



## REFERENCE GUIDE

### NEGOTIATING FLEXIBLE AND COMPRESSED WORK SCHEDULES

#### Purpose

The Office of Personnel Management recently published a Labor-Management Relations Guidance Bulletin on Negotiating Flexible and Compressed Work Schedules. The bulletin was designed to assist managers and labor relations officers in negotiating alternative work schedules as required by 5 U.S.C. § 6130. Section 6130(a)(2) limits bargaining unit employee participation in flexible or compressed work schedules only "to the extent expressly provided under a collective bargaining agreement between the agency and the exclusive representative."

A 1992 OPM Labor Agreement Information Retrieval System survey of collective bargaining agreements found that only 528 of 2,240 contracts contained provisions on alternative work schedules. We are, however, seeing many renegotiated collective bargaining agreements from Department of Defense activities with articles addressing flexible and compressed work schedules. This guide should act as a reminder that if your bargaining unit workforce is requesting or is currently on alternative work schedules, there should be an alternative work schedule provision in your collective bargaining agreement.

This guide includes sections on basic collective bargaining guidance, establishing flexible or compressed work schedules, exclusions from and adjustments to an already established alternative work schedule, and how to terminate this type of schedule. OPM also reviews the determinations not to establish alternative work schedules or to terminate an already established schedule.

Since flexible and compressed work schedules are fully negotiable, you should find this guide a useful tool in preparing to negotiate. If you have any questions concerning alternative work schedule negotiations, please contact the Labor Team at (703) 696-6301, #3 or DSN 426-6301, #3. In addition, the Field Advisory Service Pay Team can assist managers with questions on flexible and compressed work schedules. The FAS Pay Team's number is (703) 696-6301, #4 or DSN 426-6301, #4.

#### Background

The Federal Employees Flexible and Compressed Work Schedules Act of 1982, codified at 5 U.S.C. § 6120 et seq. (the F&CWS law), authorizes a versatile and innovative work





scheduling program for use in the Federal Government. In recent years, the importance of flexible and compressed work schedules has been enhanced by the emergence of work and family issues. As the workforce ages, becomes more culturally diverse, and women make up a greater percentage (see U.S. General Accounting Office, *The Changing Workforce: Demographic Issues Facing the Federal Government* (GAO/GGD-92-38, March 24, 1992)), management officials are grappling with ways to resolve conflicts that arise when an employee's work and family responsibilities collide.

Many management officials are finding that the use of flexible and compressed work schedules can help resolve a number of personnel problems. For example, an employee who routinely uses small amounts of leave at the start or end of the workday may be having difficulty integrating certain dependent care responsibilities with the constraints of a traditional work schedule that has fixed starting and quitting times. The establishment of a flexible work schedule that gives employees a reasonable degree of flexibility over starting and quitting times will usually solve this type of problem.

Additionally, given current demographic predictions, Federal employers will have to offer employees more flexibility in their work lives if they are to successfully recruit and retain qualified workers. See U.S. General Accounting Office, *The Changing Workforce: Comparison of Federal and Nonfederal Work/Family Programs and Approaches* (GAO/GGD-92-84, April 23, 1992.) The Office of Personnel Management (OPM) report, *Review of the Alternative Work Schedules Program* (March 1985), indicates that flexible and compressed work schedules will figure prominently in that effort. It found the use of flexible and compressed work schedules helped agencies recruit for some hard-to-fill jobs and helped agencies retain employees who otherwise would have resigned or been terminated. Additionally, a survey by the Office of Personnel Management's Employee Relations Division found that the availability of flexible or compressed work schedules is important to employees with dependent care responsibilities and figures into their employment decisions. See U.S. Office of Personnel Management, *A Study of the Work and Family Needs of the Federal Workforce*, 19-21 (PSO/OLRWP-2, April 1992).

Despite the acknowledged benefits of flexible and compressed work schedules to employees with dependent care responsibilities, the F&CWS law does not require agencies to use them. However, in July 1994, President Clinton adopted the recommendation of the National Performance Review and directed the head of each executive department and agency to establish programs that encourage and support the expansion of flexible family-friendly work arrangements, including flexible and compressed work schedules. See National Performance Review, *From Red Tape to Results: Creating a Government That Works Better and Costs Less* (September 1993); and the President's Memorandum of July 11, 1994, *Expanding Family-Friendly Work*





Arrangements in the Executive Branch (published in the July 15, 1994, Federal Register at pages 36017-36018).

The use of flexible and compressed work schedules has labor relations implications. Employees represented by a recognized union may participate in a flexible or compressed work schedule "only to the extent expressly provided under a collective bargaining agreement between the agency and the exclusive representative." 5 U.S.C. § 6130(a)(2). About 60 percent of Federal employees are represented by a union. Consequently, negotiations would be necessary to establish and implement flexible or compressed work schedules for over half of the Federal workforce.

A 1992 survey of 2,240 collective bargaining agreements in the Office of Personnel Management's Labor Agreement Information Retrieval System (LAIRS), A Survey of Work and Family Provisions in Federal Labor Agreements, 2, 23 (OLRWP-92-5, June 1992), showed that 349 agreements had clauses on flexible work schedules and 179 agreements had clauses on compressed work schedules. Together, these agreements covered 814,797 employees.

The following guidance on negotiating flexible and compressed work schedules relates only to schedules established under the F&CWS law. It does not relate to flexible schedules established under section 6101 of title 5, United States Code. We hope the guidance will be useful to you in future collective bargaining negotiations. Use it in conjunction with the F&CWS law and the implementing regulations in 5 CFR Part 610. The F&CWS law and the regulations are reprinted in the appendices.

## **BASIC COLLECTIVE BARGAINING GUIDANCE**

The negotiability of flexible and compressed work schedules was extensively discussed during the Congress' deliberations on the three-year experiment, the Federal Employees Flexible and Compressed Work Schedules Act of 1978, and the current law, the Federal Employees Flexible and Compressed Work Schedules Act of 1982. A congressional report on the bill that became the 1982 Act (S. 2240) indicates the use of these schedules is to be fully negotiable, subject only to the provisions of the 1982 Act. See Senate Committee on Governmental Affairs, Federal Employees Flexible and Compressed Work Schedules Act of 1982, S. Rep. No. 365, 97th Cong., 2d Sess. 3, 5 (1982).

The courts have also ruled that flexible and compressed work schedules are fully negotiable. In Bureau of Land Management v. Federal Labor Relations Authority, 864 F.2d 89 (9th Cir. 1988), (Bureau of Land Management), the court held that "[i]n order for





employees to have the flexibility and choice envisioned by the [Flexible and Compressed Work Schedules] statute, both the overall contours of the employees' available choices and the manner in which an individual's choice is exercised within those contours, must be subjects included within the terms of the collective bargaining agreement and hence negotiable."

Since bargaining unit employees may participate in flexible or compressed work schedules only to the extent provided for in a collective bargaining agreement, agency heads must negotiate the establishment of flexible and compressed work schedules. See U.S. Department of the Air Force, 416 CSG, Griffiss Air Force Base, Rome, New York and American Federation of Government Employees, 38 FLRA 1136, 1148 (1990). See also American Federation of Government Employees, Local 1934 and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, 23 FLRA 872 (1986), and National Treasury Employees Union, Atlanta, Georgia, and U.S. Department of the Treasury, Internal Revenue Service, 32 FLRA 879, 881-83 (1988). There is no provision in the F&CWS law for an agency head to unilaterally include bargaining unit employees in a flexible or compressed work schedule; and management rights under 5 U.S.C. § 7106 are not a bar to negotiations of flexible or compressed work schedules. See *Bureau of Land Management*. However, an agency head may object to the negotiation of a flexible or compressed work schedule proposed by a union if he or she finds that the proposed schedule would have an adverse agency impact, which is discussed in another part of this document.

Negotiations over establishing and using flexible or compressed work schedules should be undertaken in a spirit of partnership. A collaborative, interest based approach will greatly increase the likelihood that a workable schedule will be established and implemented. For example, during the early planning stages, meet with the union to discuss the feasibility of a flexible or compressed work schedule, even on a trial basis, and discuss the types of schedules that could be successfully implemented at your agency. Share information; and if you are going to conduct a feasibility study, get input from the union on the methodology of the study. Try to work through differences that could result in a negotiation impasse.

## **ESTABLISHING A FLEXIBLE OR COMPRESSED WORK SCHEDULE**

The establishment of a flexible or compressed work schedule constitutes a scheduled tour of duty for covered employees. The schedule, i.e., the tour of duty, defines the boundaries within which employees must perform their basic work requirement and work credit hours, if they are permitted. OPM's regulations require agencies to establish a basic work





requirement for employees under flexible and compressed work schedules. All work performed within the basic work requirement is considered to be regularly scheduled for premium pay purposes. 5 CFR 610.111(d). Consequently, failure to establish a basic work requirement could prevent proper pay determinations for overtime, night, holiday, or Sunday work.

There are few statutory or regulatory limitations relative to the establishment of flexible or compressed work schedules. Agency officials have significant latitude, subject to negotiation, concerning the type, design, scope, and operation of these schedules. Therefore, an agency head should view the negotiation process as an opportunity to create a schedule that is well suited to the agency's particular work environment, ensures the accomplishment of the agency's mission, and addresses employees' needs.

Do not assume that any existing agency policies and procedures on work scheduling or hours of duty will continue to apply to employees once they are under a flexible or compressed work schedule. Some existing policies and procedures may be incompatible with the schedule you are establishing. For example, procedures on scheduling employees for a basic 40hour workweek would preclude the use of flexible schedules designed to permit an employee to vary the length of a workweek. Therefore, you should review the policies and procedures for appropriateness and effectiveness.

We suggest that collective bargaining focus on a few particular areas where questions or problems have arisen:

***FLEXIBLE TIME.*** This is the part of a flexible schedule during which employees may, within agreed upon limits, choose their arrival and departure times. Any flexible schedule must have some flexible time. Otherwise, it would not be consistent with the requirements of 5 U.S.C. § 6122(a)(1) and (2). However, there is no minimum or maximum amount of flexibility prescribed. Nonetheless, whatever amount of flexible time is agreed to, your negotiated agreement should indicate whether, during that time, an employee would be permitted to leave work without giving notice to or getting approval from a supervisor. If the collective bargaining agreement is silent on this matter, employees could reasonably conclude that they are free to come and go at will during flexible time periods.

***LUNCH PERIODS.*** Lunch periods are not prescribed by law. They are provided for by internal agency practices and procedures, and by negotiated agreements between agencies and unions. It is important, therefore, that the collective bargaining agreement specify the length of the lunch period, when lunch is to be taken, e.g., between 11:30 a.m. and 1:30





p.m., and whether or not an employee must take lunch. Otherwise, employees, especially those on flexible schedules, may believe there is a choice and may not account for a lunch period in their workday. Lunch periods are less of a problem under compressed work schedules because they are scheduled, i.e., fixed.

**COMPENSATORY TIME OFF.** Under chapter 55 of title 5, United States Code, the head of an agency may grant General Schedule (GS) employees, on their request, compensatory time off as payment for irregular or occasional overtime work, i.e., overtime work that is not part of an employee's regularly scheduled administrative workweek. In addition, he or she may require employees whose rate of basic pay exceeds the maximum rate for GS-10 to take compensatory time off for irregular or occasional overtime work. 5 U.S.C. § 5543(a)(1) & (2); and 5 CFR 550.114(a) & (c).

Under the F&CWS law, the head of an agency may, on request of the employee, grant compensatory time off as payment for any overtime work to both GS and Wage System employees under a flexible work schedule. 5 U.S.C. § 6123(a)(1) and 5 CFR 550.114(b).

Neither the F&CWS law nor OPM's regulations specifically address whether the head of an agency may require employees under a flexible work schedule to take compensatory time off if their rate of basic pay exceeds the maximum rate for GS-10. Therefore, it is negotiable. Consequently, to prescribe compensatory time off for employees whose rate of basic pay exceeds the maximum rate for GS-10, it must be included in the collective bargaining agreement. Also, whether accumulated compensatory time off will be subject to forfeiture and the circumstances under which forfeiture will occur should be addressed in the agreement.

**CREDIT HOURS.** These are hours--in addition to the basic work requirement--that employees elect to work so as to vary the length of a workweek or a workday. 5 U.S.C. § 6121(4).

The F&CWS law allows fulltime employees to carryover a maximum of 24 credit hours to a succeeding pay period. Part-time employees may carryover one-fourth of the hours in their biweekly basic work requirement. 5 U.S.C. § 6126(a). There is, however, no limit in the law or regulations on the number of credit hours employees may earn in any pay period. Consequently, depending on the operations of a particular flexible schedule, an employee could earn more credit hours than may be carried forward. If the collective bargaining agreement permits employees to earn more credit hours than they may carryover to a succeeding pay period, what is to become of the excess?





Neither the F&CWS law nor OPM's implementing regulations provide for the disposition of credit hours that cannot be used during the pay period in which they are earned and cannot be carried forward to another pay period. Consequently, the matter comes within the discretionary authority of the agency head and would be negotiable. However, OPM believes that payment for credit hours that cannot be carried forward to a succeeding pay period is expressly forbidden by the F&CWS law (5 U.S.C. § 6126(b)), which permits a lump sum payment for accumulated credit hours (24 in the case of a fulltime employee) only when an employee ceases to be subject to a flexible schedule established under 5 U.S.C. § 6122. So, credit hours that cannot be used during the pay period in which they are earned and cannot be carried forward to a succeeding pay period would be forfeited; and a proposal to pay employees for credit hours that cannot be carried forward to another pay period would not be negotiable. Such a provision in an existing collective bargaining agreement would be unenforceable.

Regardless of the extent employees are permitted to earn and use credit hours, the agreement should include an appropriate time accounting method to keep track of the accumulation and use of credit hours. Agencies that establish flexible or compressed work schedules under the F&CWS law are required to establish a method of assuring accountability for hours worked. 5 CFR 610.404.

Information on acceptable methods of recording time and attendance can be found in title 6 of the U.S. General Accounting Office's Policy and Procedures Manual for Guidance of Federal Agencies. Some examples of the types of time accounting methods that are generally acceptable include the use of work reports, sign-in/sign-out sheets, automatic time recording equipment, electromechanical time accumulating devices, and electronic time accumulators. Also, under 5 U.S.C. § 6125, agencies may use time clocks to account for the time and attendance of employees on flexible schedules established under 5 U.S.C. § 6122, even in the District of Columbia.

Another concern relating to credit hours is whether employees may earn credit hours while they are performing representational duties on official time. There is no explicit or implied bar against either practice in the F&CWS law. Consequently, in *National Treasury Employees Union, Chapter 65 and Department of the Treasury, Internal Revenue Service*, 25 FLRA 373 (1987), the Federal Labor Relations Authority (the Authority) concluded that a union representative on official time may earn credit hours for participating in meetings scheduled by the agency within the representative's "regularly scheduled flexible tour of duty" and found the union's proposal to that effect negotiable. A similar but broader proposal was found to be negotiable in *National Treasury Employees Union and Department of the Treasury, Internal Revenue Service*,





30 FLRA 690, 695 (1987). The proposal in this case was not limited to a labor management meeting scheduled or initiated by the agency, but, like the previous case, the meeting had to occur within the "regularly scheduled flexible tour of duty."

An obviously simple matter, but often not addressed in negotiated agreements, is whether employees may use credit hours during flexible time and core time or only during core time. The negotiated agreement should spell out when accumulated credit hours may be used and when they cannot be used. To the extent that it is possible, the agency may want to follow compensatory time off practices.

***OTHER-THAN-FULL-TIME EMPLOYEES.*** Because these employees work fewer than 40 hours a week and fewer than 80 hours a pay period, they are not always entitled to the same treatment/ benefits as full-time employees. See 5 U.S.C. chapter 34 and 5 CFR Part 340. Consequently, some consideration should be given to their particular situations. The negotiated agreement should include provisions that explain what happens when holidays occur, what happens when employees are dismissed early or the Government is closed before the workday starts, what working conditions entitle employees to additional pay for overtime, night, or holiday work, and other peculiarities such as part time employees not being entitled to additional pay for Sunday work. This would, for the most part, be a restatement or incorporation by reference of the laws, regulations, and policy directives already published elsewhere.

Some other potential problem areas that should be dealt with in the design of a flexible or compressed work schedule include how the schedule will accommodate events like training, travel, jury duty, military leave, two holidays in the same pay period, etc. Negotiated agreements are often silent on the procedures to follow. Nonetheless, these are routine occurrences throughout the Federal Government that cannot be avoided. Therefore, you should negotiate a process or procedure to deal with them, especially when there is no prescription in the F&CWS law or the implementing regulations. Some collective bargaining agreements require employees to revert to the traditional 5-day, 40-hour workweek when the aforementioned events occur.

### **EXCLUSIONS FROM AND ADJUSTMENTS TO AN ALREADY ESTABLISHED FLEXIBLE OR COMPRESSED WORK SCHEDULE**

When a flexible or compressed work schedule is established, all employees in the affected work unit, organization, or group are covered unless they are expressly excluded. The agency and the union can agree to exclude individual employees or groups of employees for basically any reason. However, once a schedule is established, an agency





head's right to adjust employees' starting and quitting times, exclude them from participating, etc., exists only to the extent it is provided for in the F&CWS law or the collective bargaining agreement.

Section 6122(b) of title 5, United States Code, gives an agency head the right, subject to the provisions of a collective bargaining agreement, to exclude individual employees or groups of employees and to establish certain restrictions (adjust employees' starting and quitting times within the schedule or restrict their use of credit hours) "if the head of an agency determines that any organization within the agency which is participating in a [flexible work schedule] is being substantially disrupted in carrying out its functions or is incurring additional costs because of such participation...." However, an agency head must give the union notice and bargain over the impact and implementation of a decision to change or adjust a schedule. There is no duty to bargain over the substance of a decision to make a schedule adjustment permitted by section 6122(b). See *Air Force Accounting and Finance Center, Denver, Colorado and American Federation of Government Employees, Local 2040, AFLCIO, 42 FLRA 1196, 1205 (1991) (Air Force Accounting and Finance Center)*. If an agency head wants the right to exclude individual employees or groups of employees, restrict employees' choice of arrival and departure time, or restrict the use of credit hours for reasons other than those in section 6122(b), i.e., an organization within the agency is being substantially disrupted in carrying out its functions or is incurring additional costs because of its participation in a flexible work schedule, those rights must be specifically reserved in the negotiated agreement.

The meaning of "substantially disrupted" or "additional cost" is not in the law or the implementing regulations. Consequently, the negotiated agreement should define what criteria would be used to determine either occurrence. Otherwise, a grievance over the exercise of management's discretion under section 6122(b) to adjust employees work schedules, especially their arrival and departure times under a flexible schedule to ensure that the duties of their positions are fulfilled or to ensure office coverage during the hours the office is open for business, will be subject to the arbitrator's definition of "substantially disrupted" and "additional costs". For example, in *United States Department of Education and National Council of Department of Education Locals, Council 252, American Federation of Government Employees, Local 2607, 45 FLRA No. 114 (1992) (Department of Education)*, the Authority denied the union's exceptions and remanded the matter to the parties for resubmission to the arbitrator, who erred in finding the agency had no burden of proof to substantiate adjusting the flexible schedule of five employees to ensure better office coverage and failed to consider whether the agency must show adverse agency impact before making such changes.





OPM thinks the Authority's concerns in Department of Education about the arbitrator's failure to consider adverse agency impact have no basis in the F&CWS law. There is nothing in the law or the legislative history that indicates the Congress intended for an agency to have to show there has been an adverse agency impact in order to adjust a flexible schedule under section 6122(b).

Section 6122(b) is intended to give management the authority and flexibility necessary to alter employees' scheduling arrangements, within the confines of certain employee protections, when those arrangements interfere with the effective accomplishment of government business. Accordingly, we think section 6122(b) contemplates supervisory adjustments like those attempted in Department of Education, with the attendant duty to bargain only over impact and implementation.

The provisions of section 6122(b) do not apply to employees under a compressed work schedule. Consequently, the head of an agency does not have the statutory right to exclude individual employees or groups of employees if he or she determines that an organization is being substantially disrupted in carrying out its functions or is incurring additional costs because it is participating in a compressed work schedule. The right to exclude individuals would exist only to the extent provided for in a collective bargaining agreement.

However, the Congress recognized that participation in compressed work schedules, which sometimes requires employees to work 9-, 10, or 12-hour days, could cause a personal hardship for some employees if they are required to participate. Consequently, in organizations where employees are not represented by a union, the F&CWS law gives employees the right to (1) vote on whether they want to participate in a compressed schedule, and (2) request to be excluded from coverage of an already established schedule for hardship reasons. 5 U.S.C. § 6127(b)(2). A majority of the affected employees must vote for a compressed work schedule before participation can be required. Bargaining unit employees do not have a right to vote. Their interests are represented by the union during the negotiation process. However, they too may request to be excluded from participation in a compressed work schedule because of personal hardship.

"Personal hardship" is not defined in the F&CWS law or the implementing regulations, and is, therefore, negotiable. Determinations not to honor an employee's request for exemption on grounds of personal hardship would be grievable (if they are not otherwise excluded from the scope of the negotiated grievance procedure). For example, in the arbitration decision *Department of the Army, Headquarters, 101st Airborne Division (Air*





Assault), Fort Campbell, Kentucky and American Federation of Government Employees, Local 2022, LAIRS No. 18279 (January 15, 1988) (Foster, Arb.), an employee grieved because he was required to participate in a 410 compressed work schedule. The collective bargaining agreement listed the inability to coordinate car pool arrangements, nursery/baby-sitter problems, and health problems as examples of personal hardships that would justify exempting an employee from participation. In denying the grievance, the arbitrator found the employee's reasons for not wanting to work the compressed schedule--reasons centered around the performance of chores at home--did not rise to the level of hardship required by the language in the collective bargaining agreement.

### **DETERMINING NOT TO ESTABLISH A FLEXIBLE OR COMPRESSED WORK SCHEDULE**

As indicated earlier, the head of an agency may decide not to establish a flexible or compressed work schedule if he or she finds that the proposed schedule would have an adverse impact on the agency, i.e., a reduction in agency productivity, a diminution in the level of service to the public, or an increase in the cost of agency operations (excluding reasonable administrative startup costs). If adverse agency impact is found, the head of the agency must promptly determine not to establish the proposed schedule. 5 U.S.C. § 6131(a). The agency's findings, which form the basis for its determinations, must be supported by evidence. Mere assertions will not suffice. See Department of the Army, Health Services Command, Fort Sam Houston, Texas and Local 28, National Federation of Federal Employees, 83 FSIP 64 (August 5, 1983), Release No. 216 (Department of the Army). Unsubstantiated, conclusory assertions of adverse impact will fail. See Department of the Army, U.S. Army Ordnance Missile and Munitions Center and School, Redstone Arsenal, Alabama and Local 1858, American Federation of Government Employees, AFL-CIO, 90 FSIP 21 (March 23, 1990), Release No. 293.

Proving adverse agency impact is easiest when an agency has actually had some experience using flexible or compressed work schedules. For example, in Department of the Air Force, Williams Air Force Base, Arizona and Local 1776, American Federation of Government Employees, AFL-CIO, 86 FSIP 3 (February 4, 1986), Release No. 241, the union proposed a 410 compressed work schedule. The agency determined not to establish the proposed schedule because it would have an adverse agency impact. Through reports of a previous experiment with a 4day workweek, the agency demonstrated that such a schedule would prevent the timely delivery of services and that, because of the unavailability of certain employees every day of the pay period, interaction with area contractors would be adversely affected. The Federal Service Impasses Panel (the Panel) found that the proposed schedule would likely have an





adverse agency impact. The Panel reached a similar finding in Department of the Army, United States Army Aviation Center, Fort Rucker, Alabama and Local 1815, American Federation of Government Employees, AFLCIO, 83 FSIP 45 (October 25, 1983), Release No. 220. The agency had terminated a schedule very similar to the one proposed. Consequently, it was able to show that it experienced problems relating to productivity and service to its customers.

An agency's lack of experience with flexible or compressed work schedules does not prevent it from proving adverse agency impact. As indicated in Department of the Army, footnote 3, evidence of adverse agency impact may "include data in the form of graphs, charts, statistical analyses, and affidavits, among others." The ruling in Department of the Air Force, Langley Air Force Base, Langley Air Force Base, Virginia and Local R4-106, National Association of Government Employees, SEIU, AFL-CIO, 91 FSIP 129 (September 12, 1991), Release No. 317, shows how affidavits could be used to support an agency's determination not to establish a proposed schedule. Here, fourteen separate letters were submitted by military supervisors outlining the possible ill effects of the union proposed 410 compressed schedule. They pointed out that the proposed schedule would not be available to military personnel, which would adversely affect morale and would require longer workweeks for military supervisors. Additionally, they claimed that longer work days would increase employee fatigue, causing productivity to decline. The Panel concluded that these uncontroverted letters "constituted sufficient evidence to support the agency's finding on which it based its determination not to establish the 4-10 schedule."

In another case, Department of the Army, Corpus Christi Army Depot, Corpus Christi, Texas, 84 FSIP 28 (June 21, 1984), Release No. 225, involving an industrial fund activity that must minimize costs since its operations are dependent on reimbursements for goods and services provided to its customers, the Panel was persuaded by the uncontroverted assertions by the agency that costs would increase, particularly overtime costs, if the proposed 5-4/9 schedule was established. The adverse agency impact ruling was also predicated on finding the timely completion of projects would be jeopardized if some employees worked a standard workweek and others worked the 5-4/9 compressed work schedule.

The Panel will not find adverse agency impact when there is convincing evidence that an agency has successfully used flexible or compressed work schedules. This is demonstrated in Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and National Council of SSA Field Operations Locals, American Federation of Government Employees, AFL-CIO, 88 FSIP 28 (April





28, 1988), Release No. 268. The head of the agency determined not to establish flexible or compressed work schedules in its Field Operations offices outside the Atlanta Region, claiming that existing schedules in the Atlanta Region were having an adverse agency impact. However, the agency's own studies in the Atlanta Region, as well as that of an independent consulting firm, did not support the agency's claim. Nor did the fact that for fiscal year 1987 the Atlanta Region, which had about 39 offices using flexible or compressed work schedules, had the best productivity record of all 10 Field Operations regions. The Panel found that the evidence did not support the agency's determination.

Also, the Panel will more than likely not find adverse agency impact if the proposed work schedule is identical or similar to one that has been successful in a comparable bargaining unit, or in another agency with a similar mission. For example, in *Federal Deposit Insurance Corporation, Boston, Massachusetts and Local 2823, American Federation of Government Employees*, 83 FSIP 37 (January 4, 1984), Release No. 222, the Panel did not find the proposed 5-4/9 compressed work schedule would have an adverse agency impact because of the successful use of a similar schedule at the Office of the Comptroller of the Currency; in *Department of Health and Human Services, Region VI, Dallas, Texas and National Treasury Employees Union*, 83 FSIP 71 (November 23, 1983), Release No. 221, the Panel did not find adverse agency impact because the proposed schedule was similar to those negotiated to cover comparable bargaining units in other regions; and in *Federal Deposit Insurance Corporation, Headquarters Office, Washington, D.C. and National Treasury Employees Union*, 83 FSIP 63 (November 23, 1983), Release No. 221, the Panel did not find adverse agency impact because comparable employees working for employers with similar missions (Comptroller of the Currency and Federal Reserve Board) were participating in work schedules similar to those proposed.

## **TERMINATING A FLEXIBLE OR COMPRESSED WORK SCHEDULE**

The same standard of proof for opposing the establishment of a flexible or compressed work schedule applies to the termination of a flexible or compressed work schedule. That is, if the head of an agency finds that a particular flexible or compressed work schedule has had an adverse impact on the agency, he or she must determine not to continue that schedule. 5 U.S.C. § 6131(a). However, the legislative history of the F&CWS law indicates "[i]t is expected that the agency will consider a less drastic alternative to termination if that is possible." See Senate Committee on Governmental Affairs, *Federal Employees Flexible and Compressed Work Schedules Act of 1982*, S. Rep. No. 365, 97th Cong., 2d Sess. 16 (1982).





When the determination is to terminate an existing flexible or compressed work schedule, the Panel must rule in favor of the agency's determination if the finding on which the determination is based is supported by evidence that the schedule has caused an adverse agency impact. See Department of Health and Human Services, Public Health Service, Office of the Surgeon General, Compensation Branch, Rockville, Maryland and Local 41, American Federation of Government Employees, AFL-CIO, 92 FSIP 124 and 92 FSIP 143 (June 29, 1992), Release No. 333.

Many of the early collective bargaining agreements establishing flexible or compressed work schedules had no provisions on termination. Apparently, agency heads believed they could unilaterally terminate flexible or compressed work schedules under the management rights provisions (5 U.S.C. § 7106) of the Federal Service Labor Management Relations Statute. This, of course, is not true. The termination of these schedules must be negotiated. Management rights under section 7106 do not extend to the termination of flexible or compressed work schedules. See U.S. Environmental Protection Agency, Research Triangle Park, North Carolina v. American Federation of Government Employees, Local 3347, 43 FLRA 87, 93 (1991). However, the F&CWS law specifically provides for the head of an agency to reopen a collective bargaining agreement to seek termination of a negotiated flexible or compressed schedule. 5 U.S.C. § 6131(c)(3)(A). Consequently, he or she may reopen a collective bargaining agreement to seek termination of an existing schedule without regard to contract provisions on mid-term bargaining.

#### **REVIEW OF DETERMINATIONS NOT TO ESTABLISH A FLEXIBLE OR COMPRESSED WORK SCHEDULE OR TO TERMINATE AN ALREADY ESTABLISHED SCHEDULE**

If the head of an agency finds adverse agency impact and determines not to establish a particular flexible or compressed work schedule, or where a schedule is already established, not to continue that schedule, the agency and the union must negotiate over that determination. If an impasse is reached, either party may ask the Panel for assistance. The F&CWS law gives the Panel exclusive jurisdiction over the resolution of negotiation impasses concerning decisions not to establish or to terminate a flexible or compressed work schedule. 5 U.S.C. § 6131(c)(2)(A) and 5 U.S.C. § 6131(c)(3)(B).

When a negotiation impasse is reached over the agency head's determination to terminate an already established schedule because of adverse agency impact and either party asks the Panel for assistance, the status quo must be maintained. The head of the agency may not terminate the schedule unless the collective bargaining agreement expires or until





final action is taken by the Panel. 5 U.S.C. § 6131(c)(3)(D). The Panel is obliged to promptly consider the impasse and to rule in favor of the agency if its determination is supported by the evidence. 5 U.S.C. § 6131(c)(3)(C).

Mediation is not provided for in either the impasse procedures in 5 CFR Part 2472 or the F&CWS law. Therefore, when the agency and the union bargain to impasse over the agency's determination not to establish a proposed schedule or to terminate an already established schedule, the parties are not required to seek mediation from the Federal Mediation and Conciliation Service (FMCS) before asking for assistance from the Panel. *See Space Systems Division, Los Angeles Air Force Base and American Federation of Government Employees, Local 2429, AFL-CIO, 45 FLRA No. 85 (1992)*. Nonetheless, if the agency and the union wish, they may agree to seek mediation from the FMCS.

### Conclusion

By all accounts, the workforce of tomorrow will be older, more culturally and ethnically diverse, and will consist of more female workers than ever. This diversity will require the Federal Government to utilize new and innovative approaches toward managing human resources and delivering services. To succeed, the Government must successfully compete for skilled workers; and it must be able retain them by providing challenging job opportunities and the flexibility to accommodate family responsibilities and other activities outside work. Flexible and compressed work schedules that are carefully planned and implemented can help make the Government more successful in its recruitment efforts, and more competitive and efficient in the timely delivery of quality services. Therefore, collective bargaining should be undertaken with the goal of establishing flexible and compressed work schedules that support work and family programs, encourage the participation of employees and management, and also set up administrative controls necessary for the efficient operation of the agency and the success of the established work schedule.

As a service to employee and labor relations personnel and other interested persons, OPM has compiled a listing and summary of the Panel's decisions -- volume one covers decisions from July 1, 1991, through June 30, 1992; volume two covers decisions from July 1, 1992, through June 30, 1993; and volume three covers decisions from July 1, 1993, through June 30, 1994. OPM also publishes Case Listing, which gives a brief summary of cases decided by the Authority, the Panel, and any relevant court decisions. Contact OPM's Labor Management Relations Division at (202) 6062930 for a copy of these documents or for more information.

### Appendix A





## CHAPTER 61, TITLE 5, UNITED STATES CODE

### Subchapter II--Flexible and Compressed Work Schedules

#### § 6120. Purpose

The Congress finds that the use of flexible and compressed work schedules has the potential to improve productivity in the Federal Government and provide greater service to the public.(Added Pub. L. 97-221, § 2(a)(2), July 23, 1982, 96 Stat. 227.)

#### § 6121. Definitions

For purposes of this subchapter----

(1) "agency" means any Executive agency, any military department, and the Library of Congress;

(2) "employee" has the meaning given it by section 2105 of this title;

(3) "basic work requirement" means the number of hours, excluding overtime hours, which an employee is required to work or is required to account for by leave or otherwise;

(4) "credit hours" means any hours, within a flexible schedule established under section 6122 of this title, which are in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek or a workday;

(5) "compressed schedule" means----

(A) in the case of a full-time employee, an 80-hour biweekly basic work requirement which is  
scheduled for less than 10 workdays, and

(B) in the case of a part-time employee, a biweekly basic work requirement of less than 80  
hours which is scheduled for less than 10 workdays;

(6) "overtime hours", when used with respect to flexible schedule programs under sections 6122 through 6126 of this title, means all hours in excess of 8 hours in a day or





40 hours in a week which are officially ordered in advance, but does not include credit hours;

(7) "overtime hours", when used with respect to compressed schedule programs under sections 6127 and 6128 of this title, means any hours in excess of those specified hours which constitute the compressed schedule; and

(8) "collective bargaining", "collective bargaining agreement", and "exclusive representative" have the same meanings given such terms----

(A) by section 7103(a)(12), (8), and (16) of this title; and

(B) in the case of any other unit, by the corresponding provisions applicable under the personnel system covering this unit.

### **§ 6122. Flexible schedules; agencies authorized to use**

(a) Notwithstanding section 6101 of this title, each agency may establish, in accordance with this subchapter, programs which allow the use of flexible schedules which include---

-

(1) designated hours and days during which an employee on such a schedule must be present  
for work; and

(2) designated hours during which an employee on such a schedule may elect the time of  
of  
such employee's arrival at and departure from work, solely for such purpose or, if  
and to the  
extent permitted, for the purpose of accumulating credit hours to reduce the length of  
the  
workweek or another workday. An election by an employee referred to in paragraph

(2)  
shall be subject to limitations generally prescribed to ensure that the duties and  
requirements of the employee's position are fulfilled.

(b) Notwithstanding any other provision of this subchapter, but subject to the terms of any written agreement referred to in section 6130(a) of this title, if the head of an agency determines that any organization within the agency which is participating in a program





under subsection (a) is being substantially disrupted in carrying out its functions or is incurring additional costs because of such participation, such agency head may----

- (1) restrict the employees' choice of arrival and departure time,
- (2) restrict the use of credit hours, or
- (3) exclude from such program any employee or group of employees.

**§ 6123. Flexible schedules; computation of premium pay**

(a) For purposes of determining compensation for overtime hours in the case of an employee participating in a program under section 6122 of this title----

- (1) the head of an agency may, on request of the employee, grant the employee compensatory time off in lieu of payment for such overtime hours, whether or not irregular or occasional in nature and notwithstanding the provisions of sections 5542(a), 5543(a)(1), 5544(a), and 5550 of this title, section 4107(e)(5) of title 38, section 7 of the Fair Labor Standards Act (29 U.S.C. 207), or any other provision of law; or

- (2) the employee shall be compensated for such overtime hours in accordance with such provisions, as applicable.

(b) Notwithstanding the provisions of law referred to in subsection (a)(1) of this section, an employee shall not be entitled to be compensated for credit hours worked except to the extent authorized under section 6126 of this title or to the extent such employee is allowed to have such hours taken into account with respect to the employee's basic work requirement.

(c)(1) Notwithstanding section 5545(a) of this title, premium pay for night work will not be paid to an employee otherwise subject to such section solely because the employee elects to work credit hours, or elects a time of arrival or departure, at a time of day for which premium pay is otherwise authorized, except that----





(A) if an employee is on a flexible schedule under which----

(i) the number of hours during which such employee must be present for work, plus

(ii) the number of hours during which such employee may elect to work credit hours or elect the

time of arrival at and departure from work, which occur outside of the night work hours

designated in or under such section 5545(a) total less than 8 hours, such premium pay shall

be paid for those hours which, when combined with such total, do not exceed 8 hours, and

(B) if an employee is on a flexible schedule under which the hours that such employee must be present for work include any hours designated in or under such section 5545 (a), such premium pay shall be paid for such hours so designated. (2) Notwithstanding section 5343(f) of this title, and section 4107(e)(2) of title 38, night differential will not be paid to any employee otherwise subject to either of such sections solely because such employee elects to work credit hours, or elects a time of arrival or departure, at a time of day for which night differential is otherwise authorized, except that such differential shall be paid to an employee on a flexible schedule under this subchapter (A) in the case of an employee subject to subsection (f) of such section 5343, for which all or a majority of the hours of such schedule for any day fall between the hours specified in such subsection, or (B) in the case of an employee subject to subsection (e)(2) of such section 4107, for which 4 hours of such schedule fall between the hours specified in such subsection.

#### **§ 6124. Flexible schedules; holidays**

Notwithstanding sections 6103 and 6104 of this title, if any employee on a flexible schedule under section 6122 of this title is relieved or prevented from working on a day designated as a holiday by Federal statute or Executive order, such employee is entitled to pay with respect to that day for 8 hours (or, in the case of a part-time employee, an appropriate portion of the employee's biweekly basic work requirement as determined under regulations prescribed by the Office of Personnel Management).

#### **§ 6125. Flexible schedules; time-recording devices**

Notwithstanding section 6106 of this title, the Office of Personnel Management or any agency may use recording clocks as part of programs under section 6122 of this title.





**§ 6126. Flexible schedules; credit hours; accumulation and compensation**

(a) Subject to any limitation prescribed by the Office of Personnel Management or the agency, a full-time employee on a flexible schedule can accumulate not more than 24 credit hours, and a part-time employee can accumulate not more than one-fourth of the hours in such employee's biweekly basic work requirement, for carryover from a biweekly pay period to a succeeding biweekly pay period for credit to the basic work requirement for such period. (b) Any employee who is on a flexible schedule program under section 6122 of this title and who is no longer subject to such a program shall be paid at such employee's then current rate of basic pay for (1) in the case of a full-time employee, not more than 24 credit hours accumulated by such employee, or (2) in the case of a part-time employee, the number of credit hours (not in excess of one-fourth of the hours in such employee's biweekly basic work requirement) accumulated by such employee.

**§ 6127. Compressed schedules; agencies authorized to use**

(a) Notwithstanding section 6101 of this title, each agency may establish programs which use a 4-day workweek or other compressed schedule.

(b)(1) An employee in a unit with respect to which an organization of Government employees has not been accorded exclusive recognition shall not be required to participate in any program under subsection (a) unless a majority of the employees in such unit who, but for this paragraph, would be included in such program have voted to be so included.

(2) Upon written request to any agency by an employee, the agency, if it determines that participation in a program under subsection (a) would impose a personal hardship on such employee, shall----

(A) except such employee from such program; or (B) reassign such employee to the first position within the agency----

(i) which becomes vacant after such determination,

(ii) which is not included within such program,





(iii) for which such employee is qualified, and

(iv) which is acceptable to the employee.

A determination by an agency under this paragraph shall be made not later than 10 days after the day on which a written request for such determination is received by the agency.

**§ 6128. Compressed schedules; computation of premium pay**

(a) The provisions of section 5542(a), 5544(a), and 5550(2) of this title, section 4107(e)(5) of title 38, section 7 of the Fair Labor Standards Act (29 U.S.C. 207), or any other law, which relate to premium pay for overtime work, shall not apply to the hours which constitute a compressed schedule.

(b) In the case of any full-time employee, hours worked in excess of the compressed schedule shall be overtime hours and shall be paid for as provided by the applicable provisions referred to in subsection (a) of this section. In the case of any part-time employee on a compressed schedule, overtime pay shall begin to be paid after the same number of hours of work after which a full-time employee on a similar schedule would begin to receive overtime pay.

(c) Notwithstanding section 5544(a), 5546(a), or 5550(1) of this title, or any other applicable provision of law, in the case of any full-time employee on a compressed schedule who performs work (other than overtime work) on a tour of duty for any workday a part of which is performed on a Sunday, such employee is entitled to pay for work performed during the entire tour of duty at the rate of such employee's basic pay, plus premium pay at a rate equal to 25 percent of such basic pay rate.

(d) Notwithstanding section 5546(b) of this title, an employee on a compressed schedule who performs work on a holiday designated by Federal statute or Executive order is entitled to pay at the rate of such employee's basic pay, plus premium pay at a rate equal to such basic pay rate, for such work which is not in excess of the basic work requirement of such employee for such day. For hours worked on such a holiday in excess of the basic work requirement for such day, the employee is entitled to premium pay in accordance with the provisions of section 5542(a) or 5544(a) of this title, as applicable, or the provisions of section 7 of the Fair Labor Standards Act (29 U.S.C. 207) whichever provisions are more beneficial to the employee.

**§ 6129. Administration of leave and retirement provisions**





For purposes of administering sections 6303(a), 6304, 6307(a) and (c), 6323, 6326, and 8339(m) of this title, in the case of an employee who is in any program under this subchapter, references to a day or workday (or to multiples or parts thereof) contained in such sections shall be considered to be references to 8 hours (or to the respective multiples or parts thereof).

### **§ 6130. Application of programs in the case of collective bargaining agreements**

(a)(1) In the case of employees in a unit represented by an exclusive representative, any flexible or compressed work schedule, and the establishment and termination of any such schedule, shall be subject to the provisions of this subchapter and the terms of a collective bargaining agreement between the agency and the exclusive representative.

(2) Employees within a unit represented by an exclusive representative shall not be included within any program under this subchapter except to the extent expressly provided under a collective bargaining agreement between the agency and the exclusive representative.

(b) An agency may not participate in a flexible or compressed schedule program under a collective bargaining agreement which contains premium pay provisions which are inconsistent with the provisions of section 6123 or 6128 of this title, as applicable.

### **§ 6131. Criteria and review**

(a) Notwithstanding the preceding provisions of this subchapter or any collective bargaining agreement and subject to subchapter (c) of this section, if the head of an agency finds that a particular flexible or compressed work schedule under this subchapter has had or would have an adverse agency impact, the agency shall promptly determined not to----

(1) establish such schedule; or

(2) continue such schedule, if the schedule has already been established.

(b) For purposes of this section, "adverse agency impact" means----

(1) a reduction of the productivity of the agency;

(2) a diminished level of services furnished to the public by the agency; or





(3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule).

(c)(1) This subsection shall apply in the case of any schedule covering employees in a unit represented by an exclusive representative.

(2)(A) If an agency and an exclusive representative reach an impasse in collective bargaining with respect to an agency determination under subsection (a)(1) not to establish a flexible or compressed schedule, the impasse shall be presented to the Federal Service Impasses Panel (hereinafter in this section referred to as the "Panel").

(B) The Panel shall promptly consider any case presented under subparagraph (A), and shall take final action in favor of the agency's determination if the finding on which it is based is supported by evidence that the schedule is likely to cause an adverse agency impact.

(3)(A) If an agency and an exclusive representative have entered into a collective bargaining agreement providing for use of a flexible or compressed schedule under this subchapter and the head of the agency determines under subsection (a)(2) to terminate a flexible or compressed schedule, the agency may reopen the agreement to seek termination of the schedule involved.

(B) If the agency and exclusive representative reach an impasse in collective bargaining with respect to terminating such schedule, the impasse shall be presented to the Panel.

(C) The Panel shall promptly consider any case presented under subparagraph (B), and





shall rule on such impasse not later than 60 days after the date the Panel is presented

the impasse. The Panel shall take final action in favor of the agency's determination to

terminate a schedule if the finding on which the determination is based is supported by

evidence that the schedule has caused an adverse agency impact.

(D) Any such schedule may not be terminated until---

(i) the agreement covering such schedule is renegotiated or expires or terminates pursuant to the terms of that agreement; or

(ii) the date of the Panel's final decision, if an impasse arose in the reopening of the agreement under subparagraph (A) of this paragraph.

(d) This section shall not apply with respect to flexible schedules that may be established without regard to the authority provided under this subchapter.

### **§ 6132. Prohibition of coercion**

(a) An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with--

(1) such employee's rights under sections 6122 through 6126 of this title to elect a time of

arrival or departure, to work or not to work credit hours, or to request or not to request

compensatory time off in lieu of payment for overtime hours; or

(2) such employee's right under section 6127(b) of this title to vote whether or not to be

included within a compressed schedule program or such employee's right to request an

agency determination under section 6127(b)(2) of this title.





(b) For the purpose of subsection (a), the term "intimidate, threaten, or coerce" includes, but is not limited to, promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).

**§ 6133. Regulations; technical assistance; program review**

(a) The Office of Personnel Management shall prescribe regulations necessary for the administration of the programs established under this subchapter.

(b)(1) The Office shall provide educational material, and technical aids and assistance, for use by an agency in connection with establishing and maintaining programs under this subchapter.

(2) In order to provide the most effective materials, aids, and assistance under paragraph (1),  
the Office shall conduct periodic reviews of programs established by agencies under this  
subchapter particularly insofar as such programs may affect---

- (A) the efficiency of Government operations;
- (B) mass transit facilities and traffic;
- (C) levels of energy consumption;
- (D) service to the public;
- (E) increased opportunities for full-time and part-time employment; and
- (F) employees' job satisfaction and non-worklife.

(c) With respect to employees in the Library of Congress, the authority granted to the Office of Personnel Management under this subchapter shall be exercised by the Librarian of Congress.

**Appendix B**

**PART 610, TITLE 5, CODE OF FEDERAL REGULATIONS**

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## **Subpart D--Flexible and Compressed Work Schedules**

**AUTHORITY: 5 U.S.C. 6133 (a).**

**SOURCE: 48 FR 44060, Sept. 27, 1983, unless otherwise noted.**

### **§ 610.401 General.**

This subpart contains regulatory requirements prescribed by the Office of Personnel Management to implement certain provisions of subchapter 11 of chapter 61 of title 5, United States Code. These regulations supplement that subchapter and must be read together with it.

### **§ 610.402 Coverage.**

The regulations contained in this subpart apply only to flexible work schedules and compressed work schedules established under subchapter 11 of chapter 61 of title 5, United States Code.

### **§ 610.403 Definitions.**

In this subpart "Agency" and "Employee" have the meaning given these terms in section 6121 of title 5, United States Code.

### **§ 610.404 Requirement for time-accounting method.**

An agency that authorizes a flexible work schedule or a compressed work schedule under this subpart shall establish a time-accounting method that will provide affirmative evidence that each employee subject to the schedule has worked the proper number of hours in a biweekly pay period.

### **§ 610.405 Holiday for part-time employees on flexible work schedules.**

If a part-time employee is relieved or prevented from working on a day within the employee's scheduled tour of duty that is designated as a holiday by Federal statute or Executive order, the employee is entitled to basic pay with respect to the holiday for the number of hours the employee is scheduled to work on that day, not to exceed 8 hours. When a holiday falls on a non-workday of a part-time employee, he or she is not entitled to an in-lieu-of day for that holiday.





**§ 610.406 Holiday for employees on compressed work schedules.**

(a) If a full-time employee is relieved or prevented from working on a day designated as a holiday by Federal statute or Executive order, the employee is entitled to basic pay for the number of hours of the compressed work schedule on that day.

(b) If a part-time employee is relieved or prevented from working on a day within the employee's scheduled tour of duty that is designated as a holiday by Federal statute or Executive order, the employee is entitled to basic pay for the number of hours of the compressed work schedule on that day. When a holiday falls on a non-workday of a part-time employee, he or she is not entitled to an in-lieu-of day for that holiday.

**§ 610.407 Premium pay for holiday work for employees on compressed work schedules.**

An employee on a compressed schedule who performs work on a holiday is entitled to basic pay, plus premium pay at a rate equal to basic pay, for the work that is not in excess of the employee's compressed work schedule for that day. For hours worked on a holiday in excess of the compressed work schedule, a full-time employee is entitled to overtime pay under applicable provisions of law and a part-time employee is entitled to straight time pay or overtime pay, depending on whether the excess hours are non-overtime hours or overtime hours.

If you have any questions concerning this reference guide, please contact the Field Advisory Services, Labor and Employee Relations Team, at (703) 696-6301, Team 3. Our DSN is 426-6301.