




OFFICE OF THE DIRECTOR

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, DC 20415-1000

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MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Kay Coles James
Director 
SUBJECT: Federal Workforce Flexibility Act of 2004

This is to inform you of several changes in pay and leave administration, benefits, and other human resources policies resulting from the enactment of the Federal Workforce Flexibility Act of 2004, which was signed into law by President George W. Bush on October 30, 2004. We have listed the changes in the order in which they will become effective.

SES and SL/ST Annual Leave Accrual (Effective October 30, 2004)

Section 202(b) of the Act adds a new paragraph (f) to 5 U.S.C. 6303 to provide that members of the Senior Executive Service (SES), employees in senior level (SL) and scientific or professional (ST) positions, and employees covered by an equivalent pay system, as determined by the Office of Personnel Management (OPM), will accrue annual leave at the rate of 1 day (8 hours) for each full biweekly pay period. This provision became effective on October 30, 2004. Since the accrual rate changes during the October 17-30 pay period, the higher accrual rate will become effective as of the end of that pay period. Agencies are responsible for crediting annual leave at the 8-hour accrual rate for affected employees for the full pay period. OPM will issue conforming regulations to reflect this new provision in the near future. In addition, OPM will issue a separate memorandum regarding the extension of the higher annual leave accrual rate to employees covered by equivalent pay systems.

Critical Pay Authority (Effective October 30, 2004)

Section 102 of the Act shifts primary responsibility for the Federal Government's critical pay authority from the Office of Management and Budget (OMB) to OPM to facilitate increased application of this underutilized flexibility as a means of attracting talented individuals to critical positions in the Federal Government who would not otherwise accept or stay in Government jobs at lower rates of pay. This provision became effective on October 30, 2004.

Under the critical pay authority, OPM may, upon the request of an agency head, and after consultation with OMB, grant authority to fix the rate of basic pay for one or more critical positions in an agency at not less than the rate that would otherwise be payable for that position,

up to the rate for level I of the Executive Schedule (\$175,700 in 2004). Under this same provision of law, a higher rate of pay may be established upon the President's written approval. In order to apply the critical pay authority, the position must require a very high level of expertise in a scientific, technical, professional, or administrative field and be crucial to the accomplishment of an agency's mission. Until regulations or other guidance is provided, agencies wishing to use the critical pay authority should continue to use the criteria provided by OMB Bulletin 91-09, "Critical Pay Position Authority," dated March 7, 1991, except that all requests must be submitted to OPM, and OPM, in consultation with OMB, will make the determination to approve such a request.

Agency Training (Effective October 30, 2004)

Section 201 of the Act amends 5 U.S.C. 4103 and adds a new section 4121. These changes require Federal agencies to regularly evaluate and modify training programs or plans in order to promote a more strategic approach to agencies' integration of training programs into overall mission accomplishment, and provide specific training to develop managers as part of a comprehensive management succession program. The new provisions became effective on October 30, 2004.

The Act adds the requirement that each agency, on a regular basis, evaluate each of its training plans or programs as to how that plan or program accomplishes or effectively promotes the agency's specific performance plans and strategic goals. Agencies will modify those training plans or programs, as needed, to ensure that they continually meet and support specific agency established performance plans and strategic goals.

Under the Act, agency heads, in consultation with OPM, must establish a comprehensive management succession program that includes training of employees to develop managers. This program will include training for managers on actions, options, and strategies managers may use to address mentoring employees, improving employee performance and productivity, conducting performance appraisals, and unacceptable performance.

Compensatory Time Off for Travel (Effective no later than January 28, 2005)

Section 203 of the Act amends 5 U.S.C. chapter 55, subchapter V, by adding a new section 5550b to establish 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 if the travel time is not otherwise compensable. OPM will issue implementing regulations in the near future. This amendment will take effect on the earlier of (1) the effective date of OPM's implementing regulations or (2) January 28, 2005.

Annual Leave Enhancements (Effective no later than April 28, 2005)

Section 202(a) of the Act adds a new paragraph (e) to 5 U.S.C. 6303 to provide that a newly appointed employee's prior non-Federal work experience may be creditable in determining the amount of annual leave the employee will earn each biweekly pay period. Qualified non-Federal work experience must have been performed in a position with duties that directly relate to the

position to which he or she is being appointed and must meet other requirements as prescribed by OPM. Additionally, the head of the agency to which the new employee is appointed must determine that the granting of such service credit is necessary in order to achieve an agency mission or performance goal. Section 202 provides that not later than 180 days after enactment of the Act (April 28, 2005), OPM must prescribe regulations to allow the credit of non-Federal service for the purpose of determining an employee's annual leave accrual rate.

Recruitment, Relocation, and Retention Bonuses (Effective May 1, 2005)

Section 101(a) of the Act establishes significantly enhanced recruitment, relocation, and retention bonus authorities that will provide Federal agencies with the flexibility to use such bonuses in more strategic ways to help the Federal Government improve its competitiveness in recruiting and maintaining a high quality workforce. The enhanced authorities will replace the current recruitment and relocation bonus and retention allowance authorities under 5 U.S.C. 5753 and 5754. For example, under regulations to be prescribed by OPM, the recruitment, relocation, and retention bonus enhancements provided by the Act include the authority to—

- Pay larger recruitment and relocation bonuses based on the length of an agreed-upon service period, capped at 25 percent of the employee's annual salary multiplied by the number of years the employee agrees to serve in the position (up to a maximum of 4 years).
- Waive the normal cap on recruitment and relocation bonuses because of a critical agency need in order to pay higher amounts over shorter periods of time (not to exceed a total of 100 percent of the employee's starting salary).
- Pay recruitment bonuses to current Federal employees under conditions prescribed in OPM regulations.
- Pay retention bonuses to employees who are likely to leave for other Federal positions under conditions prescribed in OPM regulations.
- Pay recruitment, relocation, and retention bonuses in alternative ways, such as in installments or in a lump sum at the end of a service period.
- Request that OPM waive the limitation on an individual retention bonus (25 percent of salary) or a group retention bonus (10 percent of salary) to allow retention bonus payments of up to 50 percent of salary based on a critical agency need.

Under the amended provisions in 5 U.S.C. 5753 and 5754, agencies may not pay new recruitment, relocation, and retention bonuses to individuals appointed by the President, by and with the advice and consent of the Senate; noncareer appointees in the Senior Executive Service; or individuals in positions excepted from the competitive service by reason of their confidential, policy-determining, policy-making, or policy-advocating character. In addition, section 101(b) of the Act repeals the special relocation bonus limitation for law enforcement officers. This

special limitation is no longer needed because the new relocation bonus authority in 5 U.S.C. 5753 provides a higher payment limit for all employees.

Section 101(d) of the Act provides that the new recruitment, relocation, and retention bonus provisions will become effective on the first day of the first pay period beginning on or after April 28, 2005 (i.e., May 1, 2005). However, a recruitment or relocation bonus service agreement that is authorized before this effective date will continue until its expiration. Also, a retention allowance authorized before this effective date will continue until the retention allowance is reauthorized or terminated, but not longer than 1 year after the effective date of the new provisions. OPM will issue implementing regulations to reflect the new recruitment, relocation, and retention bonus authorities before the effective date. Finally, section 101(c) of the Act requires OPM to submit an annual report to Congress on the operation of the new recruitment, relocation, and retention bonus authorities. OPM will provide additional information to agencies on the data needed for this report at a later date.

Corrections Relating to Pay Administration (Effective May 1, 2005)

Section 301 of the Act amends provisions in 5 U.S.C. chapter 53 relating to special pay rates, locality rates, and retained rates. These changes are designed to restore logic and fairness in individual pay determinations and improve the effectiveness of the special salary rates program as a recruitment and retention tool. These new provisions will become effective on the first day of the first pay period beginning on or after April 28, 2005 (i.e., May 1, 2005). OPM will issue necessary implementing regulations before the effective date.

The section 301 amendments, along with OPM's implementing regulations, will correct a variety of pay administration anomalies resulting from the interaction of special rates, locality pay, and retained rates and the current application of complex pay administration rules. These changes will allow OPM to treat special rates and locality rates in similar ways for the purpose of promotions, pay retention, and movements between pay systems and schedules.

Among the changes made by section 301 are the following:

- When an employee's special rate is surpassed by a locality rate, the underlying special rate will no longer be used for any purpose.
- Locality rates may be taken into account in applying the GS promotion rule in circumstances specified in OPM regulations. For example, OPM's regulations may provide that if an employee is being promoted from a special rate position to a higher-graded non-special rate position, the former special rate will be increased by two steps and slotted into the appropriate rate on the higher locality pay schedule.
- Locality rates will be taken into account in applying pay retention rules. Locality pay will no longer be paid on top of a retained rate. Retained rates will be compared to the highest applicable rate range (as adjusted to include any locality pay or special rate supplement).
- The reduction of a special rate because of a geographic move will not trigger pay retention (i.e., the same treatment as applies to a locality rate).

- Saved rates of pay established by an authority other than the pay retention provisions of 5 U.S.C. 5363 (i.e, by the promotion rule in 5 U.S.C. 5334(b) or the grade retention provisions of 5 U.S.C. 5362) will be deemed to be retained rates under section 5363 and will be adjusted accordingly.
- The maximum special salary rate will be increased from level V to level IV of the Executive Schedule (the same cap that applies to locality rates for GS employees).
- Agencies will be authorized to determine that their employees will not be covered by a proposed or an existing special rate schedule.

Additional Information

For additional information, agency Chief Human Capital Officers and/or Human Resources Directors should contact their assigned OPM Human Capital Officer. Employees should contact their agency human resources office for assistance.

cc: Chief Human Capital Officers
Human Resources Directors