee is entitled to pay at his or her rate of basic pay plus premium pay at a rate equal to 25 percent of his or her rate of basic pay for each hour of Sunday work (as defined in § 550.103).

\* \* \* \* \*

[FR Doc. 2010-8154 Filed 4-8-10; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 21**

[Docket No. FAA-2010-0218; Notice No. 10-03]

RIN 2120-AJ56

**Function and Reliability Flight Testing for Turbine-Powered Airplanes Weighing 6,000 Pounds or Less**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This action proposes to revise the applicability for function and reliability flight testing to include all turbine-powered airplanes weighing 6,000 pounds or less. Revising the applicability is necessary because advancements in aviation technology have invalidated the reasons for excluding these airplanes. The proposed revision would improve aviation safety for these airplanes.

**DATES:** Send your comments on or before July 8, 2010.

**ADDRESSES:** You may send comments identified by Docket Number FAA-2010-0218 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.

- *Mail:* Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12-140, West

Building Ground Floor, Washington, DC 20590-0001.

- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- *Fax:* Fax comments to Docket Operations at (202) 493-2251.

*Privacy:* We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the electronic form of all comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://DocketsInfo.dot.gov>.

*Docket:* To read background documents or comments received, go to <http://www.regulations.gov> at any time and follow the online instructions for accessing the docket, or go to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Victor Powell, Aircraft Certification Service, Aircraft Engineering Division, Certification Procedures Branch, AIR-110, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 385-6312; facsimile (202) 385-6475; e-mail [victor.powell@faa.gov](mailto:victor.powell@faa.gov).

**SUPPLEMENTARY INFORMATION:**

**Authority for This Rulemaking**

The Federal Aviation Administration's (FAA) authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes the scope of the FAA Administrator's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart III, chapter 447, section 44701. Under that section, Congress charges the FAA with promoting the safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the FAA Administrator finds necessary for safety in air commerce.

This regulation is within the scope of that authority because it will prescribe new safety procedures for turbine-powered airplanes.

**Discussion of the Proposal**

*I. Statement of the Problem*

For part 23, function and reliability (F & R) flight testing is required by Title 14, Code of Federal Regulations (14 CFR) 21.35(b)(2) for all airplanes weighing more than 6,000 pounds maximum certified weight. Function and reliability flight testing is not required for gliders, nor for part 23 airplanes weighing 6,000 pounds or less. Because of advancements in airplane structures, propulsion methods, and systems technologies, the 6,000 pound break point may no longer be justified. Turbine-powered airplanes that weigh 6,000 pounds or less are not required to undergo F & R flight testing regardless of the airplane's systems complexity or level of automation. After reviewing several recent TC projects for small turbojet-powered airplanes (turbojets)—involving airplanes expected to weigh 6,000 pounds or less—the FAA has determined that most, if not all, of these airplane designs would benefit from the F & R flight testing requirement. This determination is based on new lightweight, turbine-powered airplanes having design features and performance consistent with larger airplanes that are required to undergo F & R flight testing.

*II. Background*

**A. What Is Function and Reliability Flight Testing?**

Function and reliability flight testing simulates typical aircraft, in-service flight operations for a new aircraft design. This flight testing is done prior to the aircraft's final design approval leading to the issuance of a TC. The F & R flight testing requirement in § 21.35(b)(2) gives the FAA and the public a reasonable assurance that an aircraft, its components, and its equipment are reliable and function properly.

Function and reliability flight testing covers a wide variety of operations that an aircraft will likely undertake in service. Typically, F & R flight testing plans specify the type and number of each task to be completed (*i.e.*, takeoffs, landings, Instrument Landing Systems approaches, high altitude, hot/cold/humid air operations, stalls, in-flight engine restarts, engine starts using different power sources, flight in rain, and night flights).

In addition, F & R flight testing involves simulated in-service operations