UNDER SECRETARY OF DEFENSE
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WASHINGTON, D.C. 20301-4000

JUL 21 2010

PERSONNEL AND
READINESS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
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UNDER SECRETARIES OF DEFENSE
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DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Administrative Claims for Sunday Premium Pay as a Result of the Decision in Fathauer v. United States, 566 F.3d 1352 (Fed. Cir. 2009)

Components have a requirement to pay Sunday premium pay to all eligible part-time employees, consistent with Office of Personnel Management (OPM) Compensation Policy Memorandum (CPM) 2009-21, dated December 8, 2009. The requirement applies to all eligible appropriated fund employees and to all eligible prevailing rate nonappropriated fund (NAF) employees; it does not apply to NAF white-collar employees. This memo provides guidance based on input from the Defense Finance and Accounting Service (DFAS) as to how to process administrative claims for unpaid Sunday premium pay owed eligible appropriated fund employees for Sundays worked during the covered claims period.

The subject ruling was effective on May 26, 2009. According to the Back Pay Act (5 U.S.C § 5596), payments must be authorized for eligible claims for six years prior to the date of a claim or the date of administrative determination that payments were inappropriately reduced or withheld. To avoid negative impact on employees, DoD Components shall pay claims for any unpaid Sunday premium pay owed part-time employees for Sunday work performed on or after May 26, 2003. Additional guidance on backpay actions is attached.

In CPM 2009-21 OPM provides guidance to Federal agencies on processing employees' administrative claims for Sunday premium pay consistent with the decision in *Fathauer v. United States,* 566 F.3d 1352 (Fed. Cir. 2009). Specifically, CPM 2009-21 provides that Federal agencies are required to pay part-time employees Sunday premium pay when such employees meet the requirements of 5 U.S.C. § 5546(a) and accompanying regulations (see 5 CFR §§ 550.171 and 550.172).

OPM subsequently determined that agencies are required to pay part-time prevailing rate systems employees (including part-time NAF prevailing rate employees) Sunday premium pay when such employees meet the requirements for entitlement to such payments pursuant to 5 U.S.C. § 5544(a) and 5 CFR § 532.509. DoD Components were to begin paying Sunday premium pay to all eligible part-time employees effective as of May 26, 2009.

Current and separated appropriated fund employees need not file a claim to receive premium pay for work performed since May 26, 2009. DFAS reviewed automated payroll records for this period and issued payments due to eligible appropriated fund employees in the payment for the pay period that ended May 22, 2010. Appropriated fund employees who believe they are entitled to this additional compensation, and who did not receive a payment, may submit a written claim using the procedures that will be issued separately by DFAS.

Payments to prevailing rate NAF employees (including those in the Flexible employment category) will be processed similarly to appropriated fund employees. NAF employers and payroll providers will review their records and issue payments to current NAF employees as quickly as possible. NAF employees who have separated must contact their previous DoD Component for additional procedures for filing claims. While NAF employees are not covered under the provisions of 5 U.S.C. § 5596, DoD Directive 5515.6, "Processing Claims Arising out of Operations of Nonappropriated Fund Activities," October 25, 2004, provides that DoD Components shall settle claims received from NAF employees using procedures that are similar to those used for claims received from appropriated fund employees.

The Office of the Under Secretary of Defense, Comptroller, has been notified of this change. You should ensure your Component comptrollers are also advised of potential backpay costs that may accrue. Questions concerning appropriated fund employees should be directed to Mr. Steve Rumble at Steven.Rumble@cpms.osd.mil, and questions concerning NAF employees should be directed to Ms. Alicia Marable at Alicia.Marable@cpms.osd.mil

Clifford L. Stanley

Attachment:
As stated

BACKPAY GUIDANCE

- DoD Components shall notify current and separated part-time DoD employees of CPM 2009-21.

- Pursuant to the Barring Act (31 U.S.C. 3702(b)), a claim against the Government must be received by the agency that conducts the activity from which the claim arises within six years after the claim accrues. Similarly, 5 U.S.C. § 5596 limits retroactive payments to the six-year period prior to receipt of a timely appeal or the date of an administrative determination that payments were improperly reduced or withheld.

- While NAF employees are not covered under the provisions of the Barring Act or 5 U.S.C. § 5596, DoD Directive 5515.6, "Processing Claims Arising out of Operations of Nonappropriated Fund Activities," October 25, 2004, provides that DoD Components shall settle claims received from NAF employees using procedures that are similar to those used for claims received from appropriated fund employees.

- DFAS, NAF employers, and NAF payroll providers will develop and distribute procedures for submission of claims for periods prior to May 26, 2009.

- As in all pay claims, the burden of proof is on the employee. In the this instance, the employee's burden is to establish that he or she: (1) worked part-time (for NAF this includes employees in the Flexible employment category) during the claims period on a regularly scheduled tour of duty that included Sunday, and (2) that he or she did not receive an appropriate amount of premium pay. If a DoD Component followed OPM's regulations, no independent proof of the second element shall be required.

- Employees shall provide documentation to their employer establishing when they performed the Sunday work. The documentation may include, but is not limited to, the employee's Notification of Personnel Action (Standard Form 50) indicating Part-Time Status (or equivalent form indicating eligibility), bi-weekly work schedules, time and attendance records, or other documentation such as employee affidavits or supervisory records that establish the employee performed eligible Sunday work during the period claimed.

- All claims shall be made in writing and DoD Components shall evaluate any relevant evidence provided by the claimant or in their possession to determine if it supports the claim.

- DoD Components may have relevant records that negate the need for the employee to submit documentation in support of their claim; however, submission of a claim is required from:
  - Separated NAF employees, and
  - All NAF and appropriated fund employees for periods prior to May 26, 2009.

- Employees who have retired or separated may file a claim with their former DoD Component and must receive a lump-sum payment for any Sunday premium pay found to be unpaid as a result of that claim.

- DoD Components may accept claims from representatives of current employees and of deceased or incompetent employees.

- Interest on backpay due appropriated fund employees under 5 U.S.C. 5596(b)(2) may be calculated using the tools found at http://www.opm.gov/oca/pay/backpay/backpay.asp.

- Since 5 U.S.C. 5596 does not extend to NAF employees, DoD shall not pay interest on claims from NAF employees for Sunday premium pay.

Attachment