



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

Wednesday, December 24, 2003

CPM 2003-21

MEMORANDUM FOR: Human Resources Directors

FROM: Ronald P. Sanders, Associate Director for Strategic Human Resources Policy

Subject: Recent Legislative Changes

This is to inform you of several changes in pay and leave administration, benefits, and other policies resulting from the enactment of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136, November 24, 2003).

National Security Personnel System

Section 1101 of the Act amends subpart I of part III of title 5, United States Code, to add chapter 99 that, among other things, provides the Secretary of Defense and the Director of the Office of Personnel Management (OPM) with the authority to establish a new human resources management system (including a new labor relations system) for Department of Defense (DOD) employees. The Act also provides the Secretary with the authority to establish separation and retirement incentives and additional staffing flexibilities.

Military Leave for Mobilized Federal Civilian Employees

Section 1113 of the Act amends 5 U.S.C. 6323(b) to provide that employees who perform full-time military service as a result of a call or order to active duty in support of a contingency operation (as defined in 10 U.S.C. 101(a)(13)) are entitled to 22 days of military leave each calendar year. Under 5 U.S.C. 5519, the military pay received by an individual who has been activated in support of a contingency operation (as defined in 10 U.S.C. 101(a)(13)) must be credited (less any travel, transportation, or other per diem allowances) against any Federal civilian pay the employee received during the 22 workdays of military leave provided by 5 U.S.C. 6323(b). An employee is entitled to the greater of his or her civilian or military pay, not both. However, an employee may choose to take annual leave instead of military leave in order to retain both civilian and military pay. The amendment applies to military service performed on or after November 24, 2003.

Modification of the Overtime Hourly Pay Cap

Section 1121 of the Act amends 5 U.S.C. 5542(a)(2) to modify the hourly overtime pay cap for certain Federal employees who are exempt from (not covered by) the overtime pay provisions of the Fair Labor Standards Act (FLSA) of 1938, as amended. This amendment became effective on

November 24, 2003 (which fell in the middle of a pay period for most employees). For FLSA-exempt employees who are entitled to receive overtime pay under 5 U.S.C. 5542(a)(2), the hourly rate of overtime pay is the **greater** of (1) one and one-half times the minimum hourly rate of basic pay for GS-10 (including any applicable special salary rate, locality rate of pay, or special pay adjustment for law enforcement officers), or (2) the employee's own hourly rate of basic pay (including any applicable special salary rate, locality rate of pay, or special pay adjustment for law enforcement officers). OPM will amend its regulations to reflect this new provision in the near future, but Federal agencies are responsible for ensuring proper payments as of November 24, 2003, and need not wait for revised regulations to begin making these payments.

Environmental Differential Pay and Hazardous Duty Pay for Exposure to Asbestos

Section 1122 of the Act amends the environmental differential pay (EDP) authority at 5 U.S.C. 5343(c)(4) for prevailing rate (wage) employees and hazardous duty pay (HDP) authority at 5 U.S.C. 5545(d) for General Schedule (GS) employees to require that any EDP or HDP entitlement determination concerning exposure to asbestos must be consistent with permissible exposure limits (PELs) set by the Occupational Safety and Health Administration (OSHA). As of November 24, 2003, any administrative or judicial determination concerning EDP or HDP for asbestos exposure must be based on the OSHA PELs for asbestos. OPM's regulations regarding HDP for GS employees already reflect this requirement. We plan to update the EDP regulations for wage employees in the near future.

Higher Caps on Student Loan Repayments

Section 1123 of the Act amends 5 U.S.C. 5379(b)(2)(A) to increase the maximum amount Federal agencies are authorized to repay under the Federal student loan repayment program from \$6,000 to \$10,000 for any one employee in a calendar year. The Federal Employee Student Loan Assistance Act (Public Law 108-123, November 11, 2003) had previously increased the annual limitation from \$6,000 to \$10,000 per employee in any calendar year and increased the aggregate limitation from \$40,000 to \$60,000 for any one employee. OPM will issue regulations to reflect the new payment limitations in the near future.

Authorization for Cabinet Secretaries, Secretaries of Military Departments, and Heads of Executive Agencies to be Paid on a Biweekly Basis

Section 1124 of the Act amends 5 U.S.C. 5504 to require the heads of agencies to be paid on a biweekly basis instead of a monthly basis. (The biweekly rate is determined by dividing the employee's annual rate by 2087 and multiplying the result by 80.) This amendment also applies to members of the Foreign Service, the Senior Foreign Service, and the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service. This amendment became effective on the first day of the first applicable pay period beginning on or after November 24, 2003 (November 30, 2003, for most affected officials and employees). In addition, section 1124 allows the head of an agency in exceptional circumstances to elect to cover employees under 5 U.S.C. 5504 who would otherwise be excluded from coverage and requires OPM to issue regulations providing guidelines on the coverage of such employees.

Senior Executive Service Pay

Section 1125 of the Act amends 5 U.S.C. chapter 53, subchapter VIII, to (1) establish a new performance-based pay system for members of the Senior Executive Service (SES) under 5 U.S.C. 5382, (2) end locality-based comparability payments under 5 U.S.C. 5304(h) for senior executives, and (3) change the threshold for imposing post-employment restrictions on certain senior executives under 18 U.S.C. 207(c)(2)(A). In addition, section 1125(c)(4) states that any reference in a provision of law to a rate of basic pay that is above the minimum payable and below the maximum payable to a member of the SES will be considered a reference to the rate payable for level IV of the Executive Schedule. A memorandum on the new SES pay system is available.

Design Elements for Pay-for-Performance Systems in Demonstration Projects

Section 1126 of the Act amends 5 U.S.C. chapter 47 to establish requirements for new pay-for-performance systems in demonstration projects. According to these requirements, such pay-for-performance systems must be fair, credible, and transparent, and must link the pay-for-performance system, the employee performance appraisal system, and the agency's strategic plan.

Federal Flexible Benefits Plan Administrative Costs

Section 1127 of the Act requires executive branch agencies of the Federal Government to pay to OPM, or the entity designated by OPM, any administrative fees associated with their employees' participation in the Federal Flexible Benefits Plan. The law prohibits agencies from imposing any fee on employees to defray the administrative costs of the program. The law requires that OPM submit a report to the Committee on Government Reform of the House of Representatives and the Committee on Government Affairs of the Senate by March 31, 2004, specifying the Government's administrative costs associated with the Federal Flexible Benefits Plan for 2003. The report also must project the annual administrative costs of the program for the next 5 fiscal years. Any agency participating in the program must submit annual reports for the first 3 calendar years to the Office of Management and Budget specifying the amount of employment tax savings, net of administrative fees.

Human Capital Performance Fund

Section 1129 of the Act adds a new chapter 54 to title 5, United States Code, to provide authority for a Human Capital Performance Fund (HCPF). Under this authority, agencies may grant additional, continuing pay to their highest performing and most valuable employees. OPM is responsible for administering the Fund, including approving agency HCPF plans in consultation with the Chief Human Capital Officers Council and allocating money from the Fund to agencies for training and initial payments to employees.

The law establishes broad plan requirements and requires agencies to establish and obtain OPM approval of their HCPF plans before receiving an allocation from the Fund. Agencies may use their HCPF allocation to grant additional, continuing payments of up to 10 percent of basic pay to General Schedule, prevailing rate (wage), Foreign Service, and other employees based on exceptional performance contributing to the achievement of the agency's mission. The law

prohibits agencies from granting HCPF payments to senior executives and similar employees. No more than 15 percent of an agency's employees may receive payments from the Fund in any fiscal year. Fund allocations must be used only to pay for new human capital performance payments in the fiscal year in which awarded. Agencies are responsible for funding HCPF payments thereafter.

Human capital performance payments will be part of an employee's rate of basic pay for retirement purposes under 5 U.S.C. chapter 83, subchapter III, and chapter 84; life insurance under 5 U.S.C. chapter 87; and for other purposes prescribed by OPM regulation (except for adverse actions under 5 U.S.C. chapter 75). However, OPM cannot allocate HCPF funds to agencies until separate appropriations legislation is enacted. OPM will provide additional information to agencies concerning Fund allocations at a later date.

Employee Surveys

Section 1128 of the Act requires each Executive agency (as defined in 5 U.S.C. 105) to conduct an annual employee survey. Each agency's survey must include questions that are unique to that agency, in accordance with regulations prescribed by OPM. Surveys will assess (1) leadership and management practices and (2) employees' satisfaction with their leadership, work environment, rewards and recognition, opportunities for professional development, and their opportunity to contribute to achieving their agency's mission. OPM will issue implementing regulations in 2004.

Additional Information

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

cc: Chief Human Capital Officers