



6325-39-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR PARTS 410, 550, 551, and 870

RIN: 3206-AN19

Overtime Pay for Border Patrol Agents

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing proposed regulations to implement section 2 of the Border Patrol Agent Pay Reform Act of 2014, as amended, which established a new method of compensating Border Patrol agents for overtime work. Payments under this new provision will become payable beginning with the first pay period beginning in January 2016. These regulations affect only Border Patrol agents in the U.S. Customs and Border Protection component of the Department of Homeland Security.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN number “3206–AN19” using any of the following methods:

Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.

E-mail: pay-leave-policy@opm.gov.

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

FOR FURTHER INFORMATION CONTACT: Bryce Baker by telephone at (202) 606-2858 or by email at pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing proposed regulations to implement section 2 of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277, December 18, 2014, as amended by Public Law 114-13, May 19, 2015), hereafter referred to as “BPAPRA.” BPAPRA established a new method of compensating Border Patrol agents for overtime work. These regulations affect only Border Patrol agents employed by the U.S. Customs and Border Protection (CBP) component of the Department of Homeland Security (DHS). Most BPAPRA provisions are effective on the first day of the first pay period beginning on or after January 1, 2016.

Background

Currently, Border Patrol agents generally receive a special form of overtime compensation called “Administratively Uncontrollable Overtime” (AUO) under 5 U.S.C. 5545(c)(2) and 5 CFR 550.151-550.163. AUO may be used for employees who perform substantial amounts of irregular overtime (OT) work that cannot be controlled administratively. AUO provides complete compensation under title 5 for all irregular overtime hours—i.e., overtime that is not regularly scheduled in advance of the workweek. AUO is paid as a percentage of basic pay, generally ranging from 10 to 25 percent, with the exact percentage depending on the average number of irregular overtime hours per week—subject to the title 5 premium pay cap. An employee who is nonexempt under the Fair Labor Standards Act (FLSA)

also receives an extra half rate for irregular overtime hours as FLSA overtime pay. AUO recipients receive regular title 5 or FLSA overtime pay for regularly scheduled overtime hours. AUO is basic pay for retirement purposes for recipients who are covered under the special retirement program provisions pertaining to law enforcement officers. Border Patrol agents qualify as such law enforcement officers.

Recently, the use of AUO at DHS has been under scrutiny from the Congress, the Office of Special Counsel, and the Government Accountability Office. Various reviews indicated that AUO was being used improperly for some DHS employees, and DHS has taken actions to address the matter. As documented in the August 26, 2014, report on S. 1691 (i.e., the bill later enacted as BPAPRA) by the Senate Committee on Homeland Security and Governmental Affairs (Senate Report 113-248), the nature of the work performed by Border Patrol agents has changed significantly since the AUO law was first enacted in 1954. In particular, CBP prefers deploying agents for scheduled 10-hour shifts, which is incompatible with AUO, which covers irregular overtime. Congress determined that Border Patrol agents needed a reformed overtime program that is consistent with the current nature of the work and the desired work schedules, and therefore enacted BPAPRA.

Summary of BPAPRA

Under BPAPRA, in place of AUO, a new form of overtime compensation would apply to Border Patrol agents. The key features of BPAPRA are summarized below:

- Most Border Patrol agents will have the opportunity each year to elect to be assigned to one of three types of “regular tour of duty” which provide different rates of compensation: (1) a Level 1 regular tour of duty, which provides an overtime supplement equal to 25 percent of basic pay for a regular schedule of 10 hours each

regular workday, including 2 overtime hours; (2) a Level 2 regular tour of duty, which provides an overtime supplement equal to 12.5 percent of basic pay for a regular schedule with 9 hours each regular workday, including 1 overtime hour; and (3) a Basic regular tour of duty with a regular 8-hour workday, which provides no overtime supplement.

- CBP may assign regular tours of duty in certain circumstances without regard to agent elections. For example, agents assigned to care for canines must be assigned a Level 1 regular tour of duty. Agents in certain positions—headquarters, administrative, or training or fitness instructor—must be assigned a Basic regular tour of duty unless a different tour is justified based on a staffing analysis. In addition, generally no more than 10 percent of agents at a location may have a Level 2 or Basic regular tour of duty. In other words, generally at least 90 percent of agents at a location must have a Level 1 regular tour of duty. CBP may revise the percentage requirement for a location if justified based on a staffing analysis.
- The requirement for 1 or 2 hours of scheduled overtime within a Level 2 or Level 1 regular tour of duty, respectively, applies only if the agent performs work during regular time on that same day. For example, if an agent takes leave for a full 8-hour basic workday, no obligation to perform those scheduled overtime hours accrues on that day, and there is no loss of pay.
- The overtime supplement for regularly scheduled overtime hours within the assigned Level 1 or Level 2 regular tour of duty is a percentage of the agent's hourly rate of basic pay and is multiplied by number of paid hours of basic pay (i.e., hours of regular time, whether work or paid absence) in the biweekly pay period. Thus, the

supplement is payable during leave or other paid time off taken from the 40-hour basic workweek.

- The overtime supplement is subject to the title 5 premium pay cap.
- An agent may not receive other premium pay for regularly scheduled overtime hours *within* his or her regular tour of duty (i.e., hours covered by the overtime supplement).
- The overtime supplement is treated as part of basic pay for retirement and certain other purposes, such as life insurance and severance pay.
- CBP must develop a plan to ensure that the assignment of an overtime supplement to an agent during the period beginning 3 years before the agent reaches retirement age and service requirements is consistent with the agent's career average overtime supplement.
- Overtime work in excess of the biweekly regular tour of duty (generally 100, 90, or 80 hours, as applicable) would be separately compensable. If the additional overtime work is regularly scheduled in advance of the workweek, the work is compensated under the regular title 5 overtime provisions (5 U.S.C. 5542). If the additional overtime work is irregular, the work is compensated by crediting the agent with compensatory time off. However, no more than 10 hours of compensatory time off may be earned in a biweekly pay period (unless a written waiver of this provision is approved in advance) and no more than 240 hours may be earned during a leave year.
- If the agent is absent during required scheduled overtime within the regular tour of duty (i.e., obligated overtime hours), payment of the overtime supplement is not affected but the agent accrues an obligation (debt) to perform other overtime work to make up for work not performed. Any accrued compensatory time off will be applied

against that overtime hours debt. Any additional overtime work outside the regular tour of duty in future pay periods will also be applied against that debt.

- All Border Patrol agents are FLSA-exempt. This exemption applies to both the minimum wage and the maximum hours and overtime provisions of the FLSA.

Effective Date

BPAPRA was enacted on December 18, 2014 as Public Law 113-277. On May 19, 2015, BPAPRA was amended by Public Law 114-13 to clarify the effective date of certain provisions. Section 1(a) of Public Law 114-13 added a new subsection (i) in section 2 of BPAPRA. That section 2(i) provided that subsections (b), (c), (d), and (g) of section 2 of BPAPRA are effective on the first day of the first pay period beginning on or after January 1, 2016, except that (1) any provision of 5 U.S.C. 5550(b) (as added by section 2(b) of BPAPRA) relating to administering elections and making advance assignments to a regular tour of duty is applicable before the January 2016 effective date to the extent determined necessary by the OPM Director and (2) the OPM Director's authority to issue regulations (in particular, the authority in 5 U.S.C. 5550(b)(1)(B) related to election procedures) is effective as necessary before the January 2016 effective date.

As required by these proposed regulations, CBP must provide election information notices to Border Patrol agents no later than November 1 and agents must make elections for the upcoming annual period no later than December 1. Thus, BPAPRA provisions related to administering annual elections and advance assignments for the annual period beginning in January 2016 must be applied before January 2016.

As provided by Public Law 114-13, regular tours of duty and any associated overtime supplements established under 5 U.S.C. 5550 (as added by section 2(b) of BPAPRA) will first

take effect on the first day the first pay period beginning or or after January 1, 2016. That pay period begins on January 10, 2016. Other BPAPRA provisions that are effective on January 10, 2016 include (1) the amendments to 5 U.S.C. 5542 (dealing with overtime pay and compensatory time off) made by section 2(c) of BPAPRA, (2) the amendments to 5 U.S.C. 8331 (dealing with retirement-creditable basic pay) made by section 2(d) of BPAPRA, and (3) the amendments to 5 U.S.C. 5547 (dealing with the premium pay cap) made by section 2(g)(1) of BPAPRA, and (4) the amendments to section 13(a) of the FLSA (dealing with FLSA exemptions) made by section 2(g)(2) of BPAPRA.

New Subpart P in 5 CFR Part 550

In order to implement BPAPRA, OPM is proposing to add a new subpart P, Overtime Pay for Border Patrol Agents, in part 550 (Pay Administration – General) of title 5, Code of Federal Regulations. A section-by-section explanation of the proposed regulations follows. (Note: The descriptions of the proposed regulations are stated in the present tense for readability.)

§ 550.1601 – Purpose and Authority

Section 550.1601 includes the purpose of the proposed regulations—i.e., to implement BPAPRA. It also notes that OPM is relying on its regulatory authority in 5 U.S.C. 5548 as well as section 2(h) of BPAPRA.

§ 550.1602 – Coverage

Section 550.1602 provides that subpart P applies to GS-1896 Border Patrol agents holding a position in the U.S. Customs and Border Protection (CBP) component of the Department of Homeland Security (DHS). Coverage is not affected if a Border Patrol agent is

temporarily detailed to a non-CBP position, since the agent would continue to officially hold a CBP Border Patrol agent position.

§ 550.1603 – Definitions

Section 550.1603 provides definitions of terms for purposes of subpart P. Certain definitions warrant explanation here. Other definitions are addressed later in the supplementary information in the context of the regulatory provisions in which they are used.

OPM defines the term annual period to mean the 1-year period that begins on the first day of the first pay period beginning on or after January 1 of a given year and ends on the day before the first day of the first pay period beginning on or after January 1 of the next year. The term year in 5 U.S.C. 5550(b)(1)(A) and (C) and the term leave year in 5 U.S.C. 5542(g)(5)(A) are interpreted to be an annual period as defined in § 550.1603. Under BPAPRA, agents make an election for a year, which we are interpreting to be an annual period consisting of full biweekly pay periods. This prevents starting a new regular tour of duty and associated overtime supplement in the middle of a pay period.

The definitions of irregular overtime work and regularly scheduled work parallel the definitions of similar terms in the regular premium pay regulations at 5 CFR 550.103. We are clarifying that irregular overtime work must be “officially ordered or approved,” consistent with the normal standards governing title 5 overtime in 5 U.S.C. 5542(a) and 5 CFR 550.111(a)(1). This means that, consistent with agency policies, authorized management officials must “order” the overtime work in advance or “approve” the overtime work after the fact (when emergency circumstances prevented advance approval). We include a term, regular time, that is used in BPAPRA to refer to the regular basic hours within an agent’s 8-hour basic workday within the 40-hour basic workweek.

While BPAPRA used the terms level 1 border patrol rate of pay, level 2 border patrol rate of pay, and basic border patrol rate of pay to identify agents with different overtime supplements and regular tours of duty, the subpart P regulations place the focus on an agent's regular tour of duty and use the terms Level 1 regular tour of duty, Level 2 regular tour of duty, and Basic regular tour of duty to identify the three categories of agents. We also found it clearer to focus on the overtime supplement as a separate payment rather than being rolled into an aggregate rate of pay.

We define a term obligated overtime hours to describe the overtime hours within an agent's regular tour of duty that an agent is obligated to work because he or she had performed work (of any amount) during regular time on the same day. For example, an agent with a Level 1 tour of duty would normally be obligated to work 2 hours of scheduled overtime work within the regular tour, which could add up to 20 overtime hours (10 days x 2 hours per day) in a biweekly pay period. However, if the agent was on leave during all regular time for 2 basic workdays (8 hours each day), the agent would not be obligated to perform the 2 hours of scheduled overtime work within the regular tour on each of those days. Thus, the total number of obligated overtime hours during that pay period would be 16 hours (20 hours minus 4 unobligated hours). Because an agent may have such unobligated overtime hours, the definition of regular tour of duty uses the word "generally" in describing the hours within a normal tour of duty.

The term overtime hours debt is defined as the unsatisfied balance of obligated overtime hours not worked, which represents a debt of hours for which an agent is accountable. As provided in § 550.1626(b), outside-tour overtime hours in the same pay period may be substituted for absences during obligated overtime hours for pay computation purposes. Any

remaining obligated overtime hours not worked become part of the agent’s overtime hours debt—a debt that the agent can satisfy by applying compensatory time off, as described in § 550.1626(c)(1) or by applying outside-tour overtime hours in future pay periods, as described in § 550.1626(c)(2).

§ 550.1604 – CBP Authority

This section reflects various provisions in BPAPRA that give CBP authority to assign work based on its assessment of mission requirements and operational needs. (See BPAPRA section 2(a) and (f)(1) and 5 U.S.C. 5550(g).) The BPAPRA provisions show that Congress intended to ensure that CBP retains full authority to assign work as needed, regardless of the assigned regular tours of duty.

§ 550.1605 – Interpretation Instruction

Section 550.1605 restates the instruction found in section 2(f) of BPAPRA, which provides that nothing in the Act shall be “construed to require compensation” of an agent other than for hours during which the agent is actually performing work or using approved paid time off. This reflects Congressional concern regarding alleged abuses of AUO pay that included some employees not performing work during claimed AUO hours.

§ 550.1611 – Assignments for an Annual Period

Section 550.1611 governs the assignment of regular tours of duty for an upcoming annual period to individuals who are employed as agents as of November 1 of the preceding year. The law generally envisions assignments being made for an annual period after giving agents an opportunity to state their preferred tour via an annual election. The law provides that agents must (1) be given information about election options and procedures no later than 60 days before the annual period and (2) make an annual election no later than 30 days before the annual period.

Since the beginning of the annual period may vary (since it corresponds to the beginning of the first full pay period in January), we have regulated that the deadline for providing election information is November 1 and the deadline for submitting elections is December 1. These dates meet the statutory time requirements, and provide a consistent set of deadlines that apply each year.

Consistent with the law, section 550.1611(d) provides that an agent who fails to make a timely election must be assigned a Level 1 regular tour of duty. Section 550.1611(e) provides that CBP must inform an agent of an assignment to a tour not elected by the agent. Section 550.1611(f) lists the circumstances (as provided in BPAPRA) under which management is required or allowed to unilaterally assign a regular tour of duty for an annual period that may not match an agent's annual election. For example, an agent assigned to care for a canine must be assigned a Level 1 regular tour of duty. Also, an agent assigned to a headquarters, administrative, training instructor, or fitness instructor position must be assigned a Basic regular tour of duty (with no overtime supplement), except as otherwise justified based on a CBP staffing analysis.

Section 550.1611 does not apply to newly hired agents who—though currently employed as agents on November 1—will be in initial training status as of the first day of the annual period. Instead, special provisions in § 550.1612(a) and (b) apply to such agents. Initial training is defined in § 550.1603 as meaning initial orientation sessions, basic training, and other preparatory activities provided prior to an agent's first regular work assignment in which the agent has authority to make arrests and carry a firearm.

§ 550.1612 – Assignments at Other Times

Section 550.1612 addresses other situations in which an agent may be assigned a regular tour of duty that were not addressed in BPAPRA. An individual who is newly hired as an agent during an annual period will generally undergo initial training before commencing a regular work assignment. During any period of initial training, the agent must be assigned a Basic regular tour of duty. (This is consistent with the fact that agents currently do not receive AUO pay during initial training.) Initial training is not “advanced” training during which Level 1 or Level 2 overtime supplements continue for 60 days under the BPAPRA law and regulations (5 U.S.C. 5550(b)(2)(G) or (b)(3)(G) and § 550.1622(b)). As provided in § 550.1612(a), when a newly hired agent begins a regular work assignment (after completing initial training), the agent will have a Level 1 regular tour of duty as the default schedule for the remainder of the annual period. Under applicable circumstances described in § 550.1611(f), CBP may assign instead a Level 2 or Basic tour. In addition, under § 550.1612(b), a newly hired agent will be given an opportunity to submit an election of a preferred type of regular tour of duty that would take effect prospectively. Such election must be submitted no later than 30 days after the agent begins a regular work assignment and, if approved by CBP, would be effective on the first day of the first pay period beginning on or after the later of: (1) the date the election was submitted; or (2) the date the agent completed initial training.

Under § 550.1612(c), an individual who is newly hired as an agent between November 2 and the beginning of the annual period would be allowed to make an election for the upcoming annual period, if the agent will not be in initial training status on the first day of the annual period. Instead of the December 1 election deadline, the election may be submitted within 30

days after the agent received election information, but no later than the day before the first day of the annual period.

Section 550.1612(d) provides that CBP may change an agent's assignment during an annual period under appropriate circumstances described in § 550.1611(f) or §550.1622(b). For example, CBP may change an assignment to comply with the pay assignment continuity requirement described in §§ 550.1611(f)(5) and 550.1615.

§ 550.1613 – Selection of Agents for Assignment

Section 550.1613 requires CBP to develop a written plan to guide the selection of agents for assignment to a particular regular tour of duty contrary to the agents' preferences, when only some agents' preferences can be accommodated. For example, CBP may need to implement the requirement that only 10 percent of agents in a location may have a Level 2 or Basic regular tour of duty when more than 10 percent of agents in that location want such a tour. For example, if 12 percent of agents in a particular location want a Level 2 or Basic regular tour of duty, 2 percent of agents will be required to have a Level 1 regular tour of duty contrary to their personal preference. CBP must have a plan for deciding which agents do not get assigned their desired tour (or, stated differently, which agents are assigned their desired tour).

§ 550.1614 – Percentage Limit on Agents with Level 2 or Basic Tour

Section 550.1614 regulates the statutory requirement that, except when justified based on a CBP staffing analysis, no more than 10 percent of agents stationed at a location may be assigned a Level 2 or Basic regular tour of duty (i.e., at least 90 percent of agents at a location must be assigned a Level 1 regular tour of duty). Section 550.1614(d) provides that the pay assignment continuity requirement in § 550.1615 trumps that requirement in § 550.1614.

§ 550.1615 – Pay Assignment Continuity

Under 5 U.S.C. 5550(b)(1)(G) (titled “Pay Assignment Continuity”), as added by BPAPRA, not later than December 18, 2015 (1 year after the date of enactment), CBP must “develop and implement a plan to ensure, to the greatest extent practicable, that the assignment of a border patrol agent under this section during the 3 years of service before the border patrol agent becomes eligible for immediate retirement are consistent with the average border patrol rate of pay level to which the border patrol agent has been assigned during the course of the career of the border patrol agent.” As indicated in 5 U.S.C. 5550(b)(1)(G)(iv), the purpose of this plan is to ensure that “border patrol agents are not able to artificially enhance their retirement annuities.” By law, CBP must develop and implement this plan in consultation with OPM. In addition, this plan and its implementation are subject to any OPM regulations promulgated under its authority to carry out BPAPRA and to administer section 5550.

OPM interprets section 5550(b)(1)(G) as establishing a period of time during which CBP must control the assignment of regular tours of duty to each agent (and thus the overtime supplement percentage) to ensure consistency with the agent’s career average overtime supplement percentage. This “control period” is intended to cover the period of time during which an agent could possibly have a high-3 “average pay” period as described in the retirement laws at 5 U.S.C. 8331(4) and 8401(3). The high-3 “average pay period” is a period of 3 consecutive years of creditable service during which an employee has his or her highest rates of retirement-creditable basic pay. The high-3 average pay is used in computing an employee’s retirement annuity.

Since the overtime supplement of 25 or 12.5 percent for a Level 1 or Level 2 regular tour of duty, respectively, is retirement-creditable basic pay and may vary over time (and can be the

outcome of an agent's voluntary election), this introduces the possibility of an agent electing overtime supplements during a potential high-3 period that would maximize the agent's retirement benefit, without regard to the average overtime supplement elected during the employee's career before the control period. If the overtime supplement used in computing an agent's high-3 average pay is significantly higher than the career average overtime supplement, this means that the retirement fund has not received sufficient employee and agency contributions to fund the agent's annuity benefit. Not only does this pose problems for the retirement fund on a macro level, but it also would result in inequitable treatment of individual agents relative to one another.

Retirement eligibility is based on meeting applicable minimum age and service requirements and an employee's separation. For a Border Patrol agent under the Federal Employees' Retirement System, the minimum age and service requirements for a regular law enforcement officer retirement annuity are: (1) any age with 25 years of service; or (2) age 50 with 20 years of service. The date of an employee's separation is uncertain until it takes effect. Thus, to achieve the stated goal of this pay assignment continuity provision, it is necessary to control overtime supplement assignments during any and all periods of 3 consecutive years after an agent is within 3 years of meeting age and service requirements. (We recognize that, in rare circumstances, an agent's high-3 period may not be the agent's last 3 years before separation and could contain a period before the control period. For ease of administration, the drafters of BPAPRA assumed that the high-3 period would be the last 3 years before separation and thus always be in the control period.)

Section 5550(b)(1)(G)(i) states that the control period applies "during the 3 years of service before the border patrol agent becomes eligible for immediate retirement." In one sense,

an agent has conditional retirement eligibility once he or she meets age and service requirements, with separation being the condition. In another sense, an agent is not truly retirement eligible until he or she separates. Given the intent of this provision, and the context surrounding this statutory language, we interpret the law as requiring a plan that controls overtime supplement assignments during any possible 3-year period that might precede an agent's separation, which would trigger retirement eligibility. The statutory language cannot logically be interpreted as establishing a control period only during the 3 years preceding the date an agent meets age and service requirements, since the actual high-3 period could be totally outside such a control period, which would defeat the entire purpose of the provision. We note that, in the section-by-section analysis in the Senate committee report on the bill (S. 1691) later enacted as BPAPRA (Senate Report 113-248, pages 13-14), the description of section 5550(b)(1)(G) states that the pay assignment continuity plan is designed to "ensure an agent is unable to artificially enhance his or her retirement pay by electing Level 1 pay *during his or her last three years of service* when he or she had previously consistently worked at a lower level of pay." [Italics added for emphasis.] Thus, Congress was focused on the 3 years before separation (based on the generally true assumption that an employee's high-3 period is during those last 3 years). Since an agent's actual separation date is not known in advance, it is necessary to provide pay assignment continuity for all consecutive 3-year periods for any possible separation date. The first possible separation date is when the agent meets retirement age and service requirements; thus, the date 3 years before the first possible separation date begins the control period.

Section 550.1615 regulates the pay assignment continuity requirement found in law at 5 U.S.C. 5550(b)(1)(G). Section 550.1615(a)(1) provides that, in consultation with OPM, CBP must implement a plan to ensure, to the greatest extent practicable, that an agent's overtime

supplement during *all consecutive 3-year periods within the control period* is “consistent” with the agent’s career average percentage during his or her career *prior to the beginning of the control period*. As provided in § 550.1615(a)(2), the overtime supplement percentage used in computing the career average percentage is the assigned percentage (25, 12.5, or 0) without regard to whether a premium pay cap prevents full payment based on that percentage.

Section 550.1615(a)(3) provides additional rules governing the computation of an agent’s career average overtime supplement percentage. Based on the statutory language—“the average border patrol rate of pay level to which the border patrol agent has been assigned during the course of the career of the border patrol agent”—we are proposing that an agent’s career be considered to encompass only those periods during which the agent was covered by section 5550 and subpart P. In other words, only overtime supplements established under 5 U.S.C. 5550 would be considered in computing the career average. We recognize that many agents have received an AUO supplement, which if considered, could increase or decrease the agent’s career average. We also recognize that some agents will be in the control period when the provisions of subpart P first become applicable in January 2016 and that a career average will be immediately needed to apply the pay assignment continuity provisions. Based on the law, we have proposed in § 550.1615(a)(3) that, if an agent is in a control period when the provisions of subpart P first become applicable to the agent, the agent’s initially assigned overtime supplement percentage must be considered the agent’s career average. We are aware that, under the proposed rule, certain employees in headquarters or other positions for which no overtime supplement is payable would be considered to have a 0 percent career average overtime supplement. We are specifically inviting comments on proposed section 550.1615(a)(3) and will carefully consider those comments in preparing the final regulations.

As provided in § 550.1615(b), the “control period” is the period beginning on the date 3 years before an agent first meets retirement age and service requirements and remains in effect during all subsequent service in a Border Patrol agent position.

As regulated in § 550.1615(c)(1), the two averages are considered to be “consistent” if they are within 2.5 percentage points of one another. CBP must manage agents’ assignments (i.e., make unilateral assignments) during the control period as necessary to achieve consistency, notwithstanding any other provision of law or regulation in subpart P. Section 550.1615(c)(2) allows for two exceptions. One exception applies if an agent’s overtime supplement is limited by the premium pay cap under §§ 550.105 and 550.107 and the agent voluntarily elects (and CBP approves) a regular tour that results in an average overtime supplement percentage that is less than the agent’s career average. For example, an agent’s rate of basic pay could be at the premium pay cap (generally level IV of the Executive Schedule) leaving no room for receipt of an overtime supplement. Such an agent could choose to elect a Basic regular tour of duty that would provide no overtime supplement and require no regular overtime work. (The agent could still be ordered to work overtime as needed.) Since the premium pay cap prevents manipulation of the high-3 average pay, this exception poses little or no risk to the retirement fund. As stated in 5 U.S.C. 5550(b)(1)(G)(iv), the goal of the pay assignment continuity provision is to ensure that agents are not able to artificially enhance their retirement annuities. The ability for an agent to enhance his or her annuity is limited or eliminated when the agent is subject to the premium pay cap.

We cannot allow an agent whose overtime supplement is not affected by the premium pay cap to voluntarily elect a lesser percentage during the control period, since the agent could later elect again to have a higher percentage that is consistent with his/her career average. While

the overtime supplement used in the agent's high-3 average pay would not exceed a percentage that is consistent with the agent's career average, the agent (and CBP) will have made inadequate retirement contributions during the portion of the control period when the lesser percentage was in effect.

Section 550.1615(c)(2)(ii) provides a necessary exception in cases where CBP determines an agent is unable to perform overtime work on a daily basis due to a physical or medical condition affecting the agent and assigns the agent a Basic regular tour of duty, as described in § 550.1611(f)(2) (which may be applied to make changes in an agent's tour during an annual period, as provided by § 550.1612(d)). This exception relieves CBP of applying the consistency requirement to the affected agent, but only to the extent such assignment makes it impossible to satisfy the consistency requirement during any given consecutive 3-year period. Thus, if the period during which the agent is unable to perform overtime work is short in duration, it would be possible to fully comply with the consistency requirement.

Section 550.1615(d) addresses CBP's authority in connection with the pay assignment continuity requirement. Consistent with 5 U.S.C. 5550(b)(1)(G)(ii), § 550.1615(d)(1) provides that CBP may take such action as is necessary, including unilateral assignment of an agent's regular tour of duty, to implement the pay assignment continuity plan, notwithstanding any provision of BPAPRA or the subpart P regulations. Section 550.1615(d)(2) reflects the provision in 5 U.S.C. 5550(b)(1)(G)(vi), which states that nothing in section 5550(b)(1)(G) may be construed to limit the ability of CBP to assign regular tours as necessary to meet operational requirements. At the same time, as reflected in § 550.1604, various provisions in BPAPRA (section 2(a) and 2(f)(1) of BPAPRA and 5 U.S.C. 5550(g)) make clear that CBP has authority to assign unscheduled work as needed to meet mission needs and operational requirements,

notwithstanding the regular tour assigned to agents. Thus, as a general matter, OPM does not consider the need to meet operational requirements as preventing CBP from also controlling agents' regular tour as necessary to comply with the pay assignment continuity requirement.

Section 550.1615(e) sets forth reporting requirements with which CBP must comply so that OPM can monitor and evaluate the effectiveness of CBP's pay assignment continuity plan and assess the actuarial impact on the retirement fund.

Section 550.1615(f) addresses corrective actions that CBP must take if it determines that the consistency requirement is not being met for a particular agent. Under this regulation, CBP is not required to retroactively change an agent's assigned overtime supplement based on violation of the consistency requirement unless there is evidence of fraud, misrepresentation, fault, or lack of good faith on the part of the affected agent in connection with an overtime supplement received by that agent.

§ 550.1616 – Corrective actions.

Section 550.1616 addresses corrective actions related to assignments made under the §§ 550.1611 through 550.1614. If it is determined that CBP did not comply with applicable statutory or regulatory requirements in assigning an agent to a regular tour of duty under those sections, CBP must take corrective action as soon as practicable. The corrective action would apply prospectively. CBP is not required to retroactively change an agent's assigned tour or overtime supplement, except when CBP determines there exists, in connection with the agent's tour assignment, evidence of fraud, misrepresentation, fault, or lack of good faith on the part of that agent. Since the overtime supplement is retirement-creditable basic pay, retroactive changes in the supplement would be disruptive and could adversely affect an employee's anticipated retirement benefits.

§ 550.1621 – Rules for Each Type of Regular Tour

Section 550.1621 lays out the sets of rules that apply to each type of regular tour and provides cross references to those provisions that are addressed in more detail in other places in subpart P. Paragraphs (a)(3) and (b)(3) reflect the statutory rules in 5 U.S.C. 5550(b)(2)(A)(ii) and (b)(3)(A)(ii) that an agent with a Level 1 or Level 2 regular tour of duty has an obligation to perform scheduled overtime work within that tour only on a day the agent “performs work” during the regular time (8-hour basic workday). Thus, for example, if an agent with a Level 1 regular tour of duty takes 8 hours of annual leave on a particular day, the agent does not have an obligation to work 2 hours of scheduled overtime within the tour on that day. Paragraph (e) makes clear that, in applying paragraphs (a)(3) and (b)(3), the term “work” refers to paid hours of work, consistent with § 550.112, except that paid leave and other paid time off are not considered to be work hours. Paragraph (e) also makes clear that official time under 5 U.S.C. 7131 (related to employees representing a labor organization) is “work” in applying paragraphs (a)(3) and (b)(3).

Paragraphs (a)(4) and (b)(4) provide regulations governing the computation of the overtime supplement (25 percent or 12.5 percent, respectively). The overtime supplement is computed on an hourly basis and is equal to 25 percent or 12.5 percent, respectively of an agent’s hourly rate of basic pay. The resulting hourly dollar amount is multiplied by the number of *paid* hours of regular time in the biweekly pay period to determine the biweekly dollar amount of the overtime supplement before application of the premium pay cap. Also, as provided in § 550.1626(a)(5), any hours of regular time that are paid only because of substitution of overtime hours for a period of absence without approval (AWOL) or suspension are excluded from the hours multiplied by the hourly overtime supplement.

Paragraph (d) states the overarching rule that the premium pay cap in 5 U.S.C. 5547 applies to limit, as appropriate, the payment of the overtime supplement or regularly scheduled overtime outside the regular tour and the crediting of compensatory time off for irregular overtime hours. (See 5 U.S.C. 5542(g)(5)(F) and 5547(a) and (e), as amended by BPAPRA. See also section 2(f)(3) of BPAPRA.) Consistent with the longstanding interpretation of 5 U.S.C. 5547, an agent affected by the premium pay cap is still required to perform work as assigned. In effect, an employee who reaches the premium pay cap is considered a salaried employee and the combination of basic pay and any premium pay is considered complete compensation for all hours of work. (In 2015, the premium pay cap for most employees is based on the Executive Schedule (EX) level IV annual rate of \$158,700. An employee may receive premium pay in a biweekly pay period only to the extent that the premium pay does not cause the combination of basic pay and premium pay to exceed the cap.)

§ 550.1622 – Circumstances Requiring Special Treatment

Section 550.1622(b) regulates a statutory provision providing special treatment of employees during the first 60 days of advanced training in a calendar year. During those 60 days, an agent continues to be assigned to the regular tour otherwise in effect, regardless of the actual number of hours of work on a training day, and will continue to receive the overtime supplement associated with that tour. As a general rule, an agent will be deemed to have worked during any nonwork period within obligated overtime hours on such a training day for the purpose of determining the agent's total hours of work against the applicable biweekly overtime threshold (i.e., 100 hours for a Level 1 tour and 90 hours for a Level 2 tour). (See also § 550.1623(a)(2)(iv).) For example, if an agent with a Level 1 regular tour of duty (requiring 2 obligated overtime hours each basic workday) performs actual work for 0.5 hours during

obligated overtime hours on a day of advanced training, the agent would be deemed to work during the remaining 1.5 hours and receive credit for those 1.5 hours in applying the applicable overtime threshold. However, if an agent performs creditable regularly scheduled overtime work *outside* the regular tour (e.g., night work that is creditable under 5 CFR 410.402(b)(2) as an exception to the normal bar on premium pay during training) on the same day on which credit would otherwise be given for nonwork overtime *within* the tour, those outside-tour overtime hours will be substituted for any within-tour nonwork overtime hours and reduce the crediting of nonwork hours accordingly.

Section 550.1622(b)(3) implements the statutory requirement that, after an agent has 60 days of advanced training in a calendar year, CBP must assign the agent to a Basic regular tour of duty for any additional day of advanced training. When such an agent is no longer engaged in advanced training, the agent reverts to his or her previously applicable tour.

In applying § 550.1622(b), we rely on the definition of *advanced training* found in § 550.1603. Advanced training is defined to exclude initial training (i.e., initial orientation sessions, basic training, and other preparatory activities) provided prior to an agent's first regular work assignment in which the agent has authority to make arrests and carry a firearm. The rules on advanced training apply solely to whole-workday training that covers the entire 8-hour block of regular time on a regular workday, since the statutory provisions at § 5550(b)(2)(G) and (b)(3)(G) apply to "days" of advanced training. Training that takes part of a day does not trigger application of the advanced training provision; instead, an agent with such training remains under the normal rules with the normal overtime obligations. (See also proposed § 550.1622(b)(4).)

Section 550.1622(c) regulates a statutory provision providing special treatment of agents assigned to care for a canine as part of their agent duties. During any period an agent is assigned canine care duties, the agent must be assigned a Level 1 regular tour with a 25 percent overtime supplement (unless that requirement is trumped by the pay assignment continuity requirement in § 550.1615). As provided by 5 U.S.C. 5550(b)(1)(F), an agent assigned canine care duties must be credited with 1 hour of regularly scheduled overtime work within the regular tour of duty on each regular workday, regardless of the actual duration of any such care or when the care was actually provided. The canine care may actually be provided anytime, including on a non-workday. Regardless of the time or day the canine care is actually provided or how much time is actually spent providing canine care, an agent with canine care duties is automatically credited with 1 hour of work for canine care on each regular workday. That leaves the agent with an obligation to perform 1 additional overtime hour as part of the agent's regular tour of duty to meet the 2-hour requirement for a Level 1 tour (on any regular workday on which the agent performs any work during regular time). This means that an agent assigned canine care duties actually has a 9-hour daily tour of duty for regular work instead of the 10-hour daily tour that applies to other employees on a Level 1 regular tour of duty.

If an agent is generally assigned to provide care for a canine, but is temporarily relieved of that duty for any reason (e.g., no dog available), the agent may not receive the 1-hour automatic credit for canine care on an affected regular workday.

§ 550.1623 – Overtime Work Outside the Regular Tour

Section 550.1623 provides rules governing the application of biweekly overtime thresholds that are used to determine: (1) overtime pay for regularly scheduled overtime hours outside the regular tour under § 550.1624; and (2) crediting of compensatory time off for

irregular overtime hours under § 550.1625. As a general rule, the biweekly overtime threshold is 100 hours for a Level 1 tour, 90 hours for a Level 2 tour, and 80 hours for a Basic tour, as provided in § 550.1623(b), unless there is a hybrid pay period, as described in § 550.1623(c),

Paragraph (a)(2) identifies the hours that are included in an agent's total hours of work that are compared to the applicable biweekly overtime threshold. In addition to time that qualifies as actual hours of work under the normal title 5 rules and all types of paid time off hours, we count: (1) obligated overtime hours during which no work is performed (creating a debt of hours as provided in § 550.1621(a)(8) and (b)(8)) and for which no substitution is made under § 550.1626(b); (2) nonwork hours credited during obligated overtime hours on a day of advanced training (as provided in § 550.1622(b)); and (3) overtime hours within the regular tour that an agent is not obligated to work because he or she performs no work during regular time on that day (as described in § 550.1621(a)(3) and (b)(3)). Crediting these three categories of hours is necessary to align with the 100-hour and 90-hour biweekly overtime thresholds fixed by law for a Level 1 tour and Level 2 tour, respectively. (See 5 U.S.C. 5542(g)(1)(A) and (2)(A).) Without this crediting, there could be hours of work that are outside an agent's regular tour but below the applicable overtime threshold, and there would be no authority to compensate for those hours in any way—a result clearly not intended by Congress. This crediting complies with section 2(f)(2) of BPAPRA, which states that nothing in BPAPRA may be construed to require compensation other than for hours during which an agent is actually performing work or using approved paid time off. The crediting of the three categories of hours is only for purposes of applying the overtime threshold and does not generate any additional compensation for those hours, since they are hours that only could have been potentially compensated by the overtime

supplement, the amount of which is not affected by the number of regularly scheduled overtime hours within the regular tour.

Paragraph (c) addresses the possibility of “hybrid pay periods.” One type of hybrid pay period occurs when an agent has one type of regular tour for part of the biweekly pay period and another type for another part of that period—for example, a Level 1 tour for the first week and a Basic tour for the second week. It is possible that an agent’s tour could change during a biweekly pay period due to the expiration of the 60-day advanced training period or because CBP takes action under the circumstances described in § 550.1611(f), as allowed under § 550.1612(d). A second type of hybrid pay period occurs when an individual is employed as a Border Patrol agent for only part of the pay period. Since the drafters of BPAPRA did not consider these possibilities, it is necessary to fill in the policy gap via regulation.

§ 550.1624 – Regularly Scheduled Overtime Outside the Regular Tour

Section 550.1624 provides rules governing the payment for regularly scheduled overtime hours beyond the applicable overtime threshold (outside the regular tour). Such hours are paid under the regular title 5 overtime rules in 5 U.S.C. 5542(a) and 5 CFR 550.113. Paragraph (c)(1) reflects a statutory directive that CBP should, to the maximum extent practicable, avoid the use of regularly scheduled overtime work outside the regular tour of duty. However, paragraph (c)(2) makes clear that the general restriction in paragraph (c)(1) does not prevent CBP from assigning outside-tour regularly scheduled overtime work if an agent volunteers to perform such work. For example, an agent may want to work such overtime hours to eliminate an overtime hours debt.

§ 550.1625 – Irregular Overtime and Compensatory Time Off

Section 550.1625 provides rules governing the crediting of compensatory time off for irregular overtime hours beyond the applicable overtime threshold. (By definition, any irregular overtime hour is beyond that threshold and outside the regular tour of duty.) The rules in § 550.1625 largely reflect statutory requirements and limitations. In addition, paragraph (c) shows that the call-back overtime provision in 5 U.S.C. 5542(b)(1) remains applicable to agents. In addition, since BPAPRA required that a value be assigned to compensatory time for the purpose of applying the premium pay cap (5 U.S.C. 5542(g)(5)(F)), but did not specify what the value should be, we are regulating that the value is equal to the amount of overtime pay the agent would have received for the period during which the compensatory time off was earned if the overtime had been regularly scheduled overtime hours outside the agent's regular tour. This is consistent with how OPM values compensatory time off under 5 U.S.C. 5543 and 5 CFR 550.114. (See 5 CFR 550.114(g).)

§ 550.1626 – Leave without Pay during Regular Time and Absences during Obligated Overtime Hours

Section 550.1626 provides rules governing the handling of circumstances where an agent has leave without pay during the basic workweek or absences during obligated overtime hours, consistent with 5 U.S.C. 5550(f). Additional hours worked in a biweekly pay period that are “substituted” for leave without pay or absences during obligated overtime hours are, for pay computations purposes, treated as if they are, respectively, regular time hours or obligated overtime hours. Thus, substituted hours are not overtime hours for any purpose, and they may not be considered to be obligated overtime hours under § 550.1621(a)(4) and (b)(4) (when within-tour overtime is substituted for LWOP), regularly scheduled overtime hours under

§ 550.1624, or irregular overtime hours under § 550.1625, despite their original character prior to substitution.

As provided in § 550.1603, the term *leave without pay* includes all types of nonpay status, including normal approved leave without pay (regular LWOP), absence without approval (AWOL), suspension, or furlough. Consistent with the treatment of leave without pay under the regular title 5 overtime rules (5 CFR 550.112(d)), these regulations provide for substituting hours outside the basic workweek for leave without pay within the basic workweek—for purposes of computing overtime pay. This treatment is necessary so overtime thresholds are properly applied. As specified in § 550.1626(a)(4), the substitution is done solely for pay computation purposes and does not change the fact that an agent was in a particular nonpay status during the designated hours. For other purposes, the hours that are substituted are considered to have been performed when they were worked, not during the leave without pay hours.

Consistent with 5 U.S.C. 5550(f)(1)(A), § 550.1626(a)(1) provides that an equal period of time outside regular time (which could include work during obligated overtime hours or outside the regular tour) must be substituted for leave without pay during regular time. Consistent with 5 U.S.C. 5550(f)(1)(C), § 550.1626(a)(2) provides that substitutions for leave without pay during regular time must be made before substitutions for absences during obligated overtime hours. Section 550.1626(a)(3) further provides, by authority of regulation, that overtime hours must be substituted in the following priority: first, irregular overtime hours; second, regularly scheduled overtime hours outside the regular tour of duty; and third, regularly scheduled overtime hours within the regular tour of duty. Priority is given to substituting irregular overtime hours, since those hours do not generate a cash payment.

Section 550.1626(a)(5) mandates that overtime hours that are substituted for absence without approval (AWOL) or suspension may not be used in computing an agent's overtime supplement. BPAPRA did not address how substituted hours would affect the computation of the overtime supplement. By regulation, we are allowing hours that are substituted for regular LWOP or furlough to be treated as regular time hours that are multiplied by the hourly overtime supplement. We determined that it would be inappropriate to allow AWOL or suspension hours to generate an increased amount of overtime supplement even if other hours of work are substituted for those hours.

We are not including a regulation to implement 5 U.S.C. 5550(f)(1)(B), which stated that work performed on the same day as a period of leave without pay should be substituted first. We determined that, since overtime pay is computed on a biweekly basis, it makes no difference in an agent's pay entitlements if this same-day priority were followed or not followed.

Section 550.1626(b) addresses substitution of other work outside the regular tour of duty for absence during obligated overtime hours, consistent with 5 U.S.C. 5550(f)(2). Consistent with 5 U.S.C. 5550(f)(2)(B), § 550.1626(b)(2) provides that work performed on the same day as a period of absence during obligated overtime hours must be substituted first, but only in the circumstance where same-day substitution rules make a difference—namely, the application of the advanced training provision in § 550.1622(b)(2) that is applied on a daily basis. Section 550.1626(b)(3) further provides, by authority of regulation, that overtime hours outside the regular tour of duty (remaining after applying paragraphs (a) and (b)(2)) must be substituted for obligated overtime hours not worked in the following priority: first, irregular overtime hours; and second, regularly scheduled overtime hours outside the regular tour of duty. Priority is given to substituting irregular overtime hours, since those hours do not generate a cash payment.

Section 550.1626(b)(4) makes clear that substitution of overtime hours is for pay computation purposes and does not change when those hours were actually worked for other purposes.

Section 550.1626(c) addresses situations where an agent does not have sufficient additional work in a biweekly pay period to substitute for all periods of absence during obligated overtime hours, consistent with 5 U.S.C. 5550(f)(3) and (4). It mandates that any unused balance of compensatory time off accrued by an agent under § 550.1625 must be applied towards any overtime hours debt newly accrued in the current pay period. It further mandates that, if an overtime hours debt remains after substitution and after application of unused compensatory time off, any additional work outside an agent's regular tour in future pay periods (that would otherwise be considered overtime work under § 550.1624 or § 550.1625) must be applied towards the overtime hours debt until that debt is satisfied.

Section 550.1626(d) addresses how to handle a situation where an agent has an unsatisfied overtime hours debt at the time of transfer or separation, which is not addressed in BPAPRA but is necessarily addressed in our regulations. At the time of transfer or separation, the overtime hours debt must be converted to a monetary debt equal to the result of multiplying the agent's hourly rate of basic pay by the number of hours owed by the agent. CBP would follow standard debt collection procedures to recover any debt.

§ 550.1631 – Relationship to Other Types of Premium Pay

Section 550.1631 provides rules regarding the circumstances under which an agent may receive other premium pay (not addressed elsewhere in subpart P), consistent with 5 U.S.C. 5550(c). It further provides that an agent's regular rate of basic pay (without any overtime supplement) must be used in computing any premium pay, consistent with 5 U.S.C. 5550(c)(1) and (d)(2).

§ 550.1632 – Relationship to Hazardous Duty Pay

Section 550.1632 provides that an agent may receive hazardous duty pay under 5 U.S.C. 5545(d), if otherwise eligible, consistent with 5 U.S.C. 5550(c)(3). It further provides that any hazard pay is computed using an agent's regular rate of basic pay (without any overtime supplement), consistent with 5 U.S.C. 5550(d).

§ 550.1633 – Relationship to Other Provisions Using Basic Pay

Section 550.1633 identifies the limited purposes for which an overtime supplement is treated as part of an agent's rate of basic pay, consistent with 5 U.S.C. 5550(d). In addition to the purposes prescribed in law (i.e., retirement, severance pay, workers' compensation, and life insurance), OPM is regulating that the overtime supplement is part of basic pay for purposes of advances in pay under 5 U.S.C. 5524a and 5 CFR part 550, subpart B.

§ 550.1634 – Relationship to Leave and Other Paid Time Off

Section 550.1634 makes clear that agents remain covered by title 5 provisions related to leave (5 U.S.C. chapter 63) and to other paid time off (e.g., holidays under 5 U.S.C. chapter 61, compensatory time off for religious purposes under 5 U.S.C. 5550a) and that the tour of duty for accrual of leave and for usage of leave or other paid time off is the 40-hour basic workweek.

§ 550.1635 – Relationship to Alternative Work Schedules

Section 550.1635 provides that agents may not have a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II. OPM interprets BPAPRA as establishing a special work schedule for all agents under 5 U.S.C. 5550, which supersedes any other authority to establish special schedules. CBP is still permitted to have flexible starting and stopping times for an agent's basic work day if it determines that such flexibility is appropriate for the position in question (e.g., a position with a Basic regular tour of duty that does not require fixed shifts).

§ 550.1636 – Relationship to FLSA

Section 550.1636 reflects the Fair Labor Standards Act (FLSA) amendments made by BPAPRA, which provided that the minimum wage and overtime provisions of the FLSA are not applicable to Border Patrol agents (i.e., they are automatically exempt from FLSA by virtue of being a Border Patrol agent). A conforming FLSA exemption is being added to OPM’s FLSA regulations at 5 CFR 551.217.

§ 550.1637 – Relationship to Travel Time

Section 550.1637(a) provides that an agent’s regular travel to and from home and a work location within the agent’s official duty station (as defined in § 550.112(j)) may not be considered hours of work, which is consistent with 5 U.S.C. 5550(e) as added by BPAPRA. This is also generally consistent with regular title 5 rules related to travel at 5 CFR 550.112(j)(2).

Section 550.1637(b) addresses travel away from an agent’s official duty station (as defined in § 550.112(j)). Such travel is subject to the normally applicable hours-of-work rules in 5 U.S.C. 5542(b)(2) and 5 CFR 550.112(g). When an agent travels directly between home and a temporary duty location outside the limits of the agent’s official duty station, the time the agent would have spent in normal home to work travel must be deducted from any creditable hours of work while traveling

§ 550.1638 – Relationship to Official Time

Section 550.1638 addresses how official time under 5 U.S.C. 7131 relates to BPAPRA pay provisions. Under 5 U.S.C. 7131—

- “Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee

otherwise would be in a duty status. The number of employees for whom official time is authorized shall not exceed the number of individuals designated as representing the agency for such purposes.” (See 5 U.S.C. 7131(a).)

- “The Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.” (See 5 U.S.C. 7131(c).)
- Except as provided in the previous subsections, any employee representing an exclusive representative or in connection with any other matter covered by this chapter “shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.” (See 5 U.S.C. 7131(d).)

An employee using official time is paid a base salary even though not in a regular duty status. Official time is also considered to be “hours of work” when the employee would otherwise be in a duty status. Generally, official time is used during an employee’s basic (nonovertime) hours. Official time may also be used during management-assigned overtime hours if an unplanned event occurs incident to representational functions that must be dealt with during the overtime hours.

In drafting proposed regulations to carry out BPAPRA, we determined that certain issues related to official time needed to be addressed. First, the rules in 5 U.S.C. 5550(b)(2)(A)(ii) and (b)(3)(A)(ii) provide that the obligation to perform overtime hours of work as part of an agent’s regular tour of duty is triggered only when the agent performs “work” during the 8-hour basic workday on that same day. Thus, we provide in § 550.1621(e) and § 550.1638 that official time is included as “work” in applying those section 5550 provisions. This is consistent with how

OPM treats official time during basic (nonovertime) hours as hours of work in applying title 5 and FLSA overtime provisions, based on 5 U.S.C. 7131.

In addition, we clarify in § 550.1638 that Border Patrol agents who use official time to perform union representational duties may elect to have a Level 1 or Level 2 regular tour of duty, but generally must perform regular agency work (as opposed to union representational duties) during obligated overtime hours. However, use of official time during obligated overtime hours or any other overtime hours is permitted if an unplanned event arises incident to representational functions that must be dealt with during the overtime hours.

Conforming Changes to Other Regulations

OPM is proposing conforming changes in a variety of regulations in part 410, part 550, part 551, and part 870. (Note: The descriptions of the proposed regulations below are stated in the present tense for readability.)

Section 410.402 is amended to show the receipt of the Border Patrol agent overtime supplement as a permitted exception to the general bar on premium pay during periods of training.

Section 550.103 is amended to revise the definition of *premium pay* and add a new definition of *regular tour of duty* so that these definitions can be used in applying 5 CFR part 550, subpart A (Premium Pay). The revised definition of *premium pay* makes clear the term includes a Border Patrol agent overtime supplement and the dollar value of compensatory time off earned by a Border Patrol agent, consistent with 5 U.S.C. 5542(g)(5)(F) and 5547(a)(1) and (e) and section 2(f) of BPAPRA.

Section 550.107 is amended to provide that the Border Patrol agent overtime supplement is subject solely to the biweekly premium pay cap (not the annual cap), consistent with the

treatment of other premium payments that are retirement-creditable basic pay. In prescribing this treatment, OPM is relying on its broad authority to regulate the premium pay subchapter in 5 U.S.C. 5548 plus its additional broad authority in section 2(h) of BPAPRA to issue regulations to carry out BPAPRA.

Section 550.111 is amended by adding a new paragraph (j), which provides that special overtime thresholds apply to Border Patrol agents for the purpose of paying overtime under the regular title 5 overtime authority (for overtime not compensated by an overtime supplement or by the earning of compensatory time off). (See 5 U.S.C. 5542(g) and § 550.1623.)

Sections 550.122, 550.132, and 550.172 are amended by adding new paragraphs, which provide that night pay differential, holiday premium pay, and Sunday pay are not payable for regularly scheduled overtime within a Border Patrol agent's regular tour duty (i.e., overtime hours compensated via the overtime supplement), consistent with 5 U.S.C. 5550(b)(2)(C), (b)(3)(C), and (c)(1)(A). These new paragraphs also make clear that a Border Patrol agent overtime supplement is not included in the rate of basic pay used to compute the amount of these premium payments for other hours that qualify for such payments, consistent with 5 U.S.C. 5550(c)(1) and (d)(2).

In § 550.202, we are amending the definition of *rate of basic pay* used in applying the advances in pay regulations so that it includes a Border Patrol agent overtime supplement. This amendment relies on OPM's authority in 5 U.S.C. 5550(d)(1)(B) to regulate the purposes for which the overtime supplement is treated as basic pay.

In § 550.703, we are amending the definition of *rate of basic pay* used in applying the severance pay regulations so that it includes a Border Patrol agent overtime supplement, consistent with 5 U.S.C. 5550(d)(1)(A).

In § 550.1204, we are amending paragraph (a) to provide that Border Patrol agent compensatory time off does not extend the period of leave used for calculating a lump-sum annual leave payment. This is consistent with the treatment of regular title 5 compensatory time off and with 5 U.S.C. 5542(g)(5)(D), which provides that an agent may not receive any cash value for unused compensatory time off.

In § 550.1205, we are adding a new paragraph (b)(5)(iv), which provides a Border Patrol agent overtime supplement is used in computing any annual leave lump-sum payment. This is an exercise of OPM's regulatory authority in 5 U.S.C. 5553 and is consistent with the treatment of AUO pay that Border Patrol agents have been receiving.

In OPM's FLSA regulations, we are amending § 551.216 and adding a new § 551.217. In § 551.216(c)(2), we are deleting references to Border Patrol agents, since they are no longer covered by the FLSA. In the new § 551.217, we provide that Border Patrol agents are FLSA exempt (for purposes of minimum wage and overtime provisions), as required by the amendments to section 13(a) of the FLSA (29 U.S.C. 213(a)) made by section (g)(2) of BPAPRA.

In OPM's life insurance regulations, we are amending § 870.204 to provide that a Border Patrol agent overtime supplement is treated as part of an agent's "annual pay" used in computing life insurance benefits, as required by 5 U.S.C. 5550(d)(1)(A). (Congress relied on section 5550(d)(1)(A) rather than amend 5 U.S.C. 8704(c) to specifically reference the Border Patrol agent overtime supplement. Under section 8704(c), OPM may prescribe regulations governing the types of pay included in annual pay.)

Executive Order 12866 and Executive Order 13563

The Office of Management and Budget has reviewed this proposed rule in accordance with E.O. 12866 and E.O. 13563.

Regulatory Flexibility Act

I certify that these proposed 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

5 CFR Part 410

Education, Government employees.

5 CFR Part 550

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

5 CFR Part 551

Government employees, Wages.

5 CFR Part 870

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

U.S. Office of Personnel Management.

Katherine Archuleta,
Director.

For the reasons stated in the preamble, OPM is proposing to amend parts 410, 550, 551, and 870 of title 5 of the Code of Federal Regulations as follows:

PART 410—TRAINING

1. The authority citation for part 410 continues to read as follows:

Authority: 5 U.S.C. 1103(c), 2301, 2302, 4101, *et seq.*; E.O. 11348, 3 CFR, 1967 Comp., p. 275, E.O. 11478, 3 CFR 1966–1970 Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152.

Subpart D—Paying for Training Expenses

2. In § 410.402, add paragraph (b)(8) to read as follows:

§ 410.402 Paying premium pay.

* * * * *

(b) * * *

(8) *Border Patrol agent overtime supplement.* A Border Patrol agent may receive an overtime supplement under 5 U.S.C. 5550 and 5 CFR part 550, subpart P, during training, subject to the limitation in 5 U.S.C. 5550(b)(2)(G) and (b)(3)(G) and 5 CFR 550.1622(b).

* * * * *

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart A—Premium Pay

3. The authority citation for subpart A of part 550 is revised 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); section 2(h), Pub. L. 113-277, 128 Stat. 3005; E.O. 12748, 3 CFR, 1992 Comp., p. 316.

4. Amend § 550.103 by adding a sentence at the end of the definition of *premium pay* and adding in alphabetical order a definition of *regular tour of duty* to read as follows:

§ 550.103 Definitions.

* * * * *

Premium pay * * * This includes an overtime supplement received by a Border Patrol agent under 5 U.S.C. 5550 and subpart P of this part for regularly scheduled overtime hours within the agent’s regular tour of duty and the dollar value of hours of compensatory time off earned by such an agent.

* * * * *

Regular tour of duty, with respect to a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, means the basic 40-hour workweek plus any regularly scheduled overtime work hours that the agent is assigned to work as part of an officially established 5-day weekly work schedule generally consisting of—

(1) 10-hour workdays (each including 2 overtime hours each day) in exchange for a 25-percent overtime supplement (Level 1); or

(2) 9-hour workdays (each including 1 overtime hour each day) in exchange for a 12.5-percent overtime supplement (Level 2).

* * * * *

5. In § 550.107, amend paragraph (a)(3) by removing the word “and” at the end of paragraph, removing the period from the end of paragraph (a)(4) and adding in its place “; and”, and adding paragraph (a)(5) to read as follows:

§ 550.107 Premium payments capped on a biweekly basis when an annual limitation otherwise applies.

(a) * * *

(5) An overtime supplement for regularly scheduled overtime hours within a Border Patrol agent's regular tour of duty under 5 U.S.C. 5550.

* * * * *

6. In § 550.111, add paragraph (j) to read as follows:

§ 550.111 Authorization of overtime pay.

* * * * *

(j) For Border Patrol agents covered by 5 U.S.C. 5550 and subpart P of this part, overtime work means hours of work in excess of applicable thresholds, as specified in § 550.1623, excluding hours that are—

- (1) Compensated by payment of an overtime supplement for regularly scheduled overtime within the agent's regular tour of duty under § 550.1621;
- (2) Compensated by the earning of compensatory time off under § 550.1625; or
- (3) Used in substitution or application under § 550.1626.

7. In § 550.122, add paragraph (e) to read as follows:

§ 550.122 Computation of night pay differential.

* * * * *

(e) *Border Patrol agents.* For a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, no night pay differential is payable for regularly scheduled overtime hours within the agent's regular tour of duty, as required by 5 U.S.C. 5550(b)(2)(C), (b)(3)(C), and (c)(1)(A). The overtime supplement payable for such scheduled overtime hours is not part of the agent's rate of basic pay used in computing the night pay differential for other hours that qualify for such a differential.

8. In § 550.132, add paragraph (d) to read as follows:

§ 550.132 Relation to overtime, night, and Sunday pay.

* * * * *

(d) For a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, no holiday premium pay is payable for regularly scheduled overtime hours within the agent's regular tour of duty, as required by 5 U.S.C. 5550(b)(2)(C), (b)(3)(C), and (c)(1)(A). The overtime supplement payable for such scheduled overtime hours is not part of the agent's rate of basic pay used in computing the holiday premium pay for other hours that qualify for such premium pay.

9. In § 550.172, designate the current text as paragraph (a) and add paragraph (b) to read as follows:

§ 550.172 Relation to overtime, night, and holiday pay.

* * * * *

(b) For a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, no Sunday premium pay is payable for regularly scheduled overtime hours within the agent's regular tour of duty, as required by 5 U.S.C. 5550(b)(2)(C), (b)(3)(C), and (c)(1)(A). The overtime supplement payable for such scheduled overtime hours is not part of the agent's rate of basic pay used in computing the Sunday premium pay for other hours that qualify for such premium pay.

Subpart B—Advances in Pay

10. The authority citation for subpart B of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5524a, 5527, 5545a(h)(2)(B), 5550(d)(1)(B); E.O. 12748, 3 CFR, 1992 comp., p. 316.

11. In § 550.202, amend the definition of *rate of basic pay* by removing “and” at the end of paragraph (3), removing the period at the end of paragraph (4) and adding in its place “; and”, and adding paragraph (5) to read as follows:

§ 550.202 Definitions.

* * * * *

*Rate of basic pay_** * *

(5) An overtime supplement for regularly scheduled overtime within a Border Patrol agent’s regular tour of duty under 5 U.S.C. 5550 (as allowed under 5 U.S.C. 5550(d)(1)(B)).

Subpart G—Severance Pay

12. The authority citation for subpart G of part 550 continues to read as follows:

AUTHORITY: 5 U.S.C. 5595; E.O. 11257, 3 CFR, 1964-1965 Comp., p. 357.

13. In § 550.703, amend the definition of *rate of basic pay* by removing “and” at the end of paragraph (3), removing the period at the end of paragraph (4) and adding in its place “; and”, and adding paragraph (5) to read as follows:

§ 550.703 Definitions.

* * * * *

*Rate of basic pay_** * *

(5) An overtime supplement for regularly scheduled overtime within a Border Patrol agent’s regular tour of duty under 5 U.S.C. 5550 (as required by 5 U.S.C. 5550(d)(1)(a)).

* * * * *

Subpart L—Lump-Sum Payment for Accumulated and Accrued Annual Leave

14. The authority citation for subpart L continues to read as follows:

Authority: 5 U.S.C. 5553, 6306, and 6311.

§550.1204 [Amended]

15. In § 550.1204, amend paragraph (a) by removing the phrase “compensatory time off earned under 5 U.S.C. 5543 and § 550.114(d) or § 551.531(d) of this chapter” from the third sentence and inserting in its place the phrase “unused compensatory time off earned under 5 U.S.C. 5543 and § 550.114(d) or § 551.531(d) of this chapter or under 5 U.S.C. 5542(g) and § 550.1625”.

16. In § 550.1205, amend paragraph (b)(5) by adding paragraph (iv) to read as follows:

§ 550.1205 Calculating a lump-sum payment.

* * * * *

(b) * * *

(5) * * *

(iv) An overtime supplement for regularly scheduled overtime within a Border Patrol agent’s regular tour of duty under 5 U.S.C. 5550, as in effect immediately prior to the date the agent became eligible for a lump-sum payment under § 550.1203. The agency must base the lump-sum payment on the agent’s assigned overtime supplement percentage. The assigned percentage will be considered fixed for the duration of the lump-sum annual leave projection period described in § 550.1204, even if an annual period for elections under 5 U.S.C. 5550 begins during that projection period. In cases where the amount of the overtime supplement actually payable in a pay period was limited by a statutory cap, the agency must base the lump-sum payment on a reduced percentage rate that reflects the actual amount of the overtime supplement the agent could receive in a pay period.

* * * * *

17. Add subpart P to part 550 to read as follows:

Subpart P—Overtime Pay for Border Patrol Agents

GENERAL PROVISIONS

Sec.

- 550.1601 Purpose and authority.
- 550.1602 Coverage.
- 550.1603 Definitions.
- 550.1604 Authority of U.S. Customs and Border Protection.
- 550.1605 Interpretation instruction.

ASSIGNMENT OF REGULAR TOUR OF DUTY AND OVERTIME SUPPLEMENT

- 550.1611 Assignments for an annual period.
- 550.1612 Assignments made at other times.
- 550.1613 Selection of agents for assignment.
- 550.1614 Limit on percentage of agents who do not have a Level 1 regular tour of duty.
- 550.1615 Pay assignment continuity.
- 550.1616 Corrective actions.

TREATMENT OF OVERTIME WORK

- 550.1621 Rules for types of regular tour of duty.
- 550.1622 Circumstances requiring special treatment.
- 550.1623 Overtime work outside the regular tour of duty.
- 550.1624 Regularly scheduled overtime outside the regular tour of duty.
- 550.1625 Irregular overtime and compensatory time off.
- 550.1626 Leave without pay during regular time and absences during obligated overtime hours.

RELATIONSHIP TO OTHER PROVISIONS

- 550.1631 Other types of premium pay.
- 550.1632 Hazardous duty pay.
- 550.1633 Treatment of overtime supplement as basic pay.
- 550.1634 Leave and other paid time off.
- 550.1635 Alternative work schedule.
- 550.1636 Exemption from Fair Labor Standards Act.
- 550.1637 Travel time.
- 550.1638 Official time.

Subpart P—Overtime Pay for Border Patrol Agents

AUTHORITY: 5 U.S.C. 5548 and 5550(b)(1)(B) and (d)(1)(B); section 2(h), Pub. L. 113-277, 128 Stat. 3005.

GENERAL PROVISIONS

§ 550.1601 Purpose and authority.

This subpart contains OPM regulations to implement section 2 of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277), which added section 5550 in title 5, United States Code, and made related statutory amendments. The Act created a special overtime pay program for Border Patrol agents in the U.S. Customs and Border Protection component within the Department of Homeland Security. OPM has authority under 5 U.S.C. 5548(a) to regulate subchapter V (Premium Pay) of chapter 55 of title 5, United States Code, including section 5550 and the Act’s amendments to sections 5542 and 5547. OPM was also granted broad authority to promulgate necessary regulations to carry out the Act and the amendments made by the Act under section 2(h) of the Act.

§ 550.1602 Coverage.

This subpart applies to an employee of the U.S. Customs and Border Protection component of the Department of Homeland Security (or any successor organization) who holds a position assigned to the Border Patrol Enforcement classification series 1896 or any successor series, consistent with classification standards established by OPM. Such an employee is referred to as a “Border Patrol agent” or “agent” in this subpart.

§ 550.1603 Definitions.

For the purpose of this subpart—

Advanced training means all training, other than initial training, provided on a whole-workday basis. Advanced training excludes training that covers only part of an 8-hour basic workday.

Agent means a Border Patrol agent.

Annual period means a 1-year period that begins on the first day of the first pay period beginning on or after January 1 of a given year and ends on the day before the first day of the first pay period beginning on or after January 1 of the next year. The term “year” in 5 U.S.C. 5550(b)(1)(A) and (C) and the term “leave year” in 5 U.S.C. 5542(g)(5)(A) are interpreted to be an annual period as defined here.

Basic regular tour of duty means an officially established weekly regular tour of duty consisting of five 8-hour workdays (including no overtime hours) for which no overtime supplement is payable.

Basic workday means the 8 hours of nonovertime work on a day within an agent’s basic workweek.

Basic workweek, for full-time employees, means the 40-hour workweek established in accordance with 5 CFR 610.111.

Border Patrol agent means an employee to whom this subpart applies, as provided in § 550.1602.

CBP means the component of the Department of Homeland Security known as U.S. Customs and Border Protection (or any successor organization). When this term is used in the context of CBP making determinations or taking actions, it means management officials of CBP who are authorized to make the given determination or take the given action.

Hybrid pay period means a biweekly pay period within which—

(1) An agent has one type of established regular tour of duty for one part of the pay period and another type of regular tour of duty for a different part of the pay period; or

(2) An individual is employed as an agent for only a portion of the pay period.

Initial training means training for newly hired agents—including initial orientation sessions, basic training, and other preparatory activities—provided prior to the agent’s first regular work assignment in which he or she will be authorized to make arrests and carry a firearm.

Irregular overtime work means officially ordered or approved overtime work that is not regularly scheduled overtime work—i.e., overtime work that is not part of the agent’s regularly scheduled administrative workweek.

Leave without pay means a period of time within an agent’s basic workweek during which the agent is in nonpay status, including periods of unpaid voluntary absence with approval, absence without approval (AWOL), suspension, or furlough.

Level 1 regular tour of duty means an officially established weekly regular tour of duty generally consisting of five 10-hour workdays (including 2 overtime hours each workday) that provides entitlement to a 25 percent overtime supplement.

Level 2 regular tour of duty means an officially established weekly regular tour of duty generally consisting of five 9-hour workdays (including 1 overtime hour each workday) that provides entitlement to a 12.5 percent overtime supplement.

Obligated overtime hours means regularly scheduled overtime hours that an agent with a Level 1 or Level 2 regular tour of duty is obligated to work as part of the agent’s regular tour of

duty, if the agent performs any amount of work during regular time on same day, and that are converted into an overtime hours debt when the agent fails to work the hours.

Overtime hours debt means the balance of obligated overtime hours not worked for which the agent has not satisfied the hours obligation by applying compensatory time off hours or other overtime hours of work outside the agent's regular tour of duty.

Overtime supplement means a payment received in addition to the regular amount of basic pay for nonovertime work in exchange for regularly scheduled overtime work within an agent's Level 1 or Level 2 regular tour of duty. For an agent who is assigned a 10-hour workday as part of the agent's Level 1 regular tour of duty, the overtime supplement is 25 percent. For an agent who is assigned a 9-hour workday as part of the agent's Level 2 regular tour of duty, the overtime supplement is 12.5 percent. The overtime supplement is computed as provided in § 550.1621(a)(4) and (b)(4).

Pay period means a 14-day biweekly pay period.

Rate of basic pay means the regular nonovertime rate of pay payable to an agent, excluding any overtime supplement, but including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind. An overtime supplement is included as part of an agent's rate of basic pay for purposes outside this subpart, as provided in § 550.1633.

Regularly scheduled administrative workweek, for a full-time employee, means the period within an administrative workweek, established in accordance with 5 CFR 610.111, within which the employee is regularly scheduled to work.

Regularly scheduled work means work (including overtime work) that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with 5 CFR 610.111.

Regular time means the regular basic (nonovertime) hours within an agent's 8-hour basic workday within the 40-hour basic workweek.

Regular tour of duty means the basic 40-hour workweek plus any regularly scheduled overtime work hours that the agent is assigned to work as part of an officially established 5-day weekly work schedule generally consisting of—

(1) 10-hour workdays (including 2 overtime hours each workday) in exchange for a 25 percent overtime supplement (Level 1); or

(2) 9-hour workdays (including 1 overtime hour each workday) in exchange for a 12.5 percent overtime supplement (Level 2).

§ 550.1604 Authority of U.S. Customs and Border Protection.

Authorized management officials of U.S. Customs and Border Protection are responsible for determining the mission requirements and operational needs of the organization and have the right to assign scheduled and unscheduled work as necessary to meet those requirements and needs, regardless of an agent's officially established regular tour of duty. (See subsections (a) and (f)(1) of section 2 of Public Law 113-277 and 5 U.S.C. 5550(g).)

§ 550.1605 Interpretation instruction.

As required by section 2(f) of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277), nothing in section 2 of the Act or this subpart may be construed to require compensation of an agent other than for hours during which the agent is actually performing

work or using approved paid leave or other paid time off. This section does not prevent CBP from granting paid excused absence from an agent's basic workweek under other authority.

ASSIGNMENT OF REGULAR TOUR OF DUTY AND OVERTIME SUPPLEMENT

§ 550.1611 Assignments for an annual period.

(a) *Annual period.* The assignment of a regular tour of duty and overtime supplement to an agent is in effect for a full annual period (or the portion of such period during which the individual is employed as an agent), except as otherwise provided in this subpart. The annual period is a 1-year period that begins on the first day of the first pay period beginning on or after January 1 of a given year and ends on the day before the first day of the first pay period beginning on or after January 1 of the next year.

(b) *Information regarding annual election opportunity.* No later than November 1 of each year, CBP must provide each currently employed agent with information regarding the opportunity to elect a regular tour of duty and corresponding overtime supplement for the next annual period. The information must include an explanation of election options and procedures. For an agent who will be in initial training status on the first day of the annual period, this paragraph is not applicable, and § 550.1612(a) and (b) will apply instead.

(c) *Annual election opportunity.* No later than December 1 of each year, an agent to whom paragraph (b) of this section is applicable may make an election among three options for the regular tour of duty and corresponding overtime supplement (as described in § 550.1621) that the agent wishes to be applicable to him or her during the next annual period.

(d) *Failure to make an election.* If an agent fails to make a timely election under paragraph (c) of this section, CBP must assign the agent a Level 1 regular tour of duty with a 25 percent overtime supplement, except as otherwise provided in paragraph (f) of this section.

(e) *Effect of agent election.* CBP must assign an agent the regular tour of duty elected by the agent under paragraph (c) of this section unless CBP informs the agent of an alternative assignment, as provided under paragraph (f) of this section. CBP may change the assignment during the annual period, as provided under § 550.1612(d).

(f) *Management assignment to tour.* CBP may assign a different regular tour of duty than that elected by the agent for an upcoming annual period under the following circumstances:

(1) An agent who is assigned canine care duties must be assigned a Level 1 regular tour of duty, subject to § 550.1622(c);

(2) An agent who is unable to perform overtime on a daily basis, as determined by CBP, must be assigned a Basic regular tour of duty with no overtime supplement until such time as CBP determines the agent is able to perform the required overtime on a daily basis;

(3) An agent who holds a position at CBP headquarters, as a training instructor at a CBP training facility, or as a fitness instructor—or who holds another type of administrative position— must be assigned a Basic regular tour of duty unless CBP determines a Level 1 or Level 2 regular tour of duty may be assigned to the agent based on a comprehensive staffing analysis conducted for the agent’s duty station as required by section 2(e) of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277);

(4) CBP determines that an agent must be assigned to a Level 1 regular tour of duty to ensure that not more than 10 percent (or higher percentage established under § 550.1614(b)) of agents stationed at a location are assigned to a Level 2 regular tour of duty or a Basic regular tour of duty, as required by 5 U.S.C. 5550(b)(1)(E) and § 550.1614; or

(5) CBP determines that assignment of a different regular tour of duty is necessary to comply with the pay assignment continuity provisions in 5 U.S.C. 5550(b)(1)(G) and

§ 550.1615, notwithstanding any other provision of law or this subpart (including paragraphs (f)(1) through (4) of this section).

§ 550.1612 Assignments made at other times.

(a) An individual who is newly hired as an agent must be assigned a Basic regular tour of duty during any period of initial training. After completing any period of initial training, an agent must be assigned a Level 1 regular tour of duty for any portion of the annual period remaining at that point, except under applicable circumstances described in paragraph (f) of § 550.1611 or paragraph (b) of this section.

(b) An agent who would otherwise be assigned a regular tour of duty under paragraph (a) of this section may submit an election of a different regular tour of duty to be effective on a prospective basis for the remaining portion of the annual period. CBP must provide the agent with election information no later than the date the agent begins a regular work assignment (i.e., after completing any period of initial training). CBP must assign an agent the regular tour of duty elected by the agent under this section unless CBP informs the agent of an alternative assignment based on the circumstances described in paragraph (f) of § 550.1611. Such election must be submitted to CBP no later than 30 days after the agent begins a regular work assignment and, if approved by CBP, is effective on the first day of the first pay period beginning on or after the later of—

- (1) The date the election was submitted; or
- (2) The date the agent completed initial training.

(c) An individual who is newly hired as an agent during the period beginning on November 2 and ending on the day before the first day of the next annual period may make an election to take effect at the beginning of the next annual period notwithstanding the normally

applicable December 1 election deadline, if the agent will not be in initial training status on the first day of the annual period. Such election must be submitted no later than 30 days after receiving election information, but before the first day of the annual period. Such an election is subject to the same requirements and conditions that apply to an election for an annual period under paragraphs (e) and (f) of § 550.1611. If such election is not made, CBP must assign the agent a Level 1 regular tour of duty with a 25 percent overtime supplement for the next annual period, except under applicable circumstances described in paragraph (f) of § 550.1611.

(d) CBP may change an agent's assigned regular tour of duty during an annual period under the circumstances described in paragraph (f) of § 550.1611 or paragraph (b) of § 550.1622. For example, an agent's regular tour of duty may be changed one or more times during an annual period as necessary to comply with the pay assignment continuity provision described in § 550.1611(f)(5).

§ 550.1613 Selection of agents for assignment.

If application of paragraphs (f)(3) and (4) of § 550.1611 (or application of those paragraphs through § 550.1612) requires CBP to select agents for assignment to a particular regular tour of duty out of a pool of agents who prefer a different assignment, CBP must make any such selection consistent with an established written plan that includes the criteria that will be considered and the priority of those criteria. Such plan must be consistent with the requirements of this subpart.

§ 550.1614 Limit on percentage of agents who do not have a Level 1 regular tour of duty.

(a) CBP must take such action as is necessary, including unilateral assignment of agents to a Level 1 regular tour of duty, to ensure that not more than 10 percent of agents stationed at a location are assigned to a Level 2 regular tour of duty or a Basic regular tour of duty, as required

by 5 U.S.C. 5550(b)(1)(E), notwithstanding any other provision of law or this subpart, except as provided by paragraphs (b), (c), and (d) of this section. For the purpose of this paragraph, the term “location” means a Border Patrol sector, which includes all subordinate organizational structures and related geographic areas within the sector (e.g., stations).

(b) CBP may waive the 10 percent limit in paragraph (a) of this section and apply a higher percentage limit if CBP determines it is able to adequately fulfill its operational requirements under that higher limit based on a comprehensive staffing analysis conducted for the agent’s duty station under section 2(e) of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277).

(c) The 10 percent limit in paragraph (a) does not apply to agents working at CBP headquarters or at a CBP training location.

(d) Regardless of the percentage limits set under this section, assignments of regular tours of duty to individual agents must be made consistent with the requirement to ensure pay assignment continuity under § 550.1615.

§ 550.1615 Pay assignment continuity.

(a) *Plan.* (1) In consultation with OPM, CBP must develop and implement a plan to ensure, to the greatest extent practicable, that the assignment of a regular tour of duty to an agent during all consecutive 3-year periods within the control period specified in paragraph (b) of this section produces an average overtime supplement percentage (during each 3-year period) that is consistent with the agent’s average overtime supplement percentage during the course of the agent’s career prior to the beginning of that control period, subject to paragraph (c) of this section. The goal of this plan is to ensure that agents are not able to artificially enhance their

retirement annuities during the period when the high-3 average pay may be determined (in accordance with 5 U.S.C. 8331(4) or 5 U.S.C. 8401(3)).

(2) In applying paragraph (a)(1) of this section, an agent's assigned overtime supplement percentage (25 percent, 12.5 percent, or 0 percent) must be used in computing the career average supplement regardless of whether or not the payable amount of the overtime supplement is limited by a premium pay cap established under 5 U.S.C. 5547 and §§ 550.105 and 550.107.

(3) For purpose of computing the career average overtime supplement percentage, an agent's career is considered to encompass only those periods during which the agent was covered by this subpart. If an agent is in a control period specified in paragraph (b) of this section when the provisions of this subpart first become applicable to the agent, the agent's initially assigned overtime supplement percentage must be considered the agent's career average.

(b) *Control period.* The period of time during which CBP must control an agent's assignment to a regular tour of duty begins on the date 3 years before the agent meets age and service requirements for an immediate retirement and remains in effect during all subsequent service in a Border Patrol agent position.

(c) *Consistency requirement.* (1) The consistency requirement in paragraph (a) of this section is considered to be met when the agent's average overtime supplement percentage during all consecutive 3-year periods within the control period specified in paragraph (b) of this section is within 2.5 percentage points of the agent's average overtime supplement percentage during the course of the agent's career prior to the beginning of that control period, except as provided in paragraph (c)(2) of this section.

(2) Notwithstanding the consistency requirement in paragraph (a) of this section, the CBP plan may allow an agent to be assigned a regular tour of duty that provides an overtime

supplement percentage that is less than that necessary to produce an average percentage (during all consecutive 3-year periods within the control period specified in paragraph (b)) that is consistent with the agent's career average percentage if—

(i) The agent's overtime supplement is limited by the premium pay cap under §§ 550.105 and 550.107 and the agent voluntarily elects a regular tour of duty providing such a lesser overtime supplement percentage that is approved by CBP; or

(ii) CBP determines an agent is unable to perform overtime on a daily basis due to a physical or medical condition affecting the agent and assigns the agent a Basic regular tour of duty, as described in § 550.1611(f)(2), (but only to the extent such assignment makes it impossible to satisfy the consistency requirement during any given consecutive 3-year period).

(d) *CBP authority.* (1) CBP may take such action as is necessary, including the unilateral assignment of a regular tour of duty to implement the plan described in paragraph (a) of this section, except as provided in paragraph (d)(2) of this section.

(2) Notwithstanding the requirements of 5 U.S.C. 5550(b)(1)(G) and this section, CBP is authorized to assign agents to regular tours of duty as necessary to meet operational requirements.

(e) *Reporting requirements--(1) Annual data reporting for agents subject to pay assignment continuity.* For each agent within the control period specified in paragraph (b) of this section, CBP must provide to OPM no later than March 30th of each year the following information (in a format specified by OPM) based on data compiled through the end of the most recent annual period:

(i) The date the agent became subject to controls on the assignment to a regular tour of duty;

(ii) The date the agent will become subject to mandatory separation under 5 U.S.C. 8335(b) or 5 U.S.C. 8425(b);

(iii) The service computation date based on eligibility under 5 U.S.C. 8336(c) or 5 U.S.C. 8412(d);

(iv) The average overtime supplement percentage during the course of the agent's career prior to the beginning of the control period specified in paragraph (b);

(v) The average overtime supplement percentage for the time period beginning with the date the agent became subject to controls on the assignment to a regular tour of duty and ending on the last day of the most recent annual period;

(vi) The average overtime supplement percentage for the last three annual periods (excluding any time that was not within a control period specified in paragraph (b) of this section);

(vii) The average overtime supplement percentage for the most recent annual period (excluding any time that was not within a control period specified in paragraph (b) of this section), and;

(viii) Any other information requested by OPM.

(2) *Annual data reporting for all agents.* No later than March 30th of each year, CBP must provide to OPM the following information (in a format specified by OPM) for each agent compiled for the preceding calendar year based on salary payments made during that year:

(i) The amount of earnings subject to retirement deductions, including overtime supplement payments, received during the most recent calendar year;

(ii) The amount of earnings subject to retirement deductions during the most recent calendar year minus the total amount of the overtime supplement payments during that year;

(iii) The service computation date computed as though law enforcement officer service is regular employee service (i.e., the “regular” SCD);

(iv) The service computation date computed with credit for law enforcement officer service, and any other service creditable for eligibility under 5 U.S.C. 8336(c) or 5 U.S.C. 8412(d) (i.e., the “LEO” SCD);

(v) Date of birth;

(vi) Gender;

(vii) Retirement system (e.g., CSRS, FERS, FERS-RAE, FERS-FRAE); and

(viii) Any other information requested by OPM.

(3) *Additional data.* CBP must provide additional data as requested by OPM at any time, including data on the percentage rate of administratively uncontrollable overtime under § 550.154 during the period before the annual period that begins in January 2016.

(f) *Corrective actions.* If it is determined that the consistency requirement described in paragraphs (a) and (c) of this section is not being met for a particular agent, CBP must document why the differential occurred and establish any necessary actions, including the modification of the plan described in paragraph (a) of this section, to ensure that the goal of pay assignment continuity is achieved going forward. CBP is not required to retroactively correct an agent’s assigned tour or overtime supplement based on violation of the consistency requirement, except when CBP determines there exists, in connection with an agent’s assigned overtime supplement, evidence of fraud, misrepresentation, fault, or lack of good faith on the part of that agent.

§ 550.1616 Corrective actions.

If it is determined that CBP did not comply with applicable statutory or regulatory requirements in assigning an agent to a regular tour of duty under §§ 550.1611 through

550.1614, CBP must take corrective action as soon as practicable. Such corrective action must be applied on a prospective basis. CBP is not required to retroactively change an agent's assigned tour or overtime supplement, except when CBP determines there exists, in connection with the agent's tour assignment, evidence of fraud, misrepresentation, fault, or lack of good faith on the part of that agent.

TREATMENT OF OVERTIME WORK

§ 550.1621 Rules for types of regular tour of duty.

(a) *Level 1 regular tour of duty.* For an agent with a Level 1 regular tour of duty and a 25 percent overtime supplement, the following rules apply:

(1) The agent has an officially established weekly regular tour of duty generally consisting of five 10-hour workdays (an 8-hour basic workday and 2 regularly scheduled overtime hours);

(2) The agent's 8-hour basic workday (regular time) may be interrupted by an unpaid off-duty meal break;

(3) The obligation to perform 2 hours of overtime work on a day including part of the agent's regular tour of duty does not apply if the agent performs no work during regular time on that day, subject to paragraph (e) of this section;

(4) As compensation for regularly scheduled overtime hours within the regular tour of duty, the agent is entitled to an overtime supplement equal to 25 percent of the agent's hourly rate of basic pay times the number of paid hours of regular time for the agent in the pay period (subject to the premium cap in §§ 550.105 and 550.107 and the restriction in § 550.1626(a)(5)), and no additional compensation or compensatory time off may be provided for such overtime hours;

(5) For any additional regularly scheduled overtime hours outside the regular tour of duty, the agent is entitled to overtime pay as provided in § 550.1624, except as otherwise provided by § 550.1626;

(6) For any irregular overtime hours, the agent is entitled to be credited with compensatory time off as provided in § 550.1625, except as otherwise provided by § 550.1626;

(7) The agent must be charged corresponding amounts of paid leave, compensatory time off, other paid time off, or time in nonpay status for each hour (or part thereof) the agent is absent from duty during regular time, as provided in § 550.1634, except as otherwise provided in § 550.1626(a); and

(8) If the agent is absent during regularly scheduled overtime hours within the agent's regular tour of duty that the agent is obligated to work, the agent accrues an obligation to perform other overtime work for each hour (or part thereof) the agent is absent, and such obligation must be satisfied as provided in § 550.1626.

(b) *Level 2 regular tour of duty.* For an agent with a Level 2 regular tour of duty and a 12.5 percent overtime supplement, the following rules apply:

(1) The agent has an officially established weekly regular tour of duty generally consisting of five 9-hour workdays (an 8-hour basic workday and 1 regularly scheduled overtime hour);

(2) The agent's 8-hour basic workday (regular time) may be interrupted by an unpaid off-duty meal break;

(3) The obligation to perform 1 hour of overtime work on a day including part of the agent's regular tour of duty does not apply if the agent performs no work during regular time on that day, subject to paragraph (e) of this section;

(4) As compensation for regularly scheduled overtime hours within the regular tour of duty, the agent receives an overtime supplement equal to 12.5 percent of the agent's hourly rate of basic pay times the number of paid hours of regular time for the agent in the pay period (subject to the premium cap in §§ 550.105 and 550.107 and the restriction in § 550.1626(a)(5)), and no additional compensation or compensatory time off may be provided for such overtime hours;

(5) For any additional regularly scheduled overtime hours outside the regular tour of duty, the agent is entitled to overtime pay as provided in § 550.1624, except as otherwise provided by § 550.1626;

(6) For any irregular overtime hours, the agent is entitled to be credited with compensatory time off as provided in § 550.1625, except as otherwise provided by § 550.1626;

(7) The agent must be charged corresponding amounts of paid leave, compensatory time off, other paid time off, or time in nonpay status for each hour (or part thereof) the agent is absent from duty during regular time, as provided in § 550.1634, except as otherwise provided in § 550.1626(a); and

(8) If the agent is absent during regularly scheduled overtime hours within the agent's regular tour of duty that the agent is obligated to work, the agent accrues an obligation to perform other overtime work for each hour (or part thereof) the agent is absent, and such obligation must be satisfied as provided in § 550.1626.

(c) *Basic regular tour of duty.* For an agent with a Basic regular tour of duty that includes no scheduled overtime hours and provides no overtime supplement, the following rules apply:

(1) The agent has an officially established weekly regular tour of duty generally consisting of five 8-hour basic workdays;

(2) The agent's 8-hour basic workday (regular time) may be interrupted by an unpaid off-duty meal break;

(3) For any regularly scheduled overtime hours, the agent is entitled to overtime pay as provided in § 550.1624, except as otherwise provided by § 550.1626;

(4) For any irregular overtime hours, the agent is entitled to be credited with compensatory time off as provided in § 550.1625, except as otherwise provided by § 550.1626; and

(5) The agent must be charged corresponding amounts of paid leave, compensatory time off, other paid time off, or time in nonpay status for each hour (or part thereof) the agent is absent from duty during regular time, as provided in § 550.1634, except as otherwise provided in § 550.1626(a).

(d) *Effect of premium pay cap.* If a premium pay cap established under 5 U.S.C. 5547 and §§ 550.105 and 550.107 limits payment of an overtime supplement or regularly scheduled overtime pay, or limits crediting of compensatory time off, the affected agent is still required to perform assigned overtime work.

(e) *Meaning of "work".* In applying paragraphs (a)(3) and (b)(3) of this section, the term "work" refers to paid hours of work, consistent with § 550.112, except that paid leave and other paid time off when an agent is excused from duty are not considered to be work hours. Official time under 5 U.S.C. 7131 during regular time is considered to be paid hours of "work" during the time an employee otherwise would be in a duty status.

§ 550.1622 Circumstances requiring special treatment.

(a) *General.* The rules in paragraphs (b) and (c) of this section provide for special treatment based on specified circumstances and apply notwithstanding any other provision of this subpart.

(b) *Advanced training.* (1) During the first 60 days of advanced training in a calendar year, an agent's assigned regular tour of duty must be considered to continue and the agent must be deemed to have worked during any nonwork period within obligated overtime hours for the purpose of determining the agent's total hours to be compared to the applicable overtime threshold (as provided in § 550.1623(a)(2)(iv)), except as provided under paragraph (b)(2) of this section.

(2) If an agent, during the period covered by paragraph (b)(1) of this section, performs creditable overtime work outside the agent's regular tour of duty on a day when the agent performed less than the required amount of obligated overtime work, the overtime work outside the regular tour of duty must be applied towards the obligated overtime hours, as provided in § 550.1626(b). After any such substitution, CBP must credit the agent with hours of work for any remaining nonwork time during obligated overtime hours on the same day for the purpose of determining the agent's total hours to be compared to the applicable overtime threshold. For example, if an agent performs 2 creditable hours of regularly scheduled overtime work outside the agent's Level 1 regular tour of duty on a training day when the agent performed half an hour of work during the 2 hours of obligated overtime, CBP would substitute 1.5 hours of regularly scheduled overtime outside the regular tour of duty for 1.5 hours of obligated overtime when no work was performed. CBP would not provide the agent with any credit for nonwork hours under paragraph (b)(1) of this section, since the 0.5 hours of actual work plus the 1.5 substituted hours

account for the entire 2-hour period. The agent would be paid for the unsubstituted half hour of creditable regularly scheduled overtime work under § 550.1624.

(3) For days of advanced training in excess of 60 days in a calendar year, an agent must be assigned a Basic regular tour of duty and be treated accordingly. If this results in a hybrid pay period in which an agent has two types of regular tours of duty within the same biweekly pay period, CBP must determine the number of overtime hours outside the regular tour of duty as provided in § 550.1623(c). For an agent who is assigned a Basic regular tour of duty during advanced training under this paragraph, CBP must change the agent's regular tour of duty to the type in effect before the Basic tour was assigned when the agent is no longer participating in advanced training.

(4) Paragraphs (b)(1) through (3) of this section apply solely to advanced training that is provided in whole-workday increments (i.e., covering an entire 8-hour basic workday).

(c) *Canine care.* For an agent assigned to provide care for a canine and assigned to the Level 1 regular tour of duty border patrol rate of pay, the combined sum of basic pay plus the 25 percent overtime supplement is considered to provide compensation for all canine care. Such an agent must be credited with 1 hour of regularly scheduled overtime work as part of the regular tour of duty on each day containing a part of that tour, without regard to the actual duration of such care or the time and day when such care was actually provided. That leaves the agent with an additional obligation to perform 1 other hour of regularly scheduled overtime work as part of the agent's regular tour of duty on any day containing a part of the employee's tour, if the agent performs work during regular time on that day and thus has obligated overtime hours. An agent may receive no other compensation or compensatory time off for hours of canine care beyond what is specifically provided under this paragraph. If an agent is generally assigned to provide

care for a canine, but is temporarily relieved of that duty for any reason (e.g., no dog available), the agent may not receive the 1-hour credit for canine care on a day when the agent is relieved from providing canine care.

§ 550.1623 Overtime work outside the regular tour of duty.

(a) *General.* (1) For the purpose of determining hours of overtime work outside an agent's regular tour of duty in order to apply §§ 550.1624, 550.1625, and 550.1626, CBP must apply the applicable biweekly overtime threshold prescribed in paragraphs (b) and (c) of this section. An agent's total hours of work (as determined under paragraph (a)(2) of this section) must be compared to the applicable threshold, and hours in excess of that threshold are overtime hours in applying §§ 550.1624, 550.1625, and 550.1626. The 8-hour daily and 40-hour weekly overtime thresholds under 5 U.S.C. 5542(a) and § 550.111 are not applicable to agents.

(2) An agent's total hours of work in a pay period for the purpose of applying applicable overtime thresholds is equal to the sum of:

(i) Time determined to be hours of work in duty status (regular time or overtime), subject to this subpart, 5 U.S.C. 4109 and 5 CFR 410.402 (related to training periods), and 5 U.S.C. 5542(b) and § 550.112 (establishing general rules), except that paragraphs (d) and (e) of § 550.112 are superseded by § 550.1626;

(ii) Paid leave or other paid time off during a period of nonduty status within an agent's regular time;

(iii) Obligated overtime hours during which no work is performed (creating a debt of hours) and for which no substitution is made under § 550.1626(b);

(iv) Nonwork hours deemed to be hours of work during obligated overtime hours on a day of advanced training under § 550.1622(b); and

(v) Overtime hours normally scheduled within an agent's regular tour of duty that an agent is not obligated to work because the agent performs no work during regular time on that day (as provided in paragraphs (a)(3) and (b)(3) of § 550.1621).

(b) *Overtime thresholds for standard tours.* (1) The applicable biweekly overtime threshold prescribed in paragraph (b)(2) of this section applies during a pay period to an agent whose regular tour of duty is fixed at one of the three standard tours for the entire pay period.

(2) For an agent covered by paragraph (b)(1) of this section, the threshold used to determine whether an agent has performed overtime work outside the regular tour of duty in a given pay period is—

- (1) 100 hours for a Level 1 regular tour of duty;
- (2) 90 hours for a Level 2 regular tour of duty; or
- (3) 80 hours for a Basic regular tour of duty.

(c) *Overtime threshold for hybrid pay period.* (1) For a hybrid pay period in which an agent has one type of regular tour of duty in effect for one part of the period and another type for another part of the period, the threshold used to determine whether an agent has performed overtime work outside the regular tour of duty in a given pay period is equal to the sum of the regular time hours (paid or unpaid) and the number of normally scheduled overtime hours within a regular tour of duty (whether obligated or not and whether worked or not) in the pay period. For example, if an agent has a Level 1 regular tour of duty in the first week of a pay period and a Level 2 regular tour of duty in the second week, the agent's regular time hours would be 40 in the first week and 40 in the second week and the normally scheduled overtime hours within a regular tour of duty would be 10 (5 days times 2 hours each day) in the first week and 5 (5 days times 1 hour each day) in second week, resulting in an biweekly overtime threshold of 95 hours.

(2) For a hybrid pay period in which an individual is employed as a Border Patrol agent for only part of the pay period, the threshold used to determine whether an agent has performed overtime work outside the regular tour of duty in a given pay period is equal to the sum of the paid regular time hours (paid or unpaid) and the number of normally scheduled overtime hours within a regular tour of duty (whether obligated or not and whether worked or not) during the portion of the pay period the individual was employed as an agent. For example, if an individual is employed as an agent only during the second week of a pay period and has a Level 1 regular tour of duty, the overtime threshold would be 50 hours in determining whether the agent has overtime hours in that week that are compensable under §§ 550.1624 through 550.1626.

§ 550.1624 Regularly scheduled overtime outside the regular tour of duty.

(a) *Coverage.* Any regularly scheduled overtime hours outside an agent's regular tour of duty, as specified in § 550.1623, are covered by this section, except that such hours are excluded from coverage under this section when required by the superseding provisions in § 550.1626.

(b) *Rates.* Agents receive overtime pay at the rates specified under 5 U.S.C. 5542(a) and § 550.113 for regularly scheduled overtime hours covered by paragraph (a) of this section, subject to the premium pay limitation established under 5 U.S.C. 5547 and §§ 550.105 and 550.107. An agent's rate of basic pay (without any overtime supplement) is used in computing overtime pay for such hours.

(c) *Avoiding additional regularly scheduled overtime.* (1) As required by section 2(c)(2) of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277), CBP must, to the maximum extent practicable, avoid the use of regularly scheduled overtime work by agents outside of the regular tour of duty.

(2) Notwithstanding paragraph (c)(1) of this section, CBP may allow use of regularly scheduled overtime work outside an agent's regular tour of duty if an agent volunteers to perform such overtime (e.g., to reduce an overtime hours debt).

§ 550.1625 Irregular overtime and compensatory time off.

(a) *Coverage.* An agent is entitled to compensatory time off as provided in this section for irregular overtime hours outside an agent's regular tour of duty, as specified in § 550.1623, except that such hours are excluded from coverage under this section (except paragraph (c) of this section) when required by the superseding provisions in § 550.1626. The compensatory time off provisions in 5 U.S.C. 5543 and 5 CFR 550.114 are not applicable to an agent.

(b) *Earning on an hour-for-hour basis for irregular overtime.* Subject to the limitations specified in this section and the superseding provisions in § 550.1626, an agent must receive compensatory time off for an equal amount of time spent performing irregular overtime work.

(c) *Call-back overtime work.* Notwithstanding paragraph (b) of this section, consistent with 5 U.S.C. 5542(b)(1) and § 550.112(h), an agent must be deemed to have performed 2 hours of irregular overtime work for a lesser amount of irregular overtime work if—

(1) An agent is required perform such work on a day when the agent was not scheduled to work; or

(2) An agent is required to return to the agent's place of employment to perform such work.

(d) *Earning limited by premium pay cap.* An agent may not be credited with earning compensatory time off if the value of such time off would cause the sum of the agent's basic pay and premium pay in the given pay period to exceed the limitation established under 5 U.S.C. 5547 and §§ 550.105 and 550.107 in the period in which it was earned. The dollar value of

compensatory time for the purpose of this paragraph is the amount of overtime pay the agent would have received for the period during which compensatory time off was earned if the overtime had been regularly scheduled outside the agent's regular tour of duty.

(e) *Pay period limit.* (1) An agent may not earn more than 10 hours of compensatory time off during any pay period unless—

(i) CBP, as it determines appropriate, approves in writing a waiver of the 10-hour limit; and

(ii) Such waiver approval is executed in advance of the performance of any work for which compensatory time off is earned.

(2) If a waiver of the 10-hour limit described in paragraph (e)(1) of this section is not granted, the agent involved may not be ordered to perform the associated overtime work.

(f) *Annual period limit.* An agent may not earn more than 240 hours of compensatory time off during an annual period.

(g) *Usage.* (1) An agent may use compensatory time off by being excused from duty during regular time (in an amount equal to the compensatory time being used) during the agent's basic workweek.

(2) An agent's balance of unused compensatory time off is used to satisfy an overtime hours debt, as provided in § 550.1626(c)(1).

(h) *Time limit for usage and forfeiture.* An agent must use any hours of compensatory time off not later than the end of the 26th pay period after the pay period during which the compensatory time off was earned. Any compensatory time off not used within that time limit, or prior to separation from an agent position, is forfeited and not available for any purpose, regardless of the circumstances. An agent may not receive any cash value for unused

compensatory time off. An agent may not receive credit towards the computation of the agent's retirement annuity for unused compensatory time off.

§ 550.1626 Leave without pay during regular time and absences during obligated overtime hours.

(a) *Substitution for leave without pay during regular time.* (1) For any period of leave without pay during an agent's regular time (basic workweek), an equal period of work outside the agent's regular time in the same pay period must be substituted to the extent such work was performed. Any time substituted for leave without pay must be treated for all pay computation purposes as if it were regular time (except as provided in paragraph (a)(5) of this section) and may not be considered an overtime hour of work for any purpose, including §§ 550.1621(a)(4) and (b)(4), 550.1624, and 550.1625.

(2) Hours of work must be substituted for regular time work under paragraph (a)(1) of this section before being substituted for regularly scheduled overtime within the agent's regular tour of duty under paragraph (b) of this section.

(3) Hours used for substitution under paragraph (a)(1) of this section must be substituted in the following priority order: first, irregular overtime hours; second, regularly scheduled overtime hours outside the regular tour of duty; and third, regularly scheduled overtime hours within the regular tour of duty.

(4) The substitution of overtime hours for leave without pay is solely for pay computation purposes. The substitution does not change the hours of an agent's basic workweek or the fact that the agent was in a particular type of nonpay status during those hours. The hours that are substituted are considered to have been performed when they were worked, not during the leave without pay hours for which they are substituted. For example, if an agent performs 4 hours of

overtime work outside the agent's regular tour of duty during the first week of a pay period and then is placed in leave without pay during the second week due to a shutdown furlough caused by a lapse in appropriations, the 4 hours may be substituted for furlough hours for the purpose of computing pay owed the agent for the week before the furlough began.

(5) If overtime hours are substituted for an absence without approval (AWOL) or a suspension, the basic pay for such substituted hours may not be used in computing an agent's overtime supplement.

(b) *Substitution for absences during obligated overtime hours within the regular tour of duty.* (1) For a period of absence during obligated overtime hours within an agent's regular tour of duty, an equal period of work outside the agent's regular tour of duty in the same pay period must be substituted to the extent such work was performed. Any time so substituted must be treated for all pay computation purposes as if it were obligated overtime work and may not be considered an overtime hour of work for any other purpose, including §§ 550.1624 and 550.1625.

(2) In substituting hours of work under paragraph (b)(1) of this section, work performed on the same day as the period of absence must be substituted first in circumstances described in § 550.1622(b)(2). Hours substituted under this paragraph must be substituted in the following priority order: first, irregular overtime hours; and second, regularly scheduled overtime hours outside the regular tour of duty.

(3) After substituting hours under paragraph (b)(2) of this section, any remaining hours used for substitution under paragraph (b)(1) of this section must be substituted in the following priority order: first, irregular overtime hours; and second, regularly scheduled overtime hours outside the regular tour of duty.

(4) The substitution of overtime hours outside the regular tour of duty for obligated overtime hours not worked is solely for pay computation purposes. The substitution does not change the hours of an agent's regular tour of duty. The hours that are substituted are considered to have been performed when they were worked, not during the obligated overtime hours for which they are substituted.

(c) *Application of compensatory time off or future overtime work to offset overtime hours debt.* (1) If a Border Patrol agent does not have sufficient additional work in a pay period to substitute for all periods of absence during obligated overtime hours within the agent's regular tour of duty for that pay period, any unused balance of compensatory time off hours previously earned under § 550.1625 must be applied towards the newly accrued overtime hours debt.

(2) If an agent has a remaining overtime hours debt after applying paragraphs (b) and (c)(1) of this section, any additional overtime work outside the agent's regular tour of duty in subsequent pay periods that would otherwise be credited under §§ 550.1624 or section 550.1625 must be applied towards the overtime hours debt until that debt is satisfied. The application of such hours must be done in the following priority order: first, irregular overtime hours; and second, regularly scheduled overtime hours outside the regular tour of duty. Any overtime hour applied under this paragraph (c)(2) may not be considered an overtime hour of work for any other purpose.

(d) *Unsatisfied overtime hours debt at transfer or separation.* Any unsatisfied overtime hours debt that exists at the time of transfer to a non-agent position or separation from Federal service must be converted to a monetary debt equal to the result of multiplying the agent's hourly rate of basic pay at the time of separation or transfer by the number of hours in the overtime hours debt. CBP must follow standard debt collection procedures to recover any debt.

RELATIONSHIP TO OTHER PROVISIONS

§ 550.1631 Other types of premium pay.

(a) An agent may not receive premium pay for night, Sunday, or holiday work for hours of regularly scheduled overtime work within the agent's regular tour of duty.

(b) An agent may receive premium pay for night, Sunday, or holiday work, as applicable, for hours not covered by paragraph (a) of this section, in accordance with 5 U.S.C. 5545(a) and (b) and section 5546 and corresponding regulations, except that section 5546(d) does not apply. (Contrary to section 5546(d), for an agent, pay for overtime work on a Sunday or holiday is determined under 5 U.S.C. 5542(g), not under section 5546(d).) The agent's rate of basic pay (without any overtime supplement) must be used in computing such premium payments.

(c) An agent may not be paid standby duty premium pay under 5 U.S.C. 5545(c)(1) or administratively uncontrollable overtime pay under 5 U.S.C. 5545(c)(2).

§ 550.1632 Hazardous duty pay.

An agent is eligible for hazardous duty pay, subject to the requirements in 5 U.S.C. 5545(d) and subpart I of this part. The agent's rate of basic pay (without any overtime supplement) must be used in computing any hazardous duty pay.

§ 550.1633 Treatment of overtime supplement as basic pay.

Regularly scheduled overtime pay with an agent's regular tour of duty is treated as part of basic pay or basic salary only for the following purposes:

- (a) 5 U.S.C. 5524a and 5 CFR part 550, subpart B, pertaining to advances in pay;
- (b) 5 U.S.C. 5595(c) and 5 CFR part 550, subpart G, pertaining to severance pay;
- (c) 5 U.S.C. 8114(e), pertaining to workers' compensation;
- (d) 5 U.S.C. 8331(3) and 5 U.S.C. 8401(4) and related provisions that rely on the definition in those paragraphs, pertaining to retirement benefits;

(e) Subchapter III of chapter 84 of title 5, United States Code, pertaining to the Thrift Savings Plan;

(f) 5 U.S.C. 8704(c), pertaining to life insurance; and

(g) For any other purposes explicitly provided for by law or as the Office of Personnel Management may prescribe by other regulation.

§ 550.1634 Leave and other paid time off.

(a) An agent is subject to the rules governing leave accrual and usage under 5 U.S.C. chapter 63 on the same basis as other employees. The tour of duty for leave accrual and usage purposes is the basic workweek, which excludes regularly scheduled overtime hours within the regular tour of duty established under this subpart. The agent must be charged corresponding amounts of leave for each hour (or part thereof) the agent is absent from duty during regular time (except that full days off for military leave must be charged when required).

(b) An agent is subject to the normally applicable rules governing other types of paid time off (such as holiday time off under 5 U.S.C. chapter 61, compensatory time off for religious observances under subpart J of this part, or compensatory time off for travel under subpart N of this part) on the same basis as other covered employees. The tour of duty used in applying those rules is the basic workweek, which excludes regularly scheduled overtime hours within the regular tour of duty established under this subpart. The agent must be charged corresponding amounts of paid time off for each hour (or part thereof) the agent is absent from duty during regular time.

(c) In computing a lump-sum annual leave payment under 5 U.S.C. 5551-5552, an overtime supplement for an agent's regularly scheduled overtime hours within the agent's regular tour of duty is included, as provided in § 550.1205(b)(5)(iv).

§ 550.1635 Alternative work schedule.

An agent may not have a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II. The regular tour of duty established under this subpart is a special work schedule established under 5 U.S.C. 5550. CBP may allow flexible starting and stopping times for an agent's basic workday if it determines such flexibility is appropriate for the position in question.

§ 550.1636 Exemption from Fair Labor Standards Act.

The minimum wage and the hours of work and overtime pay provisions of the Fair Labor Standards Act do not apply to Border Patrol agents. (See also 5 CFR 551.217.)

§ 550.1637 Travel time.

(a) A Border Patrol agent's travel time to and from home and the agent's regular duty station (or to an alternative work location within the limits of the agent's official duty station, as defined in § 550.112(j)) may not be considered hours of work under any provision of law.

(b) Official travel time away from an agent's official duty station may be creditable hours of work as provided in § 550.112(g). When an agent travels directly between home and a temporary duty location outside the limits of the agent's official duty station (as defined in § 550.112(j)), the time the agent would have spent in normal home to work travel must be deducted from any creditable hours of work while traveling.

§ 550.1638 Official Time.

An agent who uses official time under 5 U.S.C. 7131 may be assigned to a Level 1 or Level 2 regular tour of duty, but is required to perform agency work during obligated overtime hours or to accrue an overtime hours debt. Official time may be used during overtime hours only when an event arises incident to representational functions that must be dealt with during the

overtime hours. If CBP determines that an agent’s official time duties during the basic workday make it impracticable to perform agency work during the scheduled obligated overtime hours, CBP must provide the agent with an opportunity to eliminate any overtime hours debt by working at another time. As provided in § 550.1621(e), official time during regular time is considered to be “work” when an agent otherwise would be in an duty status in applying paragraphs (a)(3) and (b)(3) of § 550.1621.

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

18. The authority citation for part 551 continues to read as follows:

AUTHORITY: 5 U.S.C. 5542(c); Sec. 4(f) of the Fair Labor Standards Act of 1938, as amended by Pub. L. 93–259, 88 Stat. 55 (29 U.S.C. 204f).

19. In § 551.216, revise paragraph (c)(2) to read as follows:

Subpart B--Exemptions and Exclusions

* * * * *

§ 551.216 Law enforcement activities and 7(k) coverage for FLSA pay and exemption determinations.

* * * * *

(c) * * *

(2) Employees whose primary duties involve patrol and control functions performed for the purpose of detecting and apprehending persons suspected of violating criminal laws;

* * * * *

20. Add § 551.217 to subpart B to read as follows:

§ 551.217 Exemption of Border Patrol agents.

A Border Patrol agent (as defined in 5 U.S.C. 5550(a)(2) and 5 CFR 550.1603) is exempt from the minimum wage and overtime provisions of the Act.

PART 870—FEDERAL EMPLOYEES’ GROUP LIFE INSURANCE PROGRAM

21. The authority citation for part 870 is revised to read as follows:

AUTHORITY: 5 U.S.C. 8704(c), 8716; Subpart J also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 870.302(a)(3)(ii) also issued under section 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 870.302(a)(3) also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251, and section 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 870.302(a)(3) also issued under section 145 of Pub. L. 106–522, 114 Stat. 2472; Secs. 870.302(b)(8), 870.601(a), and 870.602(b) also issued under Pub. L. 110–279, 122 Stat. 2604; Subpart E also issued under 5 U.S.C. 8702(c); Sec. 870.601(d)(3) also issued under 5 U.S.C. 8706(d); Sec. 870.703(e)(1) also issued under section 502 of Pub. L. 110–177, 121 Stat. 2542; Sec. 870.705 also issued under 5 U.S.C. 8714b(c) and 8714c(c); Pub. L. 104–106, 110 Stat. 521.

Subpart B—Types and Amount of Insurance

22. In § 870.204, amend paragraph (a)(2) by removing the word “and” from the end of paragraph (x), removing the period at the end of paragraph (xi) and adding in its place “; and”, and adding a new paragraph (xii) to read as follows:

§ 870.204 Annual rates of pay.

* * * * *

(a) * * *

(2) * * *

(xii) An overtime supplement for regularly scheduled overtime within a Border Patrol agent's regular tour of duty under 5 U.S.C. 5550 (as required by 5 U.S.C. 5550(d)).

* * * * *

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