

SPECIAL REPORT -

**FEMA Paid Employees Over
the Annual Premium Pay Cap**





DHS OIG HIGHLIGHTS

FEMA Paid Employees Over the Annual Premium Pay Cap

July 31, 2018

Why We Did This Special Review

The FEMA Administrator requested that the OIG review issues related to FEMA paying employees in excess of the annual pay limitations. We conducted this special review to assess why these exceedances occurred, as well as what actions FEMA has taken to address the overpayments and enforce the statutory premium pay limitations going forward.

What We Recommend

We made four recommendations aimed at ensuring that FEMA resolves the overpayment issue, avoids future premium pay cap exceedances, and complies with Federal regulations going forward.

For Further Information:

Contact our Office of Public Affairs at (202) 254-4100, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

We found that FEMA overpaid its employees because it mistakenly believed the Department's payroll provider had an automated control to prevent payments over the annual cap, and because it did not follow its own premium pay policy. We also found that FEMA has no effective policy or practice to determine the Fair Labor Standards Act status of FEMA employees during disaster deployments, which also contributed to this issue. Since discovering the overpayments, FEMA has been working to calculate how many people were overpaid, but it cannot finish that analysis until it addresses a number of outstanding questions. Nor has FEMA yet determined how it will prevent future overpayments or account for the Fair Labor Standards Act classification issue. Although Congress passed legislation in March 2018 raising the annual premium pay cap for 2017, FEMA must still resolve these issues to determine whether it made any payments over the revised 2017 pay cap and whether it owes employees additional overtime as a result of the raised cap. Additionally, it must still complete its analysis of possible overpayments in prior years, and determine how to prevent overpayments and ensure compliance with Federal regulations going forward.

FEMA Response

FEMA concurred with our recommendations and described the corrective actions it has taken and plans to take. Appendix B includes FEMA's response in its entirety.



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Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

July 31, 2018

MEMORANDUM FOR: The Honorable Claire M. Grady
Under Secretary for Management
Department of Homeland Security

The Honorable William B. Long
Administrator
Federal Emergency Management Agency

FROM: John V. Kelly 
Senior Official Performing the Duties of the
Inspector General

SUBJECT: Special Report – *FEMA Paid Employees Over the
Annual Premium Pay Cap*

For your action is a special report, *FEMA Paid Employees Over the Annual Premium Pay Cap*. This report incorporates the management response provided by FEMA.

The report contains four recommendations aimed at ensuring that FEMA adequately addresses past overpayments and complies with the Federal premium pay cap going forward. FEMA concurred with all four recommendations. Based on the information provided in FEMA's response to the draft report, we consider recommendations 1 through 4 open and resolved.

As prescribed by DHS Directive 077-01, *Follow-Up and Resolution for Office of Inspector General Report Recommendations*, within 90 days of the date of this memorandum, please provide our office with a written update on your corrective action plan and the target completion date for each recommendation. In this update, please identify the parties responsible for implementing the corrective action and provide any other supporting documentation necessary to inform us about the current status of the recommendations. Until your response is received and evaluated, the recommendations will remain open. Please send your written update to Special.Reviews@oig.dhs.gov.



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Consistent with our responsibility under the *Inspector General Act of 1978*, as amended, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over DHS. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Matthew Neuburger, Acting Director of the Special Reviews Group, at (202) 254-4100.

Attachment



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Overview

On December 22, 2017, Federal Emergency Management Agency (FEMA) Administrator, Brock Long, sent a memorandum to U.S. Department of Homeland Security (DHS or the Department) Acting Inspector General, John V. Kelly, requesting that the DHS Office of Inspector General (OIG) review issues related to FEMA “paying employees in excess of the annual pay limitations established in Title V, United States Code.” We conducted this special review to assess why these exceedances occurred and to evaluate whether FEMA had taken sufficient action to address these overpayments and enforce the statutory premium pay limitations going forward.

We found that FEMA overpaid its employees because it mistakenly believed the Department’s payroll provider, the National Finance Center (NFC), had controls to enforce the annual premium pay limitation, and because FEMA did not follow its own premium pay policy. We also found that FEMA does not determine the Fair Labor Standards Act status of employees during disaster deployments, which further contributed to this issue. Since discovering this issue, FEMA has been working to calculate how many people were overpaid, but it cannot finish that analysis until it addresses a number of outstanding questions. Nor has FEMA yet determined how it will prevent future overpayments or account for the Fair Labor Standards Act classification issue. Although Congress recently passed legislation raising the annual premium pay cap for 2017, FEMA must still resolve these issues to determine whether it made any payments over the revised 2017 pay cap and whether it owes employees additional overtime as a result of the raised cap. Additionally, it must still complete its analysis of possible overpayments in prior years, and determine how to prevent overpayments and ensure compliance with Federal regulations going forward.

Explanation of the Biweekly and Annual Premium Pay Caps

For most Federal employees, overtime pay and other “premium pay” is governed by Title 5 of the U.S. Code and related U.S. Office of Personnel Management (OPM) regulations. Premium pay is additional pay provided to employees for working certain types of hours or under certain types of conditions, such as overtime pay, holiday pay, night pay differential, etc.¹

¹ 5 C.F.R. § 550.103 defines premium pay as “the dollar value of earned hours of compensatory time off and additional pay authorized by subchapter V of chapter 55 of title 5, United States Code, and this subpart for overtime, night, Sunday, or holiday work; or for standby duty, administratively uncontrollable overtime work, or availability duty. This excludes overtime pay



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Section 5547 of Title 5 limits the amount of premium pay that General Schedule (GS) employees may receive. Employees in the United States cannot earn a combination of basic pay and premium pay that exceeds the basic pay rate of a GS-15 step 10 adjusted for locality or special rate supplement.² Therefore, the amount of premium pay that employees may earn depends both on their base salary (*i.e.*, their grade and step), and on the location of their official worksite. For example, in 2018, a GS-15 step 8 in Richmond, Virginia may earn up to \$318.40 in premium pay each pay period without exceeding the cap, but a GS-15 step 8 in Washington, D.C. may not earn any premium pay since his/her base salary is already equal to the base salary of a GS-15 step 10 when the locality adjustment is applied.³

Generally, the premium pay cap is applied on a biweekly basis conforming to the Federal pay period. However, when an employee performs “work in connection with an emergency,” or “work that is critical to the mission of the agency,” an agency may waive the biweekly cap and instead apply an annual cap.⁴ When that happens, an employee is allowed to exceed the biweekly cap while performing the emergency or mission-critical work, but the employee’s annual earnings are limited by an annual cap equal to the biweekly cap times the number of pay periods in that year. Once the emergency or mission-critical work ends, the biweekly cap should be reinstated, and the employee also remains subject to the annual cap for the rest of the year.⁵ To help manage the annual cap when the biweekly cap is waived, agencies may defer paying premium pay above the biweekly cap until the end of the calendar year.⁶ Agencies may not waive the annual premium pay cap.

Federal employees are required to repay the government if they receive salary payments in error, including pay above the premium pay caps. However,

paid to employees under the Fair Labor Standards Act and compensatory time off earned in lieu of such overtime pay.”

² Under 5 U.S.C. § 5547(a), the limit is actually the greater of a GS-15 step 10’s basic pay rate or the rate payable for level V of the Executive Schedule. For employees stationed in the United States, the GS-15 step 10 adjusted rate of basic pay is always the higher rate.

³ In Richmond, biweekly base pay is \$5,904.00 for GS-15 step 8 employees and \$6,222.40 for GS-15 step 10 employees. In Washington, D.C., the biweekly base pay for GS-15 step 8 and step 10 employees is \$6,294.40. For a list of all premium pay caps, see <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/#url=Biweekly-Pay-Caps>.

⁴ 5 U.S.C. § 5547(b); 5 C.F.R. § 550.106. An agency or OPM may determine that an “emergency” exists for purposes of waiving the biweekly cap, but only an agency may determine that an employee is performing mission-critical work. 5 C.F.R. § 550.106(a)(1); 5 C.F.R. § 550.106(b)(1).

⁵ 5 C.F.R. § 550.106(g).

⁶ 5 C.F.R. § 550.106(e).



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employees may request that an agency waive the debt, which the agency may do if it determines collecting it “would be against equity and good conscience and not in the best interests of the United States.”⁷ Agencies may not waive the debt when there is any “indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim.”⁸ Within DHS, FEMA and other components may waive debts up to \$10,000, and the DHS Chief Financial Officer (CFO) may waive debts up to \$100,000.⁹

What Happened:
FEMA’s Overpayments to Employees and its Initial Response

Three major hurricanes — Harvey, Irma, and Maria — as well as major wildfires in California made late 2017 one of the most challenging disaster response periods in FEMA’s history. To address the overwhelming response, recovery, and basic operations needs related to these disasters, FEMA called on its non-disaster response personnel to set aside their normal duties and deploy in large scale to temporary disaster-related assignments. When this proved insufficient, DHS activated the Surge Capacity Force (SCF) to deploy volunteers first from other DHS components, and then from other Federal agencies, to provide additional support to disaster response and recovery operations.¹⁰

The Department’s Office of the Chief Human Capital Officer (Human Capital Office) issued biweekly premium pay cap waivers at the onset of each of the three hurricanes. All three waivers expired on December 31, 2017.¹¹ On November 3, 2017, OPM took the “unusual” step of issuing its own waiver to the biweekly premium pay cap for work related to the three hurricanes. The OPM waiver covered “all Federal employees covered by the title 5 premium pay

⁷ 5 U.S.C. § 5584(a).

⁸ 5 U.S.C. § 5584(b)(1).

⁹ *DHS Financial Management Policy Manual*, Section 3.14, Waiver of Claims Against Employees for Erroneous Payments, September 24, 2014. Debts over \$100,000 must be waived by the U.S. Department of Justice. For purposes of determining who is authorized to waive the debt, the *DHS Financial Management Policy Manual* contemplates aggregating claims arising from similar situations. FEMA and the DHS CFO have been in contact about how to aggregate the claims at issue here, but have not yet made any determinations.

¹⁰ The SCF program was first authorized as part of the Post-Katrina Emergency Management Reform Act of 2006. It was designed to allow the DHS components to help communities and survivors following a large-scale disaster. The SCF was activated only once before, in the aftermath of Hurricane Sandy in October 2012.

¹¹ The hurricane Harvey, Irma, and Maria waiver periods began, respectively, on August 20, 2017 (pay period 17), September 3, 2017 (pay period 18), and September 17, 2017 (pay period 19).



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provisions” and did not specify an end date.¹² To date, the OPM waiver continues in effect.

The Department’s time and attendance system, called WebTA, has a default setting that automatically applies the biweekly pay cap to DHS employees’ accounts. When the biweekly pay cap setting is on, the NFC will only pay an employee up to the biweekly limit, even if that employee submits overtime hours that would result in a payment above the biweekly cap. Consistent with FEMA practice, when DHS issued the three biweekly pay cap waivers in 2017, timekeepers switched off the biweekly pay cap setting in WebTA for employees doing work covered by the waivers.¹³ This told the NFC to pay all claimed overtime to those employees, including overtime that exceeded the biweekly pay cap. Once the DHS waiver periods ended, FEMA instructed timekeepers to switch the biweekly pay cap setting back on.

FEMA Discovered the Pay Cap Exceedances and Notified Employees

According to senior officials within FEMA’s Office of the Chief Component Human Capital Officer (OCCHCO), they first became concerned that personnel might have exceeded, or were at risk of exceeding, the annual premium pay cap at a meeting in late October 2017.¹⁴ As a result, OCCHCO personnel conducted a preliminary analysis of employee payroll data for calendar year 2017, which showed that a significant number of FEMA employees had, in fact, already exceeded the annual premium pay cap, and numerous others were at, or nearing, the cap. According to OCCHCO personnel, it was around the first week of November 2017 when they first confirmed that personnel had exceeded the annual pay cap.

After identifying the annual pay cap exceedances, OCCHCO sent several notices to FEMA employees:

- On November 2, 2017 OCCHCO sent a memorandum to all FEMA employees providing general information about the annual premium pay limitation and noting that some employees may “be affected” by the annual pay cap. This guidance stated that OCCHCO was working to identify employees at risk of exceeding the annual premium pay cap,

¹² Memorandum for Heads of Agencies and Executive Departments, Pay and Leave Guidance for Hurricane Recovery Volunteers, November 3, 2017.

¹³ Timekeepers, but not individual employees or supervisors, can change the WebTA setting to allow payments over the biweekly cap. To do so, they select “May Exceed Sal. Cap” in the “RSO/Salary Cap” field.

¹⁴ The senior officials could not recall what led them to question what was being done to enforce the annual premium pay cap.



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and would contact those employees and their supervisors. On the following day, OCCHCO posted a Frequently Asked Questions (FAQ) guidance document on its intranet page answering 17 questions about the annual premium pay limitation. The memorandum and FAQs both noted that employees would be billed for any overpayments they received.

- Also in early November 2017, OCCHCO began notifying the employees it had identified as having reached or exceeded the annual premium pay cap. This notification instructed these employees not to claim any additional premium pay on their timecards, but to instead accurately record new overtime in some other way, such as in a comments field in WebTA. The email also suggested that employees have their timekeepers turn the biweekly pay cap setting in WebTA back on.
- Around the same time, OCCHCO also contacted employees who were nearing the annual cap to inform them of the number of remaining paid overtime or compensatory hours, and corresponding dollar amount, available to them under the cap.

FEMA's Additional Steps to Understand and Address Exceedances

Beyond notifying employees, FEMA took several additional steps to understand and address annual pay cap exceedances. First, beginning in December 2017, FEMA and/or the Department had several conversations and meetings with the NFC to determine whether there were automated controls to enforce the annual pay cap. The NFC clarified that the biweekly cap setting in WebTA was the only automated control on premium pay, and it was therefore incumbent upon agencies to enforce an administrative control whenever the biweekly cap setting was turned off. FEMA and DHS requested that the NFC determine how feasible it would be to establish a system control to cap annual premium pay, or to implement some other limited functionality to help enforce the annual cap. The NFC did not believe it could feasibly develop a hard annual cap, but discussions are ongoing.¹⁵

In addition, the FEMA Chief Component Human Capital Officer tasked OCCHCO's Policy and Accountability Branch with conducting an internal review of the OCCHCO Payroll and Compensation Branches to, among other

¹⁵ Virtually all of DHS uses WebTA and the NFC and is therefore at risk of overpaying employees due to the NFC's lack of an annual cap control. Once it learned about the overpayment issue at FEMA, the Department asked other DHS components to identify if they had any controls on the annual cap. In response, several components reported that they assumed (incorrectly) that the NFC had a system control in place.



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things, assess premium pay policies and procedures, identify gaps, and make recommendations for improvements. The final report, which was submitted to FEMA's Acting Associate Administrator for Mission Support on March 1, 2018, identified a number of weaknesses and made several recommendations to strengthen internal controls, including controls on premium pay limitations.

Finally, OCCHCO personnel continue to work toward an accurate final analysis of annual premium pay cap exceedances in 2012-2017. FEMA's initial analysis of 2017 payroll data was based on a projection with several pay periods still remaining in the year, and without fully taking into account all of the nuances of accounting for premium pay. FEMA now has complete data, but addressing all the complexities of calculating annual premium pay has posed a challenge. As of mid-February 2018, FEMA had identified 148 individuals who had exceeded the 2017 annual cap by a total of approximately \$1,067,000. Of those 148 employees, nine individuals exceeded the annual cap by more than \$20,000, including one person who went over by approximately \$57,570. In addition, FEMA identified 13 individuals who exceeded the 2016 cap by a total of approximately \$75,000.¹⁶ Once FEMA has finalized its analysis, a third party vendor will verify FEMA's calculations before FEMA initiates any possible actions to collect overpayment debts.

FEMA's Communications with Congress

In November 2017, staff from the House Appropriations Committee, Subcommittee on Homeland Security, first asked FEMA whether personnel were nearing the annual premium pay cap. This initiated ongoing communications between FEMA and a number of Congressional members, committees, and staff about the premium pay cap exceedances, and a possible legislative waiver to the annual premium pay cap for personnel working on the 2017 disaster response and recovery efforts. These briefings generated a request for FEMA to review prior years (2012-2016) to determine if 2017 was truly an anomaly, or if there were past incidents of premium pay cap exceedances.

On March 23, 2018, the President signed the *Consolidated Appropriations Act, 2018*, which included language lifting the annual premium pay cap for disaster response work in 2017.¹⁷ The relevant language specified that premium pay

¹⁶ In preliminary calculations provided to Congress in January 2018, FEMA estimated approximately \$973,000 in overages in 2017, and more than \$340,000 in 2016. As compared to FEMA's mid-February calculations, these preliminary calculations underestimated the 2017 overpayments, and overestimated the 2016 overpayments. FEMA has not yet provided updated calculations to Congress.

¹⁷ Public Law 115-141.



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that was funded through the FEMA Disaster Relief Fund in 2017 was not subject to the traditional biweekly or annual premium pay caps and would instead be subject to a \$187,000 limit. This language covered FEMA employees as well as SCF volunteers, whose overtime was reimbursed through the Disaster Relief Fund.

The new 2017 pay cap limit set by the Act effectively excused the pay cap overages for 146 of the 148 employees FEMA had identified as of February 2018, thereby reducing the estimated overpayments to about \$38,000 for 2017. The Act did not, however, waive prior pay cap exceedances (*e.g.*, for the period 2012 through 2016), or limit Federal agencies' obligations to comply with the annual pay cap going forward.

How This Happened: Failures that Led to FEMA's Overpayments

Three main factors contributed to FEMA's failure to comply with the annual pay cap. First, FEMA mistakenly believed the NFC had an automated control to prevent payments over the annual cap. Second, FEMA's OCCHCO failed to follow its own premium pay policy, which was designed to mitigate the risk of overpayments. Third, FEMA has no effective policy or practice to track its employees' work during disaster deployments and, therefore, cannot determine whether that work is covered by the Fair Labor Standards Act (FLSA).

FEMA Was Unaware that the NFC Lacked Controls to Enforce the Annual Premium Pay Cap

The NFC adequately monitors and enforces the *biweekly* premium pay cap. In general, the NFC accounts for an employee's locality-adjusted salary, overtime rate, and FLSA status to ensure that the biweekly cap is not exceeded as long as the WebTA setting is on. When an employee records overtime hours that would result in payment above the biweekly cap, the NFC does not pay those hours. Instead, it issues a payment equal to the biweekly cap and denotes on the employee's Earnings and Leave statement the amount of overtime or compensatory time that exceeded the cap and was therefore not paid.

However, when a timekeeper has changed the setting in WebTA to allow payments over the biweekly premium pay cap, the NFC has no controls in place to enforce the *annual* premium pay cap, which remains in effect even during periods of biweekly pay cap waivers. The NFC system tracks the various components of premium pay and allows human resources offices to view details of premium pay earnings by employee. Yet, the NFC does not prevent the



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annual cap from being exceeded, or automatically notify anyone once it is exceeded. Despite requests from DHS and other agencies, the NFC does not believe it can feasibly create this functionality. According to the NFC, adding this functionality would be the largest project they have undertaken, would delay every other change to the system, and may never be entirely comprehensive.

FEMA and other DHS components asserted that before this issue arose in connection with the 2017 disasters, they did not realize that the NFC lacked any controls to enforce the annual cap when the biweekly cap is waived. DHS OIG was unable to determine definitively whether the NFC ever instructed DHS and FEMA about the lack of annual cap system controls.¹⁸ Nevertheless, regardless of whether the NFC communicated this or not, DHS and FEMA ultimately bore responsibility for understanding the NFC's controls and establishing any additional controls necessary to enforce the annual cap.¹⁹

FEMA Did Not Follow its Premium Pay Policy

Even though it failed to realize that the NFC did not enforce the annual pay cap, FEMA OCCHCO could have prevented or at least minimized overpayments if it had followed its own Premium Pay Policy.²⁰

FEMA's Premium Pay Policy charges employees, supervisors, program offices, and "approving officials" with "ensuring, to the extent practicable" that employees do not exceed the biweekly or annual premium pay caps.²¹ However, as one senior OCCHCO official acknowledged, Federal pay regulations are "nuanced" and average employees — particularly those working long overtime hours during a disaster — may not be familiar with or fully understand all of the regulations. Therefore, the Premium Pay Policy assigns several specific

¹⁸ NFC personnel claimed they previously notified DHS and/or FEMA that the agencies were responsible for enforcing the annual cap when the biweekly cap setting is turned off in WebTA. However, despite repeated requests from DHS OIG, the NFC has not provided any documentation of such instructions.

¹⁹ See, e.g., GAO, *Standards for Internal Controls in the Federal Government*, GAO-14-704G, September 2014, at OV4.01 ("management needs to understand the controls each service organization has designed, has implemented, and operates for the assigned operational process and how the service organization's internal control system impacts the entity's internal control system."); OMB Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Controls*, July 15, 2016, at III.B1 ("Agencies are ultimately responsible for the services and processes provided by third party service organizations as they relate to the Agency's ability to maintain internal control over operations, reporting, and compliance with laws and regulations.").

²⁰ FEMA Manual 253-2-1, Premium Pay, Approved February 11, 2014 (Premium Pay Policy or Policy).

²¹ Premium Pay Policy at § 1-8 C.4; § 1-8 D.5; § 1-8 F.4; § 3-6 C.5.



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responsibilities to OCCHCO aimed at helping FEMA employees comply with the caps. Among other things, OCCHCO is responsible for:

- providing guidance on the calculation and payment of premium pay;²²
- providing guidance and information on employees' biweekly and annual compensation to avoid their exceeding either the biweekly or annual pay cap;²³
- advising employees (and their supervisors) when they are expected to exceed the annual pay cap;²⁴
- identifying for FEMA program offices and supervisors those employees whose compensation places them at risk of exceeding the biweekly pay cap and employees who are nearing the annual pay cap;²⁵ and
- providing guidance to FEMA program offices and supervisors on which employees are subject to biweekly pay cap limitations based on the employee's status under the FLSA.²⁶

However, OCCHCO was not performing its responsibilities under any of these provisions of the Premium Pay Policy before it discovered the overpayment issue in 2017. Since that time, OCCHCO has taken measures to try to carry out some of these responsibilities, but those efforts have been incomplete.

First, before November 2017, OCCHCO did not provide any detailed guidance or instruction to employees and supervisors on what constitutes premium pay or how to calculate premium pay for purposes of the annual cap.²⁷ When OCCHCO finally did issue guidance on November 2 & 3, 2017, the guidance was not completely accurate or comprehensive. Shortly after FEMA issued its guidance, OPM provided comments to the DHS Human Capital Office calling attention to a number of incorrect and/or misleading statements that it identified in FEMA's guidance. For example, OPM noted that FEMA identified the wrong period of earnings that applies towards the annual cap. OPM also opined that employees following FEMA's instruction could, under certain circumstances, nevertheless continue to improperly earn premium pay even after they had exceeded the annual cap. OCCHCO only recently learned about OPM's concerns because the DHS Human Capital Office waited several months

²² Premium Pay Policy at § 1-8 B.4.

²³ Premium Pay Policy at § 1-8 B.3.

²⁴ Premium Pay Policy at § 1-8 B.2.

²⁵ Premium Pay Policy at §§ 3-6 A.3-4.

²⁶ Premium Pay Policy at § 3-6 A.2.

²⁷ Premium Pay Policy at § 1-8 B.4.



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to share the concerns with OCCHCO. Rather than correct the misleading guidance, OCCHCO simply removed the guidance from its intranet.

Additionally, OCCHCO's agency-wide guidance did not clearly address how employees who had reached the annual cap should account for their hours in WebTA. The Premium Pay Policy instructs employees to both ensure they do not exceed the cap, and to "accurately document[] hours worked."²⁸ However, it is not clear how employees that have reached the cap can accurately record their hours in WebTA without further exceeding the cap, since the NFC pays employees for all approved overtime entered in WebTA when the biweekly cap is waived. While OCCHCO separately informed a subset of employees that they could record hours exceeding the cap in a WebTA comments field, it did not include this instruction in the November 2 & 3, 2017 guidance, or in any other agency-wide notice. Therefore, many employees still have not been instructed about how to comply with two seemingly inconsistent mandates in the Premium Pay Policy.

Second, OCCHCO did not provide "guidance and information on employees' biweekly and annual compensation," as required under the Policy.²⁹ This is particularly problematic because FEMA employees and supervisors lack easy access to the information needed to calculate earnings toward the caps. According to the NFC, only payroll administrators, such as those within OCCHCO, have access to year-to-date premium pay data; individual employees and supervisors do not.

Further, employees cannot simply look at their Earnings and Leave statements to determine their annual premium pay since those statements do not reflect compensatory time earned, which counts towards the cap. Instead, employees would need to manually calculate the value of compensatory time hours they earned throughout the year, and add that number to the other premium pay and base pay on their Earnings and Leave statements. Compounding the problem is the fact that supervisors are not given the training, tools, resources, or information that would allow them to prevent employees from exceeding the annual cap. For example, WebTA does not show any financial information, so a supervisor does not see an employee's earnings when he/she certifies the employee's overtime in WebTA. As OCCHCO's Policy and Accountability Branch recently concluded, "neither supervisors nor employees have sufficient guidance or resources to accurately track and monitor premium pay."

²⁸ Premium Pay Policy at §§ 1-8 F.3-4.

²⁹ Premium Pay Policy at § 1-8 B.3.



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Third, prior to November 2017, OCCHCO did not identify or notify employees who were “expected to exceed” the annual pay cap, “nearing the annual pay cap,” or “whose compensation places them at risk of exceeding the biweekly pay cap.”³⁰ Without this notice, employees may not have realized that they were at risk of exceeding the annual cap. Since discovering this issue, OCCHCO now identifies and notifies employees who have already earned enough overtime to exceed the annual cap.

Fourth, FEMA never established “approving officials” as mandated by the Policy. Under the Policy, an employee’s supervisor may only authorize and certify overtime work that causes the employee to exceed the biweekly cap if he/she requests and receives approval in writing from an “approving official” who is designated by the relevant FEMA program office to ensure “to the extent practicable” that employees do not exceed the annual pay cap.³¹ Yet FEMA never created this additional level of review, which could help FEMA avoid unwitting exceedances of the annual pay cap.

Finally, OCCHCO never issued “guidance to FEMA program offices and supervisors on which employees are subject to biweekly pay cap limitations based on the employee’s status under the FLSA.”³² This is critical because FLSA-covered overtime does not count toward the premium pay caps. During an emergency, employees may be temporarily required to perform duties different from their regular duties. The FLSA may cover such temporary disaster duties, meaning overtime hours should not count toward the premium pay caps. As discussed further below, OCCHCO’s failure to provide guidance on which employees’ overtime is covered by the FLSA further undermined the ability of FEMA employees and supervisors to accurately calculate premium pay for purposes of tracking earnings toward the annual pay cap.

FEMA acknowledged these provisions of its Premium Pay Policy were not followed, and conceded that they should have been. One senior OCCHCO official opined that these issues simply “fell through the cracks.”

FEMA Does Not Determine Whether Employees Are Covered by the FLSA During Deployments

When employees who are covered by the FLSA earn overtime pay and compensatory time, those earnings are not considered “premium pay” and, therefore, do not count towards the biweekly or annual premium pay caps. In

³⁰ Premium Pay Policy at § 1-8 B.2; §§ 3-6 A.3-4.

³¹ Premium Pay Policy at § 3-3 A; § 3-4 D; § 3-6 B.1, § 3-6 C.5.

³² Premium Pay Policy at § 3-6 A.2.



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contrast, when employees who are not covered by the FLSA earn overtime and compensatory time, those earnings do apply towards the caps. Contrary to Federal regulations, FEMA does not determine whether its employees' work during disaster deployments is covered or exempt from the FLSA. Accordingly, FEMA cannot correctly determine whether employees have exceeded the premium pay caps without first resolving this issue.

Like other Federal agencies, FEMA classifies each of its employees as either FLSA non-exempt (covered by the FLSA) or FLSA-exempt (not covered by the FLSA).³³ Employees are presumed to be FLSA non-exempt and must “clearly meet[] the criteria for exemption” to overcome that presumption.³⁴ The FLSA determination “must ultimately rest on the duties actually performed by the employee.”³⁵ Many FEMA employees are FLSA-exempt because they primarily perform duties that fall into one or more defined exemption categories. For example, specialized, higher-level, non-manual occupations, such as many supervisors, attorneys, human resource employees who formulate, interpret, or implement human resource policies, and computer programmers, are FLSA-exempt.³⁶ In contrast, positions with routine duties that require little independent judgment, such as answering phone calls at a call center, tend to be FLSA non-exempt.

When an employee who is ordinarily FLSA-exempt primarily performs non-exempt work during a temporary period of time, he/she must be treated as non-exempt for that time period.³⁷ Therefore, when an employee's work or duties change for a temporary time period, agencies must assess whether those temporary duties are exempt or non-exempt.³⁸ Normally the temporary time period must last longer than 30 days to trigger this reassessment, but in “emergency situations” the determination is made on a work-week basis.³⁹

³³ 5 C.F.R. § 551.201.

³⁴ 5 C.F.R. § 551.202(a); 5 C.F.R. § 551.202(d).

³⁵ 5 C.F.R. § 551.202(e).

³⁶ See 5 C.F.R. § 551.205; 5 C.F.R. § 551.208(c); 5 C.F.R. § 551.206(k); 5 C.F.R. § 551.210(a).

³⁷ 5 C.F.R. § 551.211(e)-(f).

³⁸ 5 C.F.R. §§ 551.211(a)-(b).

³⁹ 5 C.F.R. §§ 551.211(a)-(b); 5 C.F.R. § 551.211(f). The employing agency is responsible for determining that an emergency situation exists. The definition of “emergency situation” is similar, though not identical, to the definition of emergency for purposes of waiving the biweekly premium pay cap under 5 C.F.R. § 550.106. Neither OCCHCO nor the DHS Human Capital Office appear to have a clear understanding of whether DHS or FEMA is responsible for determining that an “emergency situation” exists, or whether the two definitions are synonymous such that an emergency situation exists whenever the biweekly cap is waived and never exists when it is not waived. In any event, there does not seem to be any dispute that the hurricanes of 2017 constituted an emergency situation that triggered the need to reassess FLSA status on a workweek basis.



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OCCHCO acknowledged that FEMA employees often perform much different work during disaster deployments than during their normal “steady-state” jobs. Yet, even though FEMA officials confirmed that some normally exempt employees perform non-exempt work during disasters, no OCCHCO personnel could recall FEMA ever evaluating or adjusting the FLSA status of FEMA employees deployed to disasters.⁴⁰ Thus, in contravention of the regulation, FEMA employees who were normally FLSA-exempt continued to be treated as exempt during disasters, regardless of whether they primarily performed non-exempt work that, if classified correctly, would have resulted in their overtime not counting toward the annual pay cap.

OCCHCO discovered this mistake during its analysis of potential overpayments. However, for several reasons, it is now struggling to determine whether there is a feasible way to retroactively classify the type of work that employees performed during the 2017 hurricanes as either FLSA-exempt or non-exempt:

- FEMA does not have a reliable system for tracking the type of work that employees perform during deployments. Although every FEMA employee is assigned a FEMA Qualification System (FQS) title, which determines the type of work they will generally perform if and when they are deployed to disasters, not every FQS title has an FLSA classification.
- Due to the fast-paced and ever-changing nature of disaster-related work, employees are often assigned different work during deployments than what is covered by their FQS title. According to FEMA, it lacks complete and accurate records on the type of work a particular employee performed on any given day during a disaster deployment.
- FEMA employees have never been instructed to contemporaneously record the actual work they performed on a day-to-day basis during deployments. Accordingly, at present, employees likely could not provide accurate and complete accounts of their responsibilities during particular weeks of past deployments, making it difficult to determine in retrospect whether their work qualified them for non-exempt status.

⁴⁰ Nor could the OCCHCO personnel recall FEMA ever evaluating the FLSA status of employees who performed temporary duties in non-emergency situations under the 30-day standard. In January 2018, OCCHCO issued a new “FLSA Fact Sheet” to assist OCCHCO staff in making FLSA determinations. The Fact Sheet addresses the 30-day standard but is silent about the emergency workweek standard. According to OCCHCO, the 30-day standard was included in the Fact Sheet because they intend to start making those determinations in the future. They offered no reason for omitting the emergency situation standard from the Fact Sheet but said they would update the document to include it.



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OCCHCO is now trying to determine whether and how it can evaluate the FLSA status of FEMA employees during prior deployments. Additionally, it acknowledged that it needs to consider how to better track and record the work in future disasters.

Determining the correct FLSA status has important consequences. To illustrate: Sarah Lawyer is an FLSA-exempt FEMA attorney whose base salary is \$15,000 below the annual pay cap. During a deployment, Sarah worked overtime worth \$20,000. FEMA's current analysis would show that she exceeded the annual pay cap by \$5,000. This would be correct if Sarah primarily performed FLSA-exempt duties while deployed. If, however, Sarah primarily performed non-exempt duties (*e.g.*, she answered phones in a call center), none of the \$20,000 would be subject to the annual pay cap, and therefore Sarah would not have exceeded the annual cap. Under these circumstances, FEMA risks seeking reimbursement from Sarah for what it mistakenly believes is a \$5,000 overpayment despite the Federal Government having no legal claim to that money.

Moreover, beyond the pay cap issue, proper FLSA classification is important because the dollar value of overtime is calculated differently for FLSA-exempt and non-exempt work. Many employees are entitled to more overtime dollars under the FLSA than they would be if they were FLSA-exempt. For example, subject to a number of nuances, FLSA non-exempt employees generally earn "time and a half" (*i.e.*, one and a half times their normal hourly rate) for each hour of overtime they work,⁴¹ but FLSA-exempt employees who are higher than a GS-10, step 1 earn less than time and a half for each hour of overtime.⁴²

To illustrate the issue, assume Robert Programmer is a GS-11 whose steady-state job is as an FLSA-exempt computer programmer. During a disaster, Robert primarily answered phones in a call center and worked 20 hours of overtime. Because Robert's call center work qualifies as non-exempt under the FLSA, he is entitled to time and a half for those 20 hours. However, because FEMA does not re-evaluate the FLSA status of employees during deployments, it would continue to treat Robert as FLSA-exempt and therefore pay him less than time and a half for the 20 overtime hours, resulting in an underpayment to Robert for which the Federal Government is liable. Accordingly, even though Robert's situation would not give rise to the risk of a pay cap exceedance, improperly classifying his FLSA status still has real financial impact and puts the government at risk.

⁴¹ See 5 C.F.R. §§ 551.501-551.541 for more details on overtime calculations under the FLSA.

⁴² See 5 U.S.C. § 5542(a)(1-2).



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While a highly skilled, highly compensated attorney may not often be deployed to answer phones at a call center, FEMA officials confirmed that FLSA-exempt employees sometimes perform non-exempt work during disasters. FEMA also determined that all SCF volunteers, regardless of their steady-state FLSA status, primarily performed non-exempt work during the 2017 disaster deployments.⁴³ Under this approach to staffing disaster deployments, FLSA-exempt employees are paid their standard salaries to perform work that likely falls below their pay level. Additionally, while performing non-exempt work, they are able to collect significantly more overtime than they otherwise could, and the dollar value of that overtime is calculated based on a salary higher than that of a typical non-exempt employee. Although exigent circumstances may necessitate this outcome at times, deploying FLSA-exempt employees to perform non-exempt work during disasters results in inefficiencies and inequities. By better tracking employees' work during deployments, FEMA can help mitigate this result by ensuring that it is deploying the right number and type of employees to future disasters.⁴⁴

What Still Needs to Happen: FEMA's Next Steps to Resolve the Overpayment Issue

FEMA Needs to Complete its Overpayment Analysis

FEMA has not yet completed its analysis of employees who have exceeded the annual premium pay cap. In order to do so, it needs to resolve several issues:

- **Confirm the correct time period for earnings:** FEMA's pay cap calculations apply a different time period than other Federal entities. Specifically, FEMA is using pay periods 1 to 26 in 2017 as the basis for its calculations. In contrast, OPM, the DHS Human Capital Office, and the NFC have all taken the position that earnings paid out to an employee between January 1 and December 31 of a particular year apply towards that year's cap. Under this methodology, pay periods 25 and 26 of 2016, and pay periods 1 to 24 of 2017, would comprise the basis for pay cap calculations for 2017. The plain language of the legislation changing the 2017 pay cap appears to support the interpretation adopted by OPM, DHS, and the NFC. FEMA should reach a common understanding with DHS and OPM on the correct earnings period.

⁴³ It is not clear why it was easier for OCCHCO to determine the FLSA status of SCF volunteers than of its own employees.

⁴⁴ FEMA's deployment staffing, including its use of the SCF, is an issue DHS OIG intends to evaluate in a subsequent audit.



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- **Determine FLSA status of employees who may have exceeded the cap:** FEMA has not determined whether any FLSA-exempt employees primarily performed non-exempt work during their deployments. If so, the overtime earned during their deployments should be backed out of the premium pay calculations.
- **Identify earnings from other Federal agencies:** If an employee transferred to FEMA from another Federal agency whose payroll is not serviced by the NFC, the earnings from the other agency might not be reflected in the NFC system. Therefore, FEMA and the NFC might not have a complete picture of the employee's earnings or be able to determine if the combined earnings from the two agencies exceeded the pay cap.
- **Determine which years to analyze:** To date, FEMA has focused on analyzing possible overpayments in 2012-2017. However, nobody at FEMA identified any statute of limitations or any other statutory or regulatory authority that would limit the need to collect overpayments to these years only.

FEMA will not have an accurate accounting of the overpayment issue until it resolves these questions. Once that is done, FEMA can begin the process of issuing debt notices, collecting the overpayments, and adjudicating any waiver requests it receives pursuant to 5 U.S.C. § 5584(b).

Additionally, FEMA must also now pay employees for any earnings that were previously withheld because they exceeded the original 2017 biweekly and annual pay caps, but are now owed to employees as a result of the legislation that raised the cap for premium pay related to the 2017 disasters. To do this, FEMA must not only account for overtime hours which were recorded in WebTA, but also hours that employees did not enter into the system per OCCHCO's instruction.

DHS and/or FEMA Should Decide Whether to Withhold Premium Pay Above the Biweekly Cap Until the End of the Year

In order to ensure that the annual premium pay cap is not exceeded, the OPM regulations explicitly allow agencies to defer premium pay above the biweekly cap until the end of the year. The United States Secret Service follows this process for overtime related to protective services, which is subject to the annual cap, but not the biweekly cap. Throughout the year, Secret Service timekeepers never turn off the biweekly cap setting in WebTA and so the agency only pays employees up to the biweekly cap. Then, at the end of the year, it calculates a true-up and pays out any additional earned overtime up to



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the annual cap. While there are some drawbacks to this approach, it is the most effective way to ensure that employees do not exceed the annual cap. OCCHCO has recommended to the FEMA Administrator that FEMA start following this process. The DHS Human Capital Office has also been considering whether to make this a Department-wide policy.

If payments above the biweekly cap are not deferred until the end of the year, there is no foolproof way to enforce the annual cap. Currently, OCCHCO runs a report every pay period showing employees who are projected to exceed the annual cap. It then notifies those employees to stop entering additional premium pay, instead directing them to record those hours in a WebTA comments field. However, these projections are based on employees' salaries remaining the same throughout the year. If, for example, an employee later receives a promotion, she may exceed the annual cap even if she stopped entering premium pay when she received OCCHCO's notice. Moreover, in the past, some timekeepers have failed to replace the biweekly limitation in WebTA once biweekly waiver periods have ended. Withholding premium pay above the biweekly cap until the end of the year would also reduce this risk because timekeepers would no longer remove WebTA's biweekly limitation throughout the year.

While deferring excess premium pay until the end of the year removes these risks, this approach is not without drawbacks. According to a Secret Service human resources official, deferring some overtime impacts employee morale because some employees resent not receiving overtime when they earn it. Moreover, calculating the true-up at the end of the year presents an administrative burden to the agency. Finally, while deferring premium pay over the cap until the end of the year is the most effective way to enforce the annual cap, it is not 100 percent failsafe.⁴⁵

As an alternative to withholding excess premium pay until the end of the year, OCCHCO could provide employees with estimates at the beginning of the year about how much overtime they can work throughout the year without exceeding the annual cap. However, promotions, within-grade increases,

⁴⁵ Because the annual cap is equal to the biweekly cap times the number of pay periods in a year, an employee who never exceeds the biweekly cap will nearly always adhere to the annual cap as well. However, there is at least one rare scenario in which employees could be overpaid even if they are never paid more than the biweekly cap throughout the year. The annual limitation is based on an employee's locality at the end of the year. See 5 U.S.C. § 5547(b)(2-3). Thus, an employee's annual cap will decrease if he/she moves midyear to a different work location that has a lower locality adjustment. Consequently, even if that employee never exceeded a biweekly cap, because his/her biweekly caps were higher at the earlier location, he/she could conceivably end up exceeding the annual cap.



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quality step increases, or any other changes to base pay throughout the year would need to be accounted for to ensure that employees' overtime estimates were kept current.

It is important that FEMA and/or DHS promptly determine whether to defer premium pay because the biweekly cap is still waived for employees performing work related to Hurricanes Harvey, Irma, and Maria. While the three DHS hurricane waivers ended on December 31, 2017, OPM's government-wide waiver for the three hurricanes has not been lifted. Until OPM ends the waiver, FEMA employees performing hurricane-related work will remain subject to the annual limitation rather than the biweekly caps.⁴⁶ Because employees are currently eligible to exceed the biweekly cap, FEMA and DHS need to address how to enforce the annual cap for calendar year 2018 for those employees.

Additional Steps to Prevent Future Overpayments

There are also additional steps that FEMA can take to prevent employees from exceeding the annual caps in the future. First, FEMA's failure to follow its Premium Pay Policy contributed to these overpayments. Therefore, complying with the Policy — by correcting its premium pay guidance, establishing approving officials, and providing guidance regarding FLSA status to supervisors and program offices — would help prevent future overpayments. Alternatively, if these steps are impractical, FEMA should update its Policy to enact more workable steps to enforce the cap.

Second, FEMA would reduce the risk of future overpayments by establishing a process to track employees' work during disasters and to make FLSA determinations based on that work. This would also help ensure that normally FLSA-exempt employees receive all of the overtime they are entitled to when they perform non-exempt work.

Conclusion

We found that FEMA paid employees over the annual premium pay cap because of three main factors. First, FEMA mistakenly believed the NFC had an automated control to prevent payments over the annual cap. Second, FEMA's OCCHCO failed to follow its own Premium Pay Policy, which was designed to mitigate the risk of overpayments. Third, FEMA has no effective policy or practice to track its employees' work during disaster deployments and,

⁴⁶ Shortly after the DHS waiver period ended, OCCHCO informed FEMA timekeepers that the biweekly pay cap is back in place. OCCHCO should consider informing employees that OPM's waiver is still effective and applies to FEMA employees.



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therefore, cannot determine whether that work is covered by the FLSA. Although Congress passed legislation raising the annual premium pay cap for 2017, FEMA must still resolve these issues to complete its analysis of possible underpayments and overpayments in 2017 and in prior years, and to prevent similar issues going forward.



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Recommendations

We recommend that the FEMA Chief Component Human Capital Officer:

Recommendation 1: Finalize OCCHCO's analysis of annual premium pay cap exceedances and potential underpayments after addressing outstanding issues, including the correct time period for earnings, FLSA status, earnings from other agencies, and determination of years to analyze.

Recommendation 2: Adhere to the responsibilities defined in FEMA's Premium Pay Policy and/or update the policy as needed to enact workable steps to enforce the annual premium pay cap.

Recommendation 3: Establish processes to evaluate the FLSA status of FEMA employees during prior deployments and to track employees' work during future disasters in order to make FLSA determinations based on that work.

We recommend that the FEMA Administrator in coordination with the DHS Human Capital Office:

Recommendation 4: Adopt the process of deferring premium pay above the biweekly cap until the end of the year, or identify commensurate measures to ensure compliance with the annual premium pay cap.



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Management Comments and OIG Analysis

We have included a copy of FEMA's management response in its entirety in Appendix B. FEMA concurred with our recommendations and provided comments to the draft report. A summary of FEMA's response and our analysis follows. FEMA also provided technical comments to the report. We made changes to incorporate these comments, where appropriate.

Response to Recommendation #1: Concur. FEMA's OCCHCO is working to resolve the outstanding issues identified in our report in order to complete its overpayment analysis. FEMA provided an explanation of steps it has taken, or plans to take, to identify the correct time period of earnings, evaluate FLSA status, calculate earnings from other agencies, determine years to analyze, and identify and resolve potential underpayments caused by the legislative change to the 2017 premium pay cap.⁴⁷ FEMA provided an estimated completion date of June 30, 2019 for these corrective actions.

OIG Analysis of FEMA's Response: FEMA concurred with our recommendation. This recommendation will remain open and resolved until FEMA finalizes its calculations, establishes debts for all identified overpayments, and issues payments for all identified underpayments.

Response to Recommendation #2: Concur. FEMA provided information on steps it has taken to address instances in which FEMA's OCCHCO was not following its Premium Pay Policy. OCCHCO has created a guidance document to reflect how premium pay is calculated, implemented a process for monitoring employees in jeopardy of exceeding the annual premium pay cap, and started running biweekly reports to identify employees who are nearing the cap. In addition, FEMA plans to provide guidance to program offices regarding FLSA status and premium pay. FEMA also plans to establish approving officials. Finally, FEMA has started the process of revising its Premium Pay Policy to account for a number of premium pay and FLSA issues. FEMA provided an estimated completion date of December 31, 2018.

OIG Analysis of FEMA's Response: FEMA concurred with our recommendation. This recommendation will remain open and resolved until FEMA completes all of its intended actions and/or updates the Premium Pay Policy.

Response to Recommendation #3: Concur. FEMA's OCCHCO is working on processes to accurately determine the FLSA status for all employees who worked overtime during deployments between January 1, 2016 and December

⁴⁷ FEMA affirmed separately from its management response that it planned to address potential underpayments caused by the 2017 premium pay cap increase.



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31, 2017. In addition, for employees who exceeded the premium pay cap between January 1, 2012 and December 31, 2015, OCCHCO plans to evaluate whether any overtime may have been covered by FLSA. OCCHCO is also considering how to track employees' work during future disasters in order to make FLSA determinations based on their work. FEMA provided an estimated completion date of June 30, 2019 for its corrective actions.

OIG Analysis of FEMA's Response: FEMA concurred with our recommendation. This recommendation will remain open and resolved until FEMA finishes evaluating the FLSA status of all employees who worked overtime during deployments between January 1, 2016 and December 31, 2017, and establishes a process to track employees' work on future deployments in order to make FLSA determinations.

Response to Recommendation #4: Concur. In January 2018, FEMA notified timekeepers to remove the "May Exceed Sal. Cap" setting in WebTA. FEMA plans to communicate to employees that, in alignment with guidance proposed by DHS, FEMA will begin to defer premium pay over the biweekly cap until the end of the year. FEMA provided an estimated completion date of September 30, 2018 for its corrective actions.

OIG Analysis of FEMA's Response: FEMA concurred with our recommendation. This recommendation will remain open and resolved until FEMA notifies employees of the new policy to defer premium pay and provides guidance on how employees and timekeepers should implement this policy.



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Appendix A

Objective, Scope, and Methodology

DHS OIG was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

The objective of this special report is to assess why FEMA paid employees over the annual premium pay cap, as well as FEMA's actions to address the overpayments and enforce the statutory premium pay limitations going forward. We conducted this review between January 2018 and March 2018. We interviewed dozens of witnesses, including employees from FEMA's Office of the Chief Component Human Capital Officer, FEMA's Office of the Chief Financial Officer, FEMA's Office of Chief Counsel, FEMA's Office of External Affairs, the DHS Office of the Chief Human Capital Officer, the DHS Office of the Chief Financial Officer, the DHS Office of Legislative Affairs, and the U.S. Secret Service Office of Human Resources, as well as representatives from the National Finance Center. We also reviewed relevant DHS, FEMA, and OPM directives, guidance, policies, and procedures, as well as documents and communications related to the premium pay caps and FEMA's potential payments above those caps.

We conducted this special review in accordance with the DHS OIG Special Reviews Group's quality control standards and the *Quality Standards for Federal Offices of Inspector General* issued by the Council of the Inspectors General on Integrity and Efficiency. These standards require that we carry out work with integrity, objectivity, and independence, and provide information that is factually accurate and reliable. This report reflects work performed by the DHS OIG Special Reviews Group pursuant to Section 2 of the *Inspector General Act of 1978*, as amended. Specifically, this report provides information about FEMA's overpayments to employees and its subsequent efforts to remediate for the purpose of keeping the Secretary of DHS and Congress fully and currently informed about problems and deficiencies relating to the administration of DHS programs and operations and the necessity for and progress of corrective action. This report is designed to promote the efficient and effective administration of, and to prevent and detect fraud, waste, and abuse in, the programs and operations of DHS.



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Appendix B
FEMA Comments to the Draft Report

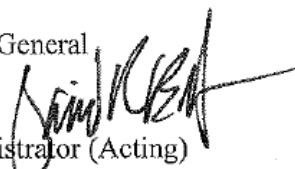
U.S. Department of Homeland Security
Washington, DC 20472



FEMA

JUL 18 2018

MEMORANDUM FOR: John V. Kelly
Acting Inspector General

FROM: David Bibo 
Associate Administrator (Acting)
Office of Policy and Program Analysis

SUBJECT: Management's Response to OIG Draft Report: "FEMA Paid Employees Over the Annual Premium Pay Cap" (Project No. 18-067-SRG-FEMA)

Thank you for the opportunity to review and comment on the draft report. The Federal Emergency Management Agency (FEMA) appreciates the work of the Office of the Inspector General (OIG) in planning and conducting its review and issuing this report.

FEMA has worked diligently to limit the number of employees who exceeded the annual pay limitation and audit premium pay policies and procedures. In addition, FEMA is analyzing premium pay from 2012-2017 to identify any previous instances of overpayments and take collection action, as appropriate. FEMA remains committed to properly compensating employees in accordance with applicable statutes and regulations.

The draft report contained four recommendations, all with which FEMA concurs. Attached find our detailed response to each recommendation. Technical comments were provided under separate cover.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to have a member of your staff contact Mr. Gary McKeon, Director of FEMA's Audit Liaison Office at (202) 646-1308, if you have any questions. We look forward to working with you in the future.

Attachment



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**Attachment: Management Response to Recommendations
Contained in 18-067-SRG-FEMA**

The OIG recommended that the FEMA Chief Component Human Capital Officer:

Recommendation 1: Finalize [the] Office of the Chief Component Human Capital Officer's (OCCHCO's) analysis of the annual premium pay cap exceedances and potential underpayments after addressing outstanding issues, including the correct time period for earnings, Fair Labor Standards Act (FLSA) status, earnings from other agencies, and determination of years to analyze.

Response: Concur. FEMA's OCCHCO is working to address the above-mentioned outstanding issues related to the correct time period of earnings, FLSA status, earnings from other agencies, and determination of years to analyze:

Correct Time Period for earnings: All data related to the annual premium pay cap determinations are based on the calendar year (CY) in which applicable payments are received. If there are retroactive corrections in a subsequent year, the payments will be attributed to the year and pay period in which the pay was earned. FEMA is utilizing this time frame as verified by the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM). On March 5, 2018, DHS confirmed the correct time period for calculating earnings subject to the annual premium pay cap.

FLSA Status: During deployments, the FLSA "Emergency Situation" provision, found in 5 C.F.R. § 551.211(f),¹ requires FEMA to review the FLSA status of all deployed exempt employees on a work week basis. FEMA has identified and will implement a process to timely review the FLSA status for exempt employees actively deployed and engaged in disaster operation activities. See discussion under Recommendation 3, below. This process will identify both underpayments (i.e., overtime work paid at a straight-time rate during a primarily non-exempt workweek), and overpayments for exempt work which should be subject to the annual and biweekly pay caps.

Earnings from Other Agencies: FEMA's OCCHCO has identified employees who transferred from other Federal agencies whose earnings are not reflected in the National Finance Center (NFC) system and contacted them to obtain earnings from those agencies. The information received is being incorporated into the review of pay records to determine overages. In addition, on April 3, 2018, a job aid was finalized providing Payroll Branch

¹ In footnote 40 of its Report, the DHS/OIG asked whether the FLSA's "emergency situation" provision (5 C.F.R. § 551.211(f)) applies every time an "emergency" – as defined in 5 C.F.R. § 551.104 for purposes of waiving the biweekly pay cap – is declared by an agency, and vice versa. FEMA will coordinate with DHS/OCCHCO to determine whether both of these definitions always apply together, and if the FLSA emergency section applies in all Presidentially-declared disasters or on a case-by-case basis. Further, FEMA will coordinate with DHS/CHCO to determine whether the FEMA Administrator has the authority declare an "emergency situation" under 5 C.F.R. § 551.211(f). To the greatest extent feasible, these determinations will then be applied to the assessment of past overpayments and underpayments, and to the processes for implementing 5 C.F.R. § 551.211(f) going forward.



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employees with clear guidance on “Updating Premium Pay Data for Transferring Employees.” The job aid includes instructions on identifying transfers, requesting the earnings data from the employees, calculating the earnings, and updating the NFC database so that the earnings are reflected on the NFC reports that are used in the analysis of premium pay data.

Determining Which Years to Analyze:

- *Overpayments:* There is no apparent statute, regulation, or policy that limits FEMA’s administrative recoupment of past overpayments. There are some practical considerations, however, that suggest that FEMA need not look further back than January 1, 2012 to assess whether overpayments were made.
 - (1) As the FLSA status of the primary work actually performed is a necessary element in the overpayments analysis, generally speaking, as time passes it becomes less likely that such an inquiry will produce an accurate result. FEMA’s previous deployment tracking system did not capture the FLSA status of the work any given employee actually performed, and employees themselves are generally less likely to remember the nature and duration of their work as the inquiry goes further back in time. See discussion below under Recommendation 3.
 - (2) The administrative burden increases significantly as FEMA’s inquiry examines earlier years. Contacting employees about the work performed on deployments also proves highly burdensome, not only for the aforementioned reason of employee memory retention, but also because, employee attrition and outdated contact information, requires OCCHCO staff to devote significant time contacting employees about work performed. Nonetheless, FEMA will endeavor to contact current and former employees where necessary in order to determine overpayments back to 2012.
 - (3) Overpayments that cannot be recouped administratively can only be recouped by civil suit action. There is a six year statute of limitations for the Department of Justice to file complaints for employee overpayments (28 U.S.C. § 2415(d)).

FEMA will focus on the January 1, 2012 – December 31, 2017 time period based on the information above. More specifically, to identify previous instances of overpayments, FEMA is actively evaluating pay records from 2012 to 2017 to determine employees who exceeded the annual premium pay cap in their respective years, taking into consideration a review of their deployment work to ensure removal of any FLSA non-exempt work. FEMA determined that based on the revised 2017 annual cap authorized on February 9, 2018, only two employees exceeded the cap. These employees have been notified of the overpayment and debts established with the NFC. FEMA OCCHCO is validating the debts.

FEMA is in the process of securing an independent contractor to validate the calculations. Once the calculations are validated, FEMA will take appropriate action.



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- *Underpayments:* FEMA will review the deployment records of FLSA exempt employees for each calendar year beginning January 1, 2016 through December 31, 2017, to identify and resolve any potential underpayments based on incorrect FLSA status.

As with the overpayments analysis, accurately determining underpayments becomes significantly more challenging with the passage of time, as employees' memories fade and earlier titles and position descriptions bear less resemblance to current ones. Furthermore, while the 2017 hurricane season was unquestionably an "emergency situation," warranting assessment of FLSA status on a workweek basis for normally exempt employees, that determination is far less clear for many previous disasters. *See* footnote 1. Additionally, under 29 U.S.C. § 255a, employees have two years to file claims for non-willful violations of the FLSA. For these reasons, FEMA will restrict its analysis to January 1, 2016 to December 31, 2017.

In addition, FEMA will:

- Identify, research, and validate any overpayments from 2012 through 2017.
- Engage with a contractor to validate FEMA's overpayment calculations from 2012 through 2017.
- Identify, research, and validate any underpayment from 2016 through 2017.
- Establish and implement a process for identifying FLSA changes during deployments, processing the corresponding FLSA changes, and properly disbursing pay according to any fluctuating FLSA designations.

To determine FLSA status for prior or future deployments, OCCHCO and FEMA's Office of Chief Counsel (OCC) are undertaking an analysis of when the FLSA's emergency situation provision, found in 5 C.F.R. 551.211(f) applies to disaster deployments. FEMA will apply the FLSA's emergency situation provisions as appropriate.

Prior Deployments: OCCHCO has separated the FLSA status issue for prior deployments into overpayments and underpayments:

- *Overpayments:* OCCHCO has already begun convening meetings with OCC attorneys to review each overpayment since 2012. These evaluation meetings incorporate information on the employee's position (both steady-state and when deployed), rate of pay, timing and location of deployments, and amount and timing of overpayments. The participants, who possess a knowledge of the applicable law and/or the duties of the positions worked, discuss the available data and attempt to reach consensus on the likelihood that each employee worked sufficient non-exempt hours, particularly during disaster deployments, to reduce or negate the stated overpayment. If the evaluation group decides that more information is needed to make a determination, it will contact the employee, a supervisor, or will otherwise make efforts to determine the nature of the work performed before reaching a more informed conclusion.



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- *Underpayments:* OPM is issuing clarifying guidance on the appropriate way to calculate the amount owed to an employee. Once this is received, FEMA will calculate payments in accordance with this guidance and will work with NFC to manually distribute any funds due to employees. OCCHCO will engage in information gathering, and use that information to estimate the nature of work performed. OCCHCO will create a list of normally FLSA-exempt employees who worked overtime during deployments between January 1, 2016 and December 31, 2017. These are the employees who were most likely to have their duties changed to possibly perform nonexempt work, and where the decreased threshold of the FLSA's emergency situation provision – 7 days vs. 30+ days – increases the possibility that a normally-exempt employee should have been temporarily reclassified as nonexempt. Based on this list, and together with other available data such as deployment dates and locations, deployment title, and amount of overtime worked, a group of OCCHCO and OCC staff will determine their confidence level at the likelihood that the employee may have performed nonexempt work. If the group decides that more information is needed about an employee's work performed during a particular workweek, OCCHCO will then contact the employee, a supervisor, or possibly co-workers to seek clarification. OCCHCO will conduct this inquiry so as not to bias the answers to its questions to encourage or discourage the mention of nonexempt work. If OCCHCO can reasonably determine that a normally exempt employee performed primarily nonexempt work during a particular workweek, it will change that employee's FLSA classification for that particular workweek, and pay the employee any overtime premiums previously unpaid.

Future deployments: FEMA is considering instituting a nightly check-in wherein employees would answer a simple initial question about whether they performed significant work that day outside of the title under which they were deployed. If they respond that they performed significant work outside of their deployment title, FEMA would ask additional questions about the nature of that work and the amount of time it was performed. Employees' supervisors would review and approve these answers on a weekly or biweekly basis, and would be generally encouraged to inform OCCHCO when otherwise exempt employees performed significant nonexempt work. Based on the employees' answers and supervisors' verifications, FEMA would follow up with employees and temporarily reclassify employees where necessary. This approach would strike a balance between near real-time collection of necessary data on work performed and minimal intrusion into employees' workflow during disaster deployments.

As described below, the process of reviewing prior-incurred overtime has already started. For future deployments, a parallel effort by this same group, working in conjunction with other FEMA Offices, is developing a system by which to track such emergencies, and any possible non-exempt overtime that may be worked during those weeks.

Estimated Completion Date (ECD): June 30, 2019.

Recommendation 2: Adhere to the responsibilities defined in FEMA's Premium Pay Policy and/or update the policy as needed to enact workable steps to enforce the annual premium pay cap.



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Response: Concur. The current Premium Pay Policy assigns the OCCHCO with several specific areas of responsibility. The areas specifically mentioned in the report are highlighted below with the steps that are being taken in order to meet these requirements:

- *Providing guidance on the calculation and payment of premium pay.* OCCHCO has created a guidance document to reflect how premium pay is calculated. This guidance will be emailed and posted on the intranet for all employees to access.
- *Advising employees (and their supervisors) when they are expected to exceed the annual cap.* The OCCHCO has a process for monitoring employees in jeopardy of exceeding the annual premium pay cap. FEMA's payroll staff uses employees' biweekly pay and estimated annual earnings to determine when an employee is nearing the annual premium pay cap. Once an employee has been determined to be at risk of exceeding the cap, a notice is provided via email giving the employees instructions on how to manage and record time in order to prevent an overpayment.
- *Identifying for FEMA program offices and supervisors those employees whose compensation places them at risk of exceeding the biweekly pay cap and employees who are nearing the annual cap.* OCCHCO runs reports biweekly to identify employees who are nearing the annual pay cap. OCCHCO notifies employees of how to manage and record their time in order to prevent an overpayment. OCCHCO provides supervisors and managers with information on employees who are at risk of exceeding the bi-weekly and annual cap to enable the responsible supervisors and managers to make effective decisions regarding resource allocations and assignments in accordance with the applicable pay limitations.
- *Providing guidance to FEMA program offices and supervisors on which employees are subject to biweekly pay cap limitations based on the employee's status under the FLSA.* OCCHCO will provide guidance to program offices regarding FLSA and premium pay. Additionally, OCCHCO will distribute biweekly reports to program offices regarding their employees and their FLSA status so that supervisors and employees are fully informed.

FEMA intends to retain the "approving official" oversight role. FEMA's OCCHCO and OCC will review the overtime approval process during disasters and emergencies. Based on the review, FEMA will implement any necessary structural and procedural changes to review requests for employees to perform overtime work.

ECD: December 31, 2018.

Recommendation 3: Establish processes to evaluate the FLSA status of FEMA employees during prior deployments and to track employees' work during future disasters in order to make FLSA determinations based on that work.

Response: Concur. FEMA's OCCHCO is working on processes to accurately determine employees' FLSA status, based on work actually performed during prior and future deployments.



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More specifically, FEMA will:

- Identify, research, and validate any overpayments from 2012 through 2017.
- Engage with a contractor to validate FEMA's overpayment calculations from 2012 through 2017.
- Identify, research, and validate any underpayment from 2016 through 2017.
- Establish and implement a process for identifying FLSA changes during deployments, processing the corresponding FLSA changes, and properly disbursing pay according to any fluctuating FLSA designations.

To determine FLSA status for prior or future deployments, OCCHCO and OCC are undertaking an analysis of when the FLSA's emergency situation provision, found in 5 C.F.R. 551.211(f) applies to disaster deployments. FEMA will apply the FLSA's emergency situation provisions as appropriate.

For prior deployments: OCCHCO is identifying the FLSA status for previous employee deployments to ensure accuracy. OCCHCO has separated the FLSA status issue for prior deployments into overpayments and underpayments:

- *Overpayments:* OCCHCO has already begun convening meetings with OCC attorneys to review each overpayment since 2012. These evaluation meetings incorporate information on the employee's position (both steady-state and when deployed), rate of pay, timing and location of deployments, and amount and timing of overpayments. The participants, who possess a knowledge of the applicable law and/or the duties of the positions worked, discuss the available data and attempt to reach consensus on the likelihood that each employee worked sufficient non-exempt hours, particularly during disaster deployments, to reduce or negate the stated overpayment. If the evaluation group decides that more information is needed to make a determination, it will contact the employee, a supervisor, or will otherwise make efforts to determine the nature of the work performed before reaching a more informed conclusion.
- *Underpayments:* OCCHCO will engage in a similar process of information gathering, and using that information to estimate the nature of work performed. OCCHCO will create a list of normally FLSA-exempt employees who worked overtime during deployments between January 1, 2016 and December 31, 2017. These are the employees who were most likely to have their duties changed to possibly perform nonexempt work, and where the decreased threshold of the FLSA's emergency situation provision – 7 days vs. 30+ days – increases the possibility that a normally-exempt employee should have been temporarily reclassified as nonexempt. Based on this list, and together with other available data such as deployment dates and locations, deployment title, and amount of overtime worked, a group of OCCHCO and OCC staff will determine their confidence level at the likelihood that the employee may have performed nonexempt work. If the group decides that more information is needed about an employee's work performed during a particular workweek, OCCHCO will then contact the employee, a supervisor, or possibly co-workers to seek clarification. OCCHCO will conduct this inquiry so as not to bias the answers to its



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questions to encourage or discourage the mention of nonexempt work. If OCCHCO can reasonably determine that a normally exempt employee performed primarily nonexempt work during a particular workweek, it will change that employee's FLSA classification for that particular workweek, and pay the employee any overtime premiums previously unpaid.

For future deployments: OCCHCO will determine the FLSA status changes when employees are deployed to actively engage in disaster operation activities. FEMA is considering instituting a nightly check-in wherein employees would answer a simple initial question about whether they performed significant work that day outside of the title under which they were deployed. If they responded that they performed significant work outside of their deployment title, FEMA would ask additional questions about the nature of that work and the amount of time it was performed. Employees' supervisors would review and approve these answers on a weekly or biweekly basis, and would be generally encouraged to inform OCCHCO when otherwise exempt employees performed significant nonexempt work. Based on the employees' answers and supervisors' verifications, FEMA would follow up with employees and temporarily reclassify employees where necessary. This approach would strike a balance between near real-time collection of necessary data on work performed and minimal intrusion into employees' workflow during disaster deployments.

ECD: June 30, 2019.

OIG recommended that the FEMA Administrator in coordination with the DHS Human Capital Office:

Recommendation 4: Adopt the process of deferring premium pay above the biweekly cap until the end of the year, or identify commensurate measures to ensure compliance with the annual premium pay cap.

Response: Concur. Consistent with DHS's proposed guidance, for work performed subject to the annual pay cap, in January 2018, FEMA adopted the practice of deferring premium pay over the biweekly cap until the end of the year in order to avoid future overpayments. This will be communicated to employees via email notice and online resources. Employees who are deployed to FLSA non-exempt positions will be paid promptly, in accordance with the FLSA and its applicable regulations.

FEMA issued a notice on January 3, 2018, to all timekeepers instructing them to remove the status of "May exceed salary cap." At this point FEMA began the policy of deferring premium pay above the bi-weekly earnings limitation until the end of the calendar year. The notice served as a trigger for employees to work with their supervisor to critically examine the need to perform work that would otherwise entitle the employee to premium pay, and as a warning that premium pay claimed must be in compliance with the applicable bi-weekly and annual earnings limitation.

Regarding the issue of employees coming within \$2,000 of the annual cap, the DHS waivers for Hurricanes Harvey, Irma, and Maria were in place for pay periods 25 and 26 of 2017. The pay for these pay periods was disbursed in CY 2018, and therefore are included in calculating the 2018 annual pay cap. Some employees may be at risk of reaching the annual pay cap for 2018



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because their base salary alone is close to the annual pay cap and/or the overtime pay disbursed for pay periods 25 and 26 of 2017 make some employees at risk of exceeding the annual pay cap.

ECD: September 30, 2018.



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