



**U.S. Immigration  
and Customs  
Enforcement**

# **U.S. Immigration and Customs Enforcement**

## **Premium Pay Guide**

## INTRODUCTION

This U.S. Immigration and Customs Enforcement (ICE) Premium Pay Guide (Guide) includes a summary of the statutory and regulatory requirements governing premium pay, as well as several examples and scenarios to provide context to the statutes and regulations. While the Guide covers most subjects applicable to ICE employees, it currently is limited to general schedule employees and excludes variations specific to wage-grade employees.

This Guide does not include or establish any new requirements, responsibilities, or procedures; rather, it is limited to a summary of federal statutes and regulations along with relevant examples. Although several examples are provided, it may not include all scenarios encountered by supervisors, law enforcement officers, or other ICE personnel.

This Guide will be continuously reviewed, revised, and updated to ensure consistency with law, regulation, and ICE policy, and on that basis, it is subject to change without notice. Nothing in this Guide is intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Therefore, should there be any questions, concerns or issues that are addressed, or not addressed in this Guide, please contact your servicing Office of Human Capital Human Resources Specialist.

### **DISCLAIMER:**

**Any ICE employee, including those in Headquarters and field offices, having any reason to believe that an ICE organizational entity is not in compliance with the guidance provided in this Guide should report such issue up his or her chain of command. Office management must immediately contact ICE Employee and Labor Relations (ELR) and the ICE Office of the Principal Legal Advisor (OPLA) to discuss how to move into compliance, consistent with any potential labor obligations. While statutes and regulations must be complied with immediately, compliance with the ICE policies or best practices referenced in this Guide may in some circumstances require that certain steps be taken prior to moving the office into compliance.**

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# I. PREMIUM PAY

## 1. OVERTIME UNDER THE FEDERAL EMPLOYEES PAY ACT OF 1945 (FEPA)/TITLE 5 OF THE UNITED STATES CODE

### Introduction:

In 1945, Congress passed and the President signed the Federal Employees Pay Act (FEPA), 5 U.S.C. § 5541, *et seq.* At the time, FEPA was the primary law governing the payment of overtime for federal employees. While FEPA provides for the payment of a certain amount of overtime and premium pay, it is heavily focused on ensuring that the federal government could maintain control over those expenses and that they would not appear inappropriate. Therefore, overtime payment is subject to a number of restrictions and limitations. FEPA overtime is commonly referred to as “45 Act” overtime or “Title 5” overtime.

### Statutory & Regulatory Authorities:

5 U.S.C. §§ 5541, 5542, 5543, 5547 & 5548; 5 CFR Part 550, Sections 101-114.

### Rules:

1. Full time federal employees working a regular schedule (as opposed to a compressed or flexible schedule) may be paid FEPA for hours of work in excess of eight hours in a day or 40 hours in an administrative workweek.<sup>1</sup> All minutes of time compensable as work under FEPA rules are considered, rounding to the nearest 15 minutes.
2. Federal employees on Compressed Work Schedules (CWS) may be paid overtime for hours of work in excess of the regularly scheduled work hours specific to the schedule, for example ten (10) hours for a “4-10” schedule. The weekly threshold continues to apply. For part-time employees, overtime hours are hours in excess of the work schedule for a day (but must be more than 8 hours) or, for a week (but must be more than 40 hours).
3. FEPA divides overtime into two categories: “regular” overtime and “irregular or occasional” overtime. “Regular” overtime refers to overtime that is **scheduled prior** to the start of the administrative workweek, while “irregular or occasional overtime” refers to work that is ordered and approved **during the same administrative workweek** in which the work is performed.
4. FEPA overtime must be officially “ordered or approved” in advance.
5. FEPA overtime is paid at a rate that is equal to the greater of an employee’s:
  - a. hourly rate of basic pay<sup>2</sup> multiplied by 1.5, capped at 1.5 times the rate at GS-10, step 1 (“time & a half”); or
  - b. hourly rate of basic pay.<sup>3</sup>
6. In general, time spent in training cannot be compensated with FEPA overtime, and agencies should attempt to avoid scheduling training during overtime hours. Notwithstanding the general

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<sup>1</sup> A “day” under FEPA means a 24 hour period set by the Agency (in general a calendar day unless otherwise specified), while the administrative workweek is the period of seven consecutive days utilized for scheduling purposes. At ICE, the administrative workweek is midnight Sunday morning to midnight Saturday night.

<sup>2</sup> An employee’s hourly rate of basic pay is equal to the rate set by statute plus locality pay, or in certain circumstances, a special salary rate under 5 C.F.R. Part 530.

<sup>3</sup> These hourly overtime pay limitations do not apply to prevailing rate (wage) employees or to FLSA overtime pay.

rule, several exceptions exist to the prohibition on paying FEPA overtime for hours spent in training, including:

- a. Training that is conducted during a period of duty for which the employee is already receiving overtime pay (e.g., an employee is scheduled to a week-long operation involving special systems and tactics, with the first day scheduled for 12 hours to cover various logistical and set up issues. If training on the special systems is performed during overtime hours, those hours can be compensated with overtime).
- b. Training that is scheduled to include overtime hours because the costs of scheduling the training in this manner, including the overtime costs, are less than the costs of confining the same training to only occur during basic hours (e.g., a training course where not using overtime will require a sixth day, extending into a weekend, adding significant travel and per diem costs as opposed to simply utilizing overtime).
  - i. A cost analysis is generally required for this exception to be used. Please contact OHC if you believe this exception is required.

Note: If an employee is scheduled for training during overtime hours, but no exception applies, the training time is not considered “hours of work” and those hours are not compensable.

Employees who are covered by the FLSA are subject to different rules regarding their entitlement to premium pay for hours of training, as explained in Section 4 of this Part of the Guide. The rules governing AUO or LEAP payments during training are addressed in this Part of the Guide in Sections 2 and 3, respectively.

7. Pay under FEPA is subject to a biweekly pay limitation. The sum of an employee’s basic pay, overtime pay, the dollar value of compensatory time off, night pay, annual premium pay, Sunday premium pay, and holiday premium pay may not exceed the greater of the biweekly rate for a GS-15, step 10 employee (including locality rate and special rates) or Level V of the Executive Schedule.
  - a. There is an exception to the biweekly pay limitation for employees performing emergency work or mission-critical work. If this exception is authorized, the pay limit is the greater of the annual rate of a GS-15, step 10 employee (including locality rate and special rates) or Level V of the Executive Schedule.
8. FEPA overtime at ICE is also subject to an appropriations overtime cap that limits all forms of overtime compensation.

## 2. ADMINISTRATIVELY UNCONTROLLABLE OVERTIME (AUO)

### Introduction:

AUO is an alternative system for the management and compensation of “*irregular and occasional*” overtime. It is designed to address the unique challenges related to positions whose duties require a significant amount of “administratively uncontrollable” overtime. Once a position is certified for AUO, AUO compensates all “*irregular or occasional overtime*” hours with an “annual premium payment,” which can vary between 10 and 25 percent. “*Regularly scheduled*” overtime hours continue to be compensated with FEPA overtime (“45 Act/Title 5 overtime”).

AUO provides for some trade-offs for employees and employers. While AUO-certified employees are given a significant degree of discretion in “self-initiating” overtime, they see decreased compensation for “*irregular or occasional*” overtime in certain circumstances, as compared to FEPA overtime. However, AUO-certified employees see comparably greater compensation in other circumstances, through various provisions set forth in the governing federal regulations where payment is continued but no overtime is performed. AUO is also considered with respect to calculating retirement payments.

While AUO provides significant discretion to self-initiate overtime work, that discretion is limited by the controlling regulations and must be used consistent with applicable policies, and it does not supersede supervisory instructions, including the instruction to cease performing work. ICE-specific guidance on policies and supervision is provided in the Responsibilities & Procedures Governing AUO (Appendix C).<sup>4</sup>

### Statutory & Regulatory Authorities:

5 U.S.C. §§ 5545 & 5548; 5 CFR Part 550, Sections 101-107, 151-154, 161-164.

### Rules:

The management of AUO involves three key determinations:

- 1) Whether an employee is *eligible* for and may be *certified* for AUO;
- 2) If an employee can be AUO certified, what *rate* he or she should receive; and
- 3) What hours of work qualify for *payment* with the AUO premium.

### *Certification for AUO*

1. An employee may be certified for AUO if:
  - a. The employee is in a position that has been determined by the Agency (at ICE, the Human Capital Officer) to be *eligible* for AUO because the duties typical to the position, as described in the position description, meet the standard set forth in 5 CFR § 550.151, in that “the hours of duty cannot be controlled administratively,” and require “substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances that require the employee to remain on duty;” and
  - b. The duties of the specific employee (or “individual position”) meet all of the requirements set forth in 5 CFR § 550.153, namely:
    - i. The responsibility to continue on duty after the end of the workday or resuming

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<sup>4</sup> These provisions accurately reflect the governing regulations at the time of drafting. If any changes are made to the regulations or Department of Homeland Security (DHS) policy that are inconsistent with the Guide, the Guide will be read in a manner consistent with the regulations and/or DHS policy. If that is not possible, any inconsistent provisions will be severed and invalid until the Guide is updated to conform with governing law, regulations and/or DHS policy.

- duty in accordance with “*irregular*” plans, as dictated by operational circumstances, is a definite, official, and special requirement inherent in employee’s duties, such that failure to continue or resume working would constitute negligence or dereliction of duty, as opposed to the continuation or resumption of work being merely desirable for the employee or agency;
- ii. The requirement for the “*irregular or occasional*” overtime work is not based solely on either clear-cut instances such as staying on duty until relief arrives or periodic requirements to perform call-back overtime work;
  - iii. The requirement for the “*irregular or occasional*” overtime work is based on work where the employee does not have discretion as to when or where the work may be performed (e.g., the requirement is not based on work where an employee has the option of taking work home or doing it at the office, or where an employee has the latitude to choose to start work later in the morning and continue working later at night);
  - iv. The employee is expected to be required to continually work an average of at least three hours of “*irregular or occasional*” overtime work per week, generally with more than one instance of such work per week; and
  - v. There is a definite basis for anticipating that the above requirements for “*irregular or occasional*” overtime work will continue throughout the period for which the particular AUO certification is valid.
2. ICE has an obligation to periodically review an employee’s AUO certification for an employee to determine whether its continuation is appropriate, and, if so, to what is the appropriate AUO rate.
  3. ICE must cease paying the AUO premium when an employee’s duties no longer meet the qualifications for AUO.<sup>5</sup> However, the regulations provide certain limited exceptions for when ICE *may* choose to continue paying AUO to employees during periods when their duties would not otherwise qualify for AUO payment, namely:
    - a. During a **temporary assignment** to non-AUO duties for a period of not more than 10 consecutive workdays, and not more than 30 total workdays in a calendar year;
    - b. During **formally approved advanced training** directly related to AUO duties, for a period of not more than 60 workdays in a calendar year;
    - c. During a temporary assignment to non-AUO duties that is directly related to a **national emergency** declared by the President, for a period of not more than 30 consecutive workdays, and not more than 90 workdays in a calendar year;
    - d. During a period **following a job-related injury** where the employee is receiving continuation of pay under the Federal Employees’ Compensation Act (FECA), 5 U.S.C. § 8101, *et seq.*, and the employee elects and is approved to take paid leave in lieu of FECA benefits, or if the employee is in receipt of FECA benefits and is in leave without pay status (where no payment would be made but authorization is continued to avoid reduction of retirement benefits). In these circumstances, AUO pay *must* be continued except where ICE has discontinued premium pay for the general position (as opposed to an individual position) which the employee occupies.

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<sup>5</sup> See 5 C.F.R. § 550.161(f); *see also* OPM MEMORANDUM FOR DIRECTORS OF PERSONNEL (CPM 97-5) “Guidance on AUO Pay,” June 13, 1997, Attachment, Findings 2 & 3.

*Computation of AUO Rate:*

4. AUO is paid at rates of 10, 15, 20 and 25 percent of an employee's rate of basic pay, corresponding with the requirements to work three to five hours (10%), more than five hours to seven hours (15%), more than seven hours to nine hours (20%), and more than nine hours (25%) of "*irregular or occasional*" overtime hours each week.
5. When computing the rate, ICE must:
  - a. consider the available records of the hours of irregular or occasional overtime work that have been required of the specific employee in the past;
  - b. consider other information bearing on the number of hours of duty that may reasonably be expected to be required of the employee in the future; and
  - c. not consider the period of time under which an employee continues to receive premium pay pursuant to paragraphs (3)(a)(b) and (c) above in computing the average hours of irregular and occasional overtime.

*Payment of AUO:*

6. Although not all "*irregular or occasional*" overtime work serves to qualify an employee for the AUO premium, pursuant to 5 CFR § 550.163(b), once an employee is AUO certified, all overtime that was not regularly scheduled for an employee, and is thus "*irregular or occasional*," is compensated through the AUO premium, as opposed to traditional FEPA overtime.
7. The only exception to the rule in Paragraph 6 is when the scheduling supervisor knew or should have known, in advance of the administrative workweek, that the specific employee was going to be needed to work overtime on the days and hours in question. (See 5 CFR § 610.121(b).) In those cases, the "*irregular*" overtime is treated as if it had been regularly scheduled, which for an AUO certified employee would result in the hours at issue being paid as FEPA overtime rather than through the AUO premium.

*Interaction with other Payments:*

8. AUO certified employees who are covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, may receive a supplemental payment under the FLSA. The AUO premium is considered to constitute the "straight time" payment for each hour of irregular overtime and is supplemented by an additional "half time" payment for each hour of work that exceeds the applicable FLSA threshold. (See 5 CFR § 551.512(b); *Alexander v. US*, 1 Cl. Ct. 653 (1983); *Adams v. US*, 48 Fed.Cl. 602 (2001).)
9. AUO pay is subject to the same cumulative limitations that cover traditional FEPA overtime, including the biweekly pay limitation and the appropriations overtime cap.
10. Because the AUO premium is the exclusive method of payment for "*irregular or occasional*" overtime for AUO certified employees, those employees cannot receive compensatory time off (CTO) or any other payment under FEPA for those "*irregular or occasional*" hours of work.
11. Employees receiving AUO are also eligible for regularly scheduled overtime, Night Differential, Sunday Pay, and Holiday Pay, but may not claim AUO for those same hours. As noted above, hours that are compensable through AUO are not compensable with any other premium payment under FEPA.

### 3. LAW ENFORCEMENT AVAILABILITY PAY (LEAP)

#### Introduction:

LEAP is a premium pay system designed to address the challenges of the substantial hours of “*unscheduled*” duty that are typically required of positions classified as *Criminal Investigators*, as defined by Congress and the Office of Personnel Management. Individuals in positions classified as GS-1811 are eligible for LEAP.

The LEAP premium is fixed at 25% of the rate of basic pay. It compensates all hours of overtime work that meet the definition of “*Unscheduled Duty Hours*,” which includes all hours of “*irregular or occasional overtime*” as well as the first two hours of regularly scheduled overtime work on any day containing part of the criminal investigator’s basic 40-hour workweek. Other hours of overtime continue to be paid under the provisions of Title 5/FEPA, but LEAP employees are exempt from the FLSA.

With a very narrow exception, all employees in *Criminal Investigator* positions are covered by LEAP beginning on the date of their entrance on duty, potentially including periods of basic training. However, LEAP may only be paid to employees certified to average two or more hours of “*unscheduled duty*” per regular workday. If an employee does not meet this “*substantial hours*” requirement, an Agency may suspend LEAP for the employee but must follow adverse action procedures. Agencies may also approve requests to temporarily “opt-out” of LEAP due to certain hardships on the understating that LEAP will not be paid and overtime generally not assigned during that period.

#### Statutory & Regulatory Authorities:

5 U.S.C. §§ 5542 & 5545a; 5 CFR Part 550, Sections 101-107, 181-187.

#### Rules:

1. The management of LEAP involves four sub-topics:
  - a. Positions covered by LEAP;
  - b. *Certification* for LEAP;
  - c. *Suspension of LEAP certifications*; and
  - d. Hours of work that qualify for *payment* of LEAP, as opposed to other forms of pay.

#### *Positions Covered by LEAP.*

2. LEAP is authorized only for positions that meet the definition of *Criminal Investigator*, set forth in 5 U.S.C. § 5545a(a)(2) and 5 C.F.R. §§ 550.103 and 550.181. Individuals in positions properly classified as GS-1811 are eligible for LEAP.
3. With a narrow exception that is inapplicable to ICE, all positions meeting the definitions of *Criminal Investigator* are covered by the provisions of LEAP.

#### *Certification for LEAP.*

4. Although the vast majority of criminal investigators are subject to the availability pay provisions, LEAP may be paid only to positions whose minimum annual average number of hours of

“*unscheduled duty*” per regular workday is 2 hours or more, where the requirement for substantial hours is appropriately *certified* on an annual basis.<sup>6</sup>

5. To the maximum extent feasible and consistent with ICE’s law enforcement requirements, a substantial number of the hours needed to meet the minimum annual average of 2 hours or more per regular workday will be unscheduled duty hours actually worked.
6. “*Unscheduled duty*” under LEAP is defined as the hours during which a criminal investigator performs work or is in “*availability status*” that are not:
  - a. Part of the employee’s basic 40-hour workweek; or
  - b. Overtime hours that were “*regularly scheduled*” in advance of the administrative workweek and compensated through traditional overtime payments under Title 5, including overtime hours in excess of ten (10) hours on a regular workday, or regularly scheduled hours of overtime work that occur on a scheduled day off.<sup>7</sup>
7. In addition to Agency directed placement in availability status and order to perform irregular overtime, which is compensated through LEAP, *Criminal Investigators* may also “self-initiate” hours of irregular or occasional overtime work or availability status, without specific supervisory pre-approval, based upon the investigators’ determination that the work or availability status is necessary to meet the needs of Agency, subject to Agency policy and a requirement for after-the-fact approval.
  - a. If the “self-initiated” hours of work or availability status are subsequently approved and consistent with Agency policy, these hours qualify as “*unscheduled duty*” for purposes of LEAP. At ICE, self-initiation of unscheduled duty should only occur in extraordinary circumstances.
  - b. If the “self-initiated” hours of work or availability status are not case- or operation-specific, or if they occur on a non-workday but do not involve the actual performance of work, they should not be approved, and will not qualify as “*unscheduled duty*” for purposes of LEAP.
  - c. Hours that would not constitute hours of work under FEPA or time in “on-call” status will not qualify as “unscheduled duty” for purposes of LEAP, including:
    - i. Time spent commuting from home to a criminal investigator’s duty station on a regular workday and vice versa via a government-owned vehicle (GOV) or a privately-owned vehicle (POV);
    - ii. Travel time outside the duty station or temporary work location during non-duty hours that does not meet the compensable overtime criteria in 5 U.S.C. § 5542 (b)(2)(B) and 5 CFR 550.1 12(g); or
    - iii. Time spent in training that is covered by the premium pay prohibition of 5 CFR 410.402.

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<sup>6</sup> See the definition of “regular workday” in Part VII, Definitions. The average of 2 hours per regular workday is a minimum annual requirement, **not** a maximum, and does not preclude assignment of additional unscheduled duty hours to meet the needs of ICE.

<sup>7</sup> The regulations provide this definition of “*unscheduled duty*” hours. For further clarification, “unscheduled duty hours” consist of (1) up to the first two hours of overtime after an 8 hour basic workday, irrespective of whether the work would otherwise be considered “*regularly scheduled*” or “*irregular or occasional*,” plus (2) any “*irregular or occasional*” overtime hours worked by an employee, either on a regular day off or after the first 10 hours of work on a basic workday; and (3) any time in “availability status,” which is substantially similar to being placed in “*standby*” status. All such “unscheduled duty” hours are compensated by the LEAP premium, as opposed to Title 5/FEPA overtime.

8. To determine whether a criminal investigator is meeting the “*substantial hours*” requirement of a minimum of two hours of “*unscheduled duty*” per regular workday, an Agency divides the total number of “*unscheduled duty*” hours for the annual period by the number of “*regular workdays*” in the certification period, as explained more fully in subsections 8(a) and (b), below:
  - a. The total number of “*unscheduled duty*” hours counted towards this requirement include only “*unscheduled duty*” hours on a regular workday and hours *where work is actually performed* (as opposed to where an employee is available) during “*unscheduled duty*” hours on days that are not regular workdays.<sup>8</sup>
  - b. The number of “*regular workdays*” is the total number of days in a criminal investigator’s basic workweek where at least four hours of work are performed. The four hour minimum does not include: (1) overtime hours, (2) unscheduled duty hours compensated via LEAP, (3) hours spent in Agency approved training, (4) hours of official travel where the travel time is not compensable as hours of work under Title 5/FEPA, (5) hours spent on approved leave or other excused absence with pay, (6) periods of leave without pay (LWOP) and LWOP compensated in compliance with the Federal Employees Compensation Act (FECA), commonly referred to as Office of Workers Compensation Programs (OWCP), (7) periods of suspension for disciplinary reasons when an employee is in a non-pay status, or (8) periods in a part-time status, where an employee is decertified from LEAP.
9. In order to initiate LEAP, a newly-hired *Criminal Investigator* and his or her appropriate supervisor must make an initial certification to the head of the Agency (or designee) that the criminal investigator is expected to meet the “*substantial hours*” requirement during the upcoming 1-year period. This is a prerequisite to receiving LEAP, and there are no provisions for a waiver of this requirement.
10. In order to continue LEAP, each *Criminal Investigator* who is not suspended from LEAP, along with the appropriate supervisor, must make an annual recertification to the head of the Agency (or designee) that the criminal investigator currently meets and is expected to continue meeting the “*substantial hours*” requirement. At ICE, this recertification is made electronically, by January 31 of each calendar year, and covers from the preceding January 1 through December 31.<sup>9</sup>

*Voluntary and Involuntary Suspensions of LEAP Certification.*

11. Once a criminal investigator is certified for LEAP, it is incumbent on the employee and management to monitor the performance of unscheduled duty to determine whether the “*substantial hours*” requirement is being met.<sup>10</sup>

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<sup>8</sup> Even though all “*availability hours*” constitute “*unscheduled duty*” hours and are compensated with LEAP rather than Title/FEPA overtime (“45 Act”), for the “*substantial hours*” calculation, the only “*availability hours*” on a regular day off that are credited are those where work is actually performed by the employee, rather than time spent “engaged to be available/wait.”

<sup>9</sup> ICE Directorates and Program Offices will track unscheduled duty hours for annual average and certification purposes using their respective case management systems. Annual certifications for LEAP must be electronically signed by both the criminal investigator and his or her supervisor or reflect a comparable signature designation, such as a supervisor witnessing a criminal investigator’s signature and then electronically verifying that signature.

<sup>10</sup> In order to meet the LEAP certification requirements and receive LEAP, criminal investigators in non-case- or non-operation specific assignments (e.g., criminal investigators assigned to Headquarters) are mandated to be available to perform unscheduled duty.

12. If management determines that an investigator who is certified for LEAP is not meeting or will not meet the “*substantial hours*” requirement, management may act to deny or cancel a certification and suspend LEAP payment.<sup>11</sup> This may be based on a finding that the investigator failed to perform unscheduled duty (assigned or reported overtime work or designated availability hours), in sufficient quantities or at all, or will not be able to perform unscheduled duty for an extended period of time due to physical or health reasons.
13. An involuntary suspension of LEAP resulting from the denial or cancellation of certification, such as described above, constitutes a reduction of pay under 5 U.S.C. § 7512 and thus must be initiated under the adverse actions procedures set forth in 5 C.F.R. part 752. If the certification was valid at the time it was made, the suspension will be prospective. Guidance on adverse actions is available from the Office of Human Capital, Employee and Labor Relations.
14. In addition to involuntary suspensions, LEAP may also be suspended voluntarily at an employee’s request and with management agreement. A criminal investigator may make a written request that he or she be generally assigned no overtime work, including unscheduled duty, and a corresponding suspension of LEAP, based upon personal or family hardships or other circumstances that would preclude him or her meeting the substantial hours requirement.<sup>12</sup> The criminal investigator must sign and date the Law Enforcement Availability Pay Waiver, indicating the understanding that LEAP will be voluntarily suspended, and thus not paid, during the designated period. Managers and supervisors will consider such requests for relief for a specific period of time on a case-by-case basis.
15. If the request is approved, the supervisor does not need to initiate adverse action procedures, but must initiate a personnel action to stop the payment of LEAP. If the request is denied, the criminal investigator shall continue to perform the full range of the duties of his or her position. At ICE, however, if a request to temporarily “opt-out” of LEAP is denied, the criminal investigator may appeal that denial to the Executive Associate Director of his or her Directorate or the Assistant Director of his or her Program Office. A criminal investigator may continue to receive LEAP during periods of approved leave.
16. If the period of an approved voluntary suspension of LEAP appears to be insufficient, a criminal investigator may request an extension of the voluntary suspension, in writing, under the same procedures described above. Such requests will be considered by management on a case-by-case basis and a denial may be appealed in the same manner as the initial request.
17. A criminal investigator who is suspended from LEAP, whether voluntarily or involuntarily, must be recertified at the end of the period of suspension of LEAP, and a personnel action must be initiated so that the payment of LEAP may resume.

*Payment of LEAP:*

18. A criminal investigator will be paid LEAP equal to 25 percent of his or her rate of basic pay, as defined in 5 CFR § 550.103. LEAP is paid only during periods when a criminal investigator is receiving basic pay.

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<sup>11</sup> The capabilities of the respective case management systems will enable management officials to monitor the progress of performed unscheduled duty during certification periods and, whenever feasible, take measures that could avoid suspension and decertification. If corrective measures are not successful or feasible and failure to meet the minimum average requirements is inadvertent, action should be taken to decertify the criminal investigator and suspend LEAP for a period compatible with the shortfall period of unscheduled duty.

<sup>12</sup> Other appropriate circumstances include the voluntary temporary assignment of a criminal investigator to part-time status, which will require a voluntary suspension of LEAP, as described here. Such requests and assignments are governed by existing ICE policies, practice, and guidance related to part-time employment.

19. In certain circumstances, LEAP continues to be paid when no “*unscheduled duty*” is performed on the workday, and the lack of such work hours is not factored into the calculation of a criminal investigator’s average daily performance of “*unscheduled duty*” to meet the “*substantial hours*” requirement. These circumstances include:
  - a. Days of excused paid absences, such as holidays and annual, sick, administrative, military, funeral, or court leave;
  - b. Days of officially approved training; or
  - c. Days spent performing officially approved travel that does not constitute hours of work, such as travel for relocation purposes.
20. LEAP is subject to the biweekly premium pay limitation prescribed by 5 U.S.C. § 5547(c) and any annual overtime limitation prescribed by the annual Appropriations Act.
21. LEAP will not be paid to a criminal investigator in part-time status, since LEAP is premium pay for unscheduled duty in excess of a 40-hour workweek.

*Interaction with other Payments:*

22. LEAP is the exclusive premium payment for all “unscheduled duty hours.” However, a criminal investigator receiving LEAP may also receive, when appropriate and officially ordered or approved:
  - a. Regularly scheduled overtime under 5 U.S.C. § 5542(a) that occurs on a scheduled day off, or that is in excess of 10 hours of work on a day during the basic 40-hour workweek (regardless of whether the ten hours were scheduled or unscheduled) which is compensated under the generally applicable provisions of Title 5/FEPA;
  - b. Night Pay under 5 U.S.C. § 5545(a) for qualifying hours that do not constitute “unscheduled duty hours;”
  - c. Sunday Pay under 5 U.S.C. § 5546(a) for qualifying hours that do not constitute “unscheduled duty hours;”
  - d. Holiday Pay under 5 U.S.C. § 5546(d) for qualifying hours that do not constitute “unscheduled duty hours;” and
  - e. Compensatory Time Off for Travel, when the hours of travel are not compensable as “*unscheduled duty*” hours under LEAP, including designated “*availability hours*.”
23. Criminal investigators receiving LEAP are not entitled to receive:
  - a. Overtime pay under the FLSA, as they are FLSA exempt (not covered by the FLSA);
  - b. Regularly scheduled standby duty pay under 5 U.S.C. § 5545(c)( I);
  - c. Administratively Uncontrollable Overtime;
  - d. Compensatory Time Off (CTO) in lieu of pay for irregular or occasional overtime work;
  - e. Hazardous duty pay under 5 U.S.C. § 5545(d) for unscheduled duty hours credited to LEAP.
24. LEAP is treated as basic pay for:
  - a. Advances in pay under 5 U.S.C. § 5524a;

- b. Severance pay under 5 U.S.C. § 5595(c);
  - c. Workers' compensation under 5 U.S.C. § 8114(e);
  - d. Retirement benefits under 5 U.S.C. § 8331(3) and 5 U.S.C. § 8401 (4);
  - e. Thrift Savings Plan under 5 U.S.C. §§ 8431-8440f; and
  - f. Life insurance under 5 U.S.C. § 8704(c).
25. LEAP is not treated as basic pay when calculating the cost-of-living allowances or other allowances and differentials. LEAP is also not treated as basic pay when calculating retirement benefits under 5 U.S.C. § 8331(3) and 5 U.S.C. § 8401(4) for non-foreign areas outside the 50 States and the District of Columbia (e.g., the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, etc.).

## 4. OVERTIME UNDER THE FAIR LABOR STANDARDS ACT (FLSA)

### Introduction:

In 1938, the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, was signed into law. In 1974, the FLSA was extended to employees of the United States Federal Government. *See* 1974 P.L. 93-259, 88 Stat. 55. Subsequently, the Federal Employees Pay Comparability Act of 1990 (FEPCA) was passed in an attempt to harmonize compensation under FEPA and the FLSA for employees covered by both statutes. *See* 1990 P.L.101-509 § 529, 104 Stat. 1389. The goal of the FLSA is to provide minimum standards for wages and overtime entitlements for time that is considered compensable hours of work. The primary principle is that employee time is compensable “hours of work” if (1) it is spent for the benefit of an agency; and (2) the employee’s activities are controlled by the agency.

This section of the Guide is directed towards employees who are covered by the provisions of the FLSA (“FLSA nonexempt”). This Guide will not address issues related to determining what positions are or are not exempt from the provisions of the FLSA.

### Statutory & Regulatory Authorities:

29 U.S.C. §§ 201-209; 5 CFR Part 551, Sections 101-104, 401-432, 501-541.

### Rules:

1. FLSA nonexempt employees fall under two categories: “Section 7(a)” employees and “Section 7(k)” employees. At ICE, section 7(k) only applies to FLSA-nonexempt law enforcement officers **who are certified to receive AUO premium pay**.
2. An FLSA nonexempt employee is entitled to be paid “FLSA time and half” for each hour of overtime worked in excess of the appropriate FLSA threshold. The threshold for Section 7(a) employees is eight (8) hours in each day (for employees who are on standard, as opposed to compressed, work schedules), or forty (40) hours per workweek. The threshold for Section 7(k) law enforcement officers is eighty-five and a half (85.5) work hours per biweekly pay period. Work hours in excess of these thresholds are compensable with FLSA overtime.
3. For Section 7(a) (non-law enforcement/non-AUO) employees on Compressed Work Schedules (CWS), the daily FLSA overtime threshold is based on hours of work in excess of the regularly scheduled work hours specific to the schedule, for example ten (10) hours for a “4-10” schedule. Similarly, for part-time employees, overtime hours are hours in excess of both 8 hours in a day and their scheduled hours for the day (including where the regular hours in the part-time schedule are compressed and greater than 8 in a day), and, on a weekly basis, over 40 hours.

### FLSA Rate:

4. “FLSA time and a half” overtime is calculated differently for Section 7(a) and Section 7(k) employees, **because Section 7(k) employees are compensated with the AUO premium**. For Section 7(a) employees, FLSA overtime is compensated with the straight time rate of pay for all overtime hours worked, plus one-half the hourly regular rate of pay for all overtime hours worked. **For Section 7(k) employees**, FLSA overtime is compensated with the straight time rate of all regular overtime hours worked, the AUO premium for all hours of irregular overtime, and

payment of an additional one-half the hourly regular rate of pay for all overtime hours over the applicable threshold, regular or irregular.<sup>13</sup>

*FLSA Hours of Work:*

5. **The FLSA considers all hours that are compensable as hours of work under FEPA as compensable hours of work under the FLSA.** Such hours include time where an employee is required to be on duty, waiting or idle time that occurs during scheduled duty time, time in a paid leave status, and travel time that is compensable under FEPA. (See 5 CFR § 551.401.) Unpaid non-duty status, such as leave without pay and furloughed time, is not compensable under the FLSA. This overlap includes identical definitions of what constitutes “standby” time as opposed to “on-call” time. (See “*On-Call v. Standby Status*” in this Guide.)
6. Unlike FEPA overtime, the FLSA does not concern itself with whether overtime is ordered or approved. Instead, **it is primarily concerned with whether an employee works for the benefit of an agency and at its direction and control.** Included in this concept is work that is “*suffered or permitted*” by an agency, where the agency knows or should know that an employee is engaged in work for its benefit and does not take action to disallow that work. Work that is “*suffered or permitted*” is compensable under the FLSA as hours of work.
  - a. “*Suffered or permitted*” work is, by definition, “irregular or occasional” overtime. For AUO certified employees, it is compensated through the AUO premium along with the corresponding supplemental FLSA payment, as described in Section 2 of the Guide.
7. The FLSA does not generally consider unscheduled work activities requiring ten minutes or less to perform to be compensable work hours; such activities are “*de minimis*.” Note: this does not apply to ordered and approved overtime or on-call duties under FEPA. (See Section 1, ¶1).
8. Greater than “*de minimis*” time spent in preparatory or concluding activities that are closely related to and indispensable to the performance of an employee’s primary duties are compensable as hours of work. Such activities should be regularly scheduled. Note: Notwithstanding ¶7, above, FEPA treats preparatory and concluding activities in the same way as the FLSA.
9. If an agency schedules a break period for meals, that time is a “bona fide” meal period, and not considered hours of work under the FLSA, as long as adequate facilities exist to allow the employee to get away from his or her work and the break is largely uninterrupted. For Section 7(k) employees, an agency must compensate any scheduled meal period where, notwithstanding having been temporarily relieved from duty, the employee returns to duty pursuant to his or her discretion under AUO. This time is compensated under AUO.<sup>14</sup>
10. The FLSA compensates certain hours of travel that are not compensable under FEPA. (See “*Travel*” in this Guide at Part I, Section 8).

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<sup>13</sup> *Straight Time Rate of Pay* is equal to the employee’s rate of pay for his or her position, exclusive of any premiums, differentials or cash awards or bonuses, for most employees. Typically this means the employee’s basic rate of pay including any locality adjustment. For AUO-certified employees, the straight time rate equals the employee’s basic rate plus AUO pay divided by the employee’s basic workweek plus the AUO hours. See 5 C.F.R. § 551.512(b).

*Hourly Regular Rate of Pay* is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation is paid. Total remuneration includes basic pay, including a locality adjustment, and, if applicable, premium pays for Sunday, night, hazard and holiday work, retention allowances, AUO pay, and a few other forms of compensation. It does not include discretionary payments such as awards or contributions toward benefits like retirement or insurance, reimbursements for travel and other expenses, or premium payments where the premium rate is at least one and one-half times the employee’s rate of pay. See 5 C.F.R. § 551.511.

<sup>14</sup> At present time, ERO does not generally schedule an unpaid lunch period for law enforcement officers. For more guidance on the interaction between AUO and FLSA meals, see OPM’s Fact Sheet on Applying the FLSA to Law Enforcement Employees Receiving AUO, <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/guidance-on-applying-flsa-overtime-provisions-to-law-enforcement-employees-receiving-administratively-uncontrollable-overtime-pay/> at ¶¶10-14

11. The FLSA compensates time spent in training, as well as in preparation for training, if:
  - a. The training occurs during regularly scheduled working hours (including regularly scheduled overtime, noting that agencies should attempt to avoid scheduling training to occur during overtime hours, as discussed in Part I, Section 1, Paragraph 6 of this Guide);
  - b. The training occurs outside of regular working hours, where:
    - i. the purpose of the training is to improve the employee's performance in his or her current position, including remedial or refresher training or training to learn a new process, technique or technology of the employee's current position (as opposed to "upward mobility" training or other courses designed to provide skills beyond those necessary in the current position, which is not compensable under the FLSA); **and**
    - ii. the employee has been directed by Management to take the training, in that the employee's performance or continued retention in his or her position would be adversely affected by non-enrollment in the training course;
  - c. It is entry-level training, or other similar training, which occurs outside of regularly scheduled working hours but is (1) given when the employee is already receiving premium pay for overtime, night, holiday, or Sunday work, (2) given at night because it concerns situations the employee must learn to handle at night, or (3) given on overtime, on a holiday or on a Sunday because ICE has determined that such scheduling is permissible, because the costs, including premium pay, are less than when the same training is confined only to regular duty hours.
12. The compensability of travel to and from training is governed by the same rules that govern all other forms of official travel, described in Part I, Section 8 of this Guide.
13. The FLSA compensates time spent by an employee who has been directed to attend a lecture or conference if:
  - a. The lecture or conference occurs during regularly scheduled working hours; or
  - b. The lecture or conference occurs outside of regular working hours, but (1) the employee's attendance is directed by the agency, or (2) the employee performs compensable work for the agency during attendance.

Note: Reference OPM FAQs Pay and Leave under the heading titled "Time Spent in Training" located at <http://www.opm.gov/faqs/topic/payleave/index.aspx?cid=148deba3-5eb1-4752-ac87-5f3897a6b212> for further guidance.
14. If a Section 7(a) employee is assigned to a shift of 24 or more consecutive hours of work, or a Section 7(k) employee is assigned to a shift of greater than 24 consecutive hours of work, an agency may schedule up to eight (8) hours of *bona fide* break time for purposes of sleep, and deduct those hours from compensable time, so long as there are adequate facilities where an employee could generally enjoy uninterrupted sleep, and the sleep period extends for at least five hours. If the sleep period is interrupted by a call to duty, the time spent on duty is hours of work and cannot be deducted. If the sleep period does not extend for at least five consecutive hours, or there are not adequate facilities for sleep, the time is not deductible.<sup>15</sup>
15. FLSA overtime at ICE is also subject to the appropriations overtime cap limiting all forms of overtime compensation. ICE shall provide updates on earnings and the overtime cap (\$35,000 in FY2013).

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<sup>15</sup> A *bona fide* break in a shift for sleep should not be confused with general off-duty time. For instance, when an employee finishes travel and checks into a hotel for sleep, his or her shift has ended, and the time at the hotel is merely off-duty time, not a *bona fide* sleep period.

## 5. COMPENSATORY TIME OFF (CTO)

### Introduction:

Compensatory time off (CTO) is time off with pay in lieu of overtime pay. For most employees, it is only substituted for overtime pay triggered by *irregular or occasional* overtime work, but it may also be paid in lieu of regularly scheduled overtime for employees on flexible work schedules. It is not to be confused with compensatory time off for travel (CTOT), which is governed by different laws and regulations. (See “Travel” in this Guide.) Please note that FLSA-exempt employees who receive LEAP or AUO are not entitled to receive CTO.

### Statutory & Regulatory Authorities:

5 U.S.C. § 5543; 5 CFR § 550.114; 5 CFR § 551.531.

### Rules:

1. CTO may be approved instead of overtime pay for irregular or occasional overtime work for both FLSA exempt and nonexempt employees who are covered by the definition of “employee” at 5 U.S.C. § 5541(2).<sup>16</sup>
2. Agencies *may require* that an FLSA-exempt employee receive CTO in lieu of overtime pay for irregular or occasional overtime work, *but only* for an FLSA-exempt employee whose rate of basic pay is above the rate for GS-10, step 10.
3. However, the agency **may not** mandate that an employee who is covered by the FLSA accept CTO for irregular or occasional overtime work instead of FLSA overtime pay. Rather, the affected employee may determine whether he or she prefers to receive CTO in place of FLSA overtime pay.
4. Employees who are on flexible work schedules (FWS) may also elect to be compensated with CTO, in lieu of “regularly scheduled” overtime,” irrespective of whether they are covered by the FLSA.

### *Time Limits:*

#### FLSA-exempt employees

5. An FLSA-exempt employee must use accrued CTO by the end of the 26th pay period after the pay period during which it was earned.
6. An FLSA-exempt employee who (1) fails to take earned CTO within 26 pay periods; or (2) transfers to another agency or separates from federal service before the expiration of the 26 pay period time limit forfeits the unused compensatory time off except when the failure to use the CTO is due to an exigency of the service beyond the employee’s control (in which case the employee must receive payment for the unused CTO at the overtime rate in effect when earned).

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<sup>16</sup> As noted in Section 2 (AUO), Paragraph 13, AUO is the exclusive method of compensating irregular or occasional overtime hours for AUO certified employees, meaning that they cannot receive CTO for such hours.

FLSA-nonexempt employees (covered by the FLSA)

7. An FLSA-nonexempt employee must use accrued compensatory time off by the end of the 26th pay period after the pay period during which it was earned.
8. If accrued CTO is not used by an FLSA-nonexempt employee within 26 pay periods or if the FLSA-nonexempt employee transfers to another agency or separates from federal service before the expiration of the 26 pay period time limit, the employee must be paid for the earned CTO at the overtime rate in effect when earned.

## 6. OTHER TYPES OF PREMIUM PAY

This section discusses premium payments for work during periods where federal employees would typically be off-duty, namely at night (“night pay”), on Sundays (“Sunday premium pay”), and on holidays (“holiday premium pay”).

### **Night Pay**

#### **Introduction:**

The night pay “differential” is equal to ten percent (10%) of an employee’s basic rate of pay, which is paid in addition to the basic rate of pay for qualifying hours of work. Night pay is provided for “night work,” which is defined as regularly scheduled work performed by an employee between the hours of 6:00 p.m. and 6:00 a.m.

#### **Statutory & Regulatory Authorities:**

5 U.S.C. § 5545(a) and (b); 5 CFR § 550.121.

#### **Rules:**

1. Night pay is paid for regularly scheduled work performed at night. This means work scheduled before the beginning of the administrative workweek, or work which is treated as if it had been regularly scheduled pursuant to 5 C.F.R. § 610.121(b)(3).
2. Night pay is also paid for night work that occurs as a result of the employee having his or her shift changed during the administrative workweek to a shift that includes hours that are compensable with night pay (such hours by definition do not include irregular or occasional overtime).
3. If a regularly scheduled shift includes both day and night hours (e.g., a 2 p.m. to 10 p.m. shift), only the night hours are compensated with night pay (e.g., 6 p.m. to 10 p.m.).
4. An employee is entitled to night pay for paid leave only when the total amount of paid leave during a biweekly pay period is less than eight hours.
5. An employee is entitled to night pay when excused from night work on a holiday or another non-workday, and for night hours of his tour of duty while he or she is in an official travel status, whether performing actual duty or not. (This does not apply to AWS non-workdays.)

#### *Interaction with other forms of Premium Pay:*

6. Night pay is paid in addition to overtime, Sunday, or holiday premium pay for qualifying hours.
7. Hours that qualify for AUO payment cannot qualify for night pay, as AUO is paid only for “irregular or occasional” overtime work, while night pay is paid for regularly scheduled work or a basic (non-overtime) shift that has been changed during the workweek to include hours that qualify for the night pay. (A regularly scheduled administrative workweek does not include periods of irregular or occasional overtime work.)
8. Irrespective of whether they are “irregular or occasional,” any “unscheduled duty hours” compensated via LEAP are not eligible to be compensated with night pay pursuant to 5 C.F.R. § 500.186(a). See Part I, Section 3 of the Guide.

## **Sunday Pay**

### **Introduction:**

An employee is entitled to an additional 25 percent of his or her rate of basic pay for work performed during a regularly scheduled basic eight hour tour of duty that begins or ends on a Sunday.

### **Statutory & Regulatory Authorities:**

5 U.S.C. § 5546; 5 CFR § 550.171-172.

### **Rules:**

1. An employee is entitled to Sunday premium pay equal to 25 percent of his or her rate of basic pay for each hour of Sunday work. For this purpose, Sunday work consists of non-overtime work during an employee's regularly scheduled basic tour of duty that begins or ends on a Sunday.
  - a. Sunday premium pay is paid for all non-overtime hours of a shift that either begins or ends on a Sunday. If the employee has two shifts, one that ends on Sunday and the other that begins on Sunday, the employee is entitled to 8 hours of Sunday pay for each shift (or the daily non-overtime hours for those on a Compressed Work Schedule, e.g., 10 hours for an employee on a "4-10" schedule). Overtime hours cannot extend a shift to qualify for Sunday pay.
  - b. However, if an employee takes paid leave during the regularly scheduled Sunday shift, then she or he will not receive Sunday pay while in a paid leave status. For example, if an employee's Sunday tour of duty is from 8:00 p.m. on Sunday until 4:00 a.m. on Monday and the employee is granted annual leave from 8:00 p.m. until 11:00 p.m., the employee is entitled to Sunday premium pay for five hours for working between 11:00 p.m. and 4:00 a.m.
2. An employee under a standard work schedule is entitled to overtime pay for hours of work on Sunday that are in excess of eight hours in a day or 40 hours in a week. However, Sunday premium pay is not paid for overtime hours of work.

### *Interaction with other forms of Premium Pay:*

3. Sunday pay is paid in addition to the premium pay for holiday work or night pay if the hours of the basic tour of duty also qualify for the other premiums. However, it cannot be paid for hours that are compensated through the AUO or LEAP premiums.
4. Sunday pay is not included in the rate of basic pay used to compute the pay for holiday work, overtime pay, or night pay.

## **Holiday Pay**

### **Introduction:**

An employee who performs holiday work is entitled to premium pay at a rate equal to his or her rate of basic pay in addition to his/her regular payment for that holiday work that is not in excess of eight hours ("double pay").

### **Statutory & Regulatory Authorities:**

5 U.S.C. § 5546; 5 CFR § 550.131-132.

## **Rules:**

1. An employee who performs work during his or her regularly scheduled tour of duty on a federal holiday is entitled to premium pay at a rate equal to his or her basic rate of pay. This premium pay is only for work up to eight hours that actually occurs on the holiday for employees on a regular schedule or FWS, or, if applicable, up to the total number of basic daily hours of a CWS that occur on a holiday (e.g., up to 10 hours for an employee on a “4-10” CWS).
2. An employee assigned to duty on a holiday must be credited for **at least two hours** of holiday work, even if the employee works less than two hours.
3. An employee who performs overtime work on a holiday is paid for those hours with overtime under the applicable overtime laws and regulations and **not** with the holiday premium.
4. When an employee has two shifts, one that begins and one that ends on a holiday, the supervisor must designate one as the employee’s holiday. Holiday pay is paid only if the employee works during the designated non-overtime shift.
5. Employees generally are **not** entitled to holiday premium pay for the time they spend in work-related travel during holiday hours of their tours of duty, unless the travel meets the requirements for being considered an hour of work under FEPA Travel, as explained in the Travel section of this guide. Holiday premium pay is paid only to employees who perform work on a holiday.

### *Interaction with other forms of Premium Pay:*

6. Premium pay for holiday work is paid in addition to Sunday pay and night pay if the hours of the basic tour of duty also qualify for the other premiums. However, it cannot be paid for hours that are compensated through the AUO or LEAP premiums. If a holiday falls on a Sunday, and the employee works on that Sunday as part of their regularly scheduled basic tour of duty, two calculations for premium pay are performed; one for Sunday pay and one for holiday pay.

## **Night, Sunday, Holiday Pay and Training**

1. In general, time spent in training cannot be compensated with Night Pay, Sunday Pay, or Holiday Pay. However, several exceptions exist. For the purposes of Night, Sunday, and Holiday pay, these exceptions include:
  - a. Training that is conducted during a period of duty for which the employee is already receiving premium pay (e.g., an employee is regularly scheduled to a night shift, and the employees on the shift are given a 4 hour training course during their regular workday, rather than disrupting operations with changes to many employees’ tours of duty).
  - b. Training that must occur during the nighttime (e.g., the training is on a process that occurs at night, such as tracking subjects outdoors in the dark).
  - c. Training that is scheduled to include premium hours because the costs of scheduling the training in this manner, including the premium pay costs, are less than the costs of confining the same training to only occur during non-premium hours.
    - i. A cost analysis is generally required for this exception. Please contact OHC if you believe this exception is required.

Note: If an employee is scheduled for training during premium hours, but no exception applies, the training time cannot be compensated with the otherwise applicable premium payment.

## 7. ON-CALL STATUS AND STANDBY DUTY STATUS

### Introduction:

Determining what portion, if any, of time is compensable under FEPA and the FLSA when an employee is idle, but still in a status that he or she may be asked to return to duty, depends on whether the time should be considered “on-call” (also referred to as “waiting to be engaged”) or “standby status” (also referred to as “engaged to wait”).

Generally, idle time spent in an “on-call” status does **not** constitute hours of work, and only periods when the employee is actually called to perform work are compensated. In contrast, all time spent in a “standby” status is considered as hours of work.

### Statutory & Regulatory Authorities:

5 CFR § 550.112(k) and (l) [FEPA]; 5 CFR § 551.431 [FLSA]

### Rules:

1. Although nearly identical, both Title 5 and the FLSA have specific sections covering when an employee is in an on call status and when an employee is in a standby status. If an employee is FLSA nonexempt, one should look at both the Title 5 and FLSA provisions, whereas if an employee is FLSA exempt, one only need refer to the Title 5 provisions.

### *On Call:*

2. Under both Title 5 (FEPA), 5 CFR § 550.112(l), and the FLSA, 5 CFR § 551.431, when an employee is off duty, time spent in an on call status is not hours of work if:
  - a. The employee is allowed to leave a telephone number or carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or
  - b. The employee is allowed to make arrangements for another person to perform any work that may arise during the on-call period.
3. An employee who is called back to return to a worksite, as opposed to continuing work, arriving early, or performing work from home, is entitled to be credited with the greater of two (2) hours of work or the amount of time spent working, whichever is greater. (*See, e.g., Matter of Overtime Compensation-Work Performed at Home*, B-217502, 65 Comp. Gen. 49 (1985)).

### *Standby:*

4. Under the Title 5 provision, 5 CFR § 550.112(k), an employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons:
  - a. The employee is restricted by official order to a designated post of duty,
  - b. The employee’s activities are so substantially limited that the employee cannot use the time effectively for his or her own purposes, and
  - c. The employee is assigned to be in a state of readiness to perform work.
5. A finding that an employee’s activities are substantially limited *may not* be based on the fact that the employee is subject to restrictions to ensure the ability to responsibly perform work duties (e.g., a restriction on the consumption of alcohol or the use of certain medications).
6. The corresponding FLSA provision, 5 CFR § 551.431, mirrors the Title 5 provision.

## 8. TIME IN TRAVEL STATUS

### Introduction:

Generally, time spent in travel status is not considered work time. Historically, such travel time was considered non-compensable in and of itself; however, there are certain instances in which travel can be credited as work time. However, these instances differ based on whether an employee is covered by, or is exempt from, FLSA.

**Statutory & Regulatory Authorities:** 5 U.S.C. § 5542(b)(2); 5 CFR § 550.112(g) and (j) [FEPA]; 29 U.S.C. § 254; 5 CFR Part 551, Sections 401 and 422 [FLSA].

### Rules:

#### *Time in Travel Status:*

1. An employee is considered to be in a travel status only for those hours spent *actually traveling between two points*, such as between the official duty station and the point of destination, or between two temporary duty points. This includes the “usual wait time” which interrupts the travel.
  - a. Outbound travel status begins when an employee departs from his/her home or official duty station, whichever is later.
  - b. Time in a travel status ends when the employee arrives at the temporary duty worksite or his or her temporary lodging, whichever occurs first.
  - c. For assignments that involve return travel, time in travel status resumes when an employee departs from the temporary duty worksite or his or her lodging in the temporary duty station, from whichever the employee departs last.
2. “Usual wait time” refers to short periods of idle time that are typical of travel and caused by factors beyond the traveler’s control, such as connection periods between flights or short delays. This sort of wait time is considered part of travel and is compensable when the travel as a whole is compensable. This is in contrast to “extended wait time” which is not considered time in travel status. “Extended wait time” can include very long connection periods or unusual delays. The determination regarding what is or is not “usual wait time” is at the sole and exclusive discretion of an agency’s management, but the Comptroller General has ruled that such time is generally limited to three hours per segment of travel (e.g., a flight with a connection would have two segments).
3. Time spent commuting to and from work is generally not considered compensable travel time under any of the provisions discussed below, absent actual compensable work occurring during the commute time.
  - a. Travel outside of regular working hours between an employee’s home and a temporary duty station or transportation terminal **outside the limits of his or her official duty station** is considered creditable travel time. However, ICE must deduct the employee's normal home-to-work/work-to-home commuting time from the creditable travel time.
  - b. Travel **outside of regular working hours between a worksite and a transportation terminal** is creditable travel time, and no commuting time offset applies.

- c. Travel outside of regular working hours **between home and a transportation terminal that is within the limits of the employee's official duty station** is considered equivalent to commuting time and is not creditable travel time.
- d. Travel between **temporary lodging** and a **work or training site at a temporary duty station** is considered equivalent to commuting time and is not creditable travel time.

*FEPA (Title 5) Travel:*

- 4. Official travel away from an employee's official duty station is deemed to be work time under FEPA **only when one of the following applies:**
  - a. It is within the employee's regularly scheduled administrative workweek, including regular overtime work;
  - b. The travel involves the performance of actual work while traveling (e.g., escorting detainees via bus);
  - c. The travel is incident to travel that involves the performance of work while traveling (e.g., driving an empty bus back to its point of origin);
  - d. The travel is carried out under such arduous and unusual conditions that the travel is inseparable from work (e.g., extremely severe weather conditions); or,
  - e. The travel results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of the employee to his or her official-duty station.
- 5. Hours of travel that are determined to be compensable as hours of work under the above provisions must be compensated with FEPA overtime or AUO or LEAP, as applicable.

*FLSA Travel:*

- 6. Time spent traveling is considered work time under the FLSA if an employee is required to:
  - a. Travel during regular working hours (e.g., regularly scheduled workweek);
  - b. Work during travel;
  - c. Travel as a passenger on a one-day assignment away from the official duty station; or
  - d. Travel as a passenger on an overnight assignment away from the official duty station during hours on non-workdays that correspond to the employee's regular working hours (e.g., if an employee generally is assigned to an 8 a.m. to 4 p.m. shift, Monday through Friday, travel on a Saturday between 8 a.m. and 4 p.m. would qualify).

*How to Determine Whether Time Spent Traveling is Creditable as Work Time:*

- 7. To determine whether an employee should be paid compensation for work-related travel, an agency must first determine (i) what hours the employee actually spent traveling, and (ii) whether the employee is covered by the FLSA (FLSA nonexempt) or is FLSA exempt.

Once these determinations have been made, one proceeds as follows:

(A) If the employee is FLSA exempt, apply the FEPA (Title 5) rules to determine if the travel time is creditable as work time.

(B) If the employee is covered by the FLSA (FLSA nonexempt), travel time is credited as work if *either* the FEPA (Title 5) or FLSA rules apply.

### ***Compensatory Time Off for Travel (CTOT)***

**Introduction:** An employee earns compensatory time off for travel (CTOT) for time spent in work related travel away from the employee’s official duty station **when that travel time is not otherwise compensable under FEPA (Title 5) or the FLSA.** (See above discussion of when time spent traveling is creditable as hours of work.)

#### **Statutory & Regulatory Authorities:**

5 U.S.C. § 5550b; and, 5 CFR Part 550, Sections 1401-1409.

#### **Rules:**

1. Compensatory time off for travel may be earned without regard to whether an employee is exempt from or covered by the overtime pay provisions of the FLSA.
2. To be creditable travel for purposes of CTOT, the travel must be officially authorized.
3. For purposes of CTOT, time in a travel status includes time spent traveling between the official duty station and a temporary duty station, time spent traveling between two temporary duty stations, and the “usual waiting time” preceding or interrupting such travel, such as waiting at an airport.<sup>17</sup>
4. An “extended” waiting period (an unusually long wait during which the employee can rest or use the time for his or her own purposes) is not considered time in a travel status.
5. As with compensable travel time, normal commuting time is deducted from time spent in a travel status for purposes of compensatory time for travel.
6. Employees should follow their normal procedures for requesting the crediting and approval of CTOT. Note that CTOT is forfeited if not used by the end of the 26th pay period after the pay period during which it was earned.

#### ***How to Determine Whether Compensatory Time for Travel Applies:***

7. To determine whether an employee’s work-related travel should be compensated with CTOT, ICE must first determine (a) what hours the employee actually spent traveling; and (b) whether those hours are “otherwise compensable” as hours of work for the employee under FEPA (Title 5) or the FLSA (if applicable). **If the time is not “otherwise compensable,”** the time spent traveling may be compensated with CTOT consistent with the laws and regulations discussed above.

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<sup>17</sup> Per 5 C.F.R. § 550.1404(b)(1), determinations regarding what is creditable as “usual waiting time” are within the sole and exclusive discretion of an Agency’s management.

## **II. SCENARIOS**

### **FLSA Travel Scenario:**

An employee is selected for a 90-day detail to an office that is located six hours away from the employee's duty station. The employee is required to report for duty on Monday; therefore, travel to this new duty station was officially approved to occur on Sunday. The employee's regular working hours are Monday through Friday 7:00 a.m. to 3:00 p.m. and the employee is in a nonexempt position.

In this scenario, if the employee traveled to the temporary duty station during the employee's regular working hours (7:00 a.m. to 3:00 p.m.), the time spent traveling to the temporary duty station should be compensated as FLSA Travel. CTOT can only be credited for the time spent in travel status that is outside of regular working hours.

### **AUO Travel Scenario:**

Two officers are assigned to an overseas escort that has been scheduled weeks in advance. Both officers have received approval for 45 Act overtime pay and had their shifts adjusted accordingly. During the week of the escort, one of the officers has a personal emergency and is unable to participate. In order for the removal to go as planned, a replacement officer must be identified and ticketed for the flight.

In this instance, because the change is taking place after the beginning of the administrative workweek, the officer assigned as the replacement must be compensated with AUO pay for any irregular overtime hours.

### **Standby Scenario:**

The regular working hours of an officer assigned to Fugitive Operations are Monday through Friday from 6:00 a.m. to 2:00 p.m. On a Tuesday afternoon, he is notified by his supervisor that he is to remain on "standby" status after his shift ends, including instructions to travel no more than 30 minutes away from the field office, stay in uniform/appropriate attire, maintain his weapon and government vehicle, continuously monitor his phone, and remain in a state of readiness, in order to be able to respond and return to the office immediately if called. The reason for the order is a potential operation later that evening, which, if it is triggered, will require the team to convene and go into action at a moment's notice. The officer remains on "standby" until 7:00 p.m. at which time his supervisor notifies him that the operation will not be occurring and he is no longer on "standby" status.

In this scenario, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. Therefore, the hours that the employee was on "standby" status should be compensated with AUO.

### **After Hours Scenario:**

A detainee is admitted to a local hospital on a Friday night. The detainee will require ERO supervision until he is discharged from the hospital, and a female officer is assigned to that duty.

In this scenario, the employee has been assigned a duty that is considered irregular and has not been scheduled prior to the administrative workweek. Therefore, the employee assigned to provide security will be compensated with AUO. If it is anticipated that the detainee will remain in the hospital and require supervision into the following administrative workweek (Saturday at midnight), the supervisor

should schedule an employee to continue this assignment and compensate the employee with 45 Act pay for the “regularly scheduled” overtime hours.

**Holiday Pay Scenario:**

An officer working in the Criminal Alien Program (CAP) is assigned to the CAP duty phone during a holiday that falls on a Friday, and she does this from her home. As part of her duties, the officer is responsible for answering calls from other law enforcement agencies and, if needed, responding to call-outs. The officer’s regular working hours are Monday through Friday from 6:00 a.m. to 2:00 p.m. At 12:00 p.m. on the holiday, the officer answers a call that requires her to respond to a jail and take custody of a detainee who is about to be released. The officer departs from her home at 12:30 p.m. and works until 6:00 p.m.

In this scenario, the officer is required to perform hours of work on a holiday during hours when she would otherwise perform non-overtime work (i.e., if it were not a holiday). Therefore, for these hours, she is entitled to her rate of basic pay plus holiday premium pay equal to her rate of basic pay for each hour of holiday work. As such, the officer should be compensated for 1.5-hours (for working from 12:30 p.m. to 2:00 p.m.) of holiday pay and four hours (for working from 2:00 p.m. to 6:00 p.m.) of AUO.

**45 Act and AUO Scenario:**

Two officers from the Seattle Field Office are assigned to an overseas escort that has been scheduled weeks in advance. Both officers have received approval for overtime pay and their shifts have been adjusted accordingly. As there are no non-stop flights available to their final destination, the officers must fly to Atlanta for a connecting flight. When the escorting officers arrive in Atlanta, the deportee becomes unruly and the airline refuses to allow them to continue on their flight. Officers from the Atlanta Field Office respond to the airport and take custody of the deportee, while the escorting officers go to a hotel.

In this scenario, the Seattle officers would be compensated with whatever overtime pay, as applicable, and previously approved, up to the time when they checked into their hotel. The Atlanta officers who responded to the airport would be compensated with AUO for any overtime caused by the unruly deportee.

**Non-Escort/45 Act Weekend Enforcement Operation Scenario:**

A Field Office is scheduling an enforcement operation (three weeks in advance) for a Saturday. It is anticipated that the operation will require several officers and will last at least ten hours in order to complete the arrests and processing. The regular working hours for the officers assigned to this operation are Monday through Friday from 6:00 a.m. to 2:00 p.m.

In this scenario, if it is operationally possible, the officers assigned to this operation should have their tour of duty changed to Tuesday through Saturday prior to the start of the administrative workweek and in compliance with the procedures set forth in the collective bargaining agreement. If the tour of duty is changed as noted, but the operation is still expected to extend beyond the shift, the supervisor can authorize overtime pay for the number of hours that are anticipated to be worked in excess of the basic eight hours.

**Duty Phone Scenario:**

A male officer working in CAP is in an “on call” status assigned to the CAP duty phone. As part of his duties, the officer is responsible for answering calls from other law enforcement agencies and for conducting interviews outside of his regular working hours.

In this scenario, the supervisor cannot predict whether or when calls will occur, how many hours of work the calls will require, or the number of calls in advance. Therefore, the hours incurred by calls and call-backs during the “duty phone” period must be compensated with AUO for an AUO certified employee.

### III. FREQUENTLY ASKED QUESTIONS

#### **1. Can an employee earn AUO while performing escorts?**

Yes. Escorts scheduled in the same work-week as the escort occurs will be compensated as AUO. In addition, unscheduled flight delays may cause an escort to take longer than scheduled. In this instance, unscheduled hours will be compensated with AUO.

#### **2. If a foreign escort is cancelled during any portion of the trip, how is the employee compensated?**

While 45 Act overtime is pre-scheduled, it can be cancelled. In the case of an escort that is cancelled after it has begun, the employee continues to be in a work or travel status until the employee returns to their official duty station, or home, whichever is first, subject to offsets for commute time and unusual/extended waiting periods. As long as this occurs within the period for which 45 Act overtime was scheduled, the employee will continue to be paid 45 Act. Once the duty status ends, any remaining 45 Act overtime will be cancelled. If for some reason the duty time extends beyond the scheduled 45 Act, any additional compensable travel time will be paid as AUO, for AUO-certified employees. If an employee is not AUO-certified but is FLSA nonexempt, the time will be paid as FLSA overtime.

#### **3. When is an employee considered to be in “travel status” for purposes of premium pay?**

An employee is considered to be in a travel status only for those hours spent *actually traveling between* two points, such as the official duty station and the point of destination, or between two temporary duty points, as well as “usual waiting time” which interrupts the travel. Outbound travel status begins when an employee departs his/her home or official duty station, whichever is later. Time in a travel status ends when the employee arrives at the temporary duty worksite or his/her temporary lodging, whichever occurs first. Time in a travel status resumes when an employee departs from the temporary duty worksite or his/her lodging in the temporary duty station, from whichever the employee departs last. This time is potentially subject to an offset for commute time, which is not compensable.

Time spent at a temporary duty station between arrival and departure is not time in a travel status. Determinations regarding what is creditable as “usual waiting time” are within the sole and exclusive discretion of the employing agency. Note: The term “travel status” may have different meanings in the context of other laws or regulations.

#### **4. What if an employee travels from his/her home or lodging to a transportation terminal within the limits of his or her official duty station?**

An employee’s time spent traveling outside of regular working hours to or from a transportation terminal within the limits of his or her official duty station is considered equivalent to commuting time and is not creditable time in a travel status for the purpose of earning CTOT or receiving other forms of overtime.

#### **5. If the employee arrives at his/her hotel well in advance of the check-in time, how is the employee compensated until he/she is allowed to check in?**

Outbound travel status ends when the employee *arrives* at the temporary duty worksite or his/her temporary lodging, whichever occurs first. This time may incorporate delays that constitute “usual wait time,” such as traffic. However, the Comptroller General has limited “usual wait time” to up to three hours per segment of a trip (an outbound flight with a connection would consist of two segments). Waiting at a hotel for a room to be made available is not, in itself, considered “usual wait time,” nor is it time actually spent in travel between two points. It is also not time that is sufficiently restricted or controlled in order to constitute “standby” time. Therefore, the time is not compensable.

#### **6. If the employee is required to check out of the hotel well in advance of his/ her scheduled departure, when will his/her shift begin?**

Historically, the Office of Personnel Management (OPM) considered travel by public conveyance, such as plane, rail, or bus, to begin at the departure of the vehicle, plus any usual waiting time prior to that departure during which an employee was required to arrive at the conveyance terminal (for example, arriving at an airport for a domestic flight one hour in advance). Recently, however, OPM indicated that return travel begins at departure from a temporary duty station or lodging, and that the travel from there to the public conveyance terminal is not itself subject to the commute offset. Travel time between lodging or a duty station and a terminal is limited to the time reasonably needed to arrive at the terminal, plus usual wait time.

Idle time at a foreign location, either at a hotel or otherwise, is not considered “usual wait time,” nor is it time actually spent in travel between two points. It is also not time that is sufficiently restricted or controlled to constitute “standby” time. Therefore, the time is not compensable.

Additionally, there are occurrences where such timing is not possible; consequently ICE has authorized standardized scheduling where an employee’s regular shift on a scheduled workday will be changed to begin at the time when the employee must check out of the hotel. This is in light of administrative concerns regarding the large variation of distance and time between lodging and terminal at various destinations, as well as certain concerns related to officer well-being.

**7. Can an employee earn AUO while travelling from home to work?**

No. An employee who travels from home before the regular workday and returns to his or her home at the end of the workday is engaged in ordinary home to work travel, which is not work time and thus is not compensable.

**8. Can an employee earn AUO while travelling from home to work on a one-day assignment in another city (outside the boundaries of the official duty station)?**

Yes, if the travel could not be regularly scheduled in advance of the administrative workweek. An employee who regularly works at a fixed location in one city but is given a one-day assignment in another city outside the limits of the official duty station, and returns home the same day, can earn AUO while traveling from home to work. The time spent in travel to and from the other city is work time, except at the point where the employee is in travel directly to or from home, since that time would normally be spent commuting to the regular worksite, and must be deducted from such travel.

**9. When is it appropriate to offset creditable time in a travel status by the amount of time that the employee spends in normal commuting between home and work?**

If an employee travels directly between his/her home and a temporary duty station outside the limits of the employee’s official duty station (e.g., driving to and from a three-day conference), the employee must deduct his/her normal home-to-work/work-to-home commuting time from the creditable travel time. ICE must also deduct an employee’s normal commuting time from the creditable travel time if the employee is required—outside of regular working hours—to travel between home and a transportation terminal (e.g., an airport or train station) outside the limits of the employee’s official duty station.

**10. Can an employee earning AUO earn other forms of Title 5 premium pay?**

An employee receiving AUO pay remains eligible for other forms of premium pay prescribed under Title 5 U.S.C. and overtime under FLSA. This includes additional pay for regularly scheduled overtime work and regularly scheduled work at night, and on Sundays and holidays as long as the appropriate regulatory requirements are met. However, those receiving AUO cannot earn other forms of premium pay for irregular or occasional overtime hours, as they are only compensated through the AUO premium.

**11. Can an employee choose the type of compensation that will be received for escort travel?**

No. The type of compensation is solely dependent on the escort assignment’s scheduling.

**12. How will employees be compensated when performing escorts?**

The type of compensation is solely dependent on the escort assignment's scheduling. If overtime hours occur during an escort assignment that is scheduled for an employee prior to the start of the administrative workweek, the employee will be compensated with 45 Act overtime. However, if unforeseen delays occur during the assignment, that portion of overtime earned beyond the 45 Act approved overtime will be compensated with AUO. However, if overtime hours occur during an escort assignment that was ordered and approved during the same administrative workweek, the employee will be compensated with AUO.

**13. Under what circumstances is an AUO-certified employee compensated with Title 5 (45 Act) Overtime?**

An AUO-certified employee can only be compensated with 45 Act for overtime work when the overtime was or should have been scheduled and approved for the employee prior to the start of the administrative workweek.

**14. What is compensatory time off (CTO)?**

CTO is time off with pay in lieu of overtime pay for irregular or occasional overtime work, or when permitted under agency flexible work schedule programs. It is not available to employees who earn AUO.

**15. What is compensatory time off for travel (CTOT)?**

CTOT may be earned by an employee for time spent in a travel status away from the employee's official duty station when such time is not compensable by a different form of payment, such as regular duty time, FEPA overtime (45 Act or AUO), or FLSA overtime.

**16. Is CTOT the same as CTO?**

No.

**17. May an employee who receives AUO pay earn CTOT?**

If such employee's travel time is not compensable under other overtime provisions (e.g., AUO, 45 Act, FLSA Travel), the employee is eligible to earn CTOT for time spent in a travel status.

**18. Can an employee receive CTOT in lieu of other compensation for escort related travel?**

No.

**19. May an employee earn CTOT when he or she travels in conjunction with the performance of union representational duties?**

No. The term "travel" is defined at 5 CFR § 550.1403 to mean officially authorized travel (i.e., travel for work purposes approved by an authorized agency official or otherwise authorized under established agency policies). The definition specifically excludes time spent traveling in connection with union activities. The term "travel for work purposes" is intended to mean travel for agency-related work purposes. Thus, employees who travel in connection with union activities are not entitled to earn CTOT because they are traveling for the benefit of the union, and not for agency-related work purposes.

**20. Can an employee receive or be credited with CTO in lieu of AUO?**

No. Employees receiving AUO premium pay cannot be credited with CTO for irregular or occasional overtime worked. CTO is another form of compensation for irregular or occasional overtime work. Pursuant to 5 CFR § 550.163(b), the AUO premium is the exclusive method of payment for irregular or

occasional overtime work for employees receiving AUO premium pay. Thus, it is illegal for an employee to receive or be credited with CTO in lieu of AUO for irregular or occasional overtime work.

**21. Can an employee receiving AUO premium pay, and who has been ordered to work and approved for regularly scheduled overtime work (45 Act), choose to be compensated through AUO instead?**

No. Pursuant to federal law and regulation, regularly scheduled overtime work is a different category of overtime work from irregular or occasional overtime work. Since the AUO premium compensates only irregular or occasional overtime work for those employees who are certified to receive it, the AUO premium cannot be used to compensate regularly scheduled overtime work.

**22. How is CTOT earned and credited?**

CTOT is earned for qualifying time in a travel status. It is credited in increments of 15 minutes.

**23. Is there a limit on the amount of CTOT an employee may earn?**

No; however, unless there are exigencies of the service or **because of uniformed service or an on-the-job injury with entitlement to injury compensation**, all CTOT is forfeited if not used by the end of the 26th pay period after the pay period during which it was earned.

**24. What if an employee is unable to use his or her accrued compensatory time off for travel because of uniformed service or an on-the-job injury with entitlement to injury compensation?**

Unused compensatory time off for travel will be held in abeyance for an employee who separates, or is placed in a leave without pay status, and later returns following (1) separation or leave without pay to perform service in the uniformed services (as defined in 38 U.S.C. § 4303 and 5 CFR § 353.102) and a return to service through the exercise of a reemployment right; or (2) separation or leave without pay due to an on-the-job injury with entitlement to injury compensation under 5 U.S.C. Chapter 81. The employee must use all of the compensatory time off for travel held in abeyance by the end of the 26th pay period following the pay period in which the employee returns to duty, or such compensatory time off for travel will be forfeited.

**25. How is an employee's travel time calculated for the purpose of earning CTOT or overtime when the travel involves two or more time zones?**

When an employee's travel involves two or more time zones, the time zone from point of first departure must be used to determine how many hours the employee actually spent in a travel status for the purpose of accruing overtime or CTOT.

**26. What if an employee travels from a worksite to a transportation terminal?**

If an employee travels between a worksite and a transportation terminal, the travel time outside regular working hours is creditable as time in a travel status, and no commuting time offset applies. For example, after completing his/her workday, an employee may travel directly from the regular worksite to an airport to attend an out-of-town meeting the following morning. Travel time between the regular worksite and the airport is creditable as time in a travel status. This is different from travel from home to a transportation terminal that is within the boundaries of an employee's official duty station; that travel is considered the equivalent of commute time and is not creditable.

**27. What if an employee elects to travel at a time other than the time selected by ICE?**

When an employee travels at a time other than the time selected by ICE, then a determination must be made by ICE as to the estimated amount of time in a travel status the employee would have had if the employee had traveled at the time selected by ICE. The employee must then be credited with the lesser of (1) the estimated time in a travel status the employee would have had if the employee had traveled at the

time selected by ICE; or (2) the employee's actual time in a travel status at a time other than that selected by ICE.

**28. If an employee who is covered by FLSA (FLSA-nonexempt) is required to travel, but no flights are available, or if ICE authorizes travel by rental car or personal vehicle, is the driving time hours of work for the purpose of earning FLSA overtime pay?**

Time spent traveling is hours of work under the FLSA if the travel time meets one of the conditions in 5 CFR § 551.422(a) or 5 CFR § 550.112(g). Under 5 CFR § 551.422(a)(2), travel time is considered hours of work if an employee is required by ICE to drive a vehicle or perform other work while traveling. Therefore, if the employee is authorized to drive, the time spent driving is considered hours of work under the FLSA. However, if ICE determines that an employee is not required to drive because other alternative modes of transportation were made available, 5 CFR § 551.422(c) requires ICE to credit the lesser of:

- 1) the actual travel time that qualifies as hours of work under 5 CFR § 551.422(a) or 5 CFR § 550.112(g); or
- 2) the estimated travel time that would have been considered hours of work under 5 CFR § 551.422(a) had the employee used the mode of transportation offered by ICE.

In other words, if the employee would have earned two hours of overtime had he/she used the authorized mode of transportation, but instead elected to use a personal vehicle, the employee would only earn two hours of overtime.

**29. Can a FLSA-nonexempt law enforcement employee earn 45 Act for non-escort related travel (e.g., travel to training or TDY location)?**

An FLSA-nonexempt employee may not be paid premium compensation for traveling during regular working hours on a workday, because the employee receives his or her rate of basic pay for those hours. However, for travel outside of an FLSA-nonexempt employee's regularly scheduled shift (including, on scheduled days off), the employee may be paid under FEPA or the FLSA if the time spent travelling meets one of the conditions in 5 CFR § 550.112(g) (FEPA) or 5 CFR § 551.422(a) (FLSA), respectively. If the travel time does not meet those conditions, as in the normal case with travel to training or to a TDY location, yet the travel time is still outside the regularly scheduled shift, the employee earns CTOT for those travel hours. Keep in mind that travel which occurs on non-workdays which correspond to the FLSA nonexempt employee's regular working hours qualifies as compensable FLSA travel pursuant to 5 CFR § 551.422. For example: the employee's regularly scheduled shift is 8:00 a.m. to 4:00 p.m., Monday through Friday. If the employee is scheduled to travel on Saturday from 6:00 a.m. to 3:00 p.m., the employee earns CTOT from 6:00 a.m. to 8:00 a.m., and FLSA travel overtime from 8:00 a.m. to 3:00 p.m.

**30. If an escorting officer whose overtime has been scheduled and approved prior to the administrative workweek is unable to perform the escort, is the replacement escorting officer entitled to 45 Act or AUO?**

5 CFR § 610.121(b)(3) states that if the Agency should have scheduled a period of work as part of the employee's regularly scheduled administrative workweek and failed to do so, that time must be treated as if it had been regularly scheduled. For such a situation to occur, it must be determined that ICE (i) had knowledge of the specific days and hours of the work requirement in advance of the administrative workweek; and (ii) had the opportunity to determine which employee had to be scheduled for the specific work requirement and hours.

Here, if ICE did not have knowledge prior to the administrative workweek that the replacement officer would have to perform this work, any overtime work associated with the escort would be irregular and occasional and therefore paid through the AUO premium for an AUO certified employee, as opposed to 45 Act.

**31. If an employee fails to have his/her overtime request approved prior to the administrative workweek, will the employee be paid AUO or 45 Act?**

Irrespective of whether the overtime was approved, this is really a matter of what management knew and when. 5 CFR § 610.121(b)(3) states that if the Agency should have scheduled a period of work as part of the employee's regularly scheduled administrative workweek and failed to do so, that time must be treated as if it had been regularly scheduled. For such a situation to occur, it must be determined that ICE (i) knew or reasonably should have known of the specific days and hours of the work requirement in advance of the administrative workweek; and (ii) had the opportunity to determine which employee had to be scheduled, or rescheduled, to meet the specific days and hours of that work requirement.

**32. Should a supervisor require that all "irregular or occasional" overtime performed by an employee certified for AUO be approved by a supervisor or manager before it is worked?**

To be certified for AUO, a position must perform duties that require an incumbent employee to be "generally responsible for recognizing without supervision when he or she must remain on duty." If a supervisor is able to require that all "irregular or occasional" overtime be approved in advance, that indicates that no AUO qualifying duties exist for the employee, and all the "irregular or occasional" overtime is in fact "administratively controllable." As a result, the conditions necessary to justify the employee's AUO certification under 5 USC § 5545 and 5 CFR §§ 550.151 and .153 would not exist, and the employee must therefore be decertified from AUO.

Therefore, if a supervisor believes that an order to not perform any "irregular or occasional" overtime without pre-approval is appropriate (absent circumstances that might require temporary AUO decertification, e.g. violation of the Overtime Cap), then, prior to making the order, he or she must contact higher level management and OHC to determine whether the relevant position(s) should be decertified.

**33. Can employees be compensated for training related to the duties of their current position when the hours of the training occur outside of their regularly scheduled shift for that day?**

FLSA-nonexempt employees may be compensated for such hours if the training constitutes "advanced training" meant to improve the employee's performance in his or her current position, including remedial or refresher training, or to learn a process, technique, or technology of their current position (as opposed to "upward mobility" training or other courses designed to provide skills beyond those necessary in the current position, which is not compensable under the FLSA), and they have been directed to attend the training, meaning that the employee's performance or continued retention in his or her position would be adversely affected by non-enrollment in the training course. This does not, however, apply to entry-level training. *See* 5 CFR § 551.423.

Both FLSA-nonexempt and FLSA-exempt employees may also be compensated for overtime hours of training, including entry-level training, or other similar training, if the training is given: (1) when the employee is already receiving premium pay for overtime, night, holiday or Sunday work; (2) at night because it concerns situations the employee must learn to handle at night; or (3) on overtime, on a holiday, or on a Sunday when ICE has determined such scheduling is permissible because the costs, including premium pay, are less than when the same training is confined only to regular duty hours. *See* 5 CFR § 410.402.

Note: Authorized training which occurs during an employee's regularly scheduled shift for that day are compensated with the employee's basic rate of pay.

**34. Can an employee choose whether to be AUO certified or not?**

No. The long-standing ICE practice is that an employee in a position which has been determined to be eligible for AUO premium pay will be certified if the employee's duties meet the criteria necessary for AUO certification.

**35. When is it appropriate for an AUO certified employee to “self-initiate” overtime?**

An employee may “self-initiate” overtime in circumstances that are consistent with the purposes of AUO as described in 5 C.F.R. §§ 550.151 and .153, where it would effectively be negligent for the employee to cease working. This authority is also constrained by any applicable Agency policies, as well as by supervisory instructions; AUO does not provide the authority to refuse a command to cease work.

**36. Who is entitled to receive LEAP within U.S. Immigration and Customs Enforcement (ICE)?**

Only ICE criminal investigators in the GS-1811 series may receive LEAP. ICE positions classified in other occupational series are not entitled to receive LEAP.

**37. May a criminal investigator refuse to participate in unscheduled duty that qualifies for receipt of LEAP?**

No. Unscheduled duty is a requirement for criminal investigator positions. If a criminal investigator refuses to meet the unscheduled duty requirements of his or her position, he or she may be decertified from receipt of LEAP and payments suspended. In addition, disciplinary action may be taken for such a refusal. The provisions of law (5 U.S.C. § 5545a) and federal regulations (5 CFR Part 550, Subpart A) governing LEAP are applicable to ICE criminal investigators. However, criminal investigator may request a voluntary suspension of LEAP, consistent with existing ICE responsibilities and procedures for LEAP.

**38. Does a less than full-time criminal investigator qualify to receive LEAP?**

No. Only a criminal investigator working a full-time schedule has the capability to meet the substantial unscheduled duty hours requirement necessary to qualify for LEAP.

**39. Does receipt of LEAP change the criteria for receiving regularly scheduled FEPA/Title 5 overtime (also known as '45 Act overtime)?**

Yes. While employees covered by LEAP remain eligible for regularly scheduled overtime under FEPA, the LEAP legislation and related federal regulations altered certain provisions as they apply to criminal investigators receiving LEAP.

For investigators receiving LEAP, on days of the basic 40-hour workweek (e.g., Monday through Friday), the first 2 hours of overtime work, regardless of when approved or scheduled, are compensated with LEAP rather than regularly-scheduled FEPA overtime. This means that for a LEAP employee, “*regularly scheduled*” hour of work compensable with FEPA overtime are limited to overtime hours, scheduled prior to the administrative workweek, that are in excess of 10 hours on these workdays. Please note that this does not mean that all hours in excess of 10 hours on these days will be compensated with FEPA overtime, however, as LEAP is the exclusive compensation for “*irregular or occasional*” overtime (overtime that was not and could not reasonably have been scheduled in advance of the administrative workweek) worked by investigators certified to receive LEAP.

On non-workdays, such as scheduled days off (e.g., weekends), all hours of “regularly scheduled” overtime work will be compensated with FEPA overtime.

Additionally, when a criminal investigator is assigned to protective duties under the authority of the U.S. Secret Service, such as protective duties during election campaigns, the scheduled FEPA criteria on days of the basic 40-hour workweek are overtime hours regularly scheduled in excess of 8 hours in a day, as long as 2 or more consecutive hours of unscheduled duty have also been performed on the same day. If 2

hours of unscheduled duty have not been performed on these workdays, the 10-hours-in-a-day LEAP criteria or scheduled FEPA applies. It should be noted that the 8-hours-in-a-day scheduled FEPA criterion only applies when the criminal investigator is assigned to protective duties under the authority of the U.S. Secret Service.

**39. Does LEAP continue during periods of official travel?**

Yes. LEAP continues to be paid during periods of official travel, as well as during all forms of approved leave, including holidays and annual, sick, administrative, military, funeral, or court leave.

**40. Since LEAP continues during periods of official travel, does this mean that all travel outside the duty station during non-duty hours qualifies as unscheduled duty when computing the annual average for certification?**

No. While LEAP continues during official travel, not all travel time during non-duty hours will qualify as unscheduled overtime duty to be credited when computing the annual average for certification.

The LEAP legislation did not amend the provisions regarding the compensability of official travel that are set out in 5 U.S.C. § 5542(b)(2)(B) and 5 C.F.R. § 550.112(g). They provide that hours in officially approved travel status (in transit between two points and the usual wait time associated with such travel) are only compensable as hours of work when:

- (i) travel which involves the actual, assigned performance of work while traveling (e.g., official responsibility for suspects while traveling, or protecting individuals while traveling);
- (ii) travel that is incident to travel that involves the performance of work (e.g., the return travel after an assignment to protect an individual in transit between two locations);
- (iii) travel under unusually arduous conditions (e.g., crossing extensive wilderness on foot);
- (iv) travel to and from an event which could not be scheduled and controlled administratively (the scheduling and control of the event must originate outside the authority of the U.S. Government, which means outside any agency of the Executive Branch of the Federal Government, not just outside ICE authority).

If travel outside the duty station during non-duty hours meets one of the criteria listed above, it may be counted as unscheduled duty and included in the annual average computation of LEAP hours for purposes of determining whether the investigator has met the “*substantial hours*” requirement. Please note that an investigator cannot receive LEAP and Compensatory Time Off for Travel (CTOT) for the same hour of travel.

**41. While on a duty agent roster, do all hours in excess of 8 hours on days of the basic 40-hour workweek count as “availability hours”?**

There is no automatic entitlement to availability hours simply because a criminal investigator’s name is placed on a duty agent roster and he or she might have to respond to duty calls or take appropriate action, unless management has directed the duty agent to be available during a specified period in anticipation of an identifiable or immediate need to perform unscheduled law enforcement duties.

For example, ICE is advised that the U.S. Coast Guard will be conducting a random vessel boarding between 7:00 PM and 11:00 PM in the evening on a regular workday. The supervisor provides the duty phone number to the Coast Guard so that the agent can be contacted if they interdict contraband or aliens. The duty agent returns home, but keeps the duty phone close; however, the evening passes without a call. In this scenario, the hours between 7:00 PM and 11:00 PM do not qualify as “*availability hours*.” Although the duty officer was advised that he or she might receive a call for service and have to subsequently respond, these circumstances does not constitute an anticipated, identifiable, and immediate need to perform law enforcement duties.

The response would be different if the potential for a call to service had been more specific and more probable. For instance, if there was a particular vessel of interest scheduled to arrive during the hours a question, and the duty agent had been advised to stay in the immediate proximity to the Coast Guard office between 7:00 PM and 11:00 PM, ready to respond at a moment's notice, those hours would constitute “*availability hours*,” even if ultimately no call to service occurs. This is because management directed the duty agent to be available during a specific period and in a specific location, in order to immediately perform law enforcement duties in support of an identified mission that was anticipated to occur. In addition, the agent's movements were so narrowly confined that he or she could not enjoy normal off-duty activity.

#### **42. What is the “substantial unscheduled duty hours” requirement for receiving LEAP?**

To qualify for LEAP, the law (5 U.S.C. § 5545a(d)(2)) and regulations (5 CFR § 550.183(a)) require that a criminal investigator perform an annual average of 2 hours or more of “*unscheduled duty*” per regular workday. The annual average is computed by dividing the total unscheduled duty hours (numerator) by the number of regular workdays (denominator) worked during the period. Days of training, official travel where no work is performed, and days of scheduled leave are not calculated into the “regular workdays” denominator. Hours that would normally constitute unscheduled duty on a regular day off, but where no work is performed, are not calculated into the numerator.

The average of 2 hours per regular workday is a minimum, not a maximum, annual requirement. It does not preclude additional unscheduled duty to meet the needs of ICE.

#### Example:

February, 2013 had 20 possible workdays (160 hours). During that February, a special agent used 5 days (40 hours) of annual leave during the workweek, traveled for 2 days (16 hours) to and from an 8-day (64 hours) training session, enjoyed a 1-day (8-hour) holiday, and then worked the remaining 4 days (32 hours) of the month. As a result, only the 4 days (32 hours) qualify as “regular workdays” for the purpose of the “substantial hours” calculation. On two of those days, the agent worked five (5) hours beyond his eight hour regular workday. On the third day he worked three hours beyond the regularly scheduled 8 hours, while on the fourth day, the agent did not work any overtime. However, on one weekend day, where the agent had been assigned to be in availability status for six (6) hours, the agent was called to duty and performed actual work for two (2) hours, which were approved after the fact by the agent's supervisor.

While the ICE case management system will automatically generate a target of “40” hours of unscheduled duty, that assumes that all 20 possible workdays in February, 2013 constituted regular workdays for the special agent. In this case, only 4 days of the month constituted regular workdays for the purpose of the “substantial hours” calculation, and the actual minimum target for LEAP hours is 8, not 40. As described above, the agent worked fifteen hours of “*unscheduled duty*” on three of the regular workdays, and actually worked two (2) hours of “unscheduled duty” on a day off, notwithstanding six (6) hours in availability status on that day. Therefore, the agent worked a total of 15 (5+5+3+0+2=17) LEAP hours, and thus met his 8 hour target.

## IV. TRAVEL EXAMPLES

### Example 1: Four day escort with nighttime departure from United States

*A male employee who receives AUO is scheduled to perform a foreign escort from his duty station to Lima, Peru. The escorted removal has been scheduled in advance of the regularly scheduled workweek. The employee's regular schedule is Monday-Friday, 6:00 a.m.-2:00 p.m. The flight has been scheduled to depart the United States at 11:00 p.m. In this example, the supervisor changed the employee's shift on the departing day to 4:00 p.m. to midnight, in order to accommodate pick-up and transportation of the detainee, property and logistical issues and the flight's departure time.*

#### DAY 1

<b>4 pm- midnight</b>
Transport detainee, airport screening, board flight
<i>Regular work hours (with night pay, where applicable)</i>

*The flight arrives at the final destination at 10:30 a.m. (corresponding US time). An additional two hours are allotted for foreign Customs/Immigration clearance and travel/check-in at hotel due to Peru's immigration practices and the location of the hotel. As no additional work is planned for this day, and work could not be stopped during the escort flight to provide a break, the supervisor changed the shift of the employee to midnight to 8:00 a.m.*

#### DAY 2

Midnight – 8 am	8 am - 12:30 pm
In flight	In flight, foreign Customs/Immigration, hotel check-in
<i>Regular work hours (with night pay, where applicable)</i>	<i>Overtime hours</i>

*The employee is scheduled to depart Lima, Peru at 11:50 p.m. The corresponding time at the official duty station is 9:50 p.m. Once again, the employee is scheduled to begin his shift at 4:00 p.m. because this is a regular workday in his scheduled tour of duty, and he therefore must have a scheduled shift. The flight arrives in the United States at 2:30 p.m. local time, and the employee is allotted up to an additional one hour to travel from the airport to his duty station based on the distance between the two locations. The supervisor could have changed the employee's shift on the fourth day; however, because the requirement*

for the employee to perform work continued throughout the employee's usual 6:00 a.m. to 2:00 p.m. shift, no shift change was performed.

**DAY 3**

4 pm - midnight
Check out, travel to airport, Customs/Immigration clearance, board flight
<i>Regular work hours (with night pay, where applicable)</i>

**DAY 4**

Midnight - 6 am	6 am – 2 pm	2 pm - 3:30 pm
In flight	In flight	In flight, Customs/Immigration, travel to duty station
<i>Overtime hours worked</i>	<i>Regular work hours</i>	<i>Overtime hours worked</i>

**Example 2: Three day escort with evening arrival in foreign country**

A female employee who receives AUO is scheduled to perform a foreign escort from her duty station to Auckland, New Zealand. The flight has been scheduled to depart from the United States on Monday at 6:00.a.m. The escorted removal has been scheduled in advance of the regularly scheduled workweek. The employee's regular schedule is Monday-Friday, 6:00 a.m. – 2:00 p.m. As there are no direct flights to New Zealand from the official duty station, the escort flight will use Los Angeles as a transit point.

In this example, the supervisor changed the employee's shift to begin four hours prior to the departure time to accommodate pick-up and transportation of the detainee, property and logistical issues and the flight's departure time, and she is assigned to the 2:00 a.m. to 10:00 a.m. shift.

**DAY 1**

2 am- 10 am	10 am- midnight
Transport detainee, airport screening, board flight	In flight and usual wait time interrupting travel (connection)
<i>Regular work hours (with night pay, where applicable)</i>	<i>Overtime hours worked</i>

The flight arrives at the final destination at 6:00 p.m. (corresponding US time). An additional one hour is allotted for foreign Customs/Immigration clearance and travel/check-in at hotel based on New Zealand immigration practices and the location of the hotel.

**DAY 2**

Midnight – 6 am	6 am–2 pm	2 pm – 7 pm
In flight	In flight	In flight, foreign Customs/Immigration clearance, hotel check-in
Overtime hours worked	Regular work hours	Overtime hours worked

The employee is scheduled to depart New Zealand the next day at 11:00am (corresponding US time). The supervisor changed the employee’s work schedule to begin four hours prior to the scheduled departure time to accommodate the time needed to travel to the airport, as well as to report to the airport three hours prior to departure, per the State Department’s guidelines for international flights.

The flight is scheduled to arrive in the United States at 9:00 p.m. local time. The employee is allotted up to an additional two hours to travel from the airport to her home, where the airport is outside of the official duty station and the trip can be expect to take 2 hours. In this case, however, the flight was delayed one hour, arriving in the United States at 10:00 p.m. local time, such that the employee arrives home at midnight. ICE determines that this short delay constitutes “usual wait time.” The employee’s regular commute is 30 minutes, and is offset against the return travel from the airport.

**DAY 3**

7 am – 3 pm	3 pm – 11 pm	11 pm – 11:30 pm	11:30 pm – 12 pm
Check out, travel to airport, Customs/Immigration clearance, board flight	In flight, Customs/Immigration clearance, travel to home	Travel from airport to home	Travel from airport to home
Regular hours worked	Overtime hours worked	Commute offset (non-compensable)	AUO worked

## V. RESPONSIBILITIES AT THE MANAGEMENT LEVEL

It is ICE policy to comply with the legal and regulatory requirements regarding all forms of premium pay, including those forms referenced in this Guide, and to ensure that the management of all compensation issues is carried out in an ethical and fiscally responsible manner. To that end, this section describes the responsibilities of the named Agency management officials.<sup>18</sup>

1. **The Principal Deputy Assistant Secretary of ICE** is responsible for overall oversight of all functions within the Agency, including the management of all compensation and premium pay programs by ensuring the Agency maintains appropriate policies and guidance regarding premium pay programs, that those policies and guidance are properly implemented and enforced, and that all issues related to compensation are managed in an ethical and fiscally responsible manner.
2. **The Executive Associate Director (EAD) for Management and Administration (M&A)** has overall oversight for all compensation programs within ICE, consistent with the responsibilities of the Principal Deputy Assistant Secretary. The EAD for M&A must direct subordinates to develop, maintain, and, where appropriate, review and update the Agency's compensation policies and guidance, as reflected in this Guide and elsewhere, and to review the Agency's compliance with the laws, regulations, policies, and guidance. The EAD for M&A is also responsible, along with the Office of the Principal Legal Advisor (OPLA), for vetting all proposed compensation policies for approval prior to issuance or implementation. The EAD for M&A shall periodically update the Principal Deputy Assistant Secretary with respect to the oversight of compensation issues, including premium pay, at the Agency, and the Agency's compliance with laws, regulations, policies, and guidance.
3. Other **Headquarters Responsible Officials (HROs)**, including the EADs for HSI and ERO, the Deputy Director, and the Chief of Staff, as well as the Assistant Directors, Officers, or equivalent positions who report directly to the Principal Deputy Assistant Secretary, Deputy Director, Chief of Staff, or EAD for M&A, are responsible for implementing the ICE policies and guidance on compensation and premium pay for employees under their supervision and for fostering an atmosphere of compliance with all laws and regulations governing federal compensation as well as any related DHS and ICE policies and guidance. HROs must work to prevent waste, fraud, and abuse with respect to compensation, and to manage operations in an ethical and fiscally responsible manner.
  - A. **HROs for Directorates and Program Offices** may, with the approval of the EAD for M&A, develop, issue, and implement policies and procedures regarding compensation topics tailored for and applicable to their respective Directorates and Program Offices, so long as those policies and procedures conform with all applicable laws and regulations, and do not contradict the guidance, responsibilities, and procedures set forth in this Guide or any policy, procedure, or directive that was enacted at a higher level at ICE or DHS. Any such compensation policies and procedures must be vetted through the EAD for M&A, the Office of Human Capital, and OPLA prior to issuance and implementation.

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<sup>18</sup> Should the titles of officials, positions, organizational units, forms, or relevant terms be replaced by successor titles prior to a revision of this Guide, the Guide should be understood to apply to successor titles in the same manner it applies to predecessor titles, absent some material change in circumstances that alters the roles and responsibilities of the various identified positions.

- B.** When an HRO acts as a first or second line supervisor, his or her responsibilities with respect to such subordinates will include those responsibilities and procedures for supervisors described in the appendices to this guide. When an HRO has supervisory and managerial authorities for employees similar in nature to a Field Responsible Official (FRO), their responsibilities with respect to such employees will incorporate the responsibilities for PFOs described below.
- 4. Field Responsible Officials (FROs)** of ICE Directorates and Program Offices, including Special Agents in Charge (SACs) and Attachés in Homeland Security Investigations, SACs in the Office of Professional Responsibility, Field Office Directors in Enforcement and Removal Operations, and other officials as designated in writing by the Principal Deputy Assistant Secretary, are responsible for implementing the ICE policies and guidance on compensation and premium pay for employees under their supervision and for fostering an atmosphere of compliance with all laws and regulations governing federal compensation as well as any related DHS and ICE policies and guidance. FROs must work to prevent waste, fraud, and abuse with respect to compensation, and to manage operations in an ethical and fiscally responsible manner.
- A.** This includes enforcement of managerial and supervisory controls regarding:
- 1.** The proper and efficient scheduling of employees;
  - 2.** The proper review, evaluation, and, where appropriate, approval and processing of requests for overtime, compensatory time, and other forms of premium payment;
  - 3.** The validity of AUO and LEAP certification status of employees, including whether proper documentation is being submitted consistent with laws, regulations, policies, and guidance, and whether administrative actions are necessary with respect to payment rates or certification status;
  - 4.** Compliance with all applicable limitations on premium payments, including the appropriations overtime cap, in a manner consistent with governing laws and regulation, as well as DHS and ICE policies, guidance, and any applicable collective bargaining agreements.
- B.** FROs must ensure that the offices under their authority meet all reporting requirements related to compensation that are described in this guide, or which they are directed to provide by the Principal Deputy Assistant Secretary or an HRO with relevant authority.
- C.** When an FRO acts as a first or second line supervisor, his or her responsibilities with respect to such subordinates will include those responsibilities and procedures for supervisors described in the appendices to this guide. Additionally, FROs, or their designees, are expected to provide an additional level of review with respect to requests for premium pay when circumstances warrant additional scrutiny.
- D.** FROs should contact the Office of Human Capital or OPLA with any questions regarding compensation and premium pay.
- E.** Although an FRO may develop practices and procedures for his or her respective Area of Responsibility (AOR) governing certain logistical issues that have strong relationships to premium payments (e.g., procedures for distribution of certain overtime assignments), FROs do not generally have independent authority to develop local compensation policies, even if an FRO believes that a local policy or practice is consistent with law, regulations and ICE policies and procedures. If an FRO believes that the local AOR has

a need for a localized policy or procedure with respect to one of the compensation subjects covered in this guide (e.g., AUO, LEAP, FLSA), the FRO should approach the HRO in his/her chain of command. That HRO will then evaluate whether to proceed with the requested policy. If the HRO chooses to proceed, he or she will follow the process described above for FRO-level policies.

**5. The Human Capital Officer, or designee, is responsible for:**

- A.** Developing and maintaining policies, procedures, and guidance for the administration and management of compensation and premium pay for ICE employees, including but not limited to the topics of premium pays and overtime under Title 5, the FLSA, AUO, LEAP, and CTOT.
- B.** Making determinations related to classification of employees with respect to premium pay issues, consistent with law and regulations, both in terms of whether classes of positions are eligible for compensation with the AUO premium and whether positions are exempt or non-exempt from the FLSA, and, if non-exempt, whether the position class falls under section 7(a) or 7(k).<sup>19</sup>
- C.** The management and administration of timekeeping and payroll systems to ensure time and attendance are properly recorded, records are maintained consistent with statutory and regulatory requirements, and employees are properly and promptly paid for the services they provide to the government.
- D.** Providing advice and assistance to HROs, PFOs, and supervisors regarding the implementation and interpretation of the guidance, responsibilities, and procedures contained in this guide.
- E.** Developing training for managers, supervisors, and employees regarding the guidance, responsibilities, and procedures contained in this guide.
- F.** Ensuring that an independent review and audit of timekeeping and payroll records is conducted at five year intervals to ensure that all provisions related to compensation and premium pay are being properly implemented. In particular, the records relating to AUO must be audited to ensure the Agency is following all laws and regulations governing AUO, including evaluating the propriety of AUO certifications and rates for employees. Upon completion of these reviews, the Human Capital Officer will report findings and recommendations to the Principal Deputy Assistant Secretary.

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<sup>19</sup> The rules regarding what positions are and are not covered by the FLSA (non-exempt and exempt) are not covered in this version of the ICE Premium Pay Guide, which is oriented more towards day-to-day use by employees and supervisors. The regulations governing exemption can be found at 5 C.F.R. 551, subpart B (551.201-216). A section regarding these rules may be added to a subsequent version of this guide.

## VI. RESPONSIBILITIES AND PROCEDURES FOR SUPERVISORS AND EMPLOYEES

Section I of this Guide articulates the statutory and regulatory rules governing various forms of premium pay. In order to provide more comprehensive guidance, this section appends to the Guide various documents that elaborate on how those rules are implemented and managed at ICE by explaining the responsibilities and procedures (“R&Ps”) of supervisors and employees with respect to the various forms of premium payment.

Some provisions in the R&Ps reflect specific and direct requirements set forth in statute or regulation, while other provisions reflect policy and procedural decisions designed to meet the many statutory and regulatory requirements directly and indirectly related to premium pay. Because these documents go beyond the summarization and explanation of the rules governing premium pay for federal employees, the R&Ps are technically separate and distinct documents from the Premium Pay Guide that are cross-referenced in this section and appended to the document. In the future, different R&Ps may be substituted for the initial appended documents, including documents in different formats.

The initial appended documents have been drafted to reflect current ICE policies, practices, and procedures, with three potential exceptions. First, the R&Ps on FLSA overtime include language to clarify any ambiguity with respect to the Agency’s position on “suffer and permit” overtime. Second, the R&Ps on AUO include provisions that clarify apparent long-standing confusion over when an employee may, and may not, “self-initiate” irregular overtime. Third, ICE has drafted a tentative “familiarity and review” R&P document, which sets forth responsibilities for periodically reviewing the guide once a training program is established.

The R&Ps can be found in the following appendices<sup>20</sup>.

### **Responsibilities & Procedures**

- Appendix A: Title 5/FEPA Overtime for Employees Exempt from the FLSA
- Appendix B: Overtime for Employees Covered by the FLSA
- Appendix C: Administratively Uncontrollable Overtime
- Appendix D: Law Enforcement Availability Pay
- Appendix E: Compensatory Time Off in Lieu of Overtime
- Appendix F: Night, Sunday, and Holiday Pay
- Appendix G: On-Call Status and Standby Status
- Appendix H: Compensation for Hours Spent Traveling
- Appendix I: Familiarity & Review

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<sup>20</sup> A document will only be attached to the Guide as an Appendix once all internal and external obligations regarding the policies and procedures contained in the document are met. In addition, like the Guide itself, the appendices are subject to revision so that ICE guidance remains consistent with any changes in the governing laws, regulations, precedent, or policies of the Department or ICE.

## VII. DEFINITIONS

**7(a) Employees.** Employees who are FLSA Nonexempt and employed in a wide variety of occupations, including non-supervisory trades and labor employees and leaders; non-supervisory clerical, protective and equipment operating employees; non-supervisory technicians; and most mission related occupations, and have not been classified as Section 7(k) Employees.

**7(k) Employees.** Employees who are FLSA Nonexempt and engaged either in law enforcement or in fire protection activities (including security personnel in correctional institutions) and are certified for either AUO or Standby Pay premium pay.

**Administrative Workweek.** The period of seven (7) consecutive calendar days used for scheduling employees and determining whether hours of work exceed the threshold for overtime pay. At ICE, the administrative workweek has been set to begin at 0001 hours on Sunday and ending at 2400 hours on the following Saturday. The administrative workweek defined here and the FLSA workweek identified at 5 C.F.R. § 551.501(b) for an FLSA Nonexempt ICE employee are the same.

**Administratively Uncontrollable Overtime (AUO).** AUO is alternative system for the management and compensation of “irregular and occasional” overtime. It may be used only to compensate employees who occupy positions that require substantial amounts of irregular, unscheduled overtime work which by its nature cannot be controlled administratively and cannot be scheduled in advance of the 7-day workweek, and where the employee is generally responsible for recognizing the need for such overtime work without supervision.

The AUO premium is paid on a pro-rated annual basis, rather than an hourly basis, and is determined as a percentage, not less than 10 percent nor more than 25 percent of an employee’s rate of basic pay. AUO pay is considered basic pay for purposes of retirement benefits for law enforcement officers (LEOs), as defined in 5 U.S.C. §§ 8331(20) and 8401(17).

AUO does not preclude supervisors from assigning irregular overtime when operations so require; when an employee is AUO certified, the premium compensates all his or her “irregular or occasional” overtime hours, not just the overtime work that qualifies the position for AUO. By contrast, AUO does not compensate employees for overtime hours of work that were or should have been scheduled before the administrative workweek in which the overtime took place; such “regularly scheduled” overtime is compensated through traditional “45 Act” overtime.

**Aggregate Limitation on Pay.** The limitation on basic pay plus any allowance, differential, bonus, award or other similar cash payment received in any calendar year that applies to employees in the Executive Branch including those in the Senior Executive Service (SES). The limit on aggregate compensation is equal to the rate paid an employee at Level I of the Executive Schedule in effect at the end of the applicable calendar year. For an SES employee covered by a performance appraisal system certified under 5 C.F.R., Part 430, Subpart D, the limit on aggregate compensation is equal to the total annual compensation payable to the Vice President at the end of the calendar year.

**Approving Official.** The official at least one level above the certifying official who will approve or disapprove and sign the Certification Concerning Payment of AUO.

**Availability Hours.** Case- or operation-specific hours in excess of 8 hours on days of the basic 40-hour workweek when a criminal investigator is determined by management to be generally and reasonably accessible to meet the needs of ICE.

**Basic workweek.** For full-time employees, the forty (40)-hour workweek established in accordance with 5 C.F.R. § 610.111.

**Certifying Officials.** Supervisors and managers, including first line supervisors, with delegated authority for performing various functions related to certifying employees for AUO coverage; managing work schedules and hours worked; reviewing and approving/disapproving biweekly, periodic and annual reviews and certifications of hours worked; and actively initiating, adjusting and terminating AUO payments.

**Computation Period.** A rolling 12 pay-period interval used to compute the average number of hours of AUO worked during the administrative workweek. This average number of hours worked is used to determine the percentage rate of AUO to be earned by the employee.

**Compensable.** Time that is creditable as hours of work for the purpose of determining a specific pay entitlement. Compensable time includes work time that may not actually generate additional compensation because of applicable pay limitations.

**Compensatory Time Off (CTO).** Time off in lieu of pay for irregular overtime work requested by an ICE employee and granted by an ICE manager with delegated authority for an equal amount of irregular or occasional overtime work. For the most part, “comp time” is granted in lieu of overtime pay for the irregular or occasional overtime work, and thus cannot be granted to those authorized to receive annual premium pay under AUO or LEAP..

**Compensatory Time Off for Travel (CTOT).** Compensatory time off earned by an employee for time spent in a travel status away from the employee’s official duty station when such time is not otherwise compensable.

**Core hours.** The time periods during the workday, workweek, or pay period that the agency requires an employee covered by a flexible work schedule (in contrast to a compressed work schedule) to be present for work.

**Criminal Investigator.** An employee serving as a law enforcement officer, as defined in 5 U.S.C. § 5541(3), whose position is classified under the GS-1811 series and meets the requirements of 5 U.S.C. § 5545a(a)(2).

**Day.** The twenty-four (24) hour period starting at 0001 and ending at 2400 as established by the Secretary of DHS. This is used for all overtime pay purposes.

**Designated Availability Hours (DAH).** Case- or operation-specific availability hours that are management-directed or subsequently approved during days of the basic 40-hour workweek.

**Eligibility Period.** The 4 pay-period interval during which an employee is compensated for AUO at the rate at which he was certified eligible until a subsequent determination is made. With the exception of an employee initially assigned to an authorized position, each eligibility period consists of the 4 pay-period interval beginning 4 pay periods after the end of the computation period.

**Employee.** As defined in Title 5, United States Code (U.S.C.) 2105, a person who is engaged in the performance of a function for the federal government under authority of law or an Executive Act, excluding contract personnel.

**Employees to Whom this Guide Applies** includes all ICE employees except those covered by the Senior Executive Service and those covered by the Federal Wage System.

**Excused Absence.** A period of administratively authorized absence from official duties without loss of pay and without charge to an employee's leave account. It is synonymous with the term "administrative leave."

**Field Responsible Officials (FROs).** For ICE Operational Program Offices, these include the Office of Homeland Security Investigations (HSI) Special Agents in Charge (SACs) and Attachés; Office of Professional Responsibility (OPR) SACs; Enforcement and Removal Operations (ERO) Field Office Directors; and other officials as designated in writing by the ICE Principal Deputy Assistant Secretary.

**FLSA Exempt.** An employee who is covered by the overtime provisions of the Federal Employees Pay Act and whose work meets one or more of the sets of exemption criteria established by the FLSA, or, if the employee is exempted from FLSA coverage by another federal statute. See ICE Policy Directive on Fair Labor Standards Act Coverage, Exemption and Overtime Pay for the criteria that must be met to be FLSA exempt.

**FLSA Nonexempt.** An employee who is covered by the minimum wage and overtime provisions of the FLSA because the work performed by the employee does not meet one or more of the sets of exemption criteria established by the Act and another federal statute does not exempt the employee.

**Foreign Exemption.** The FLSA does not apply to an employee who spends all hours of work in a given workweek in an area where the FLSA does not apply. Areas where the FLSA does not apply include any foreign country and any territory under the jurisdiction of the United States that is not listed in the regulations. The foreign exemption does not apply if the employee spends any hours of work in a nonexempt area. Nonexempt areas are: the 50 United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, the Northern Mariana Islands, and others listed at 5 C.F.R. § 551.104.

**Headquarters Responsible Officials (HROs).** The Principal Deputy Assistant Secretary, Deputy Director, Executive Associate Directors, Assistant Directors, and Deputy Assistant Directors.

**Holiday Work.** Non-overtime work performed by an employee during a regularly scheduled daily tour of duty on a holiday designated in accordance with 5 C.F.R. § 610.202.

**Hourly Regular Rate of Pay.** Pay that is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation is paid. Total remuneration incorporates such payments as basic pay including a locality adjustment; premium pays for Sunday, night, hazard and holiday work; retention allowances; and AUO pay. It does not include such payments as awards and other discretionary payments; Government contributions toward benefits such as life insurance; reimbursements for travel and other expenses; most premium payments where the premium rate is at least one and one-half times the employee's rate of pay; and other payments listed at 5 C.F.R. § 551.511(b).

**Hours of Work (under the FLSA).** All time spent by an employee performing an activity for ICE's benefit and under the control or direction of an ICE official.

**Hours of Work (under the FEPA).** Hours when an employee is scheduled to perform work or be in standby status for an agency, including any travel and pre-shift and post-shift activities which are determined to qualify as "hours of work" consistent with the regulations at 5 C.F.R. § 550.112, as well as ordered and approved overtime (regular and irregular or occasional), and overtime hours initiated by an employee pursuant to AUO or LEAP and compensated through those premiums. Leave with pay during regular (non-overtime) duty hours, while not technically hours of work, are effectively treated as such for purposes of determining entitlements to compensation.

**Irregular or Occasional Overtime Work.** Overtime work that was not scheduled for an employee in advance of the administrative workweek, and thus not part of the “regularly scheduled administrative workweek.” Where a supervisor knew or should have known, in advance of the administrative workweek, that a specific employee was going to need to perform overtime work on specific days and hours, but failed to “regularly schedule” the overtime, the resulting “irregular or occasional” overtime is nevertheless treated as if it were regularly scheduled, consistent with 5 C.F.R. § 610.121(b)(3). If such circumstances are shown to exist by an AUO or LEAP certified employee, and the hours were previously paid through the applicable premium, the employee is entitled to have their time and attendance documents revised so that the hours that should have been regularly scheduled are paid as regular overtime (“45 Act” or FLSA, as applicable) and not counted towards or compensated with AUO or LEAP.

For recipients of AUO or LEAP such overtime may, in certain circumstances, be “self-initiated” due to the nature of the work assigned to their positions. The guidelines for when an AUO-certified ICE employee may properly self-initiate irregular or occasional overtime are set forth as part of a separate policy document, which is or will be attached to this Guide as Appendix C. The guidelines for when a LEAP-certified ICE employee may properly self-initiate irregular or occasional overtime are set forth as part of a separate policy document, which is or will be attached to this Guide as Appendix D.

**Law Enforcement Availability Pay (LEAP).** Annual premium compensation paid to a criminal investigator to ensure the availability of the investigator for all unscheduled duty in excess of 8 hours on days that are part of a criminal investigator’s basic 40-hour workweek, as well as unscheduled duty hours actually worked on days that are not regular workdays, such as scheduled days off. Payment of LEAP is authorized only for periods during which a criminal investigator receives basic pay.

**Maximum Earnings Limitations.** Two earnings limits exist. First, a biweekly limitation prevents an employee from receiving premium pay when the combined basic pay and premium pay would exceed the greater of: the maximum biweekly rate of basic pay payable to a GS-15, or the biweekly rate of basic pay payable for Level V of the Executive Schedule. Second, an annual limitation which prevents an employee from receiving premium pay when the combined basic pay and premium pay in a calendar year would exceed the greater of: the maximum annual rate of basic pay payable to a GS-15, or the annual rate of basic pay payable for Level V of the Executive Schedule. The annual limitation applies when the Principal Deputy Assistant Secretary determines an employee is performing work in connection with an emergency or its aftermath, or is performing work that is critical to the mission of ICE.

**Night Work.** Any regularly scheduled work, both non-overtime and overtime, performed by an employee between the hours of 6:00pm and 6:00am.

**Non-Exempt Employees.** Employees who are covered by both the minimum wage and overtime pay provisions of the FLSA.

**Official duty station.** The geographic area surrounding an employee’s regular work site. This is the same area designated by ICE to determine whether travel time is compensable for the purpose of determining overtime pay, consistent with the regulations in 5 C.F.R. §§ 550.112(j) and 551.422(d). It is also the same area utilized to determining temporary duty travel, as defined by the ICE Travel Handbook.

**Overtime (under the FEPA).** All hours in excess of eight (8) hours in a day **or** forty (40) hours in a week officially ordered and approved in advance, but does not include credit hours. For individuals who participate in compressed work schedules, overtime refers to any hours in excess of those specified in the compressed work schedule. For individuals who participate in flexible work schedules, overtime refers only to those hours that are officially ordered and approved in excess of 8 hours in a day or 40 hours in an administrative workweek.

**Overtime (under the FLSA).** For a 7(a) employee, all hours of work that exceed 40 hours in an administrative workweek or that exceed eight hours in a day that is officially ordered or approved, or suffered or permitted, and is performed by an employee. Hours in excess of eight hours in a day are not included in computing hours in excess of 40 hours in an administrative workweek. For a 7(k) employee, it is all hours of work that exceed 85.5 hours in a biweekly work period. For those working on Compressed Work Schedules, hours of work in excess of the daily compressed work schedule will be credited as overtime. Hours in excess of the weekly compressed work schedule will be credited as overtime as long as it exceeds the applicable weekly overtime standard, e.g., 40 hours for a 7(a) employee. For those working on Flexible Work Schedules (FWS), hours of work that are officially ordered or approved in advance that exceed eight hours in a day or exceed the weekly overtime standard will be credited as overtime hours. Additional hours voluntarily worked by those on a FWS, including credit hours, are not counted as overtime.

**Protective Duties.** Duties authorized by 18 U.S.C. § 3056(a) or by 22 U.S.C. § 2709(a)(3) that allow designated federal authorities the ability to specifically protect certain identified persons.

**Rate of AUO Premium Pay.** One of the following percentages of the employee's rate of basic pay:

- 1) A position which requires an average of at least three (3) but not more than five (5) hours a week of irregular or occasional overtime work – ten (10) percent;
- 2) A position which requires an average of over five (5) but not more than seven (7) hours a week of irregular or occasional overtime work – fifteen (15) percent;
- 3) A position which requires an average of over seven (7) but not more than nine (9) hours a week of irregular or occasional overtime work – twenty (20) percent;
- 4) A position which requires an average of over nine (9) hours a week of irregular or occasional overtime work – twenty-five (25) percent.

If a new employee is being certified, the supervisor should estimate the appropriate percentage based on overtime experience of the previous incumbent.

**Rate of Basic Pay.** The rate of pay fixed by law or administrative action for the position held by an employee, including any locality pay adjustments and applicable special salary rates for law enforcement officers before any deductions and exclusive of additional pay of any other kind.

**Regular Workday (LEAP).** For the purposes of LEAP, each day in a criminal investigator's basic workweek during which the investigator works at least 4 hours (5 U.S.C. § 5545a(a)(4)), excluding:

- 1) Regularly scheduled overtime hours paid under 5 U.S.C. § 5542;
- 2) Unscheduled duty hours paid under LEAP;
- 3) Hours of ICE-approved training;
- 4) Time under official travel orders;
- 5) Hours of approved leave;
- 6) Hours of excused absence with pay, including paid holidays (5 CFR § 550.183(b)(3));
- 7) Periods of leave without pay (LWOP) and LWOP compensated in compliance with the Federal Employees Compensation Act (FECA), commonly referred to as Office of Workers' Compensation Programs (OWCP).
- 8) Periods of suspension for disciplinary reasons when an employee is in a non-pay; and
- 9) Periods in a part-time status of between 16 to 32 hours per administrative workweek (5 CFR subpart A, part 610).

**Regular working hours.** The days and hours of an employee's regularly scheduled administrative workweek established under 5 C.F.R. Part 610.

**Regularly Scheduled Administrative Workweek.** The period within the 7-day administrative workweek when an employee is regularly scheduled to be at work. This includes both daily and weekly non-overtime tours of duty, and any specific periods of regularly scheduled overtime work which may be required.

**Regularly Scheduled Work.** Work on specific days and specific hours of those days that are scheduled in advance of, i.e., before 0001 on Sunday, the 7-day administrative workweek under DHS Policy and ICE procedures for establishing workweeks in accordance with 5 C.F.R. § 610.111. This includes both the employee's basic workweek and any regularly scheduled overtime hours assigned.

**Regularly Scheduled Overtime.** Overtime that is ordered and approved in advance of the employee's workweek.

**Regularly Scheduled Overtime Hours (LEAP).** For LEAP purposes, overtime work that is officially ordered or approved in advance of the first day of the 7-day administrative workweek, and is:

- 1) Overtime hours scheduled in excess of 10 hours on days which are part of a criminal investigator's basic 40-hour workweek; or
- 2) Overtime work scheduled on a day that is not part of the basic 40-hour workweek, such as a scheduled day off.

**Scheduled tour of duty for leave purposes.** An employee's regular hours for which the employee may be charged leave under 5 C.F.R. Part 630 when absent. For full-time employees, it is the 40-hour basic workweek as defined in 5 C.F.R. § 610.102. For employees with an uncommon tour of duty as defined in 5 C.F.R. § 630.201, it is the uncommon tour of duty.

**Straight Time Rate of Pay.** Equal to the employee's rate of pay for his or her position, exclusive of any premiums, differentials or cash awards or bonuses, for most employees. Typically this means the employee's basic rate of pay including any locality adjustment. For employees authorized annual premium pay for AUO work, the straight time rate equals the employee's basic rate plus AUO pay divided by the employee's basic workweek plus the AUO hours [see 5 C.F.R. § 551.512(b)].

**Suffered and Permitted Work.** Any work performed by an employee for ICE's benefit, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed, and the employee's supervisor has an opportunity to prevent the work from being performed but does not do so. Employers are obligated to compensate FLSA non-exempt employees for all suffered or permitted overtime work. This concept of overtime does not apply to employees on a flexible work schedule, but does apply to employees on a compressed work schedule.

**Sunday Work.** Non-overtime work performed by an employee during a regularly scheduled daily tour of duty that does not exceed 8 hours when any part of that duty is on a Sunday. For employees on compressed work schedules it is non-overtime work performed by an employee during a regularly scheduled daily tour of duty when any part of that duty is on a Sunday.

**Temporary Duty Station.** An employee's temporary work site outside of the official duty station.

**Tour of duty.** The specific hours of a day (a daily tour of duty or "shift") and the specific days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek. An example of a daily tour of duty is 8:30 a.m. to 5:00 p.m. An example of a weekly tour of duty is Tuesday through Saturday. "Tour of duty" may also refer to both concepts, combined (e.g. Monday through Friday, 8:30-5:00).

**Travel.** Officially authorized travel (i.e., travel for work purposes that is approved by an authorized official or otherwise authorized under established agency policies).

**Travel Status.** Time during travel that is spent in transit (actually travelling between two points), or constitutes “usual wait time” normally associated with the trip. “Extended wait time,” such as lengthy layovers, does not constitute time in travel status. The determination what periods constitute “usual wait time” is at the sole and exclusive discretion of Agency management, but should not generally exceed three hours per segment of travel (e.g. a flight with one connection would have two “segments” and typically up to six hours of possible wait time).

**Unscheduled Duty.** For the purposes of availability pay, unscheduled duty consists of those hours during which a criminal investigator performs work or is determined by the employing agency to be available for work, that are not:

- 1) Part of the basic 40-hour workweek of the investigator; or
- 2) Regularly scheduled overtime hours (in advance of the workweek) (see Section 5.6).

**WebTA.** The current, and any successor, system used to account for employee time and attendance within ICE.

## **IX. ADDITIONAL RESOURCES**

ICE Overtime Cap Waiver Requests for ICE Employees, Delegation Order, DO 1003.2., effective May 11, 2012.

OPM FAQs on Pay and Leave “Time Spent in Training” located at  
<http://www.opm.gov/faqs/topic/payleave/index.aspx?cid=148deba3-5eb1-4752-ac87-5f3897a6b212>

## **APPENDIX A**

### **Responsibilities & Procedures Governing Overtime for Employees Exempt from the Fair Labor Standards Act (FLSA)**

This section sets forth the responsibilities and procedures governing the use, management, approval, and payment of overtime under the Federal Employees Pay Act (FEPA) (Title 5) for employees who are exempt from (not covered by) the Fair Labor Standards Act (FLSA).<sup>1</sup> The statutory and regulatory rules governing FEPA overtime are set forth in Section I, part 1 of the Premium Pay Guide. With respect to the responsibilities and procedures described below, which directly pertain to record keeping, more guidance is available in the ICE Time & Attendance Directive, policy number 1040.1.

Please note that these procedures are modified when they pertain to an employee who is certified for Administratively Uncontrollable Overtime (AUO) or Law Enforcement Availability Pay (LEAP), as discussed in Appendices C & D, respectively. Additionally, in certain circumstances, Compensatory Time Off (CTO) may be earned in lieu of overtime, subject to the same broader responsibilities and procedures discussed here. Additional responsibilities and procedures related to the use of CTO are discussed in Appendix E.

#### **I. Responsibilities & Procedures for Supervisors**

1. If a supervisor is aware, in advance of the administrative workweek, that a specific subordinate employee (or employees) will be required to perform work during overtime hours on specific days and hours, the supervisor must “regularly schedule” the appropriate subordinate(s) for overtime hours on the anticipated days and hours, consistent with 5 C.F.R. § 610.121.
  - a. Where appropriate, supervisors should assign subordinate employees to shifts and tours of duty consistent with anticipated work requirements, including through the use of staggered shifts, in a manner consistent with law, regulation, and ICE’s policies, practices, any applicable collective bargaining agreements, financial authorizations/limitations, operational requirements, and organizational goals.
  - b. Where shifts are changed as described above, subordinates must be properly notified of their scheduled shift(s) and tour of duty in a manner consistent with law, regulation, and ICE’s policies, practices, and any

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<sup>1</sup> While employees who are covered by the FLSA are technically paid exclusively under that law, the FLSA as it applies to federal employees has been amended to incorporate the rules for FEPA overtime. FLSA non-exempt employees therefore are subject to these responsibilities and procedures, as modified in the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B. An employee’s status under the FLSA (“exempt”/“not covered by” or “non-exempt”/“covered by” the Act) can be found on an employee’s SF-50, on their position description, or by contacting the Office of Human Capital (OHC).

**These Responsibilities & Procedures are not intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. If you have any questions or concerns regarding these responsibilities and procedures or the subject matter they address, please contact the Office of Human Capital.**

- applicable collective bargaining agreements. This notification generally shall be in advance of the administrative workweek and at least seven days in advance of the first day impacted by the change.
- c. Where the need for overtime is anticipated, but becomes no longer necessary, the supervisor shall cancel the overtime authorization consistent with law, regulation, and ICE's policies, practices, and any applicable collective bargaining agreements.
2. Where a supervisor becomes aware during the course of an administrative workweek that work will need to be performed during certain days and hours of that administrative workweek and that it will constitute overtime hours of work, the supervisor will order the appropriate subordinates to perform the "irregular or occasional" overtime work, consistent with law, regulation, and ICE's policies, practices, collective bargaining agreements, financial authorizations/limitations, operational requirements, and organizational goals.
  3. If a situation arises where overtime hours of work are necessary but cannot be formally ordered and approved in advance in a manner consistent with ICE policy and procedures, the written order and approval should be completed as soon as possible after the overtime is completed, but no later than prior to the certification and submission of the time and attendance (T&A) report authorizing its payment.
    - a. Supervisors should not take it upon themselves to post-authorize overtime work. Instead, a supervisor should discuss the situation with the appropriate Field Responsible Official (FRO) or Headquarters Responsible Official (HRO), and, if the higher level manager agrees that the work was necessary and overtime payment is appropriate, the supervisor can authorize the overtime after-the-fact. The written documentation of the order should include a brief explanation of the circumstances and decision.
    - b. If employees who are not certified for AUO or LEAP are assigned duties where, due to operational realities, supervisors are not able to be made aware of each instance where overtime is necessary in advance, employees may be placed in "on-call" status with respect to those duties pursuant to a policy implemented by the HRO or FRO responsible for that area.
      - i. Such policies should be in writing, be made available to employees and supervisors, and define with specificity what categories of duties are at issue (e.g., after hours hits from the National Firearms Registry), what tasks may be performed on an "on-call" basis, what circumstances may trigger the performance of the specified tasks during overtime hours, and any limitations on duration or scope of the tasks performed while "on-call."
      - ii. The responsible HROs and FROs should ensure that the necessary appropriated funds exist, and that overtime associated with the policies is properly monitored by supervisors and higher level managers in order to guarantee that the exception is not abused.

The authority to set such duty-specific “on-call” policies should not be delegated to lower level officials.

- iii. Supervisors should review any claims for overtime made by subordinates pursuant to such policies, and approve the claims for overtime in WebTA if the claims are accurate and consistent with the relevant “on-call” policy.
4. Supervisors must authorize and approve all overtime worked by their employees via the online T&A management system (webTA) and/or by using DHS Form 3000-2 (Attachment 1) for employees without computer access.
    - a. Supervisors will review, respond to, and, where appropriate, certify requests for overtime pay on webTA in a timely manner.<sup>2</sup>
    - b. Supervisors will ensure that the requests, authorizations, and claims for compensation for overtime hours reflect the appropriate category of premium pay (e.g., recording hours under an “Overtime” category as opposed to the “Compensatory Time Earned” category in webTA).
    - c. Where an organization or unit’s current practice includes the use of a specific form for overtime approval in addition to notation on webTA, that form (e.g., G-391) will be used for scheduling and authorization of overtime work in addition to webTA.
    - d. Supervisors shall ensure that employee privacy rights are respected with regard to T&A records, including proper controls on storage and distribution.
  5. A supervisor shall ensure, prior to certifying a subordinate employee’s T&A record on webTA, that all overtime hours of work that are claimed were in fact ordered, actually performed, and supported by the appropriate written authorization.
    - a. If an office uses both webTA and an alternative form for the authorization of overtime hours, either method of authorization may be relied upon to certify a claim for overtime pay.
    - b. If the T&A record contains information that the supervisor believes is erroneous, the supervisor shall have it corrected by a timekeeper or the employee and discuss the concerns with the employee as quickly as is reasonably possible.
    - c. If a subordinate employee is unable to submit and validate his or her T&A in a timely manner (i.e., before the end of the bi-weekly pay period), the supervisor should ensure that a timekeeper validates the employee’s T&A, based upon the available information. The supervisor should only certify hours claimed on the T&A record based upon the information possessed at the time of the certification; if the supervisor does not have appropriate documentation or knowledge of a claim for overtime pay, those hours should not be certified. The supervisor should follow up with the

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<sup>2</sup> For more information regarding what constitutes “timely” actions on webTA, please review the Time & Attendance Directive, Policy Number 1040.1.

employee upon his or her return and make any necessary corrections to the T&A record on webTA.

6. Supervisors are responsible for managing the use of premium hours in an efficient, responsible, and lawful manner. This includes ensuring that direct subordinates:
  - a. Comply with the overtime limit(s) set by Congress.
  - b. Do not perform work during overtime hours when it is not authorized, no longer needed, or when funds are not available or authorized to compensate the employees.
  - c. Are scheduled for overtime only when the need for the work to be performed during overtime hours is operationally justified (as opposed to during regular working hours).
  - d. Are not, absent the proper scheduling of overtime, ordered to engage in pre-shift or post-shift activities that are closely related to an employee's duties, indispensable to his or her performance and take more than 10 minutes of time; any qualifying pre- or post-shift activities that meet all three requirements must be compensated, and if these activities occur outside of a full time employee's scheduled shift, the activities will be compensated with overtime. (The determination of what types of activities meet all three requirements is very case specific, and supervisors should seek guidance from OHC and/or the Office of the Principal Legal Advisor if they have any questions.)
    - i. If funds are available and the use of overtime would be appropriate for pre-shift or post-shift activities of the kind described above, a supervisor may schedule such activities in the same manner that they would schedule any other overtime.
7. Supervisors shall make reasonable effort, within operational constraints, to ensure that work during overtime hours is fairly and equitably distributed among their subordinates who have been determined by management to be best qualified for the performance of the required work, including adherence to any negotiated procedures for the distribution of such work.
  - a. "Fair and equitable" are not self-defining terms and do not necessarily mean equal distribution of hours or earning opportunities. Operational considerations, including requisite qualifications, are always primary, as are any negotiated procedures (where applicable).
  - b. "Fair and equitable" distribution of overtime work is not merely a means of ensuring fair opportunities for additional earnings for employees, but also that work is distributed in such a way that some employees are not overburdened or doing an unreasonably disproportionate share of work.
8. Supervisors are responsible for contacting higher-level supervisors and/or OHC staff for guidance on how to respond in instances where a supervisor questions the propriety of a request or claim for overtime pay or similar issue with time and attendance report submission.

## **II. Responsibilities & Procedures for Employees**

1. An employee shall perform assigned overtime work, whether regularly scheduled or irregular or occasional, when directed to do so by a manager or supervisor.
2. An employee shall ensure that all hours of work performed were appropriate under the relevant laws, regulations, and DHS and ICE policies, including ensuring that:
  - a. Any overtime hours of work, with the exception of overtime pursuant to AUO or LEAP, are ordered, authorized and/or approved by an appropriate ICE supervisor or manager.
  - b. Any overtime hours of work, with the exception of overtime pursuant to AUO or LEAP are properly requested through webTA and/or other form(s) used by the employee's office.
  - c. No overtime hours of work performed result in a violation of any limitations in ICE's appropriations, unless a waiver for that limit has been authorized for and granted to the employee, consistent with ICE policy, practice, and any collective bargaining agreement.
3. An employee shall accurately report all hours worked, including regular work hours, hours in leave status or other authorized or approved absence, and hours that constitute overtime hours of work and are compensated through FEPA overtime.
  - a. An employee is responsible for inputting these hours in webTA, reviewing the reports to ensure their accuracy, and validating the accuracy of the T&A reports in a timely manner.<sup>3</sup>
  - b. An employee is responsible for complying with any local policies or practices regarding timekeeping, including "sign-in/sign-out" logs, consistent with ICE policy and any relevant collective bargaining agreements.
  - c. Where a timekeeper is used, the employee is responsible for providing, when requested, appropriate documentation, including any requests, orders, and/or authorizations for overtime when those requests were not made in webTA.
  - d. If it is impossible for an employee to submit and validate his or her T&A record prior to the end of the bi-weekly pay period (e.g., unanticipated absence due to illness), the employee needs to understand that a timekeeper may submit a T&A information on his or her behalf, based on the information and documentation available to the timekeeper. The employee's supervisor will review and certify (or correct) the T&A record based upon the information and documentation possessed at the time. Once the employee returns to the office, he or she shall be responsible for reviewing the submitted T&A record on webTA and making any corrections he or she believes are necessary as quickly as possible.

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<sup>3</sup> For more information regarding what constitutes "timely" actions on webTA, please review the Time & Attendance Directive, Policy Number 1040.1.

4. An employee is responsible for contacting his or her supervisor or timekeeper with any questions regarding how to report or record hours worked and/or leave taken, or when there is a discrepancy or problem with the information reflected on his or her Statement of Earnings and Leave.
5. If an employee believes there has been an error with respect to his or her entitlement for pay under FEPA regarding work performed (including, but not limited to, overtime), the employee may use the following procedures:
  - a. Employees who were covered under a collective bargaining agreement at the time of the incident upon which the claim is based may file a grievance through the negotiated grievance procedure in the applicable collective bargaining agreement if the agreement does not exempt the subject matter of the claim from its scope.
  - b. Employees who were not covered by a collective bargaining agreement at the time of the incident may either:
    - i. File an administrative grievance consistent with the Agency's administrative grievance procedures; or
    - ii. File a claim with the U.S. Office of Personnel Management (OPM); guidance for filing a claim with OPM is found at 5 C.F.R. §§ 178.101 through 178.107.
  - c. If an employee files an administrative grievance but is dissatisfied with the final decision, the employee may subsequently file a claim with OPM as described above.
  - d. Employees may work informally to resolve FEPA related questions or concerns with their supervisors, timekeepers and servicing personnel offices.
  - e. Employees may have the right to make a claim in an appropriate United States Court.

### **III. Responsibilities & Procedures for Timekeepers**

1. Timekeepers shall communicate with employees and supervisors to ensure they have the correct information and documentation necessary for the recording of T&A.
2. Timekeepers shall monitor T&A records and report any discrepancies or other issues that raise any suspicion of fraud, waste, abuse, or any potential errors or omissions that might result in incorrect payments.
3. If a program office uses timekeepers to regularly submit and validate T&A records for employees, supervisors, and/or managers on webTA, the timekeepers shall do so based upon the information available to them.
4. If employees generally submit and validate their own T&A records on webTA, timekeepers will validate T&A records on webTA on their behalf when the employees are unable to do so in a timely manner. Timekeepers will enter the information available to them so there is no delay in the payment of wages.
5. Timekeepers shall ensure that employees' privacy rights are respected with regard to T&A records, including proper controls on storage and distribution.

**OVERTIME AUTHORIZATION AND REPORT OF TIME WORKED**

**EMPLOYEE'S NAME:** \_\_\_\_\_

**FLSA status:** non-exempt  exempt

**ADVANCE APPROVAL OF OVERTIME ASSIGNMENT:**

Number of hours: \_\_\_\_\_ To be worked on:

date(s) \_\_\_\_\_ time(s) \_\_\_\_\_

date(s) \_\_\_\_\_ time(s) \_\_\_\_\_

**METHOD OF COMPENSATION:**

- Overtime Payment
- Compensatory Time Off<sup>1</sup> requested by employee
- Compensatory Time Off<sup>1</sup> directed by management<sup>2</sup>

<sup>1</sup>For overtime not scheduled prior to the work week only

<sup>2</sup>Must be an FLSA exempt employee paid more than GS 10, step 10

Reason for overtime: \_\_\_\_\_

\_\_\_\_\_

**OVERTIME AUTHORIZED BY:**

Signature \_\_\_\_\_ date \_\_\_\_\_

**REPORT OF ACTUAL OVERTIME WORKED:**

Number of hours worked: \_\_\_\_\_ Worked on:

date(s) \_\_\_\_\_ time(s) \_\_\_\_\_

date(s) \_\_\_\_\_ time(s) \_\_\_\_\_

\_\_\_\_\_

Employee signature

\_\_\_\_\_

Department approval signature

## **APPENDIX B**

### **Responsibilities & Procedures Governing Overtime for Employees Covered by the Fair Labor Standards Act**

This section sets forth the responsibilities and procedures governing the use, management, approval, and payment of overtime for employees who are covered by (“non-exempt” from) the Fair Labor Standards Act (FLSA).<sup>1</sup> The statutory and regulatory rules governing FLSA overtime are set forth in Section I, Part 4 of the Premium Pay Guide. With respect to the responsibilities and procedures described below, which directly pertain to record keeping, more guidance is available in the ICE Time & Attendance Directive, policy number 1040.1.

Please note that these procedures are modified when they pertain to an employee who is certified for Administratively Uncontrollable Overtime pay (AUO), as discussed in the Responsibilities & Procedures for AUO, Appendix C. The FLSA also interacts with payment for time in travel status, but those interactions are addressed in the Responsibilities & Procedures for Compensation of Hours Spent Traveling, Appendix H. Additionally, in certain circumstances, Compensatory Time Off (CTO) may be earned in lieu of overtime, subject to the same broader responsibilities and procedures discussed here. Additional Responsibilities & Procedures related to CTO are discussed in Appendix E.

#### **I. Responsibilities & Procedures for Supervisors**

1. FLSA overtime incorporates the responsibilities and procedures for FEPA/Title 5 overtime. Therefore, all of the guidance set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, should be followed, except where it is inconsistent with the responsibilities or procedures set forth in this Appendix.
  - a. The FLSA and Federal Employees Pay Act (FEPA) have been largely harmonized with respect to topics such as pre- and post-shift activities (“preliminary and postliminary”) or on-call as opposed to standby status. Similarly, scheduling and documentation of work hours for FLSA non-exempt employees should be managed in a manner consistent with employees exempt from the FLSA.
  - b. While supervisors’ responsibilities and procedures governing FLSA-exempt employees are not being reproduced in this section verbatim, they nevertheless should be considered incorporated here, except where inconsistent with the provisions set forth below, including all relevant obligations stemming from any applicable collective bargaining agreements.

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<sup>1</sup> An employee’s status under the FLSA (“exempt”/“not covered by” or “non-exempt”/“covered by” the Act) can be found on an employee’s SF-50, on their position description, or by contacting the Office of Human Capital.

**These Responsibilities & Procedures are not intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. If you have any questions or concerns regarding these responsibilities and procedures or the subject matter they address, please contact the Office of Human Capital.**

2. Unlike FLSA-exempt employees who may only earn overtime pay for hours of overtime that are officially ordered and approved (not including AUO premium pay), FLSA non-exempt employees must be paid if the Agency “suffers and permits” them to work for the benefit, or at the direction and control, of the Agency. Because it is not appropriate to allow FLSA status to circumvent FEPA controls on the use of overtime, supervisors must actively try to avoid “suffering or permitting” overtime for employees (except in cases where employees are certified for AUO or Law Enforcement Availability Pay (LEAP) and are performing overtime consistent with their corresponding authorities and obligations).
  - a. Supervisors should make sure that work related phone calls to FLSA non-exempt subordinates during non-duty hours are kept to a minimum. When such phone calls are necessary, they should be kept to ten minutes or less, if possible.
  - b. If a supervisor sees or learns that an FLSA non-exempt employee is performing work activities during off-duty hours, the supervisor should order the subordinate to cease working without authorization. This order should be documented, where possible.
    - i. For example, if a supervisor sees an FLSA non-exempt employee (who is not certified for AUO) at his or her desk 15 minutes after the end of his or her shift, the supervisor should inquire about the circumstances, and if it appears that work is being performed on overtime (as opposed to work being performed at an unusual time as a result of a shift adjustment or other similar consideration), the supervisor should order the employee to cease working and leave the premises. The supervisor should also document the order via email.
  - c. If a subordinate employee disregards or refuses an order to cease working, the supervisor should contact Employee & Labor Relations as quickly as practical to address any compensation and misconduct implications.
  - d. The policy described above is not intended to prohibit the after-the-fact authorization of overtime work on a case-by-case basis or authorization based on a duty-specific “on-call” policy, as described in Part I, Paragraph 3.a & b of the Responsibilities & Procedures Governing FLSA-Exempt Employees, attached to the Guide at Appendix A. Overtime that is authorized consistent with that guidance will be compensated appropriately under FEPA/Title 5 and, if applicable, the FLSA.
  - e. If any suffered and permitted FLSA overtime is allowed, it will be appropriately documented in the electronic Time & Attendance system (webTA).
3. Supervisors are responsible for seeking guidance from higher level management and/or Office of Human Capital staff regarding how to respond in instances where the supervisor questions the propriety of a request or claim for FLSA overtime or similar issue with time and attendance report submission.

## **II. Responsibilities & Procedures for Employees**

1. FLSA overtime incorporates the responsibilities and procedures for FEPA/Title 5 overtime. Therefore, all of the guidance set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, including those regarding scheduling and documentation, should be followed, except where inconsistent with the responsibilities or procedures set forth in this Appendix.
  - a. While employees' responsibilities and procedures governing FLSA-exempt employees are not being reproduced in this section verbatim, they nevertheless should be considered incorporated here, except where inconsistent with the provisions set forth below, including all relevant obligations stemming from any applicable collective bargaining agreements.
2. If an employee is not certified for AUO and the employee is not scheduled to be working, he or she will not take it upon him or herself to continue or initiate work for the benefit of ICE absent a supervisory instruction to perform work. Further, an employee will respect a supervisory order to cease working.
  - a. Where "suffered or permitted" overtime is allowed to occur, the employee who worked the overtime should timely document those hours on webTA using the appropriate category of work-time ("suffered or permitted").
  - b. If there is any question about whether a supervisor is aware of off-duty work, the work should immediately be brought to the supervisor's attention, appropriately documented, and claimed as hours of work on webTA.
3. If an employee believes there has been an error with respect to his or her entitlement for pay under the FLSA, the employee may elect to use the following procedures:
  - a. Employees who were covered under a collective bargaining agreement at the time of the incident upon which the claim is based may file a grievance through the negotiated grievance procedure in the applicable collective bargaining agreement if the agreement does not exempt the subject matter of the claim from its scope.
  - b. Employees who were not covered by a collective bargaining agreement at the time of the incident may either:
    - i. file an administrative grievance consistent with the Agency's administrative grievance procedures; or
    - ii. file a claim with the U.S. Office of Personnel Management (OPM); guidance for filing a claim with OPM is found at 5 C.F.R. §§ 551.701 through 551.710.
  - c. If an employee files an administrative grievance but is dissatisfied with the final decision, the employee may subsequently file a claim with OPM, as described above.

- d. Employees may work informally to resolve FLSA related questions or concerns with their supervisors, timekeepers, and servicing personnel offices.
- e. Employees may have the right to make a claim in an appropriate United States Court.

### **III. Responsibilities & Procedures for Timekeepers**

1. FLSA overtime incorporates the responsibilities and procedures for FEPA/Title 5 overtime. Therefore, all of the guidance set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, including those regarding scheduling and documentation, should be followed, except where it is inconsistent with the responsibilities or procedures set forth in this Appendix.

## APPENDIX C

### **Responsibilities & Procedures Governing Administratively Uncontrollable Overtime**

This section sets forth the responsibilities and procedures governing the use, management, approval, and payment of the Administratively Uncontrollable Overtime (AUO) Premium to employees, irrespective of whether they are exempt or non-exempt from the FLSA.<sup>1</sup> The statutory and regulatory rules governing AUO are set forth in Section I, part 2 of the Premium Pay Guide. With respect to the responsibilities and procedures described below, which directly pertain to record keeping, more guidance will be provided in the forthcoming ICE Time & Attendance Directive.

These provisions accurately reflect the governing regulations at the time of drafting. If any changes be made to the regulations or Department of Homeland Security (DHS) policy that are inconsistent with the below, the Guide will be read in a manner consistent with the regulations and/or DHS policy. If that is not possible, any inconsistent provisions will be severed and invalid until the Guide is updated to conform with governing law, regulations and/or DHS policy.

#### **I. Responsibilities & Procedures for Supervisors/Certifying Officials**

1. Supervisors are generally assigned to be the “certifying officials” for AUO for their direct reports. A supervisor should determine whether any employees that he or she supervises are in positions, as defined by a position description (e.g., “Immigration Enforcement Agent, GS-1801-09”) that have been designated by ICE to be eligible for AUO. Supervisors also must determine whether or not those employees are performing or are expected to perform duties, and have or are expected to have responsibilities, consistent with their position description(s) and with the regulatory requirements governing the receipt of AUO.
  - a. If a position is approved for AUO pay, the position description will be annotated with the phrase “Approved for AUO Coverage,” along with the date of approval, in the block titled “Remarks.”
  - b. The ICE Office of Human Capital (OHC) will provide and periodically update (at least on an annual basis) a list of the positions, documented by title, series, grade(s), duty station, position description number, that have been determined to be eligible for AUO. The list will be on the OHC internal website.

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<sup>1</sup> An employee’s status under the FLSA (“exempt”/“not covered by” or “non-exempt”/“covered by” the Act) can be found on an employee’s SF-50, on their position description, or by contacting OHC.

**These Responsibilities & Procedures are not intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. If you have any questions or concerns regarding these responsibilities and procedures or the subject matter they address, please contact the Office of Human Capital.**

2. A supervisor shall certify new subordinates (newly hired, transferred, re-assigned, etc.) for payment of AUO, if the AUO eligible-employee is expected to perform duties consistent with his or her position description and the regulatory requirements for AUO certification.
  - a. The initial AUO rate will be based on the supervisor's past experience with the duties and responsibilities of the position, the level of AUO work historically associated with that position or comparable positions, and any other information bearing on the number of hours of duty that may reasonably be expected to be required in the future.
  - b. For the subordinate to begin receiving AUO pay, the certifying official must initiate and forward the following documents to the approving official: (1) an SF-52 requesting OHC to process the required personnel action to start AUO, which must then be forwarded to OHC; and (2) a memorandum explaining that the work assigned to the employee is expected to meet the requirements for AUO pay and instructions to the timekeeper to code the T&A record so that payment of AUO will begin (see Certification Concerning Payment of AUO – Attachment C-1) which will be maintained by the supervisor's or employee's office/organization.
  - c. The supervisor shall explain to the employee what duties are appropriate for "self-initiation" of irregular overtime and which duties must be ordered or approved in order for overtime to be justified. The supervisor will also instruct the new employee how to complete the Record of AUO Hours Worked Worksheet and memorialize that instruction occurred.<sup>2</sup>
  - d. Supervisors should be aware that AUO may not be retroactively certified for a prior pay period.
3. With respect to current AUO-certified employees:
  - a. The supervisor shall, where practicable, ensure that the employees in such positions are performing duties and responsibilities consistent with operational requirements and their position description(s), as opposed to primarily for administrative functions better suited to other classes of positions.
    - i. An order that all "AUO work" be ordered and approved in advance establishes that none of the irregular or occasional overtime expected to be performed by the affected subordinates is in fact "administratively uncontrollable," and the ordering supervisor must contact higher level management and OHC prior to making such an order to review whether the employees subject to such an order should be decertified from AUO.

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<sup>2</sup> ICE is updating this form.

- b. The supervisor shall monitor how they schedule subordinates (work hours and practices) to ensure that overtime work is properly scheduled in advance where possible (rather than allowed to be unscheduled where scheduling is called for under 5 C.F.R. § 610.121(b)). Similarly, the supervisor should also ensure that any irregular or occasional overtime that they order is authorized and justified by operational considerations. Finally, a supervisor should monitor subordinates to ensure that they are not abusing authority under AUO to self-initiate irregular or occasional overtime for personal gain and/or convenience, as opposed to for the AUO qualifying reasons.
  - i. Supervisory responsibility includes ordering an AUO certified employee to cease working when the employee has self-initiated overtime work but the supervisor determines that the justification for doing so is not based on “administratively uncontrollable” work consistent with the purpose of AUO, or counseling the employee (and potentially initiating more serious administrative action) if the inappropriate initiation of irregular overtime is discovered after the fact;
  - ii. A supervisor should report any suspicion of AUO abuse through his or her chain of command and to OHC for evaluation and guidance.
- c. The supervisor shall ensure that subordinates submit biweekly AUO reports on the Record of AUO Hours Worked Worksheet, review these reports for sufficiency, accuracy, indications of AUO abuse, as well as their consistency with the employees’ claims for irregular or occasional overtime (marked as “AUO”) on webTA, and approve or disapprove the reports.
  - i. If a supervisor is confronted with a claim for AUO based on irregular or occasional overtime that was inappropriately self-initiated by a subordinate, and the claim was not approved after the fact by the supervisor or higher level manager, and the claim is not a claim for overtime by an FLSA non-exempt employee that would qualify as “suffer and permit” FLSA overtime if the employee was not receiving AUO, the claim for AUO should be disapproved, and the supervisor should contact higher level management and OHC for further guidance.
  - ii. If the claimed hours of work do qualify as “suffered or permitted” consistent with the Rules & Procedures Governing FLSA Overtime (Appendix B), those hours should be compensated under the FLSA consistent with the procedures described therein.
- d. The supervisor shall review subordinates’ “S-10 report” at the end of each eligibility period (four pay periods), to determine what AUO rate is justified by the employees’ weekly average AUO hours over the preceding computation period (12 pay periods), and, if necessary, adjusting the AUO rate (or decertifying) the employee from receiving AUO pay, consistent with the AUO regulations.
  - i. If an employee’s AUO rate is changed (or AUO is decertified or

- recertified), the supervisor will prepare the appropriate certification (Attachment C-1), which will be maintained in a supervisory file, and a copy provided to the Field Responsible Official (FRO) or Headquarters Responsible Official (HRO) (or appropriate delegate) responsible for maintaining oversight over premium pay for the office at issue, and ensure that the timekeeper makes the corresponding change on webTA (which will generate an SF-50 for the employee's personnel file).
- ii. The supervisor will also provide a written notice to the employee, as quickly as practicable, specifying the change and the reasons for it.
  - iii. If AUO is decertified or recertified, the supervisor will ensure an SF-52 is prepared and submitted to OHC.
4. If, at the end of a four pay period eligibility period, a subordinate employee's average weekly AUO hours over the preceding 12 pay period computation period are below the three hour minimum required for AUO certification:
- a. The supervisor shall evaluate if there is specific and reliable information that operational circumstances and/or the employee's duties are expected to change in a manner that would result in a greater amount of irregular or occasional overtime in the upcoming eligibility period such that decertification from AUO may not be appropriate. If this is the case, the supervisor should contact higher level management and OHC.
    - i. Examples of such circumstances include seasonal variations in work, employees who were temporarily limited from certain duties which are generally associated with a certain number of AUO hours, employees who are changing work assignments or units, etc.
  - b. When no considerations consistent with the above exist, the supervisor shall initiate the employee's decertification from AUO effective the first pay period of the next eligibility period as indicated on the S-10 report, by completing Attachment C-1, which shall be maintained by the supervisor and an appropriate FRO or HRO, as described above, and also having the appropriate SF-52 produced and submitted to OHC. The supervisor will also provide the affected employee with a written notice, as quickly as practicable, specifying the change and the reasons for it.
5. When an employee has been decertified from AUO as a result of his or her weekly average of irregular overtime hours being below three hours, the employee is no longer allowed to self-initiate overtime and must adhere to the rules for FEPA overtime and, if nonexempt, FLSA overtime, as described in the Guide, and in a manner consistent with the Responsibilities & Procedures governing those payments, which are attached to the Guide at Appendix A and B, respectively.
- a. The employee should nevertheless continue to complete AUO forms reflecting all irregular or occasional overtime worked, and the supervisor should be prepared to authorize irregular overtime in circumstances

where overtime would ordinarily be recognized by the employee, if that employee were AUO certified. The supervisor should monitor these forms and recertify the employee once sufficient evidence exists that the employee again meets the requirements for AUO certification (e.g., the average weekly irregular or occasional overtime hours over the past rolling certification period becomes equal to or greater than three).

- b. Supervisors should be aware that an employee who is decertified from AUO will be compensated for irregular and occasional overtime pursuant to the rules for FEPA overtime and, if non-exempt, FLSA overtime, as described in the Guide, and in a manner consistent with the Responsibilities & Procedures governing those payments, which are attached to the Guide at Appendix A and B, respectively.
6. A supervisor should be aware of circumstances that call for the temporary or indefinite suspension of a subordinate employee's AUO certification and initiate decertification, particularly where the supervisor is acting as the AUO certifying official and has responsibility to review and approve the employee's time and attendance records:
- a. On the 11<sup>th</sup> consecutive workday, or 30<sup>th</sup> cumulative workday within a calendar year, when the employee is on detail or temporary assignment (which must be documented by an SF-52) to a position or assigned to duties that do not support the payment of AUO;
  - b. On the 61<sup>st</sup> consecutive workday, when the employee is attending an advanced training program, or the 61<sup>st</sup> cumulative workday within a calendar year of training plus time spent in a detail described above;
  - c. On the 31<sup>st</sup> consecutive workday, or 91<sup>st</sup> cumulative workday within a calendar year, on a temporary assignment that is directly related to a national emergency declared by the President but does not support the payment of AUO pay;
  - d. As soon as practicable, and always within the first pay period, of a permanent reassignment to a position that is either not eligible or fails to meet the requirements for certification for AUO;
  - e. As soon as practicable, and always within the first pay period, when the employee begins an absence from his or her position/duties that appears likely to extend beyond the current eligibility period (for instance, as a result of placement on administrative leave pending an investigation into misconduct), such that there is no reasonable basis to expect that the employee will be performing duties consistent with AUO or the requisite average of irregular or occasional overtime hours for the period, and the absence is not due to a work related injury that is subject to the Federal Employees' Compensation Act ("FECA" or "Workers Compensation").
    - i. Supervisors should consult with their chain of command and OHC in these instances.
  - f. The supervisor shall track the number of days an employee spends in details, assignments, and training consistent with the above, and if any of the above thresholds are met, will immediately initiate the employee's decertification from AUO. To decertify an employee, the supervisor

will complete Attachment C-1, which shall be maintained by the supervisor and an appropriate FRO or HRO, as described above, and also having the appropriate SF-52 produced and submitted to OHC. The supervisor shall also provide the affected employee with a written notice, as soon as practicable, specifying the change and rationale.

7. When the circumstances leading to decertification from AUO as described in paragraphs 4 and 5, above, have ended and an employee returns to normal duties that merit certification for AUO, the employee should be recertified for AUO. The certifying official will, as soon as practicable but in no case after the end of the first pay period of return, certify the employee for AUO by completing the certification (Attachment C-1), which will indicate the effective date of re-certification and the appropriate rate of AUO (either the employee's prior rate, or, if an employee has had an extended absence from AUO duties, a rate consistent with the supervisor's determinations for new employees). The certifying official will also have an appropriate SF-52 produced and ensure it is submitted to OHC and higher level management, as described above.
  - a. Supervisors should be aware that AUO may not be retroactively certified for a prior pay period.
8. Supervisors shall instruct timekeepers to appropriately code the employee in webTA at the appropriate percentage rate, provide the timekeeper with all necessary documentation, and safeguard documents such that they are only accessible by persons with a need to know.
9. Irrespective of AUO certification, a Supervisor is responsible for ordering irregular overtime work where it is operationally necessary, as well as ordering employees to cease working (even where the employee has self-initiated work based upon his or her AUO authority) where the work is not operationally justified.
  - a. If a subordinate requests a written record of an order to cease working, the supervisor should supply one in a timely manner, via e-mail or memo.
  - b. A supervisor shall not avoid regularly scheduling overtime in advance of the administrative workweek in order to assign AUO; when the need for overtime is known in advance of the workweek, including who is needed to work and what days and hours will be worked, the work hours must be regularly scheduled for the employee(s) in question.
  - c. A supervisor may not offer a subordinate a "choice" in whether the employee will be compensated with AUO or "45 Act" overtime for any particular hours of overtime. For AUO certified employees, regularly scheduled overtime is compensated with 45 Act, while irregular or occasional overtime (including overtime actually worked as a result of an employee being placed in an on-call status, where the occurrence of a call to duty could not be precisely predicted) is compensated via AUO for all AUO certified employees.

10. A supervisor shall pay close attention to employees who are at, or near, applicable appropriations overtime limitations or other applicable premium pay limitations (noting that the AUO premium is subject to the Title 5 pay limitations). When an employee is in danger of violating these limitations, the supervisor shall take measures to ensure that no violation occurs, consistent with any negotiated procedures (if applicable), including, but not limited to:
  - a. Making adjustments to regularly scheduled overtime to ensure compliance with all overtime and premium pay limitations;
  - b. Adjusting the employee's duties or imposing other controls or limits on irregular overtime that would result in the reduction or elimination of the employee's expected amount of irregular overtime during the current computation period, and adjusting the rate (or decertifying the employee) accordingly; and
  - c. Obtaining approval of any such measures from the supervisor's chain of command and coordinating with OHC to ensure compliance with all negotiated procedures and/or labor obligations.
11. A supervisor is responsible for consulting with higher level management and/or appropriate OHC or the Office of the Principal Legal Advisor staff for guidance with respect to AUO, particularly as failure to take reasonable steps to monitor AUO use and prevent AUO abuse may result in administrative action.

## **II. Responsibilities & Procedures for Employees**

1. An employee shall perform assigned overtime work, whether regularly scheduled or irregular or occasional, when directed to do so by a manager or supervisor, consistent with the Responsibilities & Procedures governing FEPA overtime and FLSA overtime (Appendix A and B of the Guide), as modified by the Responsibilities & Procedures governing AUO.
2. An employee will timely, accurately and thoroughly complete and submit the Record of AUO and Overtime Hours Worked Worksheet to his or her supervisor on a biweekly basis. The employee will specify all hours of irregular or occasional overtime worked (in 15 minute increments) on the Worksheet, with the relevant details as requested by the form.
  - a. An employee will review the Record of AUO Hours Worked to determine that he or she is working duties that are consistent with the duties reflected in the position description and the requirements for AUO certification. Where the forms reflect duties that do not merit AUO certification, the employee shall advise his or her supervisor of any concerns.
3. An employee shall accurately report all hours worked, including regular work hours, hours in leave status, or other authorized or approved absence, and hours that constitute overtime hours of work on webTA.
  - a. If overtime hours were regularly scheduled, the employee will record them with the appropriate overtime category;
  - b. If the overtime was irregular or occasional (not scheduled prior to the

- administrative workweek), the employee will record the overtime under the AUO category. These hours will be consistent with the hours the employee records on the Record of AUO Hours Worked Worksheet;
- c. The employee will record excludable days on webTA for any days which qualify for such status.
4. An employee should be aware of when it is and is not appropriate to “self-initiate” irregular overtime pursuant to AUO. An employee may only initiate overtime on his or her own volition when the circumstances are consistent with the purposes of AUO (i.e., circumstances where remaining on duty is based on “compelling reasons inherently related to the duties of the position” where failure to continue working would “constitute negligence in the performance of the duties”).
- a. If an employee can choose to perform the duties at a different time, rather than on overtime, without serious impairment to his or her duties and the mission, then the circumstances do not meet the threshold for self-initiating overtime work.
  - b. While AUO authorizes employees to self-initiate overtime in appropriate circumstances, the employee will cease working when ordered to do so by a supervisor. If the employee believes that the order is inappropriate, he or she may request that the order be made in writing, and then should immediately follow the order.
  - c. If the employee self-initiated irregular or occasional overtime work in inappropriate circumstances, and the overtime is not subsequently approved, and the employee is either exempt from the FLSA or the hours would not otherwise qualify as “suffered and permitted” under the FLSA (which are payable as irregular overtime via AUO for certified employees), any claim for those hours may be rejected. This is separate from and in addition to the possibility of administrative action if abuse of AUO is determined to have occurred.
  - d. An employee shall perform irregular overtime when ordered to do so by a supervisor. If the employee believes that the supervisor was aware, prior to the administrative workweek, of the dates and times that the ordered irregular overtime would need to be performed, and also had a reasonable opportunity to determine which employees should perform the overtime, the employee may file a claim to have the irregular overtime treated as if it was regularly scheduled (compensated with 45 Act as opposed to AUO), consistent with the procedures for filing a claim described below.
  - e. An employee may not elect to receive AUO where 45 Act overtime is warranted. Likewise, an employee may not elect to receive 45 Act where AUO is warranted. The payments are for mutually exclusive circumstances.
  - f. Notwithstanding the above, an employee may “self-initiate” work if it is consistent with an on-call status or policy as described in the Part I, Paragraph 3.a & b of the Responsibilities & Procedures Governing FLSA-Exempt Employees, attached to the Guide at Appendix A.

- g. These restrictions are subject to the provisions of law, regulations, and DHS policies, and may be subject to revision so that ICE policy remains consistent with those controlling authorities.
- 5. Employees should be aware of whether their overtime earnings place them in jeopardy of exceeding the various limitations on earnings, and work with their supervisors to ensure that no violations of the pay caps occur.
- 6. If an employee is aware that he or she will be entering an extended period where he or she will not qualify for AUO (for instance, by beginning an extended assignment to fulfill administrative duties, attending an extended advanced training program, or otherwise exceeding the limitations described in Paragraph 5 of the Responsibilities & Procedures applicable to supervisors, above), the employee shall work with his or her supervisor, timekeeper, and any necessary servicing OHC personnel in order to ensure that he or she is decertified from AUO consistent with statutory and regulatory requirements.
  - a. An employee may continue to receive AUO while on “continuation of pay” for a work-related injury under FECA.
  - b. If an employee is on limited/light duty due to an accepted work-related injury (by the Department of Labor, Office of Workers’ Compensation Programs), the employee may apply for lost wages through his or her supervisor by filing Form CA-7 to compensate for decertification of AUO or any other element of missing pay due to the accepted work-related injury.
- 7. When an employee returns to normal duties after being in a status that did not justify AUO certification, the employee will work with his or her supervisor to ensure that he or she is promptly re-certified for AUO, generally at the rate which the employee was being paid prior to the non-AUO status.
- 8. If an employee believes there has been an error with respect to his or her certification or decertification for AUO, including the rate of certification, or with respect to payment of AUO as opposed to 45 Act overtime, the employee may elect to use the following procedures for making a claim:
  - a. Employees who were covered under a collective bargaining agreement at the time of the incident upon which the claim is based may file a grievance through the negotiated grievance procedure in the applicable collective bargaining agreement if the agreement does not exempt the subject matter of the claim from its scope.
  - b. Employees who were not covered by a collective bargaining agreement at the time of the incident may either:
    - i. File an administrative grievance consistent with the Agency’s administrative grievance procedures; or
    - ii. File a claim with the U.S. Office of Personnel Management (OPM); guidance for filing a claim with OPM is found at 5 C.F.R. §§ 178.101 through 178.107.

- c. If an employee files an administrative grievance but is dissatisfied with the final decision, the employee may subsequently file a claim with OPM as described above.
- d. Employees may work informally to resolve AUO-related questions or concerns with their supervisors, timekeepers, and servicing personnel offices.
- e. Employees may have the right to make a claim in an appropriate United States Court.

### **III. Responsibilities & Procedures for Timekeepers**

1. Timekeepers shall communicate with employees and supervisors to ensure that they have the correct information and documentation necessary for the recording of time and attendance.
2. Timekeepers shall monitor T&A records and report any discrepancies or other issues with T&A records that raise any suspicion of fraud, waste, abuse, or any potential errors or omissions that might result in incorrect payments.
3. If a program office uses timekeepers to regularly submit and validate T&A records for employees in webTA, the timekeepers shall do so based upon the information available to them.
4. Where employees generally submit and validate their own T&A records in webTA, timekeepers will validate T&A records in webTA on their behalf when the employees are unable to do so in a timely manner. Timekeepers will enter the information available to them so that there is no delay in the payment of wages, with no assumption that AUO has been worked where such work is not supported by adequate evidence.
5. Timekeepers will ensure that employees' webTA profiles will accurately reflect the employee's AUO status, both in terms of certification and AUO percentage.
6. Timekeepers shall ensure that employees' privacy rights are respected with respect to T&A records, including proper controls on storage and distribution.

Date:

MEMORANDUM FOR: APPROVING OFFICIAL

From: Supervisor Certifying Payment

SUBJECT: Certification Concerning Payment of Administratively Uncontrollable Overtime

I certify that the following employee(s), who are under my supervision and occupy positions eligible to receive Administratively Uncontrollable Overtime (AUO) pay, are authorized to receive AUO pay as indicated below. The employee(s) may be paid AUO pay in accordance with the provisions of 5 U.S.C. § 5545(c)(2) for the period indicated. A brief justification regarding the percentage rate of AUO pay being certified for an employee is attached if this is the initial start of AUO pay for the employee or if the percentage rate indicated below does not agree with the recommendation on the S-10 report or other applicable record.

Employee Name	Social Security Number	AUO Percentage Rate*	Period	
			From (MM/DD/YYYY)	To (MM/DD/YYYY)

Continue on Separate Page, As Necessary

\* A zero (0) should be entered into this column if the employee is no longer authorized to receive AUO payments.

\_\_\_\_\_  
Signature of Supervisor/Certifying Official

\_\_\_\_\_  
Signature of Approving Official      Date

## APPENDIX D

### **Responsibilities & Procedures Governing Law Enforcement Availability Pay**

This section sets forth the responsibilities and procedures governing the certification, tracking, recertification, suspension, and reinstatement of Law Enforcement Availability Pay (LEAP).<sup>1</sup> The statutory and regulatory rules governing LEAP are set forth in Section I, part 3 of the Premium Pay Guide. With respect to the responsibilities and procedures described below, which directly pertain to record keeping, more guidance is available in the ICE Time & Attendance Directive, policy number 1039.1.

#### **I. Responsibilities & Procedures for Supervisors**

1. Supervisors in each Directorate and Program Office at Headquarters and in the field are responsible for the implementation and the local operation of this compensation program for criminal investigators in their areas of responsibility. They may delegate all or portions of this responsibility to lower levels of supervision under their direction. Unless the payment of LEAP has been voluntarily or involuntarily suspended and an employee is decertified, management shall ensure that each criminal investigator on their staff is approved and is performing a sufficient amount of unscheduled overtime duty in order to meet the needs of ICE, is meeting the initial and annual certification requirements, and is meeting the substantial unscheduled duty hours requirement.
2. Initial Certification. During the initial LEAP certification of a criminal investigator, the supervisor shall make an initial certification to the Directorate Executive Associate Director or Program Office Assistant Director that the investigator is expected to meet the “*substantial hours*” requirement during the upcoming one-year period. This is a prerequisite to receiving LEAP, and there are no provisions for a waiver of this requirement.
  - a. The supervisor should ensure that an appropriate SF-52 is produced and submitted when certifying or decertifying an employee from LEAP. The Electronic System for Personnel can be used to initiate and submit the SF-52, which also allows the corresponding LEAP certification to be electronically attached.

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<sup>1</sup> Employees who are certified for LEAP are, by statute, exempt from the Fair Labor Standards Act (FLSA). Therefore, except where inconsistent with the provisions of this document, those supervisors and employees should abide by the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A to the Premium Pay Guide.

**These Responsibilities & Procedures are not intended to create and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. If you have any questions or concerns regarding these responsibilities and procedures or the subject matter they address, please contact the Office of Human Capital.**

3. Tracking Unscheduled Duty Hours. Supervisors will track certified employees' unscheduled duty hours on a monthly basis in order to:
  - a. Ensure that sufficient unscheduled duty is being performed and approved to enable criminal investigators to meet the minimum annual average requirement; and
  - b. Identify a potential shortfall in the minimum number of required unscheduled duty hours which could result in criminal investigators failing to meet the minimum annual average requirement and being decertified and suspended from receiving LEAP.
  
4. Recertification. In order for their employees to continue to be eligible for LEAP, supervisors must make an annual recertification to the head of the Agency (or designee) that the investigator currently meets and is expected to continue meeting the "*substantial hours*" requirement.
  - a. This recertification is made electronically, by January 31 of each calendar year, and covers the period of time from the preceding January 1 through December 31. The recertification programs will be maintained in the appropriate Directorate or Program Office case management system. These annual certifications must be electronically signed by both the criminal investigator and his or her supervisor or reflect a comparable signature designation, such as a supervisor witnessing a criminal investigator's signature and then electronically verifying that signature.
  
5. Suspension of LEAP. Supervisors are responsible for handling all involuntary and voluntary suspensions of LEAP.
  - a. If a supervisor finds that a criminal investigator will not meet the minimum annual average requirement of two hours of unscheduled duty per regular workday, the supervisor shall, whenever feasible, take measures to ensure that the criminal investigator's hours of unscheduled duty are sufficient to enable the investigator to meet the "*substantial hours*" requirement.
  - b. Supervisors may move to deny or cancel LEAP certification based on a finding that a criminal investigator has failed to perform unscheduled duty (overtime work or designated availability hours) as assigned or reported, or is unable to perform unscheduled duty for an extended period of time due to physical or health reasons. Such an involuntary suspension of LEAP, resulting from a denial or cancellation of certification, constitutes a reduction of pay under 5 U.S.C. § 7512 and thus must be initiated under the adverse actions procedures set forth in 5 C.F.R. part 752.
  - c. LEAP may also be suspended voluntarily at an employee's request and with management agreement. Managers and supervisors will consider on a case-by-case basis employees' written requests for relief from the minimum unscheduled duty hours requirement and for a suspension of LEAP for a specific period of time. If the request is approved, the supervisor does not need to initiate adverse action procedures, but must initiate a personnel action to stop the payment of LEAP. In addition, the

employee and his or her supervisor will sign and date the Law Enforcement Availability Pay Waiver (Attachment D-1) requested by the employee. If the period of an approved voluntary suspension of LEAP appears to be insufficient, an investigator may request, in writing, an extension of the voluntary suspension. Such requests will be considered by management on a case-by-case basis and a denial may be appealed in the same manner as the initial request.

- d. Any employee who enters a temporary part-time status will also lose LEAP payments. In such cases, supervisors must also initiate a personnel action to stop LEAP payments. In addition, the employee and his or her supervisor will sign and date the Law Enforcement Availability Pay Waiver requested by the employee.

6. Reinstatement of LEAP Status. When criminal investigators who have been suspended from LEAP, whether voluntarily or involuntarily, return to LEAP status, supervisors must ensure that the employees are recertified and must initiate a personnel action so that the payment of LEAP may resume.

## **II. Responsibilities & Procedures for Employees**

1. Criminal investigators receiving LEAP are responsible for:
  - a. Performing substantial amounts of unscheduled overtime duty, whether officially assigned or self-initiated, to meet the law enforcement needs of ICE;
  - b. Being accessible during those designated hours when management has directed them to be available to meet ICE law enforcement requirements;
  - c. Recognizing, based on local case- or operation-specific needs, when to place themselves in availability status for specific periods of unscheduled duty, subject to after-the-fact approval by management;
  - d. Complying with initial and minimum annual certification requirements; and
  - e. Recording unscheduled work hours in appropriate Directorate or Program Office case management systems.
2. Initial Certification. During their initial LEAP certification, criminal investigators are responsible for submitting an initial certification request to the appropriate supervisory officer.
3. Tracking Unscheduled Duty Hours. When recording unscheduled duty hours for annual average and certification purposes, criminal investigators shall follow the following guidance when using Case Management in TECS.
  - a. TECS Case Management has two data columns which enable management and criminal investigators to track and evaluate the progress of unscheduled duty toward a criminal investigator's annual average requirement of two hours or more per regular workday during the January 1 to December 31 certification period. Data in the column identified as TARGET LEAP serves as a guide for assessing unscheduled duty for a 30-day period. Data in the column identified as OFFICER LEAP will display the total unscheduled duty hours during the calendar year to date.

- b. Unscheduled duty is recorded in TECS Case Management in either of two columns labeled UOT (unscheduled overtime) and DAH (designated availability hours). Both sets of hours will be credited in computing the minimum annual average requirement for the January 1 through December 31 certification period. The sum of the hours recorded in both columns will equal the total number of hours of unscheduled duty actually performed.
- c. Unscheduled overtime duty hours worked by criminal investigators will be recorded in TECS Case Management using the column identified as UOT.
- d. A criminal investigator's case- or operation-specific availability hours that were management directed or subsequently approved during days of the basic 40-hour workweek will be recorded in TECS Case Management using the column identified as DAH.
- e. Unscheduled duty hours are to be posted on a weekly or monthly basis.

Note: Criminal investigators are reminded that the word "TARGET" is not to be interpreted as the maximum number of unscheduled duty hours they are expected to be available to work. Rather, it indicates the minimum number of such hours that they would be expected to work if all the workdays in any given calendar month were regular workdays (defined in section 5 (b) under "Certification for LEAP" in this Guide) worked by them.

- 4. Recertification. In order to remain eligible to receive LEAP payments, criminal investigators must make an annual recertification through their supervisors that they currently meet and are expected to continue meeting the "substantial hours" requirement. This recertification is made electronically, by January 31 of each calendar year, and covers the period from the preceding January 1 through December 31. The recertification programs will be maintained in the appropriate Directorate or Program Office case management system. Criminal investigators must electronically sign the annual certification, along with their supervisors.
- 5. Suspension of LEAP. Criminal investigators should keep in mind the requirement of a minimum annual average of two hours of unscheduled duty per regular workday (defined in section 5 (b) under "Certification for LEAP" in this Guide). If a criminal investigator fails to perform unscheduled duty or will not be able to perform unscheduled duty for an extended period of time due to physical, health, or other appropriate reasons, LEAP will be suspended for a period appropriate to the circumstances.
  - a. Subject to the law enforcement needs of ICE, a criminal investigator may make a written request for voluntary relief from the minimum unscheduled duty hours requirement and for a suspension of LEAP because of personal or family hardships, part-time status, or other circumstances which preclude meeting ICE's need for substantial amounts of unscheduled duty. Such requests will be considered on a case-by-case basis. When approved, criminal investigators must sign and submit a LEAP Waiver, which will also

need to be signed by their supervisors. Denial of requests may be appealed to the Executive Associate Director of the appropriate Directorate or to the Assistant Director of the appropriate Program Office.

6. Reinstatement of LEAP Status. When criminal investigators who have been suspended from LEAP, whether voluntarily or involuntarily, return to LEAP status, they must submit recertification requests through their supervisors.

### **III. Responsibilities & Procedures for Timekeepers**

1. Timekeepers shall communicate with employees and supervisors to ensure that they have the correct information and documentation necessary for the recording of time and attendance (T&A).
2. Timekeepers shall monitor T&A records and report any discrepancies or other issues with T&A records that raise any suspicion of fraud, waste, abuse, or any potential errors or omissions that might result in incorrect payments.
3. If a program office uses timekeepers to regularly submit and validate T&A records for employees, supervisors, and/or managers on webTA, the timekeepers shall do so based upon the information available to them.
4. Where employees, supervisors, and/or managers generally submit and validate their own T&A records on webTA, timekeepers will validate T&A records on webTA on their behalf when the employees, supervisors, or managers are unable to do so in a timely manner. Timekeepers will enter the information available to them so that there is no delay in the payment of wages, with no assumption that the unscheduled duty hours required for LEAP have been worked where such work is not supported by adequate evidence.
5. Timekeepers will ensure that employees' webTA profiles will accurately reflect the employee's LEAP status, along with the corresponding hours of work.
6. Timekeepers shall ensure that employees' privacy rights are respected with respect to T&A records, including proper controls on storage and distribution.

**Law Enforcement Availability Pay Waiver**

I, \_\_\_\_\_, understand that my voluntary request for suspension of Law Enforcement Availability Pay (LEAP) precludes my receiving LEAP while I maintain a part-time work schedule.

I acknowledge that my benefits will be affected as described below while I am on a part-time work schedule.

- 1) I have been advised to contact the Retirement and Employee Support Office to obtain information concerning my benefits.
- 2) My contributions to the Thrift Savings Plan follow the same rules as for full-time employees.
- 3) My contributions to Social Security and the Civil Service Retirement System and Federal Employees Retirement System funds are unaffected. Specifically, the same percentage is deducted from a part-time employee's gross earnings as from that of a full-time employee.
- 4) Each year of part-time service counts as 1 full year towards the length of service requirement, but is *prorated* for purposes of the annuity computation. This can adversely affect the amount of my retirement income.
- 5) I am eligible to continue to participate in the Federal Employees Health Benefits Program on a prorated cost basis. Because the cost of health plans varies, there is a set maximum for the U.S. Government contribution. The U.S. Government's contribution to insurance premiums is prorated based on the number of hours scheduled to work each pay period. Part-time employees pay the combined total of the regular full-time employee premiums, plus that part of the U.S. Government's share remaining after the prorated deduction.
- 6) I am eligible to continue my enrollment in the Federal Employees Group Life Insurance at a reduced rate. The amount of life insurance is reduced in proportion to the reduction in full-time salary. The cost per thousand dollars of basic life insurance per pay period remains the same.
- 7) I will accrue annual and sick leave on a prorated basis in accordance with the amount of time I have worked for the Federal Government. Annual Leave (AL) will be earned as follows: Up to but less than 3 years of service - 1 hour of AL for every 20 hours in a pay status; 3 years but less than 15 years of service - 1 hour of AL for every 13 hours in a pay status; and 15 years or more of service - 1 hour of AL for every 10 hours in a pay status. Sick Leave (SL) will be earned at the rate of 1 hour for every 20 hours in a pay status.

- 8) The waiting period for within grade increases and promotions for part-time employees is the same as for full-time employees.
- 9) I will be paid on an hourly basis calculated at the rate for my grade and step and will continue to receive the applicable locality pay rate.
- 10) I am eligible to receive awards.

I also understand that, upon resumption of a full-time work schedule, I will have to be recertified in order for LEAP payments to be resumed.

Signed: \_\_\_\_\_  
(Employee)

Date: \_\_\_\_\_

Signed: \_\_\_\_\_  
(Supervisor)

Date: \_\_\_\_\_

## **APPENDIX E**

### **Responsibilities & Procedures Governing Compensatory Time Off**

This section sets forth the responsibilities and procedures governing the use, management, approval, earning, and management of Compensatory Time Off (“CTO”) in lieu of overtime under the Federal Employees Pay Act (“FEPA”) (Title 5). It covers both employees who are exempt and employees who are non-exempt from the Fair Labor Standards Act (“FLSA”).<sup>1</sup>

The statutory and regulatory rules governing CTO are set forth in Section I, part 5 of the Premium Pay Guide. Additional guidance is available in the ICE Time & Attendance Directive, policy number 1040.1.

#### **I. Responsibilities & Procedures for Supervisors**

1. CTO is an alternative way of compensating employees for hours of overtime under FEPA; therefore, all procedures related to the scheduling, authorization, and documentation of overtime set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and, where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B, shall be followed where CTO is used, except that CTO will be requested on the electronic time & attendance (T&A) system (webTA), as opposed to a category of overtime pay.
  - a. As described in greater detail below, for most employees, CTO is only available in lieu of “irregular or occasional” overtime. However, employees who are on flexible work schedules (FWS) may receive CTO for both “irregular or occasional” and “regularly scheduled” overtime.
  - b. While Supervisors’ responsibilities and procedures governing the compensation of overtime are not being reproduced in this section verbatim, they nevertheless should be considered incorporated here, except where inconsistent with the provisions set forth below, including all relevant obligations stemming from any applicable collective bargaining agreements.
  
2. A supervisor should be aware that an employee may request and receive CTO, at the supervisor’s discretion in lieu of overtime pay, in the following circumstances:
  - a. For FLSA-exempt employees who are on flexible work schedules, “regularly scheduled” overtime may be compensated with either payment of overtime under Title 5, or with CTO, at the election of the employee. When the need for an employee to work overtime hours is anticipated

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<sup>1</sup> An employee’s status under the FLSA (“exempt”/“not covered by” or “non-exempt”/“covered by” the Act) can be found on an employee’s SF-50, on their position description, or by contacting the Office of Human Capital.

**These Responsibilities & Procedures are not intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. If you have any questions or concerns regarding these responsibilities and procedures or the subject matter they address, please contact the Office of Human Capital.**

prior to the start of the administrative workweek, supervisors should provide employees with the option of requesting either form of compensation.

- b. FLSA-exempt employees whose rate of basic pay is at or below GS-10, Step 10 have the discretion to choose between CTO and FEPA overtime pay for “irregular or occasional” overtime work, regardless of whether their schedule is fixed or flexible. Supervisors should advise the subordinate of this option and ensure that all authorizations and documentation are completed consistent with the employee’s election.
3. A supervisor should be aware that employees may be required to accept CTO in lieu of overtime pay for properly ordered and approved “irregular or occasional” overtime hours of work if they are FLSA-exempt employees who are paid at a level greater than GS-10, Step 10 (i.e., all employees at GS-12 and above, and certain GS-11s).
    - a. To implement premium pay policies and efficiently manage their respective areas of responsibility, Headquarters Responsible Officials (HRO) and Field Responsible Officials (FRO) are responsible for determining whether CTO will be mandated for such employees consistent with their responsibilities. Prior to scheduling and documenting “irregular or occasional” overtime hours of work for such employees, supervisors should, where possible, determine whether the appropriate HRO/FRO has mandated the use of CTO and advise the employee.
    - b. If an employee is FLSA non-exempt, he or she cannot be mandated to accrue CTO in lieu of overtime pay. The employee may, however, be compensated with CTO instead of overtime pay upon request.
    - c. If CTO has not been mandated, the employee may choose between CTO and FEPA overtime pay, similar to employees if they were in a lower grade. In either case, the supervisor shall ensure that all authorizations and documentation are completed consistent with the employee’s election.
  4. Employees who are certified for and are receiving Administratively Uncontrollable Overtime (AUO) or Law Enforcement Availability Pay (LEAP), regardless of FLSA status or pay grade, may not receive CTO as compensation. The AUO and LEAP premiums are the exclusive mechanisms for the compensation of “irregular or occasional overtime” for employees certified for these forms of premium pay.
  5. A supervisor shall review any requests to use earned CTO in the same manner in which he or she would review a request to use annual leave or a time off award. These requests, made through webTA, will be reviewed in a timely manner, and an employee’s request to use CTO will only be denied for valid operational reasons.
    - a. Hours of CTO may only be used after they have been earned.
    - b. For FLSA-exempt employees, earned hours of CTO are generally forfeited if not used within 26 pay periods of their accrual. However, an employee

can and will be paid for unused hours of CTO in an amount equal to what the employee would have been paid in overtime when the hours of CTO were earned when:

- i. The failure to utilize the CTO within 26 pay periods of accrual was caused by an exigency of the service beyond the employee's control (e.g., the denial or cancellation of a request for CTO due to unanticipated operational requirements);
  - ii. The failure to timely utilize the CTO was caused by the employee's placement in a leave without pay status or separation so the employee could perform service in the uniformed services as defined in 38 U.S.C. § 4303 and 5 C.F.R. § 353.102;
  - iii. The failure to timely use the CTO was caused by the employee's separation or placement in a leave without pay status because of an on-the-job injury with entitlement to injury compensation under 5 U.S.C. Chapter 81.
- c. An FLSA-nonexempt employee must use accrued CTO by the end of the 26th pay period after the pay period during which it was earned. If accrued compensatory time off is not used by an FLSA-nonexempt employee within 26 pay periods or if the FLSA-nonexempt employee transfers to another agency or separates from Federal service before the expiration of the 26 pay period time limit, the employee must be paid for the earned compensatory time off at the overtime rate in effect when earned.

## **II. Responsibilities & Procedures for Employees**

1. CTO is an alternative way of compensating employees for hours of overtime under FEPA; therefore, all procedures related to the scheduling, authorization, and documentation of overtime set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and, where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B, shall be followed where CTO is earned. CTO will be requested in webTA as opposed to a category of overtime pay.
  - a. While Employees' responsibilities and procedures governing the compensation of overtime are not being reproduced in this section verbatim, they nevertheless should be considered incorporated here, except where inconsistent with the provisions set forth below, including all relevant obligations stemming from any applicable collective bargaining agreements.
2. An employee is responsible for utilizing earned CTO in a manner consistent with the requests and approvals of annual leave or a time off award. This includes monitoring hours to ensure that requests to use CTO do not exceed the amount of CTO hours accrued, making requests in a timely manner, and using CTO prior to forfeiture.

### **III. Responsibilities & Procedures for Timekeepers**

1. CTO is an alternative way of compensating employees for hours of overtime under FEPA; therefore, all procedures related to the scheduling, authorization, and documentation of overtime set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and, where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B, shall be followed where CTO is used, except that CTO will be requested on webTA, as opposed to a category of overtime pay.

## **APPENDIX F**

### **Responsibilities & Procedures Governing Compensation for Time Worked at Night, on Sundays, and on Holidays.**

This section sets forth the responsibilities and procedures governing compensation for hours worked at night, on Sundays, and on holidays. It covers both employees who are exempt and non-exempt from the Fair Labor Standards Act (FLSA).<sup>1</sup>

The statutory and regulatory rules governing the night, Sunday and holiday premiums are set forth in Section I, part 6 of the Premium Pay Guide. With respect to the responsibilities and procedures described below which directly pertain to record keeping, more guidance is available in the ICE Time & Attendance Directive, policy number 1040.1.

#### **I. Responsibilities & Procedures for Supervisors**

1. Consistent with the procedures related to the scheduling, authorization, and documentation of overtime set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and, where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B, supervisors shall:
  - a. Ensure that all work performed by a subordinate during premium hours (at night, on a Sunday, or on a holiday) is directed or approved by a manager or supervisor with delegated authority to do so through appropriate scheduling, consistent with normal practices;
    - i. if the work at issue was self-initiated by an employee pursuant to their authority under LEAP or AUO, the supervisor shall ensure that all responsibilities and procedures for those pay premiums were observed, because those pay premiums will govern compensation for the hours, as opposed to night, Sunday or holiday premium pay;
  - b. Ensure that employee claims for premium pay submitted in webTA in accordance with applicable rules, regulations, and provisions of this document, are accurate and appropriately documented, and approved in a timely manner;
  - c. Ensure that night, holiday, and Sunday premium pay is managed through webTA;
  - d. Ensure that any paper copies of supporting documentation containing personally identifiable information are maintained in a secure location that

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<sup>1</sup> An employee's status under the FLSA ("exempt"/"not covered by" or "non-exempt"/"covered by" the Act) can be found on an employee's SF-50, on their position description, or by contacting the Office of Human Capital.

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limits access to only those with a need to know (e.g., DHS form showing ordered and authorized regularly scheduled overtime which happens to occur at night).

## **II. Responsibilities & Procedures for Employees**

1. Consistent with the procedures related to the scheduling, authorizing, and documenting of overtime set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and, where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B, employees shall:
  - a. Obtain authorization and approval for working during premium hours for premium pay, either in the form of the employees' set schedules or, with respect to night pay, appropriately authorized overtime (this does not include work during hours that would otherwise qualify for the premium but work is engaged pursuant to, and paid under, AUO or LEAP).
2. Employees are responsible for reviewing and certifying, when necessary, time and attendance reports and providing all required documentation.

## **III. Responsibilities & Procedures for Timekeepers**

1. Timekeepers will record and process claims and payment for night, Sunday and holiday pay in a manner consistent with the responsibilities and procedures described in the compensation of FEPA overtime, Attachment A.

## **APPENDIX G**

### **Responsibilities & Procedures Governing On-Call Status and Stand-by Status**

This section sets forth the responsibilities and procedures governing the management, approval, and use of On-Call Status and Stand-by Status at ICE. It covers both employees who are exempt and non-exempt from the Fair Labor Standards Act (FLSA).<sup>1</sup> The statutory and regulatory rules governing On-Call Status and Stand-by Status are set forth in Section I, part 7 of the Premium Pay Guide.

Please note that these procedures are modified when they pertain to an employee who is certified for Administratively Uncontrollable Overtime (AUO) or Law Enforcement Availability Pay (LEAP), as discussed in Appendices C & D, respectively. Additionally, in certain circumstances Compensatory Time Off (CTO) may be earned in lieu of overtime earned as a result of On-Call Status or Stand-by Status, subject to the same broader responsibilities and procedures discussed here. Additional responsibilities and procedures related to the use of CTO are discussed in Appendix E.

#### **I. Responsibilities & Procedures for Supervisors**

1. On-Call Status and Stand-by Status are descriptions of certain circumstances that are considered, or not considered, “hours of work” compensable under Title 5/ FEPA or the FLSA. All procedures related to the scheduling, authorization, and documentation of overtime are set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B.
2. A supervisor should be aware of what distinguishes Stand-by Status from On-Call Status. The following apply for Stand-by Status:
  - a. The restrictions placed on an employee include a significant limitation on mobility (e.g., being within a 5-10 minute walk of a specific location) and that the employee is required to remain in a state of vigilance and readiness to immediately perform work.
  - b. The regular scheduling of Stand-by Status is equivalent to the regular scheduling of overtime hours for employees who are not receiving the Stand-by Duty Pay Premium (no employees at ICE are certified for the Stand-by Duty Pay Premium), and will be paid accordingly. For employees certified for LEAP, the first two hours of overtime on a regular workday are compensated through the LEAP premium.

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<sup>1</sup> An employee’s status under the FLSA (“exempt”/“not covered by” or “non-exempt”/“covered by” the Act) can be found on an employee’s SF-50, on their position description, or by contacting the Office of Human Capital.

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- c. The irregular or occasional scheduling of Stand-by Status (a within-week order to an employee to remain in a relatively restricted area and Stand-by Status, (see 2.a, above)) is compensable with overtime or, if certified for AUO or LEAP, AUO pay or LEAP pay, as applicable.
  - d. Except for unique circumstances, supervisors should not generally be scheduling Stand-by overtime, and should contact higher level management or OHC with any questions with respect to the circumstances that would establish stand-by status.
3. A supervisor should be aware that for “On-Call” Status:
- a. Time is spent “on-call,” rather than “in stand-by,” if an employee is assigned to carry a phone to answer calls, but allowed a reasonable radius of travel (e.g., remain within city limits, or remain with a half-hour drive from the office, etc.), with the understanding that a return to duty triggered by a call should be prompt, but may not be immediate (may be subject to short delays, e.g., paying for a meal at a restaurant and ensuring children get safe transport home), and/or the employee is allowed to arrange for co-worker coverage for the “on-call” period.
  - b. The supervisor can restrict employees who are on-call from activities that would have an extended interference with the ability to return to duty or the office, such as the consumption of alcohol or certain medications, without triggering Stand-by Status.
  - c. On-Call Status is not considered work time in and of itself; only work-related calls or an actual call to return to full duty status are hours of work.
  - d. If an employee is “called back” (called to physically return to the official duty station or another work location, such as a local police station) during On-Call Status, the employee is entitled to claim a minimum of two hours of irregular overtime, irrespective of the amount of time taken by the call-back.
  - e. The scheduling of On-Call Status in advance of the administrative workweek does not convert any phone call or call-back into regular overtime, absent evidence that a supervisor knew or should have known if, and at exactly what time, a call-back or other work would be required to be performed.
  - f. For employees certified for LEAP, On-Call Status is encompassed in the concept of “Availability Hours.”
4. When scheduling an employee for On-Call Status, a supervisor should follow all local office policies, practices, and procedures, including, where applicable, any collectively bargained procedures for the assignment or rotation of On-Call duty (i.e., “duty officer” rosters and rotations).
5. A supervisor shall ensure that any hours of regular or irregular overtime as a result of stand-by status or work performed during On-Call Status claimed by an employee on webTA or any other record or report are accurate and appropriate.

- a. Supervisors should contact officials in their chain of command or OHC with any questions regarding claims of overtime resulting from On-Call status or stand-by status.

## **II. Responsibilities & Procedures for Employees**

1. All procedures related to the scheduling, authorization, and documentation of overtime set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and, where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B, shall be followed, including all reporting and recording procedures, all responsibilities related to limitations on premium pay, as well as the procedures for filing claims.
2. In general, time in an On-Call Status or stand-by status must be ordered by a supervisor. However, employees who are certified for LEAP may be responsible for self-initiating “availability status” encompassing On-Call Status, consistent with operational policies and guidance.
  - a. An employee will only claim overtime or AUO for any hours during On-Call Status that are actually spent working, rather than being On-Call, or that represent part of the 2 hour minimum for a call-back to duty.
  - b. An employee receiving LEAP will claim hours that would constitute time in On-Call Status in the manner prescribed for “availability hours” in the Responsibilities & Procedures governing LEAP, Appendix D.
3. An employee who is placed in On-Call Status will comply with the restrictions set by the Agency and respond to any calls in good faith and as quickly as practicable without any attempts to evade or delay calls or responses.

## **III. Responsibilities & Procedures for Timekeepers**

1. Timekeepers shall follow all procedures related to the scheduling, authorization, and documentation of overtime set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and, where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B.

## **APPENDIX H**

### **Responsibilities & Procedures Governing Compensation for Hours Spent Traveling**

This section sets forth the responsibilities and procedures governing the use, management, approval, earning, and use of Compensatory Time Off for Travel (CTOT), as well as compensation for travel generally. It covers both employees who are exempt and non-exempt from the Fair Labor Standards Act (FLSA).<sup>1</sup> It does not address issues related to per diem and other travel expenses, which are governed by the Federal Travel Regulations (FTR).

The statutory and regulatory rules governing CTOT are set forth in Section I, part 8 of the Premium Pay Guide. With respect to the responsibilities and procedures described below, which directly pertain to record keeping, more guidance is available in the ICE Time & Attendance Directive, policy number 1040.1.

#### **I. Responsibilities & Procedures for Supervisors**

1. When a subordinate employee's time in travel status may be credited as hours of work, as described in Section 1, parts 1 and 4 of the Guide, a supervisor shall follow all the procedures related to the scheduling, authorization, and documentation of overtime set forth in the Responsibilities & Procedures Governing Overtime for Employees Exempt from the FLSA, Appendix A, and, where applicable, the Responsibilities & Procedures Governing Overtime for Employees Covered by the FLSA, Appendix B, as well as the relevant provisions of the FTR.
  - a. Supervisors should contact the appropriate travel office to ensure that travel is scheduled in compliance with FTR requirements.
2. In situations when official travel will not constitute hours of work, supervisors should schedule a subordinate's official travel to occur during the employee's regular working hours, whenever reasonable and practicable. However, a supervisor may not adjust the employee's schedule solely for the purpose of covering travel time that is not otherwise compensable.
3. Time in official travel status (the actual time spent travelling plus the usual wait time that precedes or interrupts the travel) that is not compensable with base pay, Federal Employees Pay Act (FEPA) overtime, FLSA overtime, Administratively

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<sup>1</sup> An employee's status under the FLSA ("exempt"/"not covered by" or "non-exempt"/"covered by" the Act) can be found on an employee's SF-50, on their position description, or by contacting the Office of Human Capital.

**These Responsibilities & Procedures are not intended to create and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. If you have any questions or concerns regarding these responsibilities and procedures or the subject matter they address, please contact the Office of Human Capital.**

Uncontrollable Overtime, Law Enforcement Availability Pay, or regular Compensatory Time Off (CTO) is compensable with Compensatory Time Off for Travel (CTOT). Supervisors should ensure that subordinates properly request and are timely approved for CTOT for qualifying hours of official travel via the electronic Time & Attendance system (webTA) and that the claims for CTOT are consistent with the actual time spent traveling, plus usual wait time.

- a. Hours in official travel status include only the time spent traveling: (1) between home or an employee's official duty station and a temporary duty station (or temporary lodging located there), (2) between two temporary duty stations (or temporary lodgings), and (3) returning from a temporary duty station to the official duty station, or home, as well as (4) the associated "usual wait time" as determined by the Agency.
    - i. Note that home to office commuting is **not** creditable as travel under the compensation regulations or for CTOT, such that travel directly between home and a temporary duty station is subject to a deduction for normal home to work commute.
    - ii. Travel directly between home and a transportation terminal within the boundaries of an employee's official duty station is equivalent to commute time and not creditable.
    - iii. Travel between temporary lodging to an office that occurs within the temporary duty station is considered normal commute time and not creditable.
  - b. If an employee is offered one mode of transportation but is permitted to use an alternate mode of transportation, or travels at a time or by a route other than that authorized by the agency, the supervisor must determine and credit the employee with the lesser of the estimated time in a travel status between the two alternatives.
  - c. There is no limit on the accumulation of CTOT, because, unlike regular CTO, the caps on overtime and premium do not apply to CTOT.
4. Supervisors will track and manage subordinates' accrual of CTOT separately from the accrual of regular CTO. However, subordinate employees' use of CTOT for paid absences will be processed in the same manner as the use of CTO or annual leave, except that the category of absence that will be recorded in webTA will reflect the use of CTOT, as opposed to CTO or annual leave.
- a. Like regular CTO, accrued hours of CTOT expire after 26 pay periods.
    - i. Unlike CTO, if the failure to use CTOT within 26 pay periods was due to an exigency beyond the employee's control, the relevant Field Responsible Official or Headquarters Responsible Official may submit a request with the appropriate supporting documentation to the Office of Human Capital to extend the CTOT for up to an additional 26 pay periods.
  - b. Hours of CTOT are not in lieu of overtime and thus do not have "cash value." Unlike CTO, an FLSA non-exempt employee will not be paid for accrued hours of CTOT at their expiration or upon separation – the hours are forfeited.

- c. Unused hours of CTOT will be held in abeyance for an employee who returns to ICE following separation or placement in a leave without pay status when the separation or leave is:
  - i. A result of an on-the-job injury with entitlement to injury compensation under 5 U.S.C. Chapter 81 (FECA), and the employee later recovers sufficiently to return to work); or
  - ii. To perform service in the uniformed services (as defined in 38 U.S.C. § 4303 and 5 C.F.R. § 353.102) and the employee later returns to service through the exercise of a reemployment right consistent with law and regulation.

## **II. Responsibilities & Procedures for Employees**

1. Although CTOT is not in lieu of overtime, CTOT will be requested on webTA for qualifying hours in a manner consistent with the procedures and responsibilities for CTO, Appendix E, with the caveat that CTO and CTOT are accrued under different, and mutually exclusive, circumstances.
2. An employee is responsible for utilizing earned CTOT in a manner consistent with the requests and approvals of annual leave or a time off award. This includes monitoring hours to ensure that requests to use CTOT do not exceed the amount of CTOT hours accrued, making requests in a timely manner, and using CTOT prior to forfeiture.
3. An employee may make a claim regarding CTOT in a manner consistent with claims regarding entitlements to FEPA overtime or CTO.

## **III. Responsibilities & Procedures for Timekeepers**

1. Although CTOT is not in lieu of overtime, all procedures related to the scheduling, authorization, and documentation of overtime or CTO set forth in the applicable Responsibilities & Procedures shall be followed where CTOT is used, except that CTOT will be requested, for qualifying hours of official travel, on webTA, as opposed to a category of overtime pay or CTO.

## **APPENDIX I**

### **Responsibilities & Procedures Governing Familiarity & Review of the Guide / Appendices**

This section sets forth the responsibilities and procedures governing employee familiarity with and review of the ICE Premium Pay Guide and the associated Appendices.

#### **I. Responsibilities & Procedures for Supervisors**

1. Supervisors are expected to thoroughly review the ICE Premium Pay Guide and the associated Appendices of Responsibilities & Procedures upon its publication and dissemination. Supervisors are also expected to periodically re-review the Guide and Appendices, maintain a paper or electronic copy in an accessible location, and refer to the Guide when questions regarding premium pay arise.
2. If and when ICE develops a training program governing the ICE Premium Pay Guide and the associated Appendices of Responsibilities & Procedures, whether through Virtual University or by another mechanism, supervisors will be expected to comply with all training requirements and ensure that subordinate employees also comply with any applicable training requirements.

#### **II. Responsibilities & Procedures for Employees**

1. If and when ICE develops a training program governing the ICE Premium Pay Guide and the associated Appendices of Responsibilities & Procedures, and, if applicable, satisfies any labor obligations with respect to the impact and implementation of the training program, employees will be expected to comply with the requirements of the program, including any responsibilities to periodically review the guide and appendices.

**These Responsibilities & Procedures are not intended to create and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. If you have any questions or concerns regarding these responsibilities and procedures or the subject matter they address, please contact the Office of Human Capital.**