

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 575

RIN 3206-AJ08

Recruitment and Relocation Bonuses and Retention Allowances

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to provide agencies with greater flexibility to use recruitment and relocation bonuses and retention allowances. These proposed regulations would provide agencies with the flexibility to pay retention allowances to employees who are likely to leave their positions for other Federal employment under certain limited circumstances. This proposal also would allow agencies to pay recruitment and relocation bonuses and retention allowances to prevailing rate (wage) employees.

DATES: Comments must be received on or before March 20, 2001.

FOR FURTHER INFORMATION CONTACT: Jeanne Jacobson, (202) 606-2858; FAX: (202) 606-0824; email: payleave@opm.gov.

ADDRESSES: Comments may be sent or delivered to Donald J. Winstead, Assistant Director for Compensation Administration, Workforce Compensation and Performance Service, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415, FAX: (202) 606-0824, or email: payleave@opm.gov.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is proposing to amend the recruitment and relocation bonus and retention allowance regulations in 5 CFR part 575, subparts A, B, and C, to provide agencies with additional flexibility to use these incentives. The proposed regulations would allow agencies to grant a retention allowance to a current

employee likely to leave for other Federal employment under certain limited circumstances. The proposed regulations also would allow agencies to pay recruitment and relocation bonuses and retention allowances to prevailing rate (wage) employees.

Retention Allowances for Employees Likely To Leave for Other Federal Employment

Under current law (5 U.S.C. 5754), OPM may authorize agencies to grant a retention allowance to an employee if the unusually high or unique qualifications of the employee or a special need for the employee's services makes it essential to retain the employee, and the agency determines that the employee would be likely to leave in the absence of an allowance. Our regulations initially authorized agencies to grant retention allowances only if the employee was likely to leave the Federal service for employment outside the executive, legislative, or judicial branch of the Federal Government (60 FR 12833, March 28, 1991). Later, we broadened this authority to provide agencies with the flexibility to grant retention allowances to employees who were likely to leave the Federal service for any reason (60 FR 33323, June 28, 1995). We did not authorize agencies to pay retention allowances to employees likely to leave for other Federal employment because of concerns about potentially disruptive and costly bidding wars among Federal agencies competing for employees with highly desired skills or competencies.

Agencies have recently requested that OPM amend its regulations to authorize retention allowances for employees likely to leave for other Federal employment in certain limited circumstances. We recognize that agencies may experience significant staffing problems that hinder their ability to meet mission objectives when their employees leave for other Federal jobs. In some cases, the retention allowance authority may be the most effective way to resolve such problems. However, we must also continue to be cognizant of the potential costs of interagency competition.

We propose to amend the regulations at 5 CFR 575.304(b) to allow agencies to pay a retention allowance to an employee likely to leave for other Federal employment when (1) the other

Federal position is under a different pay system (with certain exceptions) or (2) it is essential to retain the employee during a temporary but critical work situation. (Agencies would continue to have authority under § 575.304(b)(1) to pay retention allowances to employees who are likely to leave the Federal service for any reason.)

Section 575.304(b)(2) of the proposed regulations would authorize an agency to pay a retention allowance to an employee likely to leave for another Federal position that is under a pay system that is different from the pay system of the employee's current position. The proposed regulations would prohibit agencies from using this authority to pay retention allowances to an employee likely to leave for a General Schedule (GS), prevailing rate (wage), senior-level and scientific or professional (SL/ST), Senior Executive Service (SES), administrative law judge (ALJ), Executive Schedule (EX), or Board of Contract Appeals (BCA) position when his or her current position is also under any of these pay systems. (See proposed § 575.304(d).)

For example, using this new authority an agency could pay a retention allowance to a General Schedule employee likely to leave for a higher-paying position under a pay system outside of title 5, United States Code, (*e.g.*, the Federal Aviation Administration). In this situation, the recruiting agency may have independent statutory authority to offer salaries or other incentives that are greater than those available under the General Schedule, making it very difficult for the employee's current agency to compete effectively. We believe allowing agencies to grant retention allowances in such situations will help level the playing field among agencies with similar staffing needs.

Section 575.304(b)(3) of the proposed regulations would allow Federal agencies to grant retention allowances to an employee likely to leave for other Federal employment (under the same or different pay system) during temporary but critical staffing situations. Private sector organizations pay "staying-on" or "retention bonuses" to help retain employees and keep operations running smoothly during "crisis" situations, such as mergers, acquisitions, and plant closings. We believe it would be reasonable to allow Federal agencies to use the retention allowance authority on

a temporary basis to help retain experienced employees who otherwise would be likely to leave during similar critical periods.

For example, an agency may need to retain an employee until the completion of a project critical to the mission of the agency or during the closure of a facility or office or the relocation of an office or facility to a different commuting area. Such employees may be likely to leave for other Federal employment if, for example, the agency has announced that it will eliminate or substantially change the duties of the employee's position as a result of the critical situation or upon completion of the important project or if the office relocation will compel the employee to change his or her residence to continue employment. A retention allowance may help entice an employee to stay through the temporary but critical work period.

To help ensure that agencies use this new authority only for temporary staffing difficulties, § 575.307(b) would limit payment of retention allowances to an employee working on a critical project to a period of no longer than 1 year. On a case-by-case basis, the head of an agency may ask OPM to extend this time limit. The proposed regulations would allow an agency to pay retention allowances to an employee likely to leave for other Federal employment prior to an office closure or relocation as long as the agency continues to have an essential need for the employee's services.

When authorizing a retention allowance for an employee likely to leave for other Federal employment under § 575.304(b)(2) and (3), the proposed regulations would require agencies to follow the payment criteria and documentation provisions currently prescribed in § 575.305(c). In addition, before approving a retention allowance for an employee who is likely to leave during a critical work period, § 575.305(c)(2) of the proposed regulations would require the agency to determine how the employee's departure would affect its ability to function effectively during the critical period.

The proposed regulations at § 575.305(c)(3)(iii) also would require agencies to consider other relevant factors when authorizing a retention allowance and determining the amount for an employee who is likely to leave for other Federal employment. These factors may include the likelihood of attracting candidates to fill the employee's position if the agency has announced that it will relocate the position, the cost and time required to hire and train a new employee to

complete a critical project, or the salaries typically paid by another Federal agency.

To help avoid unwarranted and possibly costly interagency competition, § 575.305(c)(4) of the proposed regulations also would require agencies to consider the use of non-pay alternatives to help resolve staffing problems before paying a retention allowance to an employee likely to leave for another Federal position. Such non-pay alternatives may include alternative recruitment strategies; use of temporary or term appointments or appointments with varying work schedules, such as part-time, intermittent, and seasonal schedules; employment of experts and consultants; alternative work schedules (*i.e.*, flexible or compressed work schedules), job sharing, and telecommuting arrangements; paying or sharing the cost of employee training and higher education; or redesigning jobs so that a larger pool of candidates may qualify for a position or to make a job more appealing to candidates by adding desirable duties or eliminating undesirable duties.

All other conditions and requirements for paying a retention allowance under 5 CFR part 575, subpart C, would continue to apply to employees who receive an allowance on the basis of being likely to leave for other Federal employment. For example, §§ 575.306(c) and 575.307(b) would require agencies to reduce or terminate a retention allowance paid to an employee likely to leave for other Federal employment when the conditions giving rise to the original determination to pay the allowance have changed. In addition, under § 575.307(d)(4), an agency could authorize a retention allowance of up to 10 percent (or up to 25 percent with OPM approval) of an employee's rate of basic pay for a group or category of employees likely to leave for other Federal employment. (In response to agency inquiries, the proposed regulations at § 575.305(c)(1) clarify that, when the group retention allowance authority is not used, agencies must make likely-to-leave determinations (for any reason, including for other Federal employment) only on an individual, case-by-case basis.)

Recruitment, Relocation, and Retention Payments for Prevailing Rate (Wage) Employees

Sections 5753(e) and 5754(e) of title 5, United States Code, permit the President to authorize the application of recruitment, relocation, and retention payments to one or more categories of employees in an agency who would not

otherwise be covered by these provisions of law upon the request of the head of the agency. Under section 6 of Executive Order 12748 of February 1, 1991, the President delegated this authority to the Director of OPM. In response to an agency request, these proposed regulations would provide agencies with discretionary authority to pay recruitment and relocation bonuses and retention allowances to an employee in a prevailing rate (wage) position, as defined in 5 U.S.C. 5342(a)(3). This would include Federal Wage System or "wage grade" employees. Under the proposed regulations, the same payment criteria, procedures, and documentation requirements that apply to other covered groups of employees also would apply to wage employees.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 575

Government employees, Wages.
U.S. Office of Personnel Management.
Janice R. Lachance,
Director.

Accordingly, OPM is proposing to amend part 575 of title 5, Code of Federal Regulations, as follows:

PART 575—RECRUITMENT AND RELOCATION BONUSES; RETENTION ALLOWANCES; SUPERVISORY DIFFERENTIALS

1. The authority citation for part 575 continues to read as follows:

Authority: 5 U.S.C. 1104(a)(2), 5753, 5754, and 5755; secs. 302 and 404 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101-509), 104 Stat. 1462 and 1466, respectively; E.O. 12748, 3 CFR, 1992 Comp., p. 316.

Subpart A—Recruitment Bonuses

2. In § 575.102, paragraph (a)(5) is amended by removing "or"; paragraph (a)(6) is amended by removing "." and inserting in its place "; or"; and a new paragraph (a)(7) is added to read as follows:

§ 575.102 Delegation of authority.

(a) * * *

(7) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3).

* * * * *

Subpart B—Relocation Bonuses

3. In § 575.202, paragraph (a)(5) is amended by removing “or”; paragraph (a)(6) is amended by removing “.” and inserting in its place “; or”; and a new paragraph (a)(7) is added to read as follows:

§ 575.202 Delegation of authority.

(a) * * *

(7) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3).

* * * * *

Subpart C—Retention Allowances

4. In § 575.302, paragraph (a)(5) is amended by removing “or”; paragraph (a)(6) is amended by removing “.” and inserting in its place “; or”; and paragraph (a)(7) is added to read as follows:

§ 575.302 Delegation of authority.

(a) * * *

(7) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3).

* * * * *

5. In § 575.303, the definition of *commuting area* is added in alphabetical order to read as follows:

§ 575.303 Definitions.

* * * * *

Commuting area has the meaning given that term in § 575.203.

* * * * *

6. In § 575.304, paragraph (d) is redesignated as paragraph (e), paragraphs (b) and (c) are revised, and a new paragraph (d) is added, to read as follows:

§ 575.304 Conditions for payment.

* * * * *

(b) An agency may consider an employee likely to leave if he or she is—

(1) Likely to leave the Federal service for any reason;

(2) Likely to leave his or her position for another Federal position under a different pay system (except as provided in paragraph (c) of this section); or

(3) Likely to leave his or her position for a position under the same or different Federal pay system prior to the closure of the employee's office or facility; relocation of the employee's office or facility to a different commuting area; or the completion of a project critical to the mission of an agency.

(c) An agency may not pay a retention allowance under paragraph (b)(2) of this section to an employee likely to leave for a General Schedule, prevailing rate (wage), senior-level and scientific or

professional, Senior Executive Service, administrative law judge, Executive Schedule, or Board of Contract Appeals position when his or her current position is also under any of these pay systems.

(d) An agency may not pay a retention allowance to an employee who is likely to leave his or her position for another Federal position other than under the conditions described in paragraphs (b)(2) and (3) of this section.

* * * * *

7. In § 575.305, paragraphs (a)(2)(iii), (c), and (d)(1)(i) are revised to read as follows:

§ 575.305 Agency retention allowance plans; higher level review and approval; and criteria for payment.

(a) * * *

(2) * * *

(iii) Procedures for paying allowances; and

* * * * *

(c) *Criteria for payment.* (1) An agency must base each allowance paid under this subpart on a written determination that the unusually high or unique qualifications of the employee or a special need of the agency for the employee's services makes it essential to retain the employee and that, in the absence of such an allowance, the employee would be likely to leave under one of the conditions specified in § 575.304(b). Except when using the group retention allowance authority under paragraph (d) of this section, an agency must make the determination that an employee is likely to leave on an individual, case-by-case basis.

(2) An agency must base the determination required by paragraph (c)(1) of this section on a written description of the extent to which the employee's departure would affect the agency's ability to carry out an activity or perform a function that the agency deems essential to its mission or to operate effectively during a critical period.

(3) An agency must consider the following factors, as applicable in the case at hand, in determining whether to pay a retention allowance and the amount of any such payment:

(i) The success of recent efforts to recruit candidates and retain employees with qualifications similar to those possessed by the employee for positions similar to the position held by the employee;

(ii) The availability in the labor market of candidates for employment who, with minimal training or disruption of service to the public, could perform the full range of duties and responsibilities of the employee's position; or

(iii) Other supporting factors, such as the likelihood of attracting candidates to fill the employee's position if the agency has announced that it will soon relocate the position, the cost and time required to hire and train a new employee to complete a critical, time-sensitive project, or the salaries typically paid by another Federal agency.

(4) For an employee likely to leave for other Federal employment under the conditions described in § 575.304(b)(2) and (3), the agency must consider the use of non-pay solutions to help retain the employee before authorizing a retention allowance. Such solutions may include conducting an aggressive recruiting program, using alternative appointing authorities, redesigning jobs, establishing training programs, implementing alternative work schedules, or improving working conditions.

(d) * * *

(1)(i) An agency may authorize a retention allowance of up to 10 percent of an employee's rate of basic pay for a group or category of employees (excluding individuals covered by § 575.302(a)(2), (3), (5), or (6) or those in similar positions to which OPM has delegated authority to approve retention allowances to agency heads under § 575.302(c)). An agency must determine in writing that the category of employees has unusually high or unique qualifications, or that the agency has a special need for the employees' services that makes it essential to retain the employees in that category. The agency must also determine in writing that it is reasonable to presume that there is a high risk that a significant number of employees in the targeted category are likely to leave under one of the conditions specified in § 575.304(b) in the absence of an allowance.

8. In § 575.306, paragraph (c) is revised to read as follows:

§ 575.306 Payment of retention allowance.

* * * * *

(c) An agency may continue paying a retention allowance as long as the conditions giving rise to the original determination to pay the allowance still exist, except as provided in § 575.307(a) and (b). However, at least annually, the agency must review each determination to pay an allowance to determine whether payment is still warranted. The agency approving official must certify this determination in writing.

* * * * *

9. In § 575.307, paragraphs (b) and (c) are redesignated as paragraphs (c) and

(d), respectively, and a new paragraph (b) is added to read as follows:

§ 575.307 Reduction or termination of retention allowance.

* * * * *

(b) An agency must terminate a retention allowance paid to an employee (or group of employees) under § 575.304(b)(3) (for work on a project critical to the mission of the agency) not later than 1 year after the initial allowance payment. On a case-by-case basis, the head of an agency may ask OPM to extend this time limit.

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 416, and 422

[Regulations Nos. 4 and 16]

RIN 0960-AF44

New Disability Claims Process

AGENCY: Social Security Administration (SSA).

ACTION: Notice of proposed rulemaking.

SUMMARY: We are proposing to revise our regulations that pertain to the processing of initial claims for disability benefits under title II (Social Security Disability Insurance) and title XVI (Supplemental Security Income) of the Social Security Act (the Act). The proposed rules would incorporate modifications to our administrative review process and disability determination procedures based on testing that we are conducting. The changes, which would apply to initial applications for disability benefits, would:

- First, permit disability examiners in our State agencies the flexibility to decide whether input from a medical or psychological consultant is needed to make a disability determination, so that our State agencies may use the expertise of the disability examiners and medical and psychological consultants more effectively;
- Second, provide claimants with an opportunity for an informal disability conference with the adjudicators of their claims at the initial level in cases in which it appears that the evidence does not support a fully favorable determination; and
- Third, eliminate the reconsideration step of the administrative review process.

We plan to phase in these changes over a period of 1 year until they apply in every State.

DATES: To be sure that your comments are considered, we must receive them no later than March 20, 2001.

ADDRESSES: Comments should be submitted to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235-7703; sent by telefax to (410) 966-2830; sent by e-mail to regulations@ssa.gov; or delivered to the Office of Process and Innovation Management, Social Security Administration, L2109 West Low Rise Building, 6401 Security Boulevard, Baltimore, MD 21235-6401, between 8:00 a.m. and 4:30 p.m. on regular business days. During these same hours, you may inspect the comments that we receive by making arrangements with the contact person shown below.

FOR FURTHER INFORMATION CONTACT: Georgia E. Myers, Regulations Officer, Office of Process and Innovation Management, L2109 West Low Rise Building, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 965-3632 or TTY (410) 966-5609, for information about this notice. For information on eligibility or claiming benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet web site, Social Security Online, at www.ssa.gov.

SUPPLEMENTARY INFORMATION:

In Brief, What Are We Proposing To Do?

We are proposing to change our rules in three ways:

1. We are proposing to change our rules for how State agencies make disability determinations for us. The change would allow State agency adjudicators, called "disability examiners," to decide whether input from a medical or psychological consultant is needed to make a disability determination. The medical or psychological consultant would not be responsible for the determination; *i.e.*, would not be an adjudicator of the claim.
2. We are proposing to add rules providing that disability examiners will offer claimants an opportunity for an informal conference whenever it appears that the evidence does not support a fully favorable determination.
3. We are proposing to eliminate the reconsideration step of our administrative review process.

On August 30, 1999, we published a notice in the **Federal Register** announcing a "prototype" involving these three major modifications to our disability determination process for initial applications under titles II and XVI of the Act. (See 64 FR 47218.) In the

notice, we stated that, before proceeding to national implementation, we expected that the prototype would provide a body of information about the impact of these modifications on agency operations, notice and other procedures, and the quality and timeliness of our determinations and decisions. Although the prototype is continuing and we continue to gather information and gain operational experience, we believe that we now have sufficient information to propose changes to our regulations. Public comments received on these proposed changes will assist us in fine-tuning these changes.

Because we now know that implementation of the process in each State agency requires support during the period of transition, we are considering a plan by which we would implement the process in groups of State agencies until all States use the new process. Our projected completion date will be in 2003. We explain our current plan in more detail later in this preamble, and invite public comment.

What Is the Current Process?

Sections 404.1503 and 416.903 of our regulations provide that State agencies make disability and blindness determinations, following rules that we provide. Sections 404.1615(c) and 416.1015(c) of our regulations provide with respect to initial disability claims that, in most cases, these disability determinations must be made by a State agency medical or psychological consultant and a State agency disability examiner, a lay adjudicator with expertise in evaluating disability. The medical or psychological consultant and the disability examiner work together as a team and are jointly responsible for the determination. Under current rules, a disability examiner alone may make a determination only in the very unusual circumstance in which:

- There is no medical evidence to be evaluated (*i.e.*, no medical evidence exists or we are unable, despite making every reasonable effort, to obtain any medical evidence that may exist); and
- The individual fails or refuses, without good reason, to attend a consultative examination.

State agency determinations in initial claims are generally based on review of the written information in a claimant's case record. Although our procedures permit disability examiners and medical and psychological consultants to speak to claimants to obtain more information, there are no formal requirements for such contact. Also, we have no procedures requiring a State agency adjudicator to explain and discuss our disability standards with claimants or to