



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

Friday, November 7, 2008
CPM-2008-19

MEMORANDUM FOR: Heads Of Executive Departments And Agencies

FROM: Michael W. Hager, Acting Director

Subject: Recent Pay Legislative Changes

This is to inform you of several changes in Federal employee pay administration resulting from the enactment of various legislative provisions.

I. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417, October 14, 2008)

Section 1101 – Waiver of premium pay cap and aggregate limitation on pay for certain overseas employees

Section 1101(a) provides agency heads with discretionary authority to waive the premium pay limitations in 5 U.S.C. 5547 in calendar year 2009 for certain civilian employees who perform work in an overseas location that (1) is in the area of responsibility of the Commander of the United States Central Command (CENTCOM) or (2) was formerly in the CENTCOM area of responsibility but has been moved to the area of responsibility of the Commander of the United States Africa Command (AFRICOM). The annual limitation on basic pay and premium pay allowed under the waiver authority is the annual rate of salary payable to the Vice President under 3 U.S.C. 104, which is expected to be \$227,300 in calendar year 2009. (The rate of \$227,300 reflects a 2.8 percent increase, as required by operation of 3 U.S.C. 104(a). This is based on the assumption the President will authorize a General Schedule (GS) increase of at least 2.8 percent in exercising his authority to allocate the 3.9 percent pay increase between a general increase and locality pay increases. Under 3 U.S.C. 104(b), the percentage increase in the Vice President's salary may not exceed the GS general increase.) The qualifying overseas work must meet one of two additional qualifying conditions: (1) performance of work in direct support of or directly related to a military operation (including a contingency operation as defined in 10 U.S.C. 101(a)(13)) or (2) performance of work in direct support of or directly related to an operation in response to an emergency declared by the President.

Section 1101(b) provides the aggregate limitation on pay under 5 U.S.C. 5307 will not apply to any employee in calendar year 2009 if the employee is granted a waiver of the normally applicable premium pay limitations under section 1101(a) in calendar year 2009. The aggregate limitation on pay is a limit on the total amount of allowances, differentials, bonuses, awards, or other similar payments authorized under title 5, United States Code, an employee may receive in a calendar year in addition to the employee's basic pay.

When the aggregate limitation is applicable, payments (other than basic pay) in excess of the aggregate limitation must be deferred and are generally paid as a lump-sum payment at the beginning of the following calendar year. Thus, section 1101(b) has the effect of allowing covered employees to receive applicable payments immediately without deferral.

Section 1101(c) provides any payments made under the section 1101(a) waiver authority resulting in additional premium pay of a type normally creditable as basic pay will not be considered basic pay for any purpose (e.g., retirement). Also, such additional premium pay may not be used in computing lump-sum payments for accumulated and accrued annual leave under 5 U.S.C. 5551.

Although section 1101(d) provides the Director of the U.S. Office of Personnel Management (OPM) with the discretion to issue regulations for this waiver authority, OPM does not currently plan to do so. Each agency should establish policies for using this waiver authority if they have covered employees. To ensure agencies apply this discretionary authority consistently, we have developed a summary of key elements agencies should include in their policies implementing the waiver authority that are consistent with past key common elements in the Department of Defense (DOD) and the Department of State policies implementing similar waiver authorities. (See Attachment.)

Section 1102 – Temporary discretionary authority to grant allowances, benefits, and gratuities to personnel on official duty in a combat zone

Section 1102 amends section 1603(a) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Public Law 109-234, June 15, 2006) to grant the head of an agency the discretionary authority to provide an individual employed by, or assigned or detailed to a combat zone, allowances, benefits, and gratuities comparable to those provided by the Secretary of State to members of the Foreign Service under section 413 and chapter 9 of title I of the Foreign Service Act of 1980. The civilian employee must be on official duty in a combat zone, as defined by section 112(c) of the Internal Revenue Code of 1986, which includes Iraq and Afghanistan. (Section 1603(a) of Public Law 109-234 previously applied only to Iraq and Afghanistan.) This discretionary authority may be applied during fiscal years 2009, 2010, and 2011.

Section 1102 also amends section 1603(a) of Public Law 109-234 to provide that the discretionary authority to provide Foreign Service allowances, benefits, and gratuities to employees on official duty in Iraq and Afghanistan during fiscal year 2006 included the period beginning on October 1, 2005, and ending on June 15, 2006.

(Note: Section 161 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Public Law 110-329, September 30, 2008) discussed later in this memorandum continued the authority contained in section 1603(a) of Public Law 109-234 to grant Foreign Service allowances, benefits, and gratuities to employees in Iraq and Afghanistan until March 6, 2009. The authority under section 161 is superseded by section 1102 of the National Defense Authorization Act for FY 2009.)

Section 1104 – Extension of the Department of Defense’s authority to make lump-sum severance payments

Section 1104 amends 5 U.S.C. 5595(i)(4) to extend the date by which DOD may pay severance pay in a single lump-sum payment to eligible employees from October 1, 2010, to October 1, 2014. OPM’s severance pay regulations recognize the existence of such special authorities. (See 5 CFR 550.709(g).)

Section 1235 – Employment for resettled Iraqis

Section 1235 provides the Secretary of Defense and the Secretary of State authority to jointly establish and operate a temporary program to offer employment as translators, interpreters, or cultural awareness instructors to certain Iraqi nationals lawfully present in the United States. Resettled Iraqis may be appointed to temporary positions of 1 year or less outside of Iraq without competition and without regard to the GS classification and pay provisions. (The limitation on administratively determined pay under 5 U.S.C. 5373 to the rate payable for level IV of the Executive Schedule (EX-IV) will apply.) Section 1235 also provides authority for the Departments of Defense and State to hire such individuals as personal services contractors to provide translation, interpreting, or cultural awareness instruction. Such personal services contractors will not be considered employees of the Federal Government, except for the purposes of 5 U.S.C. chapter 81 (regarding compensation for work injuries) and 28 U.S.C. chapter 171 (regarding tort claims procedures).

The Secretary of Defense, jointly with the Secretary of State and with the concurrence of the Director of OPM, must prescribe any regulations necessary to carry out the program to include ensuring the suitability of resettled Iraqis for employment, determining the number of positions under the program, and establishing pay scales and hiring procedures. Section 1235 requires the program to terminate on December 31, 2014, and allows for earlier termination after notifying Congress at least 180 days prior to termination.

II. Food, Conservation, and Energy Act of 2008 (Public Law 110-246, June 18, 2008)

Section 14219 – Elimination of the statute of limitations on administrative offset

Section 14219 amends the Debt Collection Act of 1982 (as amended by the Debt Collection Improvement Act of 1996) by removing a restriction in paragraph (e) of 31 U.S.C. 3716 on the collection of debt by administrative offset, which includes centralized salary offset. Prior to this change, administrative offset to collect debt was available if the debt was delinquent for a period of less than 10 years. The amendment to the law allows for the collection of debt by administrative offset without any time limitation and applies to any debt outstanding on or after June 18, 2008, the date of the enactment of the Act. OPM will issue guidance and revised regulations at 5 CFR part 550, subpart K, for the collection by salary offset from indebted Government employees to conform with this statutory change.

III. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Public Law 110-329, September 30, 2008)

Section 142 – Annual pay adjustment for 2009

Section 142 authorizes a 3.9 percent overall average pay adjustment in January 2009 for employees under the statutory pay systems – the General Schedule, the Foreign Service, and certain schedules for employees of the Veterans Health Administration of the Department of Veterans Affairs.

Of the 3.9 percent average increase, a certain percentage may be allocated as an across-the-board increase under 5 U.S.C. 5303 and the remaining amount as locality pay adjustments under 5 U.S.C. 5304. The President will determine these allocations when he issues an Executive order to implement the 2009 pay rates.

(Note: On September 30, 2008, the Federal Salary Council recommended an across-the-board increase of at least 2.9 percent in the rates of basic pay for the statutory pay systems with the remaining amount used for locality pay increases. OPM will issue a separate memorandum with the 2009 salary tables after the President signs the Executive order. The 2009 pay rates become effective on the first day of the first applicable pay period beginning on or after January 1, 2009(i.e., January 4, 2009).)

Section 161 – Temporary discretionary authority to grant allowances, benefits, and gratuities to personnel on official duty in a combat zone

Section 161 extends, until March 6, 2009, the authority in section 1603(a) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Public Law 109-234, June 15, 2006) granting the head of an agency the discretionary authority to provide employees working in Iraq and Afghanistan certain allowances, benefits, and gratuities comparable to those provided by the Secretary of State to members of the Foreign Service. However, as previously described in this memorandum, section 1102 of the National Defense Authorization Act for Fiscal Year 2009 supersedes this authority.

IV. Senior Professional Performance Act of 2008 (Public Law 110-372, October 8, 2008)

The Senior Professional Performance Act of 2008 establishes a new pay system for senior level and scientific or professional (SL/ST) employees comparable to the Senior Executive Service (SES) pay system. Under section 2(d), this new pay system will go into effect on the first day of the first pay period beginning on or after the 180th day of enactment (i.e., April 12, 2009).

The maximum rate of basic pay under the new SL/ST pay system will be the rate payable for EX-II for SL/ST employees covered by a performance appraisal system certified under 5 U.S.C. 5307 by OPM with the concurrence of the Office of Management and Budget. The maximum rate of basic pay will be the rate payable for EX-III for SL/ST employees covered by a performance appraisal system that has not been certified under 5 U.S.C. 5307. (See section 2(b) amendments to 5 U.S.C. 5376(b).) The minimum rate of basic pay under the new SL/ST pay system will continue to be 120 percent of the minimum rate of basic pay payable for GS-15.

Under the new pay system, locality pay will no longer be paid on top of SL/ST basic rates. (See section 2(a) amendments to 5 U.S.C. 5304.) However, upon the effective date of the new system, an SL/ST employee's rate of basic pay plus any applicable locality payment the employee received on the day before this effective date will be combined to establish the employee's new rate of basic pay. No SL/ST employee's rate of basic pay will be reduced as a result of converting to the new pay system.

Section 3 changes the maximum term for performance appraisal certification under 5 U.S.C. 5307(d) from 2 years to not to exceed 24 months from the date of certification with the option to request an extension from OPM for an additional 6 months. OPM will issue guidance and revised regulations to implement the new SL/ST pay system and new performance appraisal certification time limits.

V. Inspector General Reform Act of 2008 (Public Law 110-409, October 14, 2008)

Section 4 establishes new provisions governing the setting of the rate of basic pay for Inspector General (IG) positions. IGs at an "establishment," as defined under section 12(2) of the IG Act of 1978 (formerly designated as section 11(2)), are entitled to a rate of basic pay equal to EX-III plus 3 percent. These IGs have been removed from the list of EX-IV positions in 5 U.S.C. 5315. Also, notwithstanding any other provision of law, IGs at a "designated Federal entity" as defined under section 8G(a)(2) of the IG Act of 1978 must, for pay and other purposes, be classified at a grade, level, or rank designation at or above those of a majority of the senior-level executives in such entity, and their pay may be no less than the average total compensation (including bonuses) of the senior level executives in the entity. However, the total increase in pay provided to an IG of a designated Federal entity under this special authority may not, in any fiscal year, exceed 25 percent of the average total compensation (including bonuses) of the IG of that entity for the preceding 3 fiscal years. This limitation does not apply to any adjustment made in fiscal year 2013 or thereafter.

Section 4(c) provides that the provisions of 5 U.S.C. 3392 (dealing with continuation of various SES entitlements for certain Presidential appointees) continue to apply to career SES members who are appointed to an IG position, except that SES performance awards and awarding of ranks will not apply. Furthermore, notwithstanding any provision of law, career Federal employees serving on an appointment under an authority other than 5 U.S.C. 3392 may not suffer a reduction in pay (not including any bonus or performance award) as a result of being appointed to an IG position.

Section 5 provides that an IG of an establishment or a designated Federal entity may not receive any cash award or cash bonus, including any cash award under 5 U.S.C. chapter 45.

Sections 4 and 5 were effective on October 14, 2008, the date of enactment. Each Inspector General office is responsible for implementing and administering these provisions. OPM does not have the authority to regulate or administer the provisions of Public Law 110-409.

OPM has established a new pay plan code "IG" for Inspectors General in establishments whose rate of basic pay is fixed at the rate for EX-III plus 3 percent. In addition, OPM has established a new pay rate determinant code "D" for Inspectors General in designated Federal entities to recognize their coverage under a provision providing a special classification authority and pay

rate floor, as described above. (Note: There is no new pay plan code for Inspectors General in designated Federal entities. The pay rate floor does not constitute a pay system but rather interacts with the applicable pay system. Each Inspector General in a designated Federal entity will have his/her pay rate fixed under the applicable pay system and the resulting rate will be compared to the pay rate floor. The higher rate will be payable.)

Additional Information

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

cc: Chief Human Capital Officers
Human Resources Directors

Attachment