



## UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

Employee Services

November 27, 2019

CPM 2019-23

### **MEMORANDUM FOR: Human Resource Directors**

**FROM:** MARK D. REINHOLD, ASSOCIATE DIRECTOR, EMPLOYEE SERVICES

**Subject:** Inapplicability of a State or Local Minimum Wage to Federal Employees

An increasing number of State and local governments are establishing or increasing a jurisdictional minimum wage that is higher than the nationwide Federal minimum wage established under the Fair Labor Standards Act (FLSA). As a result, the U.S. Office of Personnel Management (OPM) has received inquiries regarding the applicability of minimum wages established by State and local governments to Federal employees stationed in affected locations. This memorandum provides agencies with necessary guidance.

Federal employees are covered by the FLSA, which is a Federal law. (See generally 29 U.S.C. 201, et seq.) The FLSA includes a minimum wage provision. (See 29 U.S.C. 206.) Thus, the FLSA minimum wage is generally applicable to Federal employees unless they are exempt from the minimum wage requirements as provided under the FLSA exemption provisions. (See 29 U.S.C. 213(a) and (f).) Under the exemption provisions of section 213(a), the FLSA minimum wage does not apply inter alia to employees who meet the executive, administrative, or professional exemption criteria; criminal investigators paid availability pay under 5 U.S.C. 5545a; certain computer employees; or border patrol agents, as defined in 5 U.S.C. 5550(a). (See 5 CFR part 551, subpart B, for more information on exemptions.) Under the exemption in section 213(f), the FLSA minimum wage does not apply to employees who perform services during a workweek solely in foreign areas outside the United States. (See also 5 CFR 551.212.)

Under OPM's FLSA minimum wage regulation at 5 CFR 551.301, an employee's "hourly regular rate" as defined in 5 CFR 551.511(a) is used to determine compliance with the FLSA minimum wage provisions. The current minimum wage under the FLSA is \$7.25 (except in American Samoa, where it is \$5.21 for government employees). By operation of Federal law, the FLSA minimum wage would supersede any lower amount of pay that would otherwise be provided under the applicable Federal employee pay system. Since the hourly regular rate reflects an employee's rate of basic pay (including locality pay) and since the lowest General Schedule (GS) rate (GS-1, step 1) is above \$7.25, GS employees generally are already paid in excess of the FLSA minimum wage requirements. (To illustrate, at GS-1, step 1, the base rate is currently \$9.13 and the lowest locality rate in the United States is currently \$10.56 (expressed as hourly rates).)

State and local government minimum wage laws are not binding on the Federal Government and its component agencies since, under the preemption doctrine which originates from the Supremacy Clause of the Constitution, Federal law supersedes conflicting State law. (See U.S. Const. Art. VI. cl. 2.) This is the case when Federal employee pay rates are specifically fixed

under Federal law (e.g., GS employees) and when Federal agencies are given discretion in setting rates of pay under Federal law.

In the case of a Federal employee pay system such as the GS pay system in which pay rates are fixed by statute, a statutory change would be needed to allow payment of a State or local minimum wage. There is no administrative authority under which OPM could allow State or local minimum wages to supersede GS statutory rates.

In the case of a Federal employee pay system under which the employing Federal agency has discretion in setting rates of pay, the agency may apply State and local minimum wages to covered employees as a matter of agency policy or through a collective bargaining agreement (where applicable). However, the agency should make it clear that employees are not actually covered by the State or local minimum wage law or any appeal mechanisms established under such a law.

OPM administers the Federal Wage System covering prevailing rate (blue collar) employees in multiple agencies. OPM administratively determines the pay schedules for these employees. OPM has issued regulations (based on a policy choice, not a statutory obligation) requiring payment of applicable State or local minimum wages to Federal Wage System employees. (See 5 CFR 532.205.) Under this regulation, the highest State or local minimum wage in effect in the local wage area is applied in setting wage schedule rates unless there is a higher FLSA minimum wage under Federal law. In other words, if there are multiple State or local minimum wages in effect in different jurisdictions encompassed within the same local wage area, the highest minimum wage will be used in setting wage schedule rates for the entire local wage area, if that minimum wage rate exceeds the FLSA minimum wage rate.

#### Additional Information

Agency headquarters-level human resources offices may contact OPM at [pay-leave-policy@opm.gov](mailto:pay-leave-policy@opm.gov). Employees should contact their agency human resources office for further information on this memorandum.

cc: Chief Human Capital Officers (CHCOs), and Deputy CHCOs