

# Rules and Regulations

Federal Register

Vol. 52, No. 241

Wednesday, December 16, 1987

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 551

#### Pay Administration Under the Fair Labor Standards Act

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management is issuing an interim rule to comply with a recent decision of the U.S. Court of Appeals for the Federal Circuit concerning the computation of overtime pay for Federal employees under the Fair Labor Standards Act of 1938, as amended.

**DATES:** This interim rule is effective retroactively to the first day of the first full biweekly pay period beginning on or after July 21, 1987. Comments must be received on or before February 16, 1988.

**ADDRESS:** Comments may be sent or delivered to Barbara L. Fiss, Assistant Director for Pay and Performance Management, Personnel Systems and Oversight Group, U.S. Office of Personnel Management, Room 7H28, 1900 E Street NW., Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:** James E. Matteson, (202) 632-5056.

**SUPPLEMENTARY INFORMATION:** On May 14, 1987, the U.S. Court of Appeals for the Federal Circuit rendered its decision in the matter of *Chester Lanehart, et al. v. Constance Horner, et al.*, 818 F. 2d 1574 (Fed. Cir. 1987). At issue was the quantum of "pay" to which appellants, Federal firefighters subject to the Fair Labor Standards Act (FLSA), were and are entitled during authorized absences from work under the "leave with pay" provisions of 5 U.S.C. 6303 (annual leave), section 6307 (sick leave), section 6233 (court leave), and section 6323

(military leave). The Court of Appeals held that the "leave with pay" statutes prevent any reduction in the "customary and regular pay" of the appellants, including overtime pay under the FLSA. The U.S. Solicitor General decided not to request a rehearing of *Lanehart* before the U.S. Court of Appeals for the Federal Circuit or to appeal the decision to the U.S. Supreme Court, and the decision on the merits of the case became final on July 21, 1987.

The Court of Appeals' decision overturns a longstanding principle upon which most of the Federal Government's FLSA pay administration policy was based—namely, that the administration of pay under the FLSA is entirely separate from pay administration under Title 5, United States Code. The Court specifically concluded that the Title 5 "leave with pay" statutes must be construed as covering compensation under a different statute—i.e., the Fair Labor Standards Act (title 29).

The Office of Personnel Management has determined that the Court of Appeals' decision applies to any employee who receives additional compensation for overtime work on a "customary and regular" basis, including (1) annual premium pay for standby duty under 5 U.S.C. 5545(c) (1); (2) annual premium pay for administratively uncontrollable overtime (AUO) work under 5 U.S.C. 5545(c)(2); and (3) overtime pay for "regularly scheduled" overtime work, as defined in 5 CFR 550.103(p) and 610.102(g)—e.g., six 8-hour days each week or four 10-hour days each week (not under an Alternative Work Schedule).

While the Court of Appeals' decision specifically addressed the "leave with pay" statutes under sections 6303, 6307, 6322, and 6323 of Title 5, United States Code, the interim rule also encompasses "paid absences" under section 6305 (home leave and shore leave) and section 6326 (funeral leave), holidays under section 6102 of Title 5, United States Code, and excused absences. Therefore, if an employee in any of the situations described above receives pay for periods of nonwork (leave, holidays, or excused absences), the paid absence must be counted *as if* it were "hours of work" for the purpose of determining the employee's FLSA overtime pay entitlement. Additional guidance concerning implementation of this

decision will be provided through the Federal Personnel Manual system.

Pursuant to section 553 (b)(3)(B) and (d)(3) of Title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making this amendment effective in less than 30 days. The notice and 30-day delay in the effective date are being waived because of the need to implement the Court of Appeals' decision, which became final on July 21, 1987.

#### E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that this rule will not have a significant impact on a substantial number of small entities because it will affect only Federal employees and agencies.

#### List of Subjects in 5 CFR Part 551

Administrative practice and procedure, Fair Labor Standards Act, Government employees, Manpower training programs, Travel, Wages.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM is amending Part 551 of Title 5, Code of Federal Regulations, as follows:

#### PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

1. The authority citation for Part 551 continues to read as follows:

Authority: Sec. 4(f) of the Fair Labor Standards Act, as amended by Pub. L. 93-259, enacted April 8, 1974, 88 Stat. 55; 29 U.S.C. 204f.

2. In § 551.401, paragraph (b) is revised, paragraph (c) is redesignated as paragraph (d), and a new paragraph (c) is added to read as follows:

#### § 551.401 Basic principles.

\* \* \* \* \*

(b) Except as provided in paragraph (c) of this section, paid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work for the purpose of this part.

(c) Paid periods of nonwork (e.g., leave, holidays, or excused absences) are counted as hours of work for the purpose of this part for an employee who receives—

- (1) Annual premium pay for standby duty under 5 CFR 550.141;
- (2) Annual premium pay for administratively uncontrollable overtime work under 5 CFR 550.151; or
- (3) Overtime pay for regularly scheduled overtime work, as defined in 5 CFR 550.103(p) and 610.102(g).

\* \* \* \* \*

3. In § 551.511, (b) introductory text is republished for the convenience of the reader, paragraph (b)(2) is revised, paragraphs (b)(3) through (b)(7) are redesignated as paragraphs (b)(4) through (b)(8), respectively, and a new paragraph (b)(3) is added to read as follows:

**§ 551.511 Hourly regular rate of pay.**

\* \* \* \* \*

(b) "Total remuneration" includes all remuneration for employment paid to, or on behalf of, an employee except:

- (2) Payments for periods during which no work is performed (e.g., leave, holidays, or excused absences) for all employees except those in receipt of—
  - (i) Annual premium pay for standby duty under 5 CFR 550.141;
  - (ii) Annual premium pay for administratively uncontrollable overtime work under 5 CFR 550.151; or
  - (iii) Overtime pay for regularly scheduled overtime work, as defined in 5 CFR 550.103(p) and 610.102(g);
- (3) Reimbursements for travel expenses, or other similar expenses, incurred by an employee in furtherance of an agency's interest, which are not related to hours of work;

\* \* \* \* \*

[FR Doc. 87-28816 Filed 12-15-87; 8:45 am]  
BILLING CODE 6325-01-M

**DEPARTMENT OF AGRICULTURE**

**Animal and Plant Health Inspection Service**

[Docket No. 87-149]

**7 CFR Part 301**

**Witchweed Regulated Areas**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Affirmation of interim rule.

**SUMMARY:** We are affirming without change an interim rule that amended the list of suppressive areas under the

witchweed quarantine and regulations by adding to, and deleting from, the list of areas in counties in North Carolina and South Carolina.

**EFFECTIVE DATE:** January 15, 1988.

**FOR FURTHER INFORMATION CONTACT:** Milton C. Holmes, Operations Officer, Domestic and Emergency Operations, PPQ, APHIS, USDA, Room 660, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-6365.

**SUPPLEMENTARY INFORMATION:**

**Background**

In an interim rule published in the *Federal Register* on July 8, 1987 (52 FR 25579-25585, Docket Number 87-011), we amended the regulations at 7 CFR Part 301 by adding areas in Columbus, Cumberland, Harnett, Hoke, Lenoir, Richmond, and Wayne Counties in North Carolina, and Florence County in South Carolina, to the list of suppressive areas in § 301.80-2a.

We also deleted areas in Beaufort, Columbus, Cumberland, Duplin, Greene, Harnett, Hoke, Johnston, Lenoir, Pender, Pitt, Richmond, Sampson, Scotland, and Wayne Counties in North Carolina and Florence, Horry, and Marlboro Counties in South Carolina from the list of suppressive areas in § 301.80-2a.

We did not receive any comments, which were required to be postmarked or received on or before September 8, 1987. The facts presented in the interim rule still provide a basis for the rule.

**Executive Order 12291 and Regulatory Flexibility Act**

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than \$100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived the review process required by Executive Order 12291.

This action affects the interstate movement of regulated articles from specified areas in North Carolina and South Carolina. Based on information compiled by the Department, we have

determined that, although there are approximately 290,000 small entities that move these articles interstate from the nonregulated areas in the United States, only about 5 small entities move them interstate from these areas in North Carolina and South Carolina. Further, we have estimated the overall economic impact from this action to be less than \$80.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

**Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

**Paperwork Reduction Act**

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 7 CFR Part 301**

Agricultural commodities, Plant pests, Plants (Agriculture), Quarantine, Transportation, Witchweed.

**PART 301—DOMESTIC QUARANTINE NOTICES**

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR Part 301 and that was published in the *Federal Register* on July 8, 1987 (52 FR 25579-25585).

**Authority:** 7 U.S.C. 150dd, 150ee, 150ff, 161, 162, and 164-167; 7 CFR 2.17, 2.51, and 371.2(c).

Done at Washington, DC, this 10th day of December, 1987.

**Donald Houston,**  
*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 87-28791 Filed 12-15-87; 8:45 am]  
BILLING CODE 3410-34-M

**Farmers Home Administration**

**7 CFR Part 1956**

**Debt Settlement for Farmer Programs and Single Family Housing Loans**

**AGENCY:** Farmers Home Administration, USDA.