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U. S. DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT

DIRECTIVES SYSTEM

Subject Number: PER-4-1

Transmittal Number: 633

Date: 9/11/90

Subject: Application of Fair Labor Standards Act (FLSA) to Positions in the Office of Surface Mining Reclamation and Enforcement (OSMRE)

Approval: Jennifer A. Salisbury **Title:** Deputy Assistant Sec.

Please make the following changes to:

Subject No.: PER-4 Date: 8/28/86
Subject: As shown above Transmittal No.: 274

The purpose of this change notice is to eliminate the section of 5 CFR Part 551 dated March 4, 1986 (attached to Federal Personnel Manual Bulletin 551-18 dated March 13, 1986) which provided for a presumption that employees classified at GS-11 and above are exempt from FLSA. It would also change the criteria for determining whether an employee is an executive (i.e., an exempt supervisor or manager) to make them more consistent with pertinent aspects of the Department of Labor's criteria.

1. Change paragraph 3.b. to add the following: Also see Federal Personnel Manual Bulletin 551-21 dated February 4, 1988.

2. Change paragraph 3.f. to add the following: Also see 5 CFR-551.203(c) and 551.204 (copy attached).

3. Change paragraph 5. to add the following: Also see FPM Bulletin No. 551-21 dated February 4, 1988.

4. Change paragraph 6. to eliminate the reference to OSMRE Directive on "First 40 Hours Workweek Schedule (PER-1).

5. Change paragraph 8. to: Chief, Branch of Employment and Classification, Division of Personnel (202) 208-2953 or FTS 268-2953.

CHANGE NOTICE

To Print 9/12/90

Federal Personnel Manual System
FPM Bulletin

Bulletin No. 551– 21

Washington, D. C. 20415
February 4, 1988

SUBJECT: Change in Criteria for Exemptions Under the Fair Labor Standards Act (FLSA)

Heads of Departments and Independent Establishments:

An Information Notice on Changes to Federal Personnel Regulations Is Attached to This Bulletin

This Notice Must Be Posted in a Prominent Place

1. The Director of the Office of Personnel Management (OPM) is required to take steps to ensure that OPM regulations that apply to individuals or organizations outside OPM are posted in offices of Federal agencies maintaining copies of Federal personnel regulations [5 USC 1103(b)(2)(A)].
2. To carry out this responsibility, OPM issued regulations under Part 110 of 5 CFR that require agencies to (a) make available for review on request the regulatory material that appears as attachment 1 to this bulletin; and (b) complete and post the notice (attachment 2) in a prominent place.
3. Completion of the notice requires insertion of the room number where the regulations are available for review.
4. Individuals who wish to make comments on regulations or notices should address them to the OPM official whose mailing address is listed on the reprint of *Federal Register* material in attachment 1 of this bulletin.
5. The public comment period on proposed regulations begins when they are published in the *Federal Register* or made available for public inspection at the Office of the Federal Register in Washington, D.C. Sometimes delays in distribution may result in posting notices on proposed regulations being received at agency field offices near the end of the comment period of a regulation. In other cases, the attached posting notice may convey information about a final regulation and no comments will be sought. **In either case, the attached notice must still be posted. The purpose of the material is to provide notice rather than to solicit comment.**
6. There is no maximum number of days that the attached notice must remain posted; each agency or office is free to make this determination. However, we suggest 10 working days as a minimum. The basic requirement is that there be sufficient opportunity for interested individuals to receive adequate notice of changes in the Federal personnel regulations.

Constance Horner
Director

Attachments (2)

Inquiries: Program Development Division, Agency Compliance and Evaluation, Personnel Systems and Oversight Group, (202) 632–4530

Code: 551, Pay Administration Under the Fair Labor Standards Act

Distribution: Basic FPM

Bulletin Expires: January 20, 1989

Rules and Regulations

Federal Register
Vol. 53, No. 14
Friday, January 22, 1988

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; Exemptions

AGENCY: Office of Personnel Management.

ACTION: Interim rule.

SUMMARY: The Office of Personnel Management is publishing an interim rule to revise its Fair Labor Standards Act overtime regulations to bring them into conformity with a court decision. The revisions will: (1) Eliminate the sections concerning the presumption that employees in positions classified at GS-11 and above are exempt (not covered by the overtime provisions of the Act) and the agency-proposed exceptions to the presumption of exemption, and (2) change the criteria for determining whether a Federal employee is an executive under the Act (i.e., an exempt supervisor or manager) to make them more consistent with pertinent aspects of the Department of Labor's criteria for determining that a nonFederal employee is an executive.

DATES: *Effective date:* January 22, 1988.

Comment date: Comments must be received on or before February 22, 1988.

ADDRESS: Send written comments to Michael Clogston, Assistant Director for Agency Compliance and Evaluation, Office of Personnel Management, Room 5459, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Jack Tapping, (202) 632-4530.

SUPPLEMENTARY INFORMATION:

Background

On June 26, 1987, the United States Court of Appeals for the District of Columbia Circuit vacated two sections of the regulations in 5 CFR Part 551, as follows:

1. 5 CFR 551.203(c) which provides: (a) For a presumption that any employee in a position classified at GS-11 or above (or the equivalent level in other white collar pay systems) is exempt, and (b) that any agency which properly classifies a position in this grade range has satisfied the burden of proof that the incumbent is exempt.

The Court found that this provision was inconsistent with the meaning, scope, and application of the Act because it places an unwarranted and confusing burden on the employee, who must take the initiative to challenge his exemption.

Consequently, 5 CFR 551.203(c) and a related section, 5 CFR 551.207 (providing for agency-proposed exceptions to the presumption of exemption), are eliminated.

2. 5 CFR 551.204 which provides executive exemption criteria. (The issues the Court raised involve only the introductory text and paragraph (a) of this section.) This section says the requirement that the primary duty of management or supervision is met if an employee meets or exceeds the definition of "supervisor" in the Supervisory Grade Evaluation Guide or meets or exceeds the "Foreman range of responsibility" in the Job Grading Standard for Supervisors. Thus, the executive exemption criteria were tied to, and dependent on, classification under the supervisory classification standards.

The Court found that § 551.204 was "susceptible to a more expansive interpretation" (indicating that exemption was easier to reach) than is possible when applying the comparable Department of Labor (Labor) regulation (29 CFR 541.1). The Court indicated that Labor's executive exemption criteria more narrowly limit the possibility of an "exempt" finding than OPM's executive exemption criteria do. The Court said, for example, that under Labor's executive exemption criteria, an exempt employee must "customarily and regularly" direct the work of others and must manage the entire "enterprise" in which he is employed or at least a "department" thereof.

Although criteria as limiting as Labor's criteria are stated or implied in the supervisory classification standards to which 5 CFR 551.204 refers, these criteria are not stated in the regulation itself.

Consequently, the revised § 551.204 contains criteria for determining that the primary duty of an employee's work is "executive," without reference to the classification standards or other sources of information. The criteria include language the Court used to exemplify factors it concluded were omitted in the previous regulation, and are more directly consistent with Labor's description of its regulatory criteria for executive exemption.

Waiver of Notice of Rulemaking

Pursuant to section 553(b)(3)(B) of title 5 of the United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking. The notice is being waived because a court decision vacating certain sections in 5 CFR Part 551 requires immediate implementation.

Waiver of 30-day Delay in Effective Date of Final Regulation

Pursuant to section 553(d)(3) of title 5 of the United States Code, I find that good cause exists to make this amendment effective in less than 30 days. The regulation is being made effective immediately because of the need to implement the Court decision mentioned above.

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 regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal employees.

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 issuing interim amendments to Part 551 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. 204(f).

§ 551.203 [Amended]

2. Section 551.203 is amended by: (1) Removing the semicolon at the end of paragraph (b) and adding a period in its place; and (2) by removing paragraph (c).

3. Section 551.204 is amended by revising the introductory text and paragraph (a) to read as follows:

§ 551.204 Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee—

(1) Has authority to select or remove, and advance in pay and promote, or make any other status changes of subordinate employees, or has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

* * * * *

§ 551.207 [Removed]

§§ 551.208 and 551.209 [Redesignated as §§ 551.207 and 551.208 and Amended]

4. Section 551.207 is removed and §§ 551.208 and 551.209 are redesignated §§ 551.207 and 551.208, respectively. The reference in the new § 551.208(a) to 551.207 is revised to read "551.206". The reference in the new § 551.208(c) to 551.209 is revised to read "551.208". The two references in the new § 551.208(d) to § 551.209 are revised to read "551.208".

[FR Doc. 88-1249 Filed 1-21-88; 8:45 am]
BILLING CODE 6325-01-M

United States Office of Personnel Management

Notice of Changes to Title 5 of the Code of Federal Regulations

The Office of Personnel Management has issued interim regulations on the Fair Labor Standards Act (FLSA).

These regulations would eliminate the section providing for a presumption that employees classified at GS-11 and above are exempt (not covered by the overtime provisions of the FLSA) and would change the criteria for determining whether an employee is an executive (i.e., an exempt supervisor or manager) to make them more consistent with pertinent aspects of the Department of Labor's criteria for determining that a nonfederal employee is an executive.

You can review a copy of the complete text of the regulations in the room shown below. The U.S. Office of Personnel Management would like to hear any comments you may have. Please send them to arrive by the date shown below to the address indicated.

Location of complete text:		Send comments to: Michael Clogston, Assistant Director for Agency Compliance and Evaluation, Office of Personnel Management, Rm. 5459, 1900 E Street, NW., Washington, DC 20415
Notice expires:	Date comments to arrive: February 22, 1988	

The Director of the Office of Personnel Management (OPM) is required to take steps to ensure that OPM regulations which apply to individuals or organizations outside OPM are posted in Federal agencies maintaining copies of the Federal personnel regulations [5 USC 1103(b)(2)(A)]. This notice, which should be posted in a prominent place, carries out that regulation.

OPM Form 1222-FP2 (3-80)

*U.S. GOVERNMENT PRINTING OFFICE: 1988-200-571:60081