

the requirements of this rule. Therefore, the effective date of these changes will be 30 days from the date of publication of this rule in the **Federal Register**.

#### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

#### Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

#### List of Subjects in 5 CFR Part 293

Government employees, Privacy, Records.

U.S. Office of Personnel Management.

**John Berry,**

*Director.*

Accordingly, OPM amends 5 CFR part 293, subpart C as follows:

### PART 293—PERSONNEL RECORDS

#### Subpart C—Official Personnel Folder

■ 1. The authority citation for part 293, subpart C, is revised to read as follows:

**Authority:** 5 U.S.C. 552; 5 U.S.C. 552a; 5 U.S.C. 1103; 5 U.S.C. 1104; 5 U.S.C. 1302, 5 U.S.C. 2951(2), 5 U.S.C. 3301; 5 U.S.C. 4315; E.O. 12107 (December 28, 1978), 3 CFR 1954–1958 Compilation; E.O. 9830 (February 24, 1947); 3 CFR 1943–1948 Compilation.

■ 2. Revise § 293.301 to read as follows:

#### § 293.301 Applicability of regulations.

Except for those agencies specifically excluded from Office of Personnel Management (OPM) recordkeeping requirements by statute, OPM regulation, or formal agreement between OPM and the agency, this subpart applies to—and within this subpart agency means—each executive department and independent establishment of the Federal Government; each corporation wholly owned or controlled by the United States; and, with respect to positions subject to civil service rules and regulations, the legislative and judicial branches of the Federal Government. OPM will list agencies to which this subpart does not apply in the Guide to Personnel Recordkeeping, and will amend the Guide from time to time to update that list.

■ 3. Revise § 293.303 to read as follows:

#### § 293.303 The roles and responsibilities of the Office, agencies, and custodians.

(a) The Official Personnel Folder (OPF) of each employee in a position

subject to civil service rules and regulations and of each former employee who held such a position is part of the records of the Office of Personnel Management (Office).

(b) The Office has Government-wide responsibility for developing regulations, practices and procedures for the establishment, maintenance, and transfer of OPFs.

(c) Agencies shall be responsible for the following:

(1) The establishment of the OPF for a new appointee or a new employee for whom no OPF has previously been established; and

(2) The maintenance of a previously existing OPF during the period any new appointee or employee remains an agency's employee.

(d)(1) Custodian means the agency in physical possession of an OPF. In the case of an electronic OPF (eOPF), the custodian is the agency that has primary access to an eOPF contained within a document management system approved by the Office.

(2) A custodian shall be responsible for the maintenance and transfer of the OPF or eOPF, and the costs associated with these activities.

(3) An agency is the custodian of an OPF it requests from the National Personnel Records Center (NPRC), for any temporary use, from the date that the OPF is transmitted by the NPRC to the agency until the date that the NPRC receives the OPF back from the agency.

(4) An agency is no longer the custodian of an OPF once the OPF has been transferred to and accepted by the NPRC.

(5) Once NPRC has approved the transfer, the Office is the custodian of the OPF until the destruction date established for the file pursuant to the National Archive and Records Administration's General Records Schedule, unless another agency requests the OPF from the NPRC in the interim.

(e) Agencies and custodians shall carry out their responsibilities with respect to the OPF or eOPF in accordance with this subpart and the Office's Guide to Personnel Recordkeeping.

■ 4. Amend § 293.307 by adding new paragraphs (c) and (d) as follows:

#### § 293.307 Disposition of folders of former Federal employees.

\* \* \* \* \*

(c) Agencies are responsible for all costs associated with the establishment and maintenance of OPFs and the transfer of OPFs to the National Personnel Records Center.

(d) Agencies are responsible for all costs associated with agency-initiated requests for OPFs or services from the National Personnel Records Center.

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BILLING CODE 6325–47–P

### OFFICE OF PERSONNEL MANAGEMENT

#### 5 CFR Parts 532 and 550

RIN 3206–AM08

#### Pay for Sunday Work

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management is issuing final regulations to implement the ruling in the case of *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009). In this decision, the United States Court of Appeals for the Federal Circuit ruled that part-time employees are covered under the provisions of 5 U.S.C. 5546(a), the statute governing the payment of Sunday premium pay for work performed on Sundays. The revised Sunday premium pay regulations eliminate references to “full-time” employees, which will permit Sunday premium payments to part-time employees, in accordance with 5 U.S.C. 5546(a). Consistent with the reasoning in the *Fathauer* decision, OPM has determined that part-time prevailing rate employees are also entitled to payment of Sunday premium pay, pursuant to 5 U.S.C. 5544(a). Intermittent employees continue to be excluded from earning Sunday premium pay because of the nature of their appointment.

**DATES:** This rule is effective September 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** David Barash by telephone at (202) 606–2858; by fax at (202) 606–0824; or by e-mail at [pay-leave-policy@opm.gov](mailto:pay-leave-policy@opm.gov).

**SUPPLEMENTARY INFORMATION:** On April 9, 2010, the U.S. Office of Personnel Management (OPM) issued proposed regulations at 75 FR 18133 to implement the decision in *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009), in which the court determined that part-time employees are covered under the Sunday premium pay statute at 5 U.S.C. 5546(a).

#### Background

Under the *Fathauer* decision, the United States Court of Appeals for the Federal Circuit held that the definition

of “employee” in 5 U.S.C. 5546(a) is unambiguous under the plain language of the statute and concluded that part-time employees are covered under the Sunday premium pay statute at 5 U.S.C. 5546(a). Consequently, we have revised the Sunday premium pay regulations to provide that part-time employees are entitled to premium pay for Sunday work.

OPM issued a compensation policy memorandum (CPM–2009–21, December 8, 2009) to inform departments and agencies of the *Fathauer* decision and to provide guidance for processing administrative claims for back pay. The guidance covers General Schedule and other employees covered by 5 U.S.C. 5546(a) and 5 CFR 550.171(a) and prevailing rate employees (wage grade employees) covered by 5 U.S.C. 5544(a) and 5 CFR 532.509. Based on the *Fathauer* decision, eligible part-time employees are entitled to Sunday premium pay under 5 U.S.C. 5546(a), effective as of May 26, 2009.

#### *Eliminate Restriction for Sunday Premium Pay to Full-Time Employees Only*

OPM’s final regulations amend §§ 550.103 and 550.171(a) to remove references to “full-time” employee, which eliminate the restriction on the payment of Sunday premium pay to full-time employees only. The final regulations clarify, in accordance with the *Fathauer* decision, that part-time employees who are regularly scheduled to perform work on a Sunday are entitled to Sunday premium pay for the non-overtime hours worked. However, intermittent employees will continue to be excluded from earning Sunday premium pay because of the nature of their appointment and irregular work schedule. Sunday premium pay may be paid only to full-time and part-time employees who have Sundays as part of their non-overtime regularly scheduled tour of duty.

#### *Prevailing Rate Employees*

OPM applied the reasoning in the *Fathauer* decision to determine that part-time prevailing rate employees are covered under the Sunday premium pay provisions of 5 U.S.C. 5544(a) (also effective as of May 26, 2009). While OPM’s regulation at § 532.509 does not reference either part-time or full-time employees, we are making a clarifying amendment to this section. Currently § 532.509 states that a wage employee whose regular work schedule *includes an 8-hour period of service* which is not overtime work, a part of which is on Sunday, is entitled to additional pay

under the provisions of 5 U.S.C. 5544. We are amending § 532.509 to clarify that a wage employee is entitled to Sunday pay for a period of service, a part of which is on Sunday, of *up to 8 hours*. This clarification is based on a Comptroller General opinion (46 Comp. Gen. 337 (1966)), that the period of service entitling an employee to Sunday premium pay may be less than 8 hours.

#### **Discussion of Comments**

The 60-day comment period for the proposed regulations ended on June 8, 2010. We received five comments in response to the proposed regulations, one from a national union organization and four from individual commenters. As explained below, OPM is adopting the proposed regulations as final regulations without further changes.

Two of the commenters questioned the use of Sunday premium pay and questioned the cost to taxpayers. These two comments are beyond the scope of this regulation. Sunday premium pay is authorized by statute. We are merely altering the Sunday premium pay regulations to ensure part-time employees are not excluded from receiving this entitlement pursuant to the statute at 5 U.S.C. 5546(a), consistent with a decision of the United States Court of Appeals for the Federal Circuit.

#### *Administrative Claims*

The union organization supported the proposed rules, but expressed concern that agencies may not notify employees in a timely manner of their right to file administrative pay claims. The union urged OPM to take more aggressive action by requiring agencies to advise part-time employees promptly of their right to file claims. While agencies are responsible for notifying their employees regarding actions that affect them, OPM took a proactive role in advising agencies in CPM 2009–21 that they should inform employees of the holding by the Court of Appeals in order to give notice to potential claimants. OPM provided thorough guidance in its memorandum and advised on the effective date of the decision and the time limitations for back pay claims permitted by the Barring Act of 1940, and noted that agencies could use the memorandum to inform employees of the *Fathauer* decision. OPM also provided notification to employees through its Web site and list server, published the proposed Sunday premium pay rule changes in the **Federal Register** as official notice to the public, and required agencies to post a notice of the rule change in a prominent place for employees to view.

The union organization also believes that OPM should issue regulations directing agencies to pay employees Sunday premium pay retroactive to May 26, 2009, without the need to file an administrative claim. It asserts that no administrative claim is necessary, which it believes would be consistent with the approach OPM used in issuing regulations to implement agency reimbursement provisions of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act). However, Title II of the No FEAR Act contains provisions for agency reimbursement of the Judgment Fund for payment made to employees because of violations of antidiscrimination and whistleblower protection laws, and/or retaliation claims arising from the assertion of rights under those laws. Unlike the compensation claims process, the No FEAR reimbursement rules are not subject to the provisions of the Barring Act or the Back Pay Act of 1966 (as amended) and apply specifically to one Government agency reimbursing another. Therefore, the administrative claims process is the appropriate means for employees to recover any unpaid Sunday premium pay owed them as a result of the *Fathauer* decision.

#### *Employee Coverage*

One commenter thought OPM diverged from the analysis of the *Fathauer* decision by limiting Sunday premium pay only to full-time and part-time employees in which Sundays are part of their regularly scheduled tour of duty. The commenter asserted that the proposed regulations do not reflect the Court of Appeals conclusions regarding the definition of “employee,” (*i.e.*, generally, “those who work for pay”), and “full-time and part-time” workers do not encompass all types of employees who should be eligible to earn Sunday premium pay. The commenter also stated that the statutory requirement in which an employee performs work during a “regularly scheduled” period of service is unduly restrictive.

Another commenter also recommended that intermittent employees should receive Sunday premium pay. The individual reasoned that since intermittent employees may earn overtime pay under 5 U.S.C. 5542(a), they should also be permitted to earn Sunday premium pay. The commenter further noted that Sunday work imposes an inconvenience on all employees, and referred to the Court of Appeals conclusion regarding the definition of an “employee.”

OPM disagrees with the commenters' recommendations. Employees, within the meaning of 5 U.S.C. 5546(a), are entitled to Sunday premium pay when they work a "regularly scheduled" 8 hour period of service which is not overtime work, a part of which falls on Sunday. OPM, by regulation, has defined "intermittent employment" as "employment without a regularly scheduled tour of duty." (See 5 CFR 340.401(b)). Accordingly, employees who are correctly classified as intermittent employees may not receive Sunday premium pay because, by definition, they do not perform regularly scheduled work.

#### Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

#### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

#### List of Subjects

##### 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements.

##### 5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

U.S. Office of Personnel Management.

**John Berry,**  
Director.

Accordingly, OPM amends 5 CFR parts 532 and 550 as follows:

#### PART 532—PREVAILING RATE SYSTEMS

- 1. The authority citation for part 532 continues to read as follows:

**Authority:** 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

- 2. Revise § 532.509 to read as follows:

##### § 532.509 Pay for Sunday work.

A wage employee whose regular work schedule includes a period of service of up to 8 hours which is not overtime work, a part of which is on Sunday, is entitled to additional pay under the provisions of section 5544 of title 5, United States Code.

#### PART 550—PAY ADMINISTRATION (GENERAL)

##### Subpart A—Premium Pay

- 3. The authority citation for subpart A of part 550 continues to read as follows:

**Authority:** 5 U.S.C. 5304 note, 5305 note, 5504(d), 5541(2)(iv), 5545a(h)(2)(B) and (i), 5547(b) and (c), 5548, and 6101(c); sections 407 and 2316, Pub. L. 105–277, 112 Stat. 2681–101 and 2681–828 (5 U.S.C. 5545a); E.O. 12748, 3 CFR, 1992 Comp., p. 316.

- 4. In § 550.103, revise the definition of *Sunday work* to read as follows:

##### § 550.103 Definitions.

\* \* \* \* \*

*Sunday work* means nonovertime work performed by an employee during a regularly scheduled daily tour of duty when any part of that daily tour of duty is on a Sunday. For any such tour of duty, not more than 8 hours of work are Sunday work, unless the employee is on a compressed work schedule, in which case the entire regularly scheduled daily tour of duty constitutes Sunday work.

\* \* \* \* \*

- 5. In § 550.171, revise paragraph (a) to read as follows:

##### § 550.171 Authorization of pay for Sunday work.

(a) An employee is entitled to pay at his or her rate of basic pay plus premium pay at a rate equal to 25 percent of his or her rate of basic pay for each hour of Sunday work (as defined in § 550.103).

\* \* \* \* \*

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#### OFFICE OF PERSONNEL MANAGEMENT

##### 5 CFR Part 843

##### RIN 3206–AM29

#### Federal Employees' Retirement System; Present Value Conversion Factors for Spouses of Deceased Separated Employees

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing an interim rule to revise the table of reduction factors for early commencing dates of survivor annuities for spouses of separated employees who die before the date on which they would be eligible for unreduced deferred annuities, and to revise the annuity

factor for spouses of deceased employees who die in service when those spouses elect to receive the basic employee death benefit in 36 installments under the Federal Employees' Retirement System (FERS) Act of 1986. These rules are necessary to ensure that the tables conform to the economic, demographic and mortality assumptions adopted by the Board of Actuaries and published in the **Federal Register** on June 3, 2011, as required by 5 U.S.C. 8461(i).

**DATES:** This rule is effective August 23, 2011.

**FOR FURTHER INFORMATION CONTACT:** Roxann Johnson, (202) 606–0299.

**SUPPLEMENTARY INFORMATION:** OPM has published a notice in the Federal Register at 76 FR 32242 (June 3, 2011) to revise the normal cost percentages under the Federal Employees' Retirement System (FERS) Act of 1986, Public Law 99–335, 100 Stat. 514, as amended, based on economic assumptions, new demographic factors and mortality assumptions adopted by the Board of Actuaries of the Civil Service Retirement System. By statute under 5 U.S.C. 8461(i), the demographic factors, economic and mortality assumptions require corresponding changes in factors used to produce actuarially equivalent benefits when required by the FERS Act.

Section 843.309 of title 5, Code of Federal Regulations, regulates the payment of the basic employee death benefit. Under 5 U.S.C. 8442(b), the basic employee death benefit may be paid as a lump sum or as an equivalent benefit in 36 installments. These rules amend 5 CFR 843.309(b)(2) to conform the factor used to convert the lump sum to 36-installment payments with the revised economic assumptions.

Section 843.311 of title 5, Code of Federal Regulations, regulates the benefits for the survivors of separated employees under 5 U.S.C. 8442(c). This section provides a choice of benefits for eligible current and former spouses. If the current or former spouse is the person entitled to the unexpended balance under the order of precedence under 5 U.S.C. 8424, he or she may elect to receive the unexpended balance instead of an annuity.

Alternatively, an eligible current or former spouse may elect to receive an annuity commencing on the day after the employee's death or on the deceased separated employee's 62nd birthday. If the annuity commences on the deceased separated employee's 62nd birthday, the annuity will equal 50 percent of the annuity that the separated employee would have received had he or she