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Departmental
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Office of the
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TO: Mission Area Chief Operating Officers and Staff Office Equivalents
USDA CHCO Council

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SUBJECT: OHRM Advisory 2023-006 Administratively Uncontrollable Overtime

The purpose of this advisory is to provide guidance on implementing administratively uncontrollable overtime (AUO) to USDA agencies and Staff Offices. AUO is an alternate form of overtime pay authorized under [5 U.S.C. 5545\(c\)\(2\)](#) and [5 CFR 550.151 to 164](#). Agency requests to authorize AUO are submitted to the Chief Human Capital Officer (CHCO), Office of Human Resources Office (OHRM), for approval.

Administratively Uncontrollable Overtime (AUO)

AUO is a type of discretionary premium pay for an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular, unscheduled overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty.

1. The requirement that a position be one in which "the hours of duty cannot be controlled administratively" must be inherent in the nature of the position. For example, the work hours of some law enforcement officers are governed by what criminals do and when they do it. In a position of this type, the hours of duty cannot be controlled by hiring additional personnel or rescheduling the hours of duty.
2. The requirement that the position requires "substantial amounts of irregular or occasional overtime work" involves the following elements:
 - a. A substantial amount of irregular or occasional overtime work means an average of at least 3 hours a week of AUO;
 - b. The irregular or occasional overtime work is a continual requirement, generally averages more than once a week; and
 - c. There must be a definite basis for the anticipation of irregular or occasional overtime work to continue over an appropriate period with a duration and frequency sufficient to meet the requirements under (a) and (b).

3. The requirement that an employee is generally "responsible for recognizing, without supervision, circumstances which require the employee to remain on duty" means:
 - a. The responsibility to remain on duty when required by circumstances must be a definite, official, and special requirement of their position.
 - b. The employee must remain on duty not merely because it is desirable but because of compelling reasons inherently related to continuance of their duties and of such a nature that failure to undertake this responsibility would constitute negligence; and
 - c. The requirement that the employee is responsible for recognizing circumstances does not include such clear-cut instances as, for example, when an employee must continue working because a relief fails to report as scheduled.

The fact that the employee does not need supervisory approval to perform irregular overtime work does not mean that the employee has a right to perform work when their supervisor has given a direct order to cease work.

4. The words "circumstances which require the employee to remain on duty" means:
 - a. The employee is required to continue on duty in continuation of a full daily tour of duty or, that after the end of the regular workday, the employee resumes duty in accordance with a prearranged plan or an awaited event. The performance of only call-back overtime work under [5 CFR 550.112\(h\)](#) does not constitute a circumstance that requires the employee to remain on duty.
 - b. The employee has no choice as to when or where the work is performed. This is different from situations when an employee has the option of taking work home or doing it at the office; or doing it in continuation of their regular hours of duty or later in the evening. It also differs from a situation in which an employee has such latitude in their working hours, as when in a travel status, that they may decide to begin work later in the morning and continue working later at night to better accomplish a given objective.

Determining the AUO Rate

AUO is paid as an appropriate percentage, not less than 10% nor more than 25% of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime required in the position. (See 5 U.S.C. 5545(c)(2) and 5 CFR 550.151)

1. An employee who occupies an authorized position does not qualify for AUO pay by itself; the employee must also perform an average of 3 hours of qualifying work each week to meet the minimum eligibility requirement for AUO. Employees who occupy positions that qualify for AUO but who do not average at least 3 qualifying hours per week are paid overtime under 5 U.S.C. 5542 for irregular or occasional overtime work instead of receiving AUO. Overtime of this nature is used to qualify for AUO during the next review cycle.

AUO is paid at one of the following percentages of the employee's rate of basic pay:

Average Hours of Irregular Overtime Worked per Week	AUO Percentage
Less than 3 hours	None
3 to 5 hours	10%
Over 5 to 7 hours	15%
Over 7 to 9 hours	20%
Over 9 hours	25%

2. The percentage amount of AUO pay must be established initially and reviewed periodically in accordance with regulations and this advisory. The AUO rate for a new employee or an employee assigned for the first time to an AUO-approved position will be determined by the employee's supervisor based on the irregular or occasional overtime hours customarily required in a specific position each week. The supervisor must review available records of similar positions and take into consideration the amount of qualifying AUO work required in the past and any other information that would provide a reasonable expectation of the number of AUO hours the position will require in the future. Once the employee has completed 4 quarters then the AUO rate is based on actual AUO hours worked (see 5 CFR 550.154 and 550.161(d) and (e)). Determinations to pay AUO for a particular position may not be retroactive.
3. AUO employees reassigned or promoted to a different AUO position will retain their current AUO rate until the next AUO review period. At the next AUO review period the employee's prior 4-quarter work history is used in the rate determination (see 5 CFR 550.164(g)). AUO is terminated on the effective date an AUO employee is permanently reassigned or promoted to a non-AUO covered position.

Qualifying Duty

Work that qualifies for AUO is based on the occurrence of compelling circumstances or reasons inherently related to the need to remain on duty or to resume duty in accordance with a prearranged plan or awaited event. Occurrences of this nature include special events, conditions, or situations inherent in the performance of duties that cannot be postponed to the next workday and that require employees to recognize, generally without supervision, the need to remain on duty. The compelling nature of the work is decided before, not after it is performed. When determining if the work performed qualifies for AUO, supervisors must consider the reason why a duty is being performed and not necessarily what duty is being performed.

Work activities and other related occurrences that are not the result of compelling circumstances do not qualify as AUO, including:

1. Work that could be performed during regular work hours or postponed until the next workday.
2. Arriving early or departing late from the office without official cause.
3. Working through lunch for personal reasons, including eating lunch at the desk.
4. The performance of work or training that could be scheduled during regular duty hours or that could be accomplished through the use of regularly scheduled overtime. Note: Approval of premium pay for training must meet the exceptions under [5 CFR 410.402](#).

Payment Provisions

1. An AUO employee is eligible to receive other premium pay for regularly scheduled work hours, including overtime pay under [5 U.S.C. 5542](#), night pay under 5 U.S.C. 5545(a), Sunday pay under [5 U.S.C. 5546\(a\)](#), and holiday premium pay under 5 U.S.C. 5546(b). However, once AUO becomes applicable, AUO is the sole compensation under Title 5 for all irregular or occasional overtime work hours. (See 5 CFR 550.163(b))
2. AUO employees may not receive:
 - a. Premium pay differentials for the hours claimed as AUO;
 - b. Compensatory time off instead of overtime pay for irregular or occasional overtime work;
 - c. AUO instead of compensatory time off for travel;
 - d. Hazardous duty differential for the hours claimed as AUO; and
 - e. AUO is not used as a basis to compute allowances and differentials.
3. Employees continue to receive AUO during periods of paid leave.
4. Agencies may continue to pay AUO:
 - a. For a period of not more than 10 consecutive prescribed workdays on temporary assignment to other duties in which conditions do not warrant payment of premium pay on an annual basis, and for a total of not more than 30 workdays in a calendar year while on such a temporary assignment. An agency may not continue to pay an employee premium pay on an annual basis under this paragraph for more than 60 workdays in a calendar year.
 - b. During a temporary assignment that would not otherwise warrant the payment of AUO pay if the temporary assignment is directly related to a national emergency declared by the President. An agency may continue to pay AUO for not more than 30 consecutive workdays for such a temporary assignment and for a total of not more than 90 workdays in a calendar year while on such a temporary assignment.

The period of time which an employee continues to receive AUO under these situations is not considered in computing the average hours of irregular and occasional overtime in the employee's quarterly AUO review periods. (See 5 CFR 550.154(c))
5. AUO may not be paid to a criminal investigator receiving availability pay under [5 CFR 550.181](#).
6. AUO is treated as basic pay for severance pay under [5 U.S.C. 5595\(c\)](#); worker's compensation under [5 U.S.C. 8114\(e\)](#); retirement benefits under [5 U.S.C. 8331\(3\)](#) and [5 U.S.C. 8401\(4\)](#); life insurance under [5 U.S.C. 8704\(c\)](#); advances in pay under [5 U.S.C. 5524\(a\)](#); thrift savings plan under [5 U.S.C. 8431 to 8440\(f\)](#); and lump sum leave payments.

Work Schedules

1. AUO employees may elect to work a standard fixed 8-hour work schedule or a flexitour work schedule.
2. Employees must take a minimum of 30 minutes for an unpaid bona fide meal break, roughly halfway through their shift, on any day that they work more than 6 hours.

Pay Under the Fair Labor Standards Act (FLSA)

Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. Nonexempt employees who receive AUO are covered under section 7(k) of the Act. Overtime is defined as hours of work in excess of 42.75 in a 7-day period (instead of a 40-hour weekly overtime threshold, the weekly overtime threshold is 42.75 hours).

Training

1. An appropriate number of hours for training should be scheduled in advance of the administrative workweek. Training should be completed within an 8-hour tour; however, when unforeseen events occur (e.g., equipment failure, etc.) which requires the employee to remain on duty, it would be appropriate to code the additional irregular overtime hours as AUO.
2. Agencies may continue to pay AUO for an aggregate period of not more than 60 prescribed workdays on temporary assignment to a formally approved program for advanced training duty directly related to duties for which premium pay on an annual basis is payable. An agency may not continue to pay AUO under this paragraph for more than 60 workdays in a calendar year. The period of time which an employee continues to receive AUO under this paragraph is not considered in computing the average hours of irregular and occasional overtime in the employee's quarterly AUO review periods. (See 5 CFR 550.154(c))

Light Duty

When an employee is placed in light-duty status and remains in their current position, the employee will continue to receive AUO in accordance with 5 CFR 550.162, for not more than 10 consecutive workdays, and for a total of not more than 30 workdays in a calendar year, while on such temporary assignment. The supervisor has the responsibility to ensure the authority is properly administered and that the payment must not exceed 30 workdays in a calendar year.

Daily Log

Employees who receive AUO pay are required to keep records of all hours of work, including whether each hour of work is regularly scheduled or irregular and occasional in nature. This documentation is necessary not only to determine the appropriate rate of AUO pay but also to determine whether employees are entitled to additional pay for regularly scheduled overtime work and premium pay for regularly scheduled night, Sunday, and holiday work.

Employees must keep a daily log of the number of AUO hours worked, including the date, time, and activity performed. The daily log and timesheet must be submitted to the employee's supervisor at the end of each pay period for review and approval. Nonexempt employees must also record their weekly AUO hours in the time and attendance system under transaction code 41. These hours are not paid hours but are used to determine the employee's regular hourly rate of pay under the FLSA. To ensure consistent reporting requirements among employees, agencies should develop a daily log form for employee use.

Quarterly Review Period

The AUO rate is calculated quarterly and is based on the average of actual AUO hours worked over the prior 4 quarters, as indicated in the daily log. Employees may not exclude leave and other days that are contrary to regulations from their AUO calculations (see OHRM advisory dated October 20, 2022, *OHRM Advisory FY 2023-002: Administratively Uncontrollable Overtime Review Periods*). The quarters for the AUO review period are January through March (pay periods 1 to 6); April through June (pay periods 7 to 13); July through September (pay periods 14 to 20); and October through December (pay periods 21 to 26 (or 27)). After submission of timesheets for pay periods 6; 13; 20; and the last pay period of the year, employees must complete their quarterly computation based on their daily logs and submit it to their supervisor for review and approval. Changes to the AUO percentage rate will generally be effective pay period 1, 7, 14, or 21. To ensure consistent reporting requirements among employees, agencies should develop a quarterly review form for employee use.

The supervisor's review is mandatory. The supervisor must carefully review and validate the information submitted in the daily logs, timesheets, and quarterly computation form. The AUO rate must be adjusted accordingly, or discontinued if applicable, based on the average of the prior 4 quarters.

Annual Certification Requirement and Requests to Continue AUO Pay

Agencies that are authorized to pay AUO must annually request AUO authority if they wish to continue to pay AUO for the next calendar year. In addition, agencies must certify the usage and AUO rate for each of their AUO employees for the prior year. Certifications must include an alphabetical listing of each employee who received AUO during the prior year (name, series, and grade); total AUO hours claimed per employee (per pay period); AUO percentage rate received by each employee (per pay period); and agencies must certify the requirements for AUO have been met in accordance with 5 CFR 550.151 to 164. Annual certifications must be submitted to the CHCO, OHRM, by January 31st of each year.

If you have any questions about this advisory, please contact Mike Rafferty, Director, Office of Human Resources Policy Division, at michael.rafferty@usda.gov or (202) 603-6180.