



**U.S. Customs and
Border Protection**

OCT 21 2010

MEMORANDUM FOR: See Distribution

FROM: Assistant Commissioner
Office of Human Resources Management

SUBJECT: Compensation Reform Project Features and Legislative Language

Over the course of the past year, the Office of Human Resources Management has partnered with subject matter experts in your offices to develop a compensation system that will address the varied interests and issues of CBP frontline employees while enhancing CBP's mission capability. This partnership led to the development of the Compensation Reform Project which reviewed the various forms of overtime pay of our front line employees. The Compensation Reform proposal was presented to the Department of Homeland Security and the Office of Management and Budget and was approved for inclusion in the upcoming FY 2012 Budget Process.

Features of the Proposed Compensation System:

The proposed compensation system will simplify the administration of overtime for managers and employees, promote uniformity of the current overtime systems, and result in a net savings of approximately \$68 million to CBP. The features of the proposed compensation system are described below.

- Achieves uniformity by exempting all frontline positions from the Fair Labor Standards Act (FLSA)
- Brings all Law Enforcement Officer (LEO) and Enhanced Customs and Border Protection Officer positions into the same retirement system
- Pays all LEOs on the Office of Personnel Management (OPM) LEO Special Salary Rate (SSR) tables
- Covers all Customs and Border Protection LEO managers under Law Enforcement Availability Pay (LEAP)
- Retains Customs and Border Protection Officers (CBPOs), Customs and Border Protection Officers-Enforcement (CBPOEs), and Customs and Border Protection Agricultural Specialists (CBPAS) under Customs Officer Pay Reform Act (COPRA)
- Converts all other CBP LEOs (other than CBPOs) to LEAP

In addition, we expect to establish a temporary SSR for existing Border Patrol Agent (BPA) canine handlers. CBP will request a temporary 4 percent SSR increase from OPM to compensate current BPA canine handlers for the loss of FLSA overtime pay. The SSR will be temporary and

continue until their new salary matches Administratively Uncontrollable Overtime (AUO) and FLSA earnings before LEAP.

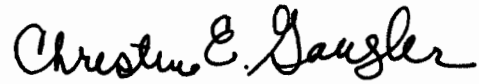
The uniformity of CBP's overtime pay systems is necessary to achieve our mission integration objective; however in order to effectively achieve this goal, several changes in law are essential. The following outlines the legislative actions that are necessary to effect these changes.

Legislative Actions Necessary:

- **Amend the statutory definition of Law Enforcement Officer to specifically include positions that are covered by the Enhanced Customs and Border Protection Officer Retirement legislation.** Currently, because of the two different retirement systems and the varying overtime and compensation systems, employees cannot easily move from position to position and cannot qualify for higher-level positions without the required years of experience in the specific retirement system.
- **Amend the Law Enforcement Availability Pay statute to allow the Secretary DHS to include all Law Enforcement Officers, including Border Patrol Agents employed by CBP (except Customs and Border Protection Officers and Customs and Border Protection Officers/Enforcement grades GS-5 through GS-13).**
- **Amend the Fair Labor Standards Act to statutorily exempt all CBP employees defined as Law Enforcement Officers.**
- **Amend the COPRA to exclude GS-14 and GS-15 Office of Field Operations (OFO) LEO managers.** There will be no reduction in pay for FLSA-exempt employees since LEAP pays a 25 percent overtime premium that is equal to the highest AUO percentage earned. However, there will be some reduction in pay for employees earning AUO and FLSA. Additionally, this will achieve consistency in the payment of overtime at the managerial level by allowing OFO LEO managers to earn LEAP, further supporting CBP's mission integration goals.
- **Amend the COPRA to establish it as the exclusive and sole overtime pay system for CBPOs, CBPOEs and CBPAS (GS 5-13).** Amending COPRA to reflect the current environment in which CBP is now operating will close the loophole that allowed FLSA payments for non-officially assigned overtime in various cases (e.g., Bull v. U.S.), and avoid future costs from arbitrations or settlements.

Attached is a summary of the financial impact and the draft legislative language that specifically addresses each of the actions outlined above for your review and concurrence. We would appreciate your returning the packet indicating your concurrence on the blue cover sheet by October 28, 2010 to Ms. Alethea Smalls, Supervisory Human Resources Specialist, at Alethea.Smalls@dhs.gov.

Should you have any questions, please feel free to contact me.

A handwritten signature in black ink that reads "Christine E. Gaugler". The signature is written in a cursive style with a large, prominent "C" and "G".

Christine E. Gaugler

Attachments

Distribution: Assistant Commissioner, Office of Air and Marine
Chief, Office of Border Patrol
Assistant Commissioner, Office of Field Operations
Assistant Commissioner, Office of Congressional Affairs
Assistant Commissioner, Office of Administration
Assistant Commissioner, Office of Training and Development

cc: Chief Counsel

SUMMARY OF FINANCIAL IMPACT:**Estimated Savings for Fiscal Year 2012**

CBP New Overtime/Pay System	Estimated Out year Savings
OBP LEAP Conversion	\$110.1M
OAM LEAP Conversion	(\$3.3M)
OFO LEAP Conversion (GS 14/15 Managers)	(\$11.2M)
LEAP Conversion Net Savings	\$95.6M
Cost of SSR for CBPOs (GS-5/9)	(\$24.9M)
Cost of SSR for OBP Canine Handlers	(\$2.3M)
Net Savings to CBP	\$68.4M

***NOTE:** Current overtime pay estimates are dependent on predicted attrition rates, overtime trends, and the implementation dates of the phased actions. Additional OAM costs associated with employees currently not receiving the full 25 percent AUO but, once under LEAP, they will be eligible. Internal Affairs' 1801s currently earning AUO will be converted to LEAP with no financial impact.

Compensation Reform Project
Draft Legislative Language
Executive Summary

Section 1: Classifies Customs and Border Protection Officers (“CBPOs”) as Law Enforcement Officers to eliminate retirement barriers to movement between current law enforcement officer positions (*e.g.*, Border Patrol Agent, CBPO/E) and the CBPO position

- CBPOs are already covered by the same retirement statutes that cover law enforcement officers
- As Law Enforcement Officers, CBPOs will be entitled to the Law Enforcement Special Salary Rates at GS 5/7/9

Section 2: Authorizes the Secretary of the Department of Homeland Security to designate positions within DHS for coverage by Law Enforcement Availability Pay (LEAP)

- Those positions would be exempt from the wage and hour provisions of the Fair Labor Standards Act of 1938 (FLSA)

Section 3: Modernizes the Customs Officer Pay Reform Act to:

- Exempt Customs Officers (current CBPOs) from the wage and hour provisions of the FLSA
- Eliminate the COPRA-specific overtime pay cap
- Bring Customs Officers under a new Agency-wide overtime pay cap
- Exclude COPRA premium pay from Customs Officers’ overtime pay cap
- Replace the current statutory method that includes within the Customs Officers’ base pay for retirement purposes overtime earned “up to ½” the COPRA statutory pay cap with a similar plan that includes, also for retirement purposes, the overtime earned “up to 25 percent” of the employee’s rate of basic pay (similar to the LEAP retirement package and very similar in real dollars to the current method)
- Allow Customs Officers above grade GS-13 to, if designated by the Secretary of DHS, receive LEAP in lieu of COPRA overtime

Section 4: Provides for a permanent limitation on overtime pay (“pay cap”) for all employees of U.S. Customs and Border Protection and allows the pay cap to adjust in accordance with Federal salaries.

Section 5: Excludes certain CBP Officer and agent positions (those designated to receive LEAP and Customs Officers) from the wage and hour provisions of the Fair Labor Standards Act.

A BILL

To modernize the overtime pay statutes applicable to officers and agents employed by U.S. Customs and Border Protection, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1 DESIGNATING CUSTOMS AND BORDER PROTECTION OFFICERS AS LAW ENFORCEMENT OFFICERS.

- (a) Section 8401 of title 5 United States Code is amended –
 - (1) By amending paragraph (17)(A) to read as follows:
 - “(A) an employee, the duties of whose position--
 - (i) are
 - (I) primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or
 - (II) primarily the protection of officials of the United States against threats to personal safety, or
 - (III) as an employee in the Department of Homeland Security (A) who holds a position within the GS-1895 job series (determined applying the criteria in effect as of September 1, 2007) or any successor position, and (B) whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry; and” and
 - (2) by deleting paragraph (36).
- (b) Section 8331 of title 5 United States Code is amended –
 - (1) in paragraph (20) –
 - (A) by inserting “a customs and border protection officer as defined in paragraph (31) or” after “‘law enforcement officer’ means”; and
 - (B) by striking the term “this activity” and inserting in lieu thereof “these activities”; and
 - (2) in paragraph (31) by inserting a period after the term “ports of entry” and by striking the remainder of that paragraph.
- (c) “RULE OF CONSTRUCTION - Nothing in the amendments made by this section is intended to affect or diminish the rights granted to customs and border protection officers by section 535(e)(2) of P.L. 110-161.”

Sec. 2. AUTHORIZING THE SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY TO DESIGNATE POSITIONS FOR COVERAGE BY LAW ENFORCEMENT AVAILABILITY PAY.

(a) Section 5545a(j) of Title 5 United States Code is redesignated as section 5545a(k), and

(b) A new section 5545a(j) of Title 5 United States Code is added to read as follows:

“(j) As may be determined by the Secretary of Homeland Security with the approval of the Office of Personnel Management, the provisions of subsections (a)--(h) providing for availability pay shall apply to officers or agents of U.S. Customs and Border Protection who meet the unscheduled overtime duty provisions of subsection (d). The Office of Personnel Management may prescribe regulations to carry out this subsection.”

(c) Section 5545a(e)(1) of Title 5 United States is amended by adding “or designated officer or agent of U.S. Customs and Border Protection” after “criminal investigator”.

(d) Section 5542(d) of Title 5 United States Code is amended to read as follows:

“(d) In applying subsection (a) of this section with respect to any criminal investigator or officer or agent of the Department of Homeland Security who is paid availability pay under section 5545a—

(1) such investigator, officer, or agent shall be compensated under such subsection (a), at the rates there provided, for overtime work which is scheduled in advance of the administrative workweek—

(A) in excess of 10 hours on a day during such investigator’s, officer’s or agent’s basic 40 hour workweek; or

(B) on a day outside such investigator’s, officer’s, or agent’s basic 40 hour workweek; and

(2) such investigator, officer, or agent shall be compensated for all other overtime work under section 5545a.”.

Sec. 3. MODERNIZING THE CUSTOMS OFFICER PAY REFORM ACT OF 1993

- (a) Section 5 of the Act of February 13, 1911 (section 267 of Title 19 United States Code) is amended:
- (1) by striking “Secretary of the Treasury” each place it appears and inserting “Secretary of Homeland Security”; and
 - (2) by amending subsection (c) to read as follows:

(c) LIMITATIONS-

- (1) EXCLUSIVITY OF PAY UNDER THIS SECTION – Except for physical hardship and hazard pay under section 5545(d) of title 5, United States Code, pay under this section shall be the exclusive overtime and premium pay available for customs officers at grades GS-13 and below.
 - (2) Compensation for overtime services provided for under subsection (a), but not to exceed 25 percent of the employee’s rate of basic pay,¹ shall be treated as part of the employee’s basic pay for purposes of--
 - (A) Title 5 U.S.C. sections 5595(c), 8114(e), 8331(3), 8431, and 8704(c); and
 - (B) such other purposes as may be expressly provided for by law or as the Office of Personnel Management may by regulation prescribe.
- (b) Section 8331(3)(G) of title 5, United States Code, is repealed,² and current section 8331(3)(H) of title 5, United States Code is redesignated as Section 8331(3)(G).²

¹ See 5 CFR § 531.203 – “Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by a GS employee before any deductions, including a GS rate, an LEO special base rate, a special rate, a locality rate, a retained rate, but exclusive of additional pay of any other kind. For the purpose of applying the maximum payable rate rules in 531.216 and 531.221 to non-GS employees, rate of basic pay means a rate of pay under other legal authority which is equivalent to a rate of basic pay for GS employees, as described in this definition.”

² This section included the overtime pay earned by the employee, up to one half the statutory maximum (cap), in the employee’s “base pay for high three retirement purposes. It is superfluous in light of the amendment above to new 19 U.S.C. § 267(c)(2).

Sec. 4. PROVIDING FOR A PERMANENT LIMITATION ON OVERTIME PAY FOR EMPLOYEES OF THE BUREAU OF CUSTOMS AND BORDER PROTECTION.

Title 6, United States Code, is amended by adding a new section 219 to read as follows –

“Sec. 219 - FISCAL YEAR OVERTIME PAY CAP FOR U.S. CUSTOMS AND BORDER PROTECTION OFFICERS AND EMPLOYEES – The aggregate of overtime pay (including commuting compensation under subsection 19 U.S.C. § 267(a)(2)(B)) from whatever sources that an employee of U.S. Customs and Border Protection may be paid in any fiscal year may not exceed \$ 40,000, adjusted effective on the first day of each fiscal year after fiscal year 2012. Such adjustment shall be equal to the annual adjustment in the General Schedule under section 5303 of title 5, United States Code, during the preceding fiscal year. The Commissioner of Customs and Border Protection [Secretary of the Department of Homeland Security] or his designee may waive this fiscal year cap in order to prevent excessive costs or to meet emergency requirements of the Department of Homeland Security. “.

Sec. 5. SPECIFICALLY EXCLUDING CERTAIN OFFICER AND AGENT POSITIONS OF THE DEPARTMENT OF HOMELAND SECURITY FROM THE WAGE AND HOUR PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938.

(a) Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended—

(1) by striking current paragraph (16) and inserting in lieu thereof:
“(16) a criminal investigator or an officer or agent of the Department of Homeland Security who is in a position authorized to receive availability pay under section 5545a of title 5;”³

(B) by deleting the period at the end of current paragraph (17) and inserting “; and”;

(B) by adding at the end thereof the following new paragraph:

“(19) a customs officer as defined in section 5(e)(1) of the Act of February 13, 1911 (19 U.S.C. 267(e)(1)).”.

³ This creates a slight change in the exclusion language even for criminal investigators to be sure that even those on light duty at that moment and not getting LEAP will not be able to claim FLSA overtime.