

NTEU Chapter 296 Legislative Roundup  
2018-12-15

This legislative round contains political information. Under the Hatch Act, federal employees should not participate in partisan political activities while on duty or in a federal building. However, you can use NTEU’s Action Center to take action on these items (not while on duty): <https://www.nteu.org/legislative-action/priority-issues>

The legislative roundup is a compilation of the various communications from NTEU National including the ebulletin, communications from NTEU President Tony Reardon, NTEU Political Insider, Status Call, and whatever else they send us. It is intended to answer the question: So, what does NTEU do outside of our chapter?

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NTEU has been following the government shutdown ups-and-downs quite a lot. (I think they sent about 4,391 updates on it.) I just included the latest update from December 13. NTEU will continue to strongly press Congress to prevent a partial government shutdown and approve a pay raise for federal employees for 2019. At the same time, NTEU will work to ensure Congress provides prompt pay for the thousands of frontline federal employees who would be furloughed in the event of a shutdown

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# Table of Contents

Item 01: SUMMARY: Question about Use time that has been scheduled and a possible shutdown: .....	3
Item 02: Summary: ELECTION Results and we should all stay involved .....	3
Item 03: SUMMARY: Ebulletin .....	3
Item 04: Shutdown SUMMARY: An update is provided on government funding for Fiscal Year 2019 for agencies currently operating under a Continuing Resolution. ....	3
Item 05: Legislation SUMMARY: An official cost estimate has been released for an official time bill. ....	5
.....	5
Item 06: Summary: OSC Clarifies Guidance After NTEU Raises Concerns .....	8
Item 07: Summary: NTEU's letter to OPM asking about ongoing protection for 2015 data breach victims .....	8
.....	8
Item 08: Summary: NTEU's publication Status Call .....	8
Item 09: Pay SUMMARY: OPM is issuing the final rule to establish six new locality pay areas in 2019. ....	11
.....	11

Item 01:

**SUMMARY: Question about Use time that has been scheduled and a possible shutdown:**

Q. If an employee has properly scheduled “use-or-lose” annual leave before the start of the third biweekly pay period prior to the end of the leave year, but is unable to use some or all of the scheduled leave because of the furlough, does the furlough constitute an “exigency of the public business” that would permit an agency to restore the leave after the beginning of the new leave year?

A. Employees in this situation should make every effort to reschedule “use-or-lose” annual leave for use before the end of the current leave year. However, if this is not possible due to a lapse in appropriations, agency heads (or their designees) are encouraged to use their discretionary authority to restore any lost annual leave by determining that the employee was prevented from using his or her leave because of an exigency of the public business— namely, the need to furlough employees because of the lapse in appropriations.

Item 02:

**Summary: ELECTION Results and we should all stay involved**

The election may be over, but NTEU’s political and legislative involvement has just begun! Check out the last Political Insider [blog update](#) of 2018 to read up on some of the new members of Congress who will be taking the oath to serve on Jan. 3. Many of these incoming members are former federal employees themselves or have worked with federal workers when serving in the military.

However, just because new legislators may be more likely to support federal employees doesn’t mean our work is over. Battles over agency funding, pay increases, pension cuts, and workplace rights are looming. It’s still so important to keep up with [Legislative Action Center](#) updates and to stay aware of what your congressional delegation is doing on behalf of federal employees. Even if you live in a congressional district where your representative always votes with NTEU, stay in touch to thank them and to keep them updated on your agency workplace.

And, you should consider [donating to TEPAC](#). As NTEU’s political action committee, TEPAC helps support the candidates who support the issues you care about: pay, pension and your voice in the workplace.

Stay tuned for next year’s quarterly Political Insider updates where we’ll be back to talk about presidential primary kickoffs and other preparations for 2020!

Item 03:

**SUMMARY: Ebulletin**

NTEU’s Ebulletin covers the shutdown, new locality pay areas in 2019, and new Hatch Act guidelines.

<https://www.nteu.org/ebulletin>

Item 04: Shutdown

**SUMMARY: An update is provided on government funding for Fiscal Year 2019 for agencies currently operating under a Continuing Resolution.**

Attachment:

item4-GovtFndngUpdate--Dec13.doc

December 13, 2018

## **MEMORANDUM**

TO: Chapter Presidents and Legislative Coordinators

RE: Update on FY19 Government Funding

**SUMMARY: An update is provided on government funding for Fiscal Year 2019 for agencies currently operating under a Continuing Resolution.**

Following President Trump's meeting with the House and Senate Minority Leaders on Tuesday to discuss funding the agencies currently operating under a Continuing Resolution (CR) past next Friday night, December 21st, there remains little progress on reaching a consensus on how to move forward. Senate Minority Leader Chuck Schumer (D-NY) has offered passing the six remaining appropriations bills that the House and Senate can agree on and pass a CR for the Department of Homeland Security for the remainder of the fiscal year. He also proposed a CR for all of the remaining appropriations bills as an alternative. News reports show that a number of Senators and Representatives want to move the remaining spending bills and some are open to moving the Homeland Security bill as a short-term CR or a full-year CR with additional funding provisions, but there is no agreement on the path forward and the House is currently planning to be out of session until next Wednesday, just three days before the current CR expires.

The following NTEU-represented agencies are currently operating under the CR that expires on December 21st: IRS and other Department of Treasury Offices and Bureaus, CBP and FLETC, CFTC, EPA, FCC, FDA (portions) FEC, NPS, PTO, SEC, and USDA. (Please note many agencies have multiple funding sources—appropriations, fees, trust and working capital funds—so each agency can have employees covered under different funding sources and laws.)

As Congress and the White House discuss how to move forward on the outstanding appropriations bills, I will continue to advocate against a shutdown and to press for adequate funding for our agencies as well as for a pay increase for federal employees. In the case of a shutdown for some agencies, NTEU will work to ensure Congress provides prompt pay for impacted employees. I will keep you updated on these developments. For more information, [click here](#).

Anthony M. Reardon  
National President

Item 05: Legislation

**SUMMARY: An official cost estimate has been released for an official time bill.**

(NTEU strongly opposes any legislation to limit or restrict official time given its essential role in providing representation to frontline workers.)

Attachment:

item05-CostEstRlsdforOfclTmLeg

December 10, 2018

## MEMORANDUM

TO: Chapter Presidents and Legislative Coordinators

RE: Cost Estimate Released for Official Time Legislation

**SUMMARY: An official cost estimate has been released for an official time bill.**

In March of 2017, the House Committee on Oversight and Government Reform approved several measures on party-line votes, including H.R. 1364, an official time bill sponsored by Representative Jody Hice (R-GA). Since early 2017 the bill has not advanced to the House floor for a vote, and there is no Senate companion legislation.

The measure seeks to substantially limit official time—primarily by not providing retirement credit to individuals who spend more than 80 percent of their regular work hours on official time. The bill was amended in committee by Representative Virginia Foxx (R-NC) to also prohibit recruitment, retention, and relocation awards for individuals who spend more than 80 percent of their time on official time. Further, H.R. 1364 was crafted in a manner that would apply the change in law retroactively thereby requiring a number of individuals to repay the U.S. government both pension and award monies and to see existing pensions and related retirement benefits reduced.

As you know, NTEU strongly opposes any legislation to limit or restrict official time given its essential role in providing representation to frontline workers. Further, NTEU has strongly opposed H.R. 1364 because it unfairly and unacceptably penalizes individuals' retirement credits and pensions—and therefore their income security—for having agreed to serve on allowable official time. NTEU worked with congressional allies to block this measure this session, and it has not advanced further through the legislative process. We have also devoted time in our outreach to Capitol Hill to highlight the key role official time plays to ensure federal employees receive assistance from unions for workplace issues such as discrimination, safety issues, sexual harassment, hostile work environment, and to be protected from retaliation.

The Congressional Budget Office (CBO) has recently released an official cost estimate for H.R.1364 that finds the bill carries a significant implementation cost for the Office of Personnel Management (OPM) and employing agencies—over \$100 million in discretionary spending over ten years. The bill would also produce some savings in mandatory spending stemming from the reductions to retirement benefits. The CBO estimate also found that less than 0.1 percent of the entire federal workforce—approximately 1,600 individuals—spend between 50 and 100 percent of their work hours on official time.

While this legislation is not currently in play, I wanted to share this information with you. NTEU has always known that H.R. 1364 was crafted to target labor organizations, and to dismantle federal employee workplace representation rights, and was not in fact about reducing government operational and taxpayer costs. It will be helpful to our arguments to have outside CBO analysis and documentation highlighting agency costs, as well as the wasted work time and impossible search for historical data and recalculations to be borne by agencies were this legislation to be enacted.

Anthony M. Reardon  
National President

Item 06:

**Summary: OSC Clarifies Guidance After NTEU Raises Concerns**

After new Hatch Act guidelines on what federal employees can discuss at work were issued, NTEU immediately raised concerns causing the Office of Special Counsel to issue a clarification. The guidelines broadly cautioned federal employees from discussing ‘impeachment’ and ‘the resistance’ while at work, on duty, or in uniform. OSC clarified that Hatch Act investigations are supposed to be fact specific.

While NTEU appreciated the clarification, we remain concerned that broad, general guidance can lead to confusion among employees. We intend to closely monitor the implementation of this guidance to make sure individual employees are not adversely impacted, National President Tony Reardon said.

Meanwhile, Rep. Elijah Cummings of Maryland and the Ranking Member of the House Committee on Oversight and Government Reform, sent a [letter](#) to Special Counsel Henry Kerner urging him to rescind the guidance. Cummings said the guidance is a radical departure from past guidance and is certain to have a chilling impact on federal employees.

Item 07:

**Summary:** NTEU's [letter](#) to OPM asking about ongoing protection for 2015 data breach victims sent a message. OPM has now announced plans to extended contract coverage for enrollees in identity theft protection and credit monitoring services through June 30, 2019, as the agency shops for new contracts

Item 08:

**Summary:** NTEU’s publication Status Call has updates on: Customs Border Protection and expanded bargaining, the anti-union executive orders, IRS overtime grievances, OPM Data Breach appeal, and premium pay denials

attachment: item-08-StatusCall—Aug-Nov(Attach).pdf

# STATUS CALL

VOL. XXX, No. 4

AUGUST - NOVEMBER 2018

## NTEU Fights CBP in Federal Court For Expanded Bargaining

NTEU has consistently fought for a broad interpretation of what is properly negotiable, and resisted agencies' efforts to curtail negotiations over matters that are important to the employees we represent. As part of its ongoing efforts to preserve fair collective bargaining, NTEU is taking two negotiability disputes with U.S. Customs and Border Protection (CBP) to federal court.

Under federal law, agencies are generally required to bargain with employee unions over proposals that affect conditions of employment. There are some exceptions. Agencies are prohibited from bargaining over any proposal that is contrary to law. They also do not have to bargain over "management rights," that is, matters which affect management's authority to direct employees or to assign work.

During term negotiations with CBP, NTEU proposed that an employee's "official station" be defined as extending 50 road miles in every direction from the employee's work station. The definition of the 50-mile radius has an important practical effect because employees who travel outside of their official station for work are generally entitled to various types of travel compensation, including overtime for travel, per

diem, and lodging. CBP employees currently receive these entitlements only if they are traveling within a 50-mile radius of their official duty station "as the crow flies." NTEU argued that the agency's interpretation of the 50-mile radius was unfair because, of course, employees cannot travel "as the crow flies." They must travel on roadways and, in some cases, must travel more than 50 miles to arrive at their destination. CBP rejected the union's proposal as non-negotiable, asserting that its interpretation was dictated by federal travel regulations and thus NTEU's proposal was contrary to law.

NTEU took this matter to the Federal Labor Relations Authority (FLRA), which sided with CBP in a 2-1 decision issued on July 19, 2018. The dissenting FLRA member noted that the relevant federal travel regulations permit alternative methods of defining a "work station." He concluded that, because NTEU's proposal was directly related to an employee's actual travel, it complied with the regulations' language and purpose to fairly compensate employees.

On September 14, 2018, NTEU filed a petition for review challenging the FLRA's decision with the U.S. Court of Appeals for the D.C. Circuit. NTEU will defend its proposal as



*continued on next page*

## Court Invalidates Significant Portions of Anti-Union Executive Orders

On May 25, 2018, President Trump issued three blatantly anti-union Executive Orders (EOs). The EOs seek to undermine collective bargaining in the federal sector and to eviscerate employee rights. NTEU immediately filed a lawsuit in federal court against the President and the Office of Personnel Management (OPM), arguing that these EOs were contrary to civil service law.

The EOs weaken employee protections and union rights in many ways. One EO bars union representatives from using official time to help employees with grievances; it further imposes an arbitrary overall cap on how much official time may be used by union representatives. Another EO bars grievances over performance ratings and incentive pay. Such grievances would no longer be permitted - even if an employer's decision is flawed or discrimi-

natory. This EO also limits grievances over removals and restricts performance improvement periods (PIPs) to 30-days or less. The third EO prohibits union-agency negotiations over matters such as the numbers, types, and grades of employees or positions assigned to organizational subdivisions, or the technology and methods of performing work.

The illegality of these EOs was extensively briefed on an expedited schedule in U.S. District Court for the District of Columbia. The presiding judge held a lengthy, four-hour hearing on July 25, 2018 during which she extensively questioned counsel for the government, NTEU and other unions which had filed similar lawsuits. In a decisive victory for the unions, the judge issued an order on August 24, 2018 invalidating nine provisions in the three executive orders. The judge then

issued an accompanying 119-page opinion the next day, on August 25. She restated the bedrock principle that the President cannot act contrary to a statute duly enacted by Congress. She also recognized that "existing, binding federal law fully endorses labor organizations and collective bargaining in the federal civil service[.]" She methodically rejected most of the government's arguments, terming one of them "specious."

The government filed an appeal with the U.S. Court of Appeals for the D.C. Circuit on September 25, 2018. The court has directed the unions which had filed separate lawsuits in the lower court to file one consolidated brief with the appellate court. Under the court-ordered schedule, briefing will conclude by February 19, 2019. The court will then set a date for oral argument.

continued from page 1

consistent with the federal travel regulations, arguing that the FLRA member's dissenting view is correct.

Another current negotiability dispute with CBP concerns the agency's performance appraisal system. CBP has long used a pass/fail appraisal system, which means that employees are generally rated "successful" or "unacceptable"; there are no ratings above "successful." This straightforward system works for management because they do not have to make the complicated and miniscule distinctions between employees required for a multiple-tiered appraisal system. And it is better for employees because a many-tiered appraisal system can create mistrust as employees are shoehorned into multiple different ratings.

NTEU proposed in term bargaining that CBP retain its previous pass/fail appraisal system. CBP refused. The FLRA found in CBP's favor on July 11, 2018. It held that a pass/fail appraisal system affects management's right to direct employees and

assign work and is therefore nonnegotiable.

On September 7, 2018, NTEU filed a petition for review of the FLRA's appraisal system decision with the D.C. Circuit. NTEU will argue that under circuit precedent, an appraisal system as contemplated by the union's proposal does not affect any management right to assign work or direct employees.

NTEU's opening briefs in both cases are due December 26, 2018. The FLRA will file replies on January 25, 2019. Briefing is scheduled to conclude in February 2019, with an oral argument date to follow.

Bargaining entails a series of trade-offs, and the fewer matters that NTEU can bargain over, the less leverage it has over the collective bargaining agreement as a whole. NTEU will continue to aggressively fight for a fair definition of what is negotiable at the bargaining table.

## NEWS BRIEFS

### **Holiday Premium Pay Denial Goes to Arbitration.**

On November 17, 2017, NTEU filed a national grievance challenging CBP's denial of full holiday premium pay to employees on compressed work schedules (CWS) when those employees work shifts that straddle a holiday and a non-holiday. Premium pay is an important benefit for employees who must work on holidays. Employees on CWS who work a shift on a holiday rightfully receive holiday premium pay for their full shift. Starting in late 2017, CBP wrongly began to cap the holiday premium pay for employees on CWS who work a shift that straddles a holiday and a non-holiday.

For example, an employee who works an 8-hour shift starting at 8 p.m. on Labor Day and ending at 4:00 a.m. on the following day (a non-holiday) will receive holiday premium pay for the full 8 hours. Yet a CBP employee on a CWS who works a 10-hour shift starting at 8 p.m. on Labor Day and ending at 6:00 a.m. the following day will receive only 8 hours of holiday premium pay, not the full ten hours to which the employee is entitled under the law.

An arbitration hearing was held on October 10, 2018. NTEU argued that CBP's position is contrary to law and to its own prior practice. CBP and NTEU will also submit post hearing briefings early next year.

### **Oral Argument in OPM Data Breach Appeal.**

NTEU's appeal of the district court's unfavorable September 19, 2017 decision in the OPM data breach lawsuit is pending before the U.S. Court of Appeals for the D.C. Circuit. The lower court held that NTEU members have not been sufficiently harmed to have legal standing to pursue this suit; the court also dismissed NTEU's constitutional claim. Briefing before the D.C. Circuit was completed in August 2018, and a three-judge panel held oral argument on November 2, 2018. The judges thoroughly questioned counsel for NTEU and the government, as well as counsel for other plaintiffs and a government contractor who are involved in this litigation. NTEU now awaits the panel's ruling.

### **Overtime Grievance for IRS Customer Support Employees.**

On August 10, 2018, NTEU filed a grievance alleging that the IRS had wrongly exempted certain Information Technology Specialists from the federal overtime law. The IRS claims these employees fall under a computer employee exception to the overtime statute. NTEU argues, however, that these employees do largely customer support work and do not fall under the computer employee exception, which applies generally to computer programmers and software designers. The IRS denied the grievance and NTEU has invoked. The next step will be to schedule an arbitration date.

## **STATUS CALL** is a benefit of NTEU membership



Back issues of Status Call are available in the Workplace Rights section of the NTEU website.



Follow any breaking news about NTEU's legal work through the NTEU Blog—*A Day's Work*—and the weekly NTEU e-Bulletin, delivered to your inbox every Tuesday.

Item 09: Pay

**SUMMARY: OPM is issuing the final rule to establish six new locality pay areas in 2019.**

Attachments:

item06-2019LocalityPay

item06-2019LocalityPayAreas(Attach).pdf

December 6, 2018

**MEMORANDUM**

TO: Chapter Presidents and Legislative Coordinators

RE: Final Rule on New Locality Pay Areas

**SUMMARY: OPM is issuing the final rule to establish six new locality pay areas in 2019.**

The Office of Personnel Management (OPM) has informed NTEU that it plans to issue a final rule tomorrow to implement the Federal Salary Council's pending recommendation to establish six new locality pay areas, specifically:

Birmingham-Hoover-Talladega, AL;  
Burlington-South Burlington, VT;  
San Antonio-New Braunfels-Pearsall, TX;  
Virginia Beach-Norfolk, VA-NC;  
Corpus Christi-Kingsville-Alice, TX; and  
Omaha-Council Bluffs-Fremont, NE-IA.

NTEU is a member of the Council and supports the establishment of these new locality pay areas, some of which have languished for a significant period of time owing to a lack of action by the administration. These six areas were recommended based on data provided by the Bureau of Labor Statistics that showed that private sector wages in these areas averaged more than 10 percent higher than wages in the remainder of the "Rest of U.S." pay area over a three-year period.

A copy of the final rule which will be formally released tomorrow is attached. These six new locality pay areas are scheduled to take effect the first full pay period after January 1, 2019, and affect about 70,000 General Schedule employees. However, as stated in the notice, employees in these areas need to be aware that the President's planned pay freeze for January 2019, which was formalized in August under authority provided under the law, means that despite these new locality pay areas being in existence that there would be no change in locality pay rates for employees in these areas in the new year. At this point, given that we do not yet know whether Congress will override the President's pay freeze and provide for an overall federal employee pay increase for 2019, it is not yet clear whether or not there will be any locality pay increases for any employee, regardless of locality pay area. I will keep you informed of developments on this key issue and on NTEU's actions to secure deserved pay increases.

Anthony M. Reardon  
National President

Attachment



Billing Code: 6325-39-P

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 531

### RIN 3206-AN64

### General Schedule Locality Pay Areas

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** On behalf of the President's Pay Agent, the Office of Personnel Management (OPM) is issuing final regulations to establish six new General Schedule locality pay areas, make certain changes to the definitions of existing locality pay areas, and make minor clarifying changes to the names of two locality pay areas. Those changes in locality pay area definitions are applicable on the first day of the first pay period beginning on or after January 1, 2019.

Locality pay rates for the six new locality pay areas will be set by the President.

**DATES:** The regulations are effective January 5, 2019, and are applicable on the first day of the first pay period beginning on or after January 1, 2019.

**FOR FURTHER INFORMATION CONTACT:** Joe Ratcliffe by e-mail at [pay-leave-policy@opm.gov](mailto:pay-leave-policy@opm.gov) or by telephone at (202) 606-2838.

**SUPPLEMENTARY INFORMATION:** Section 5304 of title 5, United States Code (U.S.C.), authorizes locality pay for General Schedule (GS) employees with duty stations in the United States and its territories and possessions. Section 5304(f) authorizes the President's Pay Agent (the Secretary of Labor, the Director of the Office of Management and Budget (OMB), and the Director of the Office of Personnel Management (OPM)) to determine locality pay areas. The boundaries of locality pay areas must be based on appropriate factors, which may include local

labor market patterns, commuting patterns, and the practices of other employers. The Pay Agent must give thorough consideration to the views and recommendations of the Federal Salary Council, a body composed of experts in the fields of labor relations and pay policy and representatives of Federal employee organizations. The President appoints the members of the Federal Salary Council, which submits annual recommendations on the locality pay program to the Pay Agent. The establishment or modification of locality pay area boundaries must conform to the notice and comment provisions of the Administrative Procedure Act (5 U.S.C. 553).

On July 9, 2018, OPM published a proposed rule in the **Federal Register** on behalf of the Pay Agent. (See 83 FR 31694.) The proposed rule proposed linking locality pay area definitions to metropolitan statistical areas (MSAs) and combined statistical areas (CSAs) defined by OMB in OMB Bulletin No. 18-03, and proposed establishing four new locality pay areas:

Birmingham-Hoover-Talladega, AL; Burlington-South Burlington, VT; San Antonio-New Braunfels-Pearsall, TX; and Virginia Beach-Norfolk, VA-NC. The proposed rule also proposed adding two “Rest of U.S.” locations to the geographic definitions of two existing locality pay areas and making minor, clarifying changes to the names of two locality pay areas. The proposed rule did not propose modifying the standard commuting and GS employment criteria used in the locality pay program to evaluate, as possible areas of application, locations adjacent to the metropolitan area comprising the basic locality pay area. (A basic locality pay area is an OMB-defined MSA or CSA on which the definition of a locality pay area is based, and an area of application is a location that is not part of a basic locality pay area but is included in the locality pay area. Criteria used to establish areas of application were explained in the proposed rule.)

The proposed rule provided a 30-day comment period. Accordingly, the Pay Agent

reviewed comments received through August 8, 2018. After considering those comments, the Pay Agent has decided to implement the locality pay area definitions in the proposed rule, with two additional changes based on recommendations received from the Federal Salary Council on July 10, 2018. Those changes are the establishment of a new Corpus Christi-Kingsville-Alice, TX, locality pay area and establishment of a new Omaha-Council Bluffs-Fremont, NE-IA, locality pay area.

On July 10, 2018—the day after the proposed rule was published—the Pay Agent received the Federal Salary Council’s recommendations for locality pay for January 2019, which included a recommendation to establish a Corpus Christi-Kingsville-Alice, TX, locality pay area and an Omaha-Council Bluffs-Fremont, NE-IA, locality pay area. (The Council’s recommendations for locality pay for January 2019 are posted at <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/federal-salary-council/recommendation17.pdf>.) Because the Council based that recommendation on the same criteria as used for the four new locality pay areas included in the proposed rule, we have approved the Council’s recommendation regarding the two additional locality pay areas. In addition, a number of commenters on the proposed rule supported the establishment of these two additional locality pay areas. Accordingly, these final regulations establish a Corpus Christi-Kingsville-Alice, TX, locality pay area and an Omaha-Council Bluffs-Fremont, NE-IA, locality pay area. As with the four new locality pay areas included in the proposed rule, locality pay rates for the two additional new locality pay areas will be set by the President at a later date after they are established by these final regulations.

### **Impact and Implementation**

Establishing 6 new locality pay areas will impact about 70,000 GS employees. Locality

pay rates now applicable in those areas will not change automatically because locality pay percentages are established by Executive order under the President's authority in 5 U.S.C. 5304 or 5304a, and the President decides each year whether to adjust locality pay percentages. When locality pay percentages are adjusted, past practice has been to allocate a percent of the total GS payroll for locality pay raises and to have the overall dollar cost for such pay raises be the same, regardless of the number of locality pay areas. If a percent of the total GS payroll is allocated for locality pay increases, the addition of new areas results in a somewhat smaller amount to allocate for locality pay increases in existing areas. Implementing higher locality pay rates in the six new locality pay areas could thus result in relatively lower pay increases for employees in existing locality pay areas than they would otherwise receive.

Establishing McKinley County, NM, as an area of application to the Albuquerque-Santa Fe-Las Vegas, NM, locality pay area will impact about 1,600 GS employees. Establishing San Luis Obispo County, CA, as an area of application to the Los Angeles-Long Beach, CA, locality pay area will impact about 100 GS employees.

Using the definitions of MSAs and CSAs in OMB Bulletin No. 18-03 as the basis for locality pay area boundaries will impact about 153 GS employees in the new San Antonio-New Braunfels-Pearsall, TX, locality pay area. However, those GS employees are included in the impact statement above regarding establishment of the six new locality pay areas. No other locality pay areas are impacted by using MSAs and CSAs in OMB Bulletin No. 18-03 as the basis for locality pay area boundaries.

The changes in the names of the Boston-Worcester-Providence, MA-RI-NH-CT-ME and Albany-Schenectady, NY, locality pay areas will have no impact on GS employees because the geographic boundaries of the two locality pay areas affected will remain the same.

## **Comments on the Proposed Rule**

OPM received 184 comments on the proposed rule. Most commenters supported the proposed changes in the definitions of locality pay areas.

A number of comments reflected misunderstanding of the proposed rule's definitions of locality pay areas, with some comments indicating a belief that certain counties actually included in a proposed locality pay area were excluded. As explained in the proposed rule, locality pay areas consist of (1) the MSA or CSA comprising the basic locality pay area and, where criteria recommended by the Federal Salary Council and approved by the Pay Agent are met, (2) areas of application. Regarding the MSAs and CSAs comprising basic locality pay areas, these final regulations define MSA as the geographic scope of an MSA as defined in OMB Bulletin No. 18-03 and define CSA as the geographic scope of a CSA as defined in OMB Bulletin No. 18-03. (OMB Bulletin No. 18-03 is posted at <https://www.whitehouse.gov/wp-content/uploads/2018/04/OMB-BULLETIN-NO.-18-03-Final.pdf>.) Where a locality pay area defined in these regulations lists one or more locations in addition to the MSA or CSA comprising the basic locality pay area, those additional locations are areas of application that meet criteria recommended by the Federal Salary Council and approved by the President's Pay Agent. OPM plans to post the definitions of locality pay areas on its website soon after these final regulations are issued.

Some commenters objected that certain locations were to remain in the "Rest of U.S." locality pay area under the proposed rule. Some of these commenters were concerned about locations in MSAs or CSAs in the "Rest of U.S." locality pay area for which the Federal Salary Council has studied disparities between non-Federal pay and Federal pay over several years of data. For such locations that will remain in the "Rest of U.S." locality pay area, the Council

found that the pay disparities do not significantly exceed the pay disparity for the “Rest of U.S.” locality pay area over the same period. Some commenters were concerned about locations that will remain in the “Rest of U.S.” locality pay area because those locations do not meet the criteria for areas of application. Some commenters were concerned about rural locations that do not qualify as areas of application and for which the locality pay program’s current salary survey methodology cannot produce reliable estimates due to data insufficiency with respect to non-Federal salaries. For example, some comments expressed concern about Accomack and Northampton Counties, VA, not being included in the proposed Virginia Beach-Norfolk, VA-NC, locality pay area. These two counties comprise an area known as the Eastern Shore of Virginia and do not meet the Pay Agent’s criteria to be part of the Virginia Beach-Norfolk, VA-NC, locality pay area. In some cases, comments expressed concern regarding possible recruitment and retention difficulties the commenters believe agencies may have in certain locations that will remain in the “Rest of U.S.” locality pay area when these final regulations are put into effect. The Pay Agent has no evidence that the changes these final regulations will make in locality pay area definitions will create recruitment and retention challenges for Federal employers. However, should recruitment and retention challenges exist in a location, Federal agencies have considerable administrative authority to address those challenges through the use of current pay flexibilities. Information on these flexibilities is posted on the OPM website at <http://www.opm.gov/policy-data-oversight/pay-leave/pay-and-leave-flexibilities-for-recruitment-and-retention>.

A number of commenters expressed their views on pay levels in locality pay areas. Some commenters suggested specific locality pay percentages to apply to new or existing locality pay areas, and some commenters offered opinions on the extent to which pay increases are needed in

some locality pay areas compared to others. Some commenters expressed concern that existing locality pay areas' future pay levels could be set lower than they otherwise would, due to establishment of new locality pay areas. Such comments as these are outside of the scope of these final regulations. The purpose of these final regulations is to define the boundaries of locality pay areas. The role of the Pay Agent with regard to locality pay percentages is to report annually to the President what locality pay percentages would go into effect under the Federal Employees Pay Comparability Act of 1990 (FEPCA). The President establishes a base General Schedule and sets locality pay percentages each year by Executive order.

Some commenters expressed the belief that various indicators of living costs should be considered in defining locality pay areas or in setting locality pay. Living costs are not directly considered in the locality pay program. Locality pay is not designed to equalize living standards for GS employees across the country. Under 5 U.S.C. 5304, locality pay rates are based on comparisons of GS pay and non-Federal pay at the same work levels in a locality pay area. Relative living costs may indirectly affect non-Federal pay levels, but living costs are just one of many factors that affect the supply of and demand for labor, and therefore labor costs, in a locality pay area.

Some commenters objected that, as a consequence of the definitions of current locality pay areas, adjacent counties are included in two different locality pay areas while receiving different locality payments. These commenters were concerned that the adjacent California Counties of Sacramento and San Joaquin receive different locality payments, with Sacramento County receiving Sacramento-Roseville, CA-NV, locality pay and San Joaquin County receiving higher San Jose-San Francisco-Oakland, CA, locality pay. Sacramento County is located in the Sacramento-Roseville, CA, CSA, which is the basis for the geographic definition of the

Sacramento-Roseville, CA-NV, locality pay area. San Joaquin County is located in the San Jose-San Francisco-Oakland, CA, CSA, which is the basis for the geographic definition of the San Jose-San Francisco-Oakland, CA, locality pay area. Locality pay percentages are based on comparisons in each locality pay area between GS and non-Federal pay for the entire locality pay area. The results of such pay comparisons differ between the Sacramento-Roseville, CA-NV, and San Jose-San Francisco-Oakland, CA, locality pay areas. Consequently, those two locality pay areas and the locations comprising them receive different locality payments.

One commenter suggested a change in the criteria for evaluating Federal facilities that cross locality pay area boundaries. This commenter suggested that the term “facility” in those criteria be replaced with the term “Federal administrative boundary.” The commenter stated that most GS employees with duty stations within the Tahoe National Forest are in the Sacramento-Roseville, CA-NV, locality pay area, while Sierra County, CA, remains in the “Rest of U.S.” locality pay area. The commenter reported that the U.S. Forest Service is having difficulty recruiting and retaining employees for its duty stations in Sierra County. The Pay Agent’s criteria for evaluating Federal facilities that cross locality pay area boundaries is intended to cover single Federal facilities rather than large geographic areas such as National Forests. As stated above, Federal agencies have considerable administrative authority to address significant recruitment and retention challenges through the use of current pay flexibilities.

Some commenters expressed concern that certain Federal pay systems outside of the General Schedule would not benefit from the changes planned for definitions of GS locality pay areas. The purpose of these final regulations is to define locality pay areas for Federal employees who receive locality pay under 5 U.S.C. 5304, not to set pay levels for Federal employees who do not receive locality pay under 5 U.S.C. 5304.

One commenter suggested that all GS employees should receive the same locality pay rates regardless of location. The purpose of locality pay is to reduce pay disparities, which vary by locality pay area. Therefore, it is appropriate that locality rates differ between locations.

### **Expected Impact of the Final Rule**

Establishing new locality pay areas could have the long-term effect of increasing pay for Federal employees in affected locations if the President establishes higher locality pay percentages for those new pay areas. In addition, studies do suggest that increasing wages can raise the wages of other workers when employers need to compete for personnel. However, when locality pay percentages are adjusted, the practice has been to allocate a percent of the total GS payroll for locality pay raises and to have the overall cost for such pay raises be the same, regardless of the number of locality pay areas.

OPM expects this final rule to impact approximately 71,700 GS employees. Of the changes this final rule implements, the most significant change in terms of employment results from establishment of the Virginia Beach-Norfolk, VA-NC locality pay area, in which approximately 30,400 GS employees would be affected. Considering the relatively small number of employees affected, OPM does not anticipate this rule will substantially impact local economies or have a large impact in local labor markets. In addition, OPM did not receive any comments expressing concern regarding such impact.

As future locality pay rulemakings may impact higher volumes of employees in geographical areas and could rise to the level of impacting markets, OPM will continue to study the implications of such impacts in EO 13771 designations for future rules as needed.

## **REGULATORY PROCEDURES**

### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

### **Reducing Regulation and Controlling Regulatory Costs**

This rule is not an Executive Order 13771 regulatory action because this rule is related to agency organization, management, or personnel.

### **Regulatory Flexibility Act**

OPM certifies that this rule will not have a significant economic impact on a substantial number of small entities as this rule only applies to Federal agencies and employees.

### **Federalism**

OPM has examined this rule in accordance with Executive Order 13132, Federalism, and has determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

### **Civil Justice Reform**

This regulation meets the applicable standard set forth in Executive Order 12988.

### **Unfunded Mandates Act of 1995**

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### **Congressional Review Act**

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of nonagency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

### **Paperwork Reduction Act**

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

### **List of Subjects in 5 CFR Part 531**

Government employees, Law enforcement officers, Wages.

Office of Personnel Management.

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Alexys Stanley,  
Regulatory Affairs Analyst.

Accordingly, OPM is amending 5 CFR part 531 as follows:

**PART 531—PAY UNDER THE GENERAL SCHEDULE**

1. The authority citation for part 531 continues to read as follows:

**Authority:** 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Public Law 103-89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335 and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5941(a), E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682; and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

**Subpart F—Locality-Based Comparability Payments**

2. In § 531.602, the definitions of “CSA” and “MSA” are revised to read as follows:

**§ 531.602 Definitions.**

\* \* \* \* \*

CSA means the geographic scope of a Combined Statistical Area, as defined by the Office of Management and Budget (OMB) in OMB Bulletin No. 18-03.

\* \* \* \* \*

MSA means the geographic scope of a Metropolitan Statistical Area, as defined by the Office of Management and Budget (OMB) in OMB Bulletin No. 18-03.

\* \* \* \* \*

3. In § 531.603, paragraph (b) is revised to read as follows:

**§ 531.603 Locality pay areas.**

\* \* \* \* \*

(b) The following are locality pay areas for the purposes of this subpart:

(1) Alaska—consisting of the State of Alaska;

(2) Albany-Schenectady, NY-MA—consisting of the Albany-Schenectady, NY CSA and also including Berkshire County, MA;

(3) Albuquerque-Santa Fe-Las Vegas, NM—consisting of the Albuquerque-Santa Fe-Las Vegas, NM CSA and also including McKinley County, NM;

(4) Atlanta—Athens-Clarke County—Sandy Springs, GA-AL—consisting of the Atlanta—Athens-Clarke County—Sandy Springs, GA CSA and also including Chambers County, AL;

(5) Austin-Round Rock, TX—consisting of the Austin-Round Rock, TX MSA;

(6) Birmingham-Hoover-Talladega, AL—consisting of the Birmingham-Hoover-Talladega, AL CSA and also including Calhoun County, AL;

(7) Boston-Worcester-Providence, MA-RI-NH-ME—consisting of the Boston-Worcester-Providence, MA-RI-NH-CT CSA, except for Windham County, CT, and also including Androscoggin County, ME, Cumberland County, ME, Sagadahoc County, ME, and York County, ME;

(8) Buffalo-Cheektowaga, NY—consisting of the Buffalo-Cheektowaga, NY CSA;

(9) Burlington-South Burlington, VT—consisting of the Burlington-South Burlington, VT MSA;

(10) Charlotte-Concord, NC-SC—consisting of the Charlotte-Concord, NC-SC CSA;

- (11) Chicago-Naperville, IL-IN-WI—consisting of the Chicago-Naperville, IL-IN-WI CSA;
- (12) Cincinnati-Wilmington-Maysville, OH-KY-IN—consisting of the Cincinnati-Wilmington-Maysville, OH-KY-IN CSA and also including Franklin County, IN;
- (13) Cleveland-Akron-Canton, OH—consisting of the Cleveland-Akron-Canton, OH CSA and also including Harrison County, OH;
- (14) Colorado Springs, CO—consisting of the Colorado Springs, CO MSA and also including Fremont County, CO, and Pueblo County, CO;
- (15) Columbus-Marion-Zanesville, OH—consisting of the Columbus-Marion-Zanesville, OH CSA;
- (16) Corpus Christi-Kingsville-Alice, TX—consisting of the Corpus Christi-Kingsville-Alice, TX CSA;
- (17) Dallas-Fort Worth, TX-OK—consisting of the Dallas-Fort Worth, TX-OK CSA and also including Delta County, TX;
- (18) Davenport-Moline, IA-IL—consisting of the Davenport-Moline, IA-IL CSA;
- (19) Dayton-Springfield-Sidney, OH—consisting of the Dayton-Springfield-Sidney, OH CSA and also including Preble County, OH;
- (20) Denver-Aurora, CO—consisting of the Denver-Aurora, CO CSA and also including Larimer County, CO;
- (21) Detroit-Warren-Ann Arbor, MI—consisting of the Detroit-Warren-Ann Arbor, MI

CSA;

(22) Harrisburg-Lebanon, PA—consisting of the Harrisburg-York-Lebanon, PA CSA, except for Adams County, PA, and York County, PA, and also including Lancaster County, PA;

(23) Hartford-West Hartford, CT-MA—consisting of the Hartford-West Hartford, CT CSA and also including Windham County, CT, Franklin County, MA, Hampden County, MA, and Hampshire County, MA;

(24) Hawaii—consisting of the State of Hawaii;

(25) Houston-The Woodlands, TX—consisting of the Houston-The Woodlands, TX CSA and also including San Jacinto County, TX;

(26) Huntsville-Decatur-Albertville, AL—consisting of the Huntsville-Decatur-Albertville, AL CSA;

(27) Indianapolis-Carmel-Muncie, IN—consisting of the Indianapolis-Carmel-Muncie, IN CSA and also including Grant County, IN;

(28) Kansas City-Overland Park-Kansas City, MO-KS—consisting of the Kansas City-Overland Park-Kansas City, MO-KS CSA and also including Jackson County, KS, Jefferson County, KS, Osage County, KS, Shawnee County, KS, and Wabaunsee County, KS;

(29) Laredo, TX—consisting of the Laredo, TX MSA;

(30) Las Vegas-Henderson, NV-AZ—consisting of the Las Vegas-Henderson, NV-AZ CSA;

- (31) Los Angeles-Long Beach, CA—consisting of the Los Angeles-Long Beach, CA CSA and also including Kern County, CA, San Luis Obispo County, CA, and Santa Barbara County, CA;
- (32) Miami-Fort Lauderdale-Port St. Lucie, FL—consisting of the Miami-Fort Lauderdale-Port St. Lucie, FL CSA and also including Monroe County, FL;
- (33) Milwaukee-Racine-Waukesha, WI—consisting of the Milwaukee-Racine-Waukesha, WI CSA;
- (34) Minneapolis-St. Paul, MN-WI—consisting of the Minneapolis-St. Paul, MN-WI CSA;
- (35) New York-Newark, NY-NJ-CT-PA—consisting of the New York-Newark, NY-NJ-CT-PA CSA and also including all of Joint Base McGuire-Dix-Lakehurst;
- (36) Omaha-Council Bluffs-Fremont, NE-IA—consisting of the Omaha-Council Bluffs-Fremont, NE-IA CSA;
- (37) Palm Bay-Melbourne-Titusville, FL—consisting of the Palm Bay-Melbourne-Titusville, FL MSA;
- (38) Philadelphia-Reading-Camden, PA-NJ-DE-MD—consisting of the Philadelphia-Reading-Camden, PA-NJ-DE-MD CSA, except for Joint Base McGuire-Dix-Lakehurst;
- (39) Phoenix-Mesa-Scottsdale, AZ—consisting of the Phoenix-Mesa-Scottsdale, AZ MSA;
- (40) Pittsburgh-New Castle-Weirton, PA-OH-WV—consisting of the Pittsburgh-New Castle-Weirton, PA-OH-WV CSA;

(41) Portland-Vancouver-Salem, OR-WA—consisting of the Portland-Vancouver-Salem, OR-WA CSA;

(42) Raleigh-Durham-Chapel Hill, NC—consisting of the Raleigh-Durham-Chapel Hill, NC CSA and also including Cumberland County, NC, Hoke County, NC, Robeson County, NC, Scotland County, NC, and Wayne County, NC;

(43) Richmond, VA—consisting of the Richmond, VA MSA and also including Cumberland County, VA, King and Queen County, VA, and Louisa County, VA;

(44) Sacramento-Roseville, CA-NV—consisting of the Sacramento-Roseville, CA CSA and also including Carson City, NV, and Douglas County, NV;

(45) San Antonio-New Braunfels-Pearsall, TX—consisting of the San Antonio-New Braunfels-Pearsall, TX CSA;

(46) San Diego-Carlsbad, CA—consisting of the San Diego-Carlsbad, CA MSA;

(47) San Jose-San Francisco-Oakland, CA—consisting of the San Jose-San Francisco-Oakland, CA CSA and also including Monterey County, CA;

(48) Seattle-Tacoma, WA—consisting of the Seattle-Tacoma, WA CSA and also including Whatcom County, WA;

(49) St. Louis-St. Charles-Farmington, MO-IL—consisting of the St. Louis-St. Charles-Farmington, MO-IL CSA;

(50) Tucson-Nogales, AZ—consisting of the Tucson-Nogales, AZ CSA and also including Cochise County, AZ;

(51) Virginia Beach-Norfolk, VA-NC—consisting of the Virginia Beach-Norfolk, VA-NC CSA;

(52) Washington-Baltimore-Arlington, DC-MD-VA-WV-PA—consisting of the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA CSA and also including Kent County, MD, Adams County, PA, York County, PA, King George County, VA, and Morgan County, WV; and

(53) Rest of U.S.—consisting of those portions of the United States and its territories and possessions as listed in 5 CFR 591.205 not located within another locality pay area.

Billing Code: 6325-39-P

[FR Doc. 2018-26519 Filed: 12/3/2018 11:15 am; Publication Date: 12/7/2018]