

**Calendar No. 548**

113TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
{ 113-248

**BORDER PATROL AGENT PAY REFORM ACT**

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**R E P O R T**

OF THE

**COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE**

TO ACCOMPANY

**S. 1691**

TO AMEND TITLE 5, UNITED STATES CODE, TO IMPROVE THE SECURITY OF THE UNITED STATES BORDER AND TO PROVIDE FOR REFORMS AND RATES OF PAY FOR BORDER PATROL AGENTS



AUGUST 26, 2014.—Ordered to be printed  
Filed, under authority of the order of the Senate of August 5 (legislative  
day, August 1), 2014

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U.S. GOVERNMENT PRINTING OFFICE

39-010

WASHINGTON : 2014

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Mr. CARPER, from the Committee on Homeland Security and  
Governmental Affairs, submitted the following

### R E P O R T

[To accompany S. 1691]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1691) to amend title 5, United States Code, to improve the security of the United States border and to provide for reforms and rates of pay for border patrol agents, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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#### I. PURPOSE AND SUMMARY

S. 1691 would reform the pay system for Border Patrol agents by updating it to reflect the number of hours those agents regularly work and the way in which those hours are scheduled. At the same time, the bill would provide those agents with more reliable schedules and predictable paychecks, while enabling them to spend more time patrolling the border and saving taxpayers an estimated \$100 million annually.

## II. BACKGROUND AND NEED FOR THE LEGISLATION

### COMPENSATION FOR FEDERAL EMPLOYEES IN GENERAL

Federal law contains a number of different systems under which federal employees receive compensation for the hours they work. Most federal employees, including the Border Patrol agents who are the subject of S. 1691, receive a base salary whose amount is set by their grade and step on the General Schedule, or GS.<sup>1</sup> This salary generally compensates them for the first 40 hours they work each week. Depending on the type of work they perform, those working in excess of 40 hours in a given week may receive compensation under one or more of several statutes governing overtime pay.<sup>2</sup>

The Fair Labor Standards Act (FLSA), the primary federal statute regulating the wages and hours of most of the nation's workforce, requires most employees to receive an amount equal to one and one-half of their hourly rate of pay for each hour they work over 40 in any given week.<sup>3</sup> The Federal Employee Pay Act (FEPA) authorizes overtime pay for scheduled overtime—or overtime that is authorized by a manager in advance of the work being performed. FEPA overtime compensation is capped by law at the greater of the time-and-a-half at the GS-10, step 1 rate (currently \$69,344 before locality pay adjustments are factored in) or the straight time rate at the agent's own GS and step level.<sup>4</sup>

In 1954, Congress established Administratively Uncontrollable Overtime (AUO) to compensate federal employees whose duties require irregular and unpredictable work extending beyond a normal shift.<sup>5</sup> As explained in the Code of Federal Regulations, AUO premium pay is authorized for a position "in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty."<sup>6</sup> Essentially, an employee is only allowed to use AUO if he or she is working hours that could not have been scheduled in advance and if it would be negligent to leave the job unfinished.

AUO provides additional pay for an employee—generally between 10 and 25 percent of the base salary—for self-directed hours of overtime worked that are unschedulable. For example, if an employee works an additional 10 hours of unscheduled work each week—for a total of 100 hours worked in a pay-period—that employee would receive a 25 percent increase in their basic pay. Managers must certify that an employee is eligible to earn AUO pay—based on the characteristics of the tasks that they are performing—on a quarterly basis. AUO-eligible employees are then charged with determining on any given day whether the work that they are performing requires them to work additional hours beyond their regu-

<sup>1</sup> Entry level agents are usually placed at GS 5, step 1, while the most experienced agents can reach GS 12, step 10.

<sup>2</sup> Some workers, most notably those at a supervisory level are exempt from overtime pay requirements. See 29 U.S.C. § 213(a)(1).

<sup>3</sup> Again, several types of employees not at issue in this bill are exempt from the FLSA's overtime rules. See 29 U.S.C. § 213.

<sup>4</sup> See 5 U.S.C. § 5542(a).

<sup>5</sup> See 5 U.S.C. § 5545(c).

<sup>6</sup> See 5 C.F.R. § 550.151. As of 1974, AUO compensation is considered in an employee's retirement annuity calculation. See 5 U.S.C. § 8331(3)(D).

larly scheduled 8-hour shifts. An AUO-eligible employee may also receive other premium pay for “regularly scheduled work” hours—defined under federal regulations as the first 40 hours worked during a work-week<sup>7</sup>—including night pay,<sup>8</sup> Sunday pay,<sup>9</sup> and holiday premium pay.<sup>10</sup> The amount of AUO premium pay that any employee can generally receive in a pay-period is capped by law.<sup>11</sup>

AUO-certified employees may also receive FLSA-regulated compensation for overtime hours, in addition to the premium pay they receive through AUO.<sup>12</sup> The FLSA generally requires employers to pay nonexempt employees<sup>13</sup> one-and-a-half times their regular rate of pay for hours worked in excess of 40 in a workweek. Under the FLSA, law enforcement employees, including Border Patrol agents, are paid time-and-a-half for hours worked in excess of 42.75 hours in a week<sup>14</sup>—something virtually all AUO-eligible employees at the Border Patrol do.<sup>15</sup> For unscheduled overtime hours worked above 85.5 per pay-period (up to 100 hours) the agency pays AUO at the agent’s regular rate of pay plus an additional half-rate of pay through FLSA—totaling time and a half.<sup>16</sup> In the rare instance in which an agent exceeds 100 hours, for those additional hours they would receive only the half-rate FLSA compensation.<sup>17</sup>

<sup>7</sup> See 5 C.F.R. § 610.111.

<sup>8</sup> Employees eligible for night pay receive an additional 10 percent of their hourly rate for each hour of regularly scheduled work performed at night. See 5 U.S.C. § 5545(a).

<sup>9</sup> Employees eligible for Sunday pay receive an additional 25 percent of their hourly rate for each hour of regularly scheduled work when any part or the whole of that shift is performed on a Sunday. See 5 U.S.C. § 5546(a).

<sup>10</sup> According to OPM, “employees who are required to work on a holiday receive their rate of basic pay, plus holiday premium pay, for each hour of holiday work. Holiday premium pay is equal to an employee’s rate of basic pay.” See 5 U.S.C. § 5546(b). and [<http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/holidays-work-schedules-and-pay/>] last visited July 24, 2014.

<sup>11</sup> According to OPM:

There is a biweekly pay limitation that limits the amount of premium pay that can be paid during a biweekly pay period. Under 5 U.S.C. § 5547(a) and 5 C.F.R. § 550.105, premium pay cannot be paid to General Schedule employees (including law enforcement officers and other covered employees) to the extent that doing so would cause an employee’s basic pay, overtime pay, the dollar value of compensatory time off, night pay, annual premium pay, Sunday premium pay, and holiday premium pay to exceed the greater of the biweekly rate for GS–15, step 10 (including any applicable special salary rate or locality rate of pay), or level V of the Executive Schedule. Exception: For employees performing emergency work (as determined by the agency head or OPM), or mission-critical work (as determined by the agency head), premium pay cannot be paid which causes the total of basic pay and premium pay to exceed the greater of the annual rate for GS–15, step 10 (including any applicable special salary rate or locality rate of pay); or level V of the Executive Schedule. These limitations do not apply to wage employees or to FLSA overtime pay.”

See <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/overtime-pay-title-5/>, last visited on July 29, 2014.

<sup>12</sup> Some employees, generally managers, are exempt from earning FLSA overtime (See 29 U.S.C. § 213) but can still receive AUO under 5 U.S.C. § 5545(c)(2).

<sup>13</sup> Employees that are exempted from receiving FLSA overtime include most management personnel, including all personnel at the GS–14 and GS–15 level. From email correspondence with CBP, July 29, 2014.

<sup>14</sup> 5 C.F.R. § 551.216.

<sup>15</sup> Briefing by Customs and Border Protection, May 11, 2014.

<sup>16</sup> According to OPM, the guidelines for how FLSA interacts with AUO are as follows:

“for AUO employees, the straight time rate of pay is equal to basic pay plus AUO pay divided by the hours for which the basic pay plus AUO pay are intended. (See 5 CFR § 551.512(b).) Thus, an AUO employee has received the straight time rate of pay for the hours for which basic pay and AUO pay are intended. In other words, the AUO employee has been paid once for hours covered by basic pay and AUO pay, leaving an agency with the obligation of straight time pay for any regularly scheduled overtime hours (not covered by AUO pay) plus a half-rate obligation for all overtime hours to meet the FLSA time-and-one-half overtime requirement.”

See [<http://archive.opm.gov/oca/compmemo/html/cpm97-5a.htm>], last visited on May 30, 2014.

<sup>17</sup> This is because AUO pays a maximum of 25 percent of an agent’s basic pay—for example if an agent worked 110 hours in a pay-period that agent would get their 25 percent AUO rate,

Continued

Lastly, the Border Patrol uses a separate legal authority to pay for scheduled overtime—or overtime that is authorized by a manager, generally in advance of the work being performed. This compensation is authorized by the Federal Employee Pay Act of 1945 (FEPA). For example, an agent in the field may be scheduled to work a 6th shift in one work week in order to respond to an emergency—such as dealing with the current humanitarian challenge involving unaccompanied minors in south Texas. For that extra shift, the agent would be paid under the FEPA pay authority.<sup>18</sup> In recent years, the Border Patrol has used scheduled FEPA overtime very sparingly, paying out only \$4 million in fiscal year 2012 and less than \$1 million in fiscal year 2013.<sup>19</sup>

#### BORDER PATROL AGENTS' OVERTIME COMPENSATION

The Border Patrol, a component of the Department of Homeland Security's (DHS's) U.S. Customs and Border Protection (CBP), is charged with securing our nation's borders against the illegal entry of terrorists, criminals, illicit contraband and undocumented immigrants. Over the years, the Border Patrol has become a prolific user—and as it turns out, often a misuser—of the AUO system, often using it to pay for overtime hours that are predictable and could have been scheduled in advance. Forty years ago, when the AUO system was last extensively modified, AUO offered an entirely appropriate means for awarding agents overtime pay based on the operational demands of the Border Patrol. Border Patrol agents were regularly in “hot pursuit” of a group of border crossers when their shift was scheduled to end. Because of the remoteness of the areas in which the agents routinely found themselves and the limits on communications systems at the time, those agents could not pause from their pursuit to seek approval of unscheduled overtime. AUO was a natural fit for this kind of work environment.

However, the nature of the work performed by frontline agents has changed dramatically over the past 40 years—and particularly over the past decade, as apprehensions made by Border Patrol agents have declined to near historical lows. In 1975 the Border Patrol had 1,746 agents who made 596,796 apprehensions of individuals attempting to cross the border illegally.<sup>20</sup> In fiscal year 2013, the most recent year for which data is available, the Border Patrol had a legislatively mandated floor of 21,370 agents who made 420,789 apprehensions.<sup>21</sup> In other words, the Border Patrol has more than 12 times more agents deployed to the border today than it did when AUO was created, but these agents make 30 percent fewer apprehensions overall. On the ground, this change has

plus 24.5 hours of half rate FLSA overtime payments. Briefing by Customs and Border Protection, July 29, 2014.

<sup>18</sup> Agents assigned to such a shift would be paid by FEPA, but are also subject to the FLSA requirements. This means that they often receive both FEPA and FLSA pay for this kind of scheduled overtime. FEPA overtime compensation is capped by law at the greater the time-and-a-half of the GS-10, step 1 rate (\$69,344 before locality pay adjustments are factored in) or the straight time rate at the agent's own GS and step level. However, agents paid with FEPA for scheduled overtime are also eligible for FLSA payments if they are non-exempt. In practice, the interplay between FEPA and FLSA means most agents who are scheduled overtime earn very close to time-and-a-half. From a telephone call with Customs and Border Protection, July 29, 2014.

<sup>19</sup> Email correspondence with Customs and Border Protection, May 28, 2014.

<sup>20</sup> University of Syracuse, Transactional Records Access Clearinghouse Immigration, *National Trends in Apprehensions and Staffing*, available at [<http://trac.syr.edu/immigration/reports/141/include/rep141table2.html>], last visited June 3, 2014.

<sup>21</sup> Briefing by Customs and Border Protection, May 11, 2014.

meant that agents needing regular AUO to continue “hot pursuits” no longer accurately reflects the work agents generally do today.

In the early 1990s, the Border Patrol began implementing a new strategy known as “prevention through deterrence” that focused its efforts on deploying agents and resources directly on the border in order to deter illegal border crossings. Starting in El Paso, Texas in 1993 with Operation Hold the Line, and later expanded to San Diego with Operation Gatekeeper in 1994, the Border Patrol began deploying agents, cameras and underground sensors, and fencing directly on the border in an effort to deter illegal border crossings. Over the next two decades, the Border Patrol continued to expand the resource-intensive “prevention through deterrence” approach across the length of the border with Mexico, increasingly deploying its agents to the more remote parts of the southern border.<sup>22</sup> In order to maximize their ability to cover the length of the border, managers began routinely assigning agents to work 10-hour shifts—which allowed the agency to cover each day with three overlapping 10-hour shifts, instead of four overlapping 8-hour shifts. Agents were paid for these extra hours using AUO, despite the fact that the extra hours they were working were largely predictable and essentially scheduled.<sup>23</sup>

Over the past decade, the Border Patrol has increasingly begun to use intelligence gathering by its agents during a shift in order to focus the enforcement efforts of the next shift of agents. The 2012 Border Patrol Strategic Plan formalized this change in operations, shifting the agency away from the “prevention through deterrence” model and instead emphasizing the use of intelligence and risk analysis to guide deployments.<sup>24</sup> Agents are now regularly tasked with generating real-time intelligence reports on the trends they encounter during their shift, including geo-locating their apprehensions and mapping them, in order to allow supervisors to more effectively deploy their personnel. They are also increasingly being deployed into remote, rugged environments where travel time from the station where they receive their instructions for the shift—known as the muster—to the border can take up to two hours each way. However, travel to and from their work station and generating reports to inform the next shift of agents are not activities that are authorized to be paid by the AUO statute and its implementing regulations. Additionally, communication systems along the border have increased dramatically over the past 40 years, making it far easier for an agent deployed to a remote part of the border to contact a supervisor in order to authorize their actions.<sup>25</sup>

While the nature of the work performed by the average agent has changed over the years, the Border Patrol has been slow to change how it administers its overtime system. Part of the issue is that for years, CBP reportedly promised agents that they would

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<sup>22</sup> Seghetti, Lisa, *Border Security: Immigration Enforcement Between Ports of Entry*, R42138, Congressional Research Service, January 16, 2014.

<sup>23</sup> From a series of briefings by Customs and Border Protection, January to June 2014.

<sup>24</sup> See: Customs and Border Protection, *2012–2016 Border Patrol Strategic Plan*, Washington, DC, 2012.

<sup>25</sup> From a series of briefings by Customs and Border Protection, January to June 2014.

receive an additional 25 percent pay above their base salary each year, essentially guaranteeing them the maximum hours of AUO.<sup>26</sup>

As reported last year by the Office of Special Counsel (OSC), the independent federal agency charged with protecting federal employees and applicants from prohibited personnel practices, the Border Patrol has misused AUO to pay for work performed by agents that should have been paid using a different kind of overtime, or perhaps in some cases, for hours that were not worked and should not have been paid at all.

On October 31, 2013, OSC issued a letter and report to the President detailing “long-standing abuse of overtime payments by the Department of Homeland Security.”<sup>27</sup> The report followed up on a 2008 OSC investigation that reached similar conclusions. In its report, OSC discussed 10 specific cases involving Border Patrol agents,<sup>28</sup> and revealed that, for years, the Border Patrol misused AUO by using it to pay for activities that were not uncontrollable by their nature and not contemplated by the statute authorizing AUO. This misuse essentially means that either: (a) agents should have been compensated under the more generous FLSA or FEPA overtime systems; or (b) agents were performing work that was not time-sensitive, could have been deferred to a subsequent shift, and thus should not have received overtime at all.

One key way that AUO has been misused by Border Patrol managers is to compensate employees in the field for working a 10-hour shift. As noted above, the Border Patrol prefers deploying three 10-hour shifts of agents in any given day because it believes this maximizes its ability to patrol the border in a 24-hour period. The Deputy Special Counsel for Policy and Congressional Affairs of the OSC, Adam Miles, testified before this Committee that Border Patrol managers in Laredo, Texas made a deliberate choice to “continue with three, ten-hour shifts per day utilizing AUO to facilitate the shift changes. The managers insist that employing three, ten-hour shifts is a more cost-effective approach to securing the border, even if AUO may not properly be used for routine activities.”<sup>29</sup>

The OSC referred a total of ten cases to CBP’s Office of Internal Affairs and the DHS Office of the Inspector General (OIG) alleging misuse of AUO by CBP personnel.<sup>30</sup> Some of the allegations received by the OSC, and detailed in this report, claimed that Border Patrol agents were getting paid AUO for hours that they were not actually performing work, or for watching television or surfing the internet. In testimony before this Committee, Paul L. Hamrick, the Deputy Assistant Commissioner of the Office of Internal Affairs at the U.S. Customs and Border Protection noted that his office had

<sup>26</sup> See testimony of Brandon Judd, President of the National Border Patrol Council, “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014). <http://www.hsgac.senate.gov/hearings/border-security-examining-the-implications-of-s-1691-the-border-patrol-agent-pay-reform-act-of-2013>.

<sup>27</sup> Letter from Carolyn Lerner, Special Counsel, to President Barack Obama, October 31, 2013. Available at: <https://osc.gov/PublicFiles/FY2014/14-1%20DI-13-0002/14-1%20DI-13-0002%20-%20Letter%20to%20the%20President.pdf>, last visited August 20, 2014.

<sup>28</sup> The OSC report also identified cases of AUO misuse at Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS) and other agencies within DHS.

<sup>29</sup> See testimony of Adam Miles, Deputy Special Counsel, Policy and Congressional Affairs, U.S. Office of Special Counsel, “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014).

<sup>30</sup> One of the cases referred by OSC alleged misuse of AUO by personnel at the CBP Office of Internal Affairs. That case, and three others, are being investigated by the OIG.

investigated 6 of the 10 cases of AUO abuse identified by the OSC, and in at least one case had performed covert surveillance on employees. He noted that, “[a]lthough the Office of Special Counsel received complaints that overtime hours compensated under AUO were not being worked—allegations that, if proven, could constitute criminal or administrative violations—our investigations did not substantiate any OSC allegations that employees had received AUO compensation for hours that were not worked.”<sup>31</sup> In other words, these employees were, in fact, working the additional hours that they were paid for with AUO, but they should have been compensated for the work they performed using a different overtime system.<sup>32</sup> Mr. Hamrick also stated that his office confirmed that CBP was misusing AUO in a number of locations, including at the Commissioner’s Situation Room in U.S. Customs and Border Protection’s Headquarters and the Federal Law Enforcement Training Academy in Artesia, New Mexico.

In two cases referred by OSC and substantiated by Internal Affairs, Border Patrol agents were working alongside other CBP personnel and performing the same type of work. In these cases, the Border Patrol agents were receiving AUO but the other CBP personnel were not. For example, agents in San Ysidro, California were assigned to work paralegal duties alongside civilian paralegals, but the agents were regularly provided AUO while the civilian paralegals did not work overtime. Similarly, Border Patrol agents working as instructors at DHS training facilities regularly received AUO, while CBP officers<sup>33</sup> working at the same facilities did not. The Border Patrol has argued that their instructors need to work overtime at these facilities in order to prepare for the 8-hour day of instruction that trainees receive.<sup>34</sup> CBP officers at these facilities told Internal Affairs that they were generally able to complete their preparatory work without working overtime, but acknowledged that “[w]hen it is not possible to complete all additional instructor duties within an 8-hour day, [CBP officer] instructors generally complete these types of duties without compensation because AUO is not available to them.”<sup>35</sup>

In response to this report, DHS undertook a series of internal reviews. These reviews culminated in a May 23 memorandum issued by Deputy Secretary Alejandro Mayorkas to DHS components acknowledging that “it is clear that the Department is not in compliance with the rules governing AUO.” The memo goes on to outline a number of new steps that will have to be taken by DHS components that use AUO, including:

<sup>31</sup> See testimony of Paul L. Hamrick, Deputy Assistant Commissioner of the Office of Internal Affairs at the U.S. Customs and Border Protection, “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014).

<sup>32</sup> “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014). <http://www.hsgac.senate.gov/hearings/border-security-examining-the-implications-of-s-1691-the-border-patrol-agent-pay-reform-act-of-2013>.

<sup>33</sup> CBP officers work at ports of entry and are not eligible to receive AUO.

<sup>34</sup> See testimony of Ronald Vitiello, Deputy Chief of the Border Patrol, “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014).

<sup>35</sup> See written testimony of Adam Miles, Deputy Special Counsel, Policy and Congressional Affairs U.S. Office of Special Counsel, “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014).

1. Reviewing and updating the positions that are eligible for AUO;
2. Improving AUO record-keeping;
3. Systematically reviewing the hours of AUO that are claimed;
4. Requiring managers to take a more active role in managing overtime; and
5. Updating the practice of “excluding” hours to come into compliance with regulations.<sup>36</sup>

However, as the OSC pointed out in its letter, the misuse of AUO has been a known problem at DHS generally—and the Border Patrol specifically—since at least 2008. In response to the initial OSC complaint in 2008, DHS initiated an interagency process that culminated in a legislative proposal attached to the 2012 budget request.<sup>37</sup> Congress did not act on this proposal, and CBP continued to misuse AUO.<sup>38</sup>

#### S. 1691, THE BORDER PATROL AGENT PAY REFORM ACT OF 2013

S. 1691 would address the problems outlined above by dramatically simplifying the pay system used by Border Patrol agents. It would eliminate AUO and FLSA overtime for Border Patrol agents and create a new pay system that results in more hours worked by agents, provides more reliable schedules and paychecks for agents, and saves taxpayers money. According to the Congressional Budget Office, these savings are estimated at \$100 million annually.

The bill has the support of both CBP and the union representing most Border Patrol agents. At a hearing before this Committee on June 9, 2014, Border Patrol Deputy Chief Ronald Vitiello testified that the bill would enable his agency to better secure the border: “S. 1691 would replace AUO with a system that controls costs, fairly compensates certain agents for irregular and necessary work, and maximizes agent capability for critical law enforcement and border security responsibilities.” Additionally, Deputy Chief Vitiello testified that the bill would result in current Border Patrol agents working 2.5 million hours more than they do today—or the equivalent of adding 1,500 agents to its workforce.<sup>39</sup>

The Border Patrol Council, which represents Border Patrol agents, has also been supportive of this bill, despite the fact that the average Border Patrol agent likely would be paid less each year

<sup>36</sup> Memo from Deputy Secretary Alejandro N. Mayorkas to DHS components entitled: “Improving AUO Administration in the Department of Homeland Security,” May 23, 2014. Hereafter referenced as “May 23 AUO Memo.”

<sup>37</sup> Briefing with DHS Office of Legislative Affairs and Customs and Border Protection, November 21, 2013.

<sup>38</sup> The 2012 legislative proposal would have put Border Patrol agents on the Law Enforcement Availability Pay (LEAP) system that is used by criminal investigators across the federal government. LEAP allows criminal investigators to be compensated for time that they are “available” to work, and reflects the uncertain nature of their work. Criminal investigators work irregular hours and generally need to be “on-call”, or available, even when they are not working. The LEAP system was created to reflect these realities, and to compensate them for the extra hours that they need to work to close a case. LEAP is easier to manage and would be an improvement over the use of AUO for CBP. However, CBP believes that the nature of a Border Patrol agent’s work requires them to be present, not available. Securing the border, by its very nature, requires that agents either be physically working along the border, or supporting frontline agents at stations, checkpoints, or headquarters. S. 1691 is an improvement over LEAP because it would require that Border Patrol agents be provided with an hour of pay for an hour of work performed.

<sup>39</sup> See testimony of Ronald Vitiello, Deputy Chief of the Border Patrol, “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014).

under this new pay system. As Brandon Judd, President of the Border Patrol Council, said in his testimony before the Committee, “I want to make it clear that no Border Patrol agent is happy about the prospect of losing \$6,400 per year. . . . We are sacrificing a lot, but in the end, it will prove to be a boon for border security, the American public, the agency, and the agents whom I represent.”<sup>40</sup>

Key components of the bill, as reported by the Committee, include:

- No AUO or FLSA. The bill would make Border Patrol agents ineligible for compensation under AUO or for overtime pay through the FLSA.
- Election. Each year, Border Patrol agents would select one of three rates of pay—and number of hours—that they would like to work:
  - Level 1 rate of pay. Agents would work 100 hours per two-week pay period and receive 125 percent of their basic pay under the GS scale;
  - Level 2 rate of pay. Agents would work 90 hours over the two-week pay period and receive 112.5 percent of their basic pay under the GS scale;
  - Basic rate of pay. Agents would work 80 hours over the two-week pay period and receive their basic pay under the GS scale.
- Staffing Assessment. The bill requires the Border Patrol to undertake a detailed assessment of its operational requirements and staffing needs at every Border Patrol station within one year of enactment, and submit it to Congress for review.
- GAO Audit. The bill requires the Government Accountability Office (GAO) to examine CBP’s methodology and analysis and, within 90 days, submit a report to Congress indicating whether GAO concurs with CBP’s assessment.
- Staffing Floor. The bill initially requires that no more than 10 percent of the agents at any given location be allowed to work less than 100 hours per two-week pay period, and authorizes CBP to unilaterally assign agents to work 90 or 100 hours per pay period in order to meet this staffing floor. This means that if fewer than 90 percent of agents elect to work 100 hours in a given location, CBP must unilaterally assign agents to work the extra hours in order to ensure that 90 percent of Border Patrol agents in that location are working 100 hours per pay-period. This will ensure that the Border Patrol has a stable floor of staffing, allowing managers with a steady annual baseline of hours to plan border security operations. The staffing floor initially set by the bill would result in the average agent working more hours than they have in recent years, increasing efforts to secure the border by the equivalent of more than 1,500 agents.
- Lowering the Staffing Floor. Based on the results of the staffing assessment required by the bill, the staffing floor—the requirement that 90 percent of Border Patrol agents work 100 hours in a given location—could be lowered at any location if

<sup>40</sup> See testimony of Brandon Judd, President of the National Border Patrol Council, “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014).

the assessment shows that the Border Patrol needs less hours to be worked in order to meet its operational requirements.

- **Ensuring Security.** The bill authorizes CBP to unilaterally assign agents to work additional hours if the security situation along the border necessitates it.
- **Management and Training Exemption.** Border Patrol agents assigned to work at headquarters, as training instructors, or in an administrative or fitness instructor position at any location would initially be assigned to the Basic Rate of Pay set by the bill—or required to work 80 hours every two-week pay period. However, if the staffing assessment required by the bill shows a need for additional hours to be worked by these agents in order to meet the agency’s operational requirements, CBP would be authorized to allow agents to elect—or be assigned to work 100 hours or 90 hours per pay period.
- **Compensatory Time.** The work of securing the border is highly unpredictable, and there may be weeks when conditions on the ground necessitate that agents in a given location work more hours than the amount they initially elected. Unscheduled overtime worked beyond those hours they elected (or were assigned) to work would entitle agents to compensatory time off that *could not* be cashed out upon departure or retirement from the Border Patrol. Agents could not receive overtime pay for these hours. This compensatory time would be capped at 10 hours per pay period—although a manager could waive this 10 hour cap for compensatory time per pay period in order to respond to an emergency. The bill would, however, set a hard cap of 240 hours in compensatory time that any agent could earn in a given year.
- **Scheduled Overtime.** The bill would allow for scheduled overtime in order to give managers the flexibility to deal with surges in workload that necessitate agents being scheduled to work an additional shift. Such overtime would be compensated under the FEPA overtime system, as described above. The bill directs CBP to limit the use of scheduled overtime. The Committee expects that the Border Patrol will continue to minimize the use of scheduled overtime under this bill, much as it has over the past three years.
- **Retirement Continuity.** The bill, as amended by the Committee, would require CBP, in consultation with the Office of Personnel Management, to develop a plan to ensure that agents are not able to artificially elevate their retirement annuities by selecting a higher rate of pay than they have historically once they are within three years of being eligible to retire. CBP would have the authority to unilaterally assign agents to rates of pay in order to implement this plan. GAO would be required to review this plan and report to Congress concerning whether the plan proposed by CBP is effective.

### III. LEGISLATIVE HISTORY

On November 13, 2013, Senators Tester and McCain introduced the Border Patrol Pay Reform Act of 2013 (S. 1691). A companion bill, H.R. 3463, was introduced in the House of Representatives on the same day. S. 1691 was referred to the Senate Committee on

Homeland Security and Governmental Affairs. Additional co-sponsors are Senators Heitkamp, Ayotte and Flake.

On January 28, 2014, the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce held a hearing on reported DHS abuses AUO.<sup>41</sup> The hearing, entitled “Examining the Use and Abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security,” examined the instances of AUO abuse raised in OSC’s report, as well as how the DHS and CBP responded to OSC’s findings, including the disciplinary actions taken. Some of the witnesses also discussed how the Border Patrol Pay Reform Act of 2013 would help address the concerns raised by the OSC report and eliminate the use of AUO at the Border Patrol. The Special Counsel, Carolyn Lerner, Deputy Chief of the U.S. Border Patrol, Ronald Vitiello, DHS’s Chief Human Capital Officer, Catherine Emerson, and President of the National Border Patrol Council, Brandon Judd, testified at the hearing.

On June 9, 2014, the Committee held a hearing on the bill, entitled, “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013.”<sup>42</sup> The hearing focused on the impact the bill would have on CBP’s ability to secure the border, manage its workforce, and make the most effective use of taxpayer resources. The Committee heard testimony from Deputy Chief of the U.S. Border Patrol, Ronald Vitiello, President of the National Border Patrol Council, Brandon Judd, Deputy Assistant Commissioner of the Office of Internal Affairs at U.S. Customs and Border Protection, Paul L. Hamrick and OSC’s Deputy Special Counsel for Policy and Congressional Affairs, Adam Miles.

The Committee considered S. 1691 at a business meeting on June 25, 2014.

Senators Tester and McCain offered a substitute amendment that made a number of changes suggested by DHS and the Office of Personnel Management. These changes included a requirement that CBP perform a staffing assessment, which would be used to determine whether CBP could deviate in either direction from the bill’s baseline requirement that 90 percent of agents at a location work 100 hours per pay period at the level 1 Border Patrol rate of pay; a requirement that CBP implement a plan to ensure agents cannot artificially inflate their retirement annuities through the election process in the bill; an exemption for Headquarters and training facilities from the bill’s requirement that 90 percent of agents work 100 hours per pay period at the level 1 Border Patrol rate of pay; and a requirement that CBP try to limit or avoid the use of scheduled overtime by Border Patrol agents. The substitute amendment was adopted by voice vote, with Senators Carper, Levin, Pryor, McCaskill, Tester, Heitkamp, Coburn, McCain, Johnson, and Portman present.

<sup>41</sup> “Examining the Use and Abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security,” hearing before the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce of the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (January 28, 2014). See <http://www.hsgac.senate.gov/subcommittees/fp/w/ hearings/examining-the-use-and-abuse-of-administratively-uncontrollable-overtime-at-the-department-of-homeland-security>.

<sup>42</sup> “Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013,” hearing before the Senate Committee on Homeland Security and Governmental Affairs, 113th Cong. (June 9, 2014). See <http://www.hsgac.senate.gov/hearings/border-security-examining-the-implications-of-s-1691-the-border-patrol-agent-pay-reform-act-of-2013>.

Senator Coburn offered an amendment that would have required that CBP employees who spend 50 percent or more of their work hours serving as a union representative in negotiations and representing employees in personnel disputes—known as “official time”<sup>43</sup>—be assigned to work 80 hours per pay period at the basic Border Patrol rate of pay. This amendment was not adopted by a roll call vote of 6–9. Senators Coburn, McCain, Johnson, and Portman voted in favor of the amendment, and Senators Carper, Levin, Pryor, McCaskill, Tester and Heitkamp voted against the amendment. In addition, Senators Enzi and Ayotte voted in favor of the amendment by proxy, and Senators Landrieu, Begich and Baldwin voted against the amendment by proxy. Senators present for the vote were Senators Carper, Levin, Pryor, McCaskill, Tester, Heitkamp, Coburn, McCain, Johnson, and Portman.

Senator Coburn offered another amendment that was modified by a second degree amendment offered by Senators Tester, McCain and Heitkamp. As originally offered, the amendment would have required that all Border Patrol agents assigned to Headquarters, working as training instructors at a training facility, working in an administrative position, or working as a fitness instructor be assigned to work 80 hours per pay period at the basic Border Patrol rate of pay. Senators Tester, McCain and Heitkamp offered a second degree amendment that allowed the Border Patrol more flexibility to have those Border Patrol agents work 90 or 100 hours and receive the level 1 or level 2 Border Patrol rate of pay if the staffing assessment required by the bill showed additional hours to be necessary to fulfill operational requirements. The Tester, McCain, Heitkamp second degree amendment was adopted by voice vote, as was the Coburn amendment, as modified by the second degree amendment. Senators present for both votes were Senators Carper, Levin, Pryor, McCaskill, Tester, Heitkamp, Coburn, McCain, Johnson and Portman.

The Committee ordered the bill, as amended, favorably reported by a roll call vote of 9–0. Senators Carper, Levin, Pryor, McCaskill, Tester, Heitkamp, McCain, Johnson, and Portman voted in favor of the bill, while Senator Coburn voted present. Senators Landrieu, Begich, Baldwin, Enzi and Ayotte asked to be recorded as voting in favor of the bill by proxy, while Senator Paul asked to be recorded against the bill by proxy.

#### IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

*Section 1*—This section establishes the title of the legislation as “The Border Patrol agent Pay Reform Act of 2014”.

##### *Section 2*—Border Patrol Rate of Pay

(a) *Purpose*—States that the purpose of this bill is to provide a pay system for Border Patrol agents that acknowledges that agents routinely work beyond 40 hours per week and ensures that Customs and Border Protection has the ability to schedule work to fit operational needs.

(b) *Rates of Pay*—inserts a new section 5550 after 5 U.S.C. § 5549:

##### § 5550 (a) *Definitions*

<sup>43</sup> Official time is authorized under 5 U.S.C. § 7131.

- (a)(1) defines the term “basic Border Patrol pay” as the hourly rate of basic pay based on a 40 hour work week.
- (a)(2) defines the term “Border Patrol agent.”
- (a)(3) defines the term “level 1 Border Patrol rate of pay” as an hourly rate 1.25 times an agent’s basic hourly rate of pay.
- (a)(4) defines the term “level 2 Border Patrol rate of pay” as an hourly rate 1.125 times an agent’s basic hourly rate of pay.
- (a)(5) defines the term “work period” as a 14-day bi-weekly pay period.

§ 5550 (b) *Receipt of Border Patrol Rate of Pay*

(b)(1) *Voluntary Election*

- (b)(1)(A) *Voluntary Election*. On an annual basis Border Patrol agents will elect whether to be assigned to receive the level 1, level 2 or basic Border Patrol rate of pay. An agent has 30 days to elect. If the agent elects the basic rate of pay, CBP can still assign overtime as needed.
- (b)(1)(B) *Regulations*. OPM shall promulgate procedures for the election process.
- (b)(1)(C) *Information Regarding Election*. Customs and Border Protection must provide information to the agents regarding each type of pay that they can elect to be assigned.
- (b)(1)(D) *Assignment in Lieu of Election*. If an agent fails to elect a pay level within 30 days, the agent is automatically assigned to the level 1 rate of pay. A Border Patrol agent who is assigned a patrol dog will be assigned to the level 1 rate of pay. CBP has the authority to assign an agent to the basic rate of pay if CBP thinks the agent is unable, for any reason, to work the additional hours, and may also assign agents to level 1 or level 2 to ensure that at least 90 percent of agents, or the floor indicated by the staffing plan, are at the level 1 or level 2 rate of pay. Border Patrol agents at Headquarters, working as training instructors at a training facility, working in an administrative position, or working as a fitness instructor will be assigned to the basic Border Patrol rate of pay unless the staffing analysis CBP is required to conduct indicates additional hours by those agents are necessary to fulfill operational requirements.
- (b)(1)(E) *Flexibility*. No more than 10 percent of the agents stationed at a particular CBP duty station can be assigned to the basic Border Patrol rate of pay. CBP should take whatever action is necessary to ensure these results. However, if the staffing analysis required by the bill determines that less than 10 percent of agents should be assigned to the basic Border Patrol rate of pay in order to meet operational requirements, CBP can waive the requirement that not more than 10 percent of agents be assigned to the basic Border Patrol rate of pay for that duty station. Further, this 10 percent threshold would not apply at headquarters or training locations.
- (b)(1)(F) *Canine Care*. If an agent is both assigned to provide care for a patrol dog and to the level 1 rate of pay, that rate of pay covers all of the work the agent must do to care for his or her patrol dog. Each hour spent caring for the dog is counted as 1 hour of scheduled work on each regular workday.
- (b)(1)(G) *Pay Assignment Continuity*.

- (i) Since the amount of a federal employee's retirement annuity is calculated based on the highest three years of the employee's salary, CBP must develop and implement a plan within one year of enactment to ensure an agent is unable to artificially enhance his or her retirement pay by electing level 1 pay during his or her last three years of service when he or she had previously consistently worked at a lower level of pay.
  - (ii) CBP must take the actions necessary to implement the plan.
  - (iii) CBP must submit the plan to the appropriate Congressional committees.
  - (iv) Within six months of CBP issuing this plan, GAO is required to submit a report on the effectiveness of the plan to the appropriate Congressional committees.
  - (v) "Appropriate committees of Congress" means the Senate Committee on Homeland Security and Governmental Affairs and Committee on Appropriations, and the House Committee on Homeland Security, Committee on Oversight and Government Reform, and Committee on Appropriations.
  - (vi) Clarifies that CBP would retain the ability to assign Border Patrol agents to respond to operational requirements.
- (b)(2) *Level 1 Border Patrol Rate of Pay*
- (b)(2)(A) Agents electing the level 1 Border Patrol rate of pay will be compensated at 1.25 times the agent's hourly rate of pay for the 10 shifts they are assigned to work each pay period. Under this system, an agent is scheduled to work 5 days per week, and each shift lasts 10 hours—or 8 hours regular time plus 2 additional hours of scheduled overtime per day. Agents choosing the level 1 Border Patrol rate of pay will thus work 100 hours per pay period.
  - (b)(2)(B) The level 1 Border Patrol rate of pay compensates agents for working the 8 hours of regular time each work day at 1.25 times their base pay for these 8 hours.
  - (b)(2)(C) Agents electing the level 1 Border Patrol rate of pay will also be scheduled to work 2 hours of overtime per work day. The agent shall not receive any additional compensation under this section nor compensatory time for these additional work hours.
  - (b)(2)(D) If an agent being paid at level 1 Border Patrol rate of pay works over 100 hours in a two-week pay period, he or she will receive compensatory time off for unscheduled overtime or pay at the overtime hourly rate for scheduled overtime.
  - (b)(2)(E) If an agent is absent from work during regular time, he or she will be charged the corresponding amount of paid leave, compensatory time off, or other paid time off.
  - (b)(2)(F) If an agent is absent during scheduled overtime, he or she will accrue an obligation to perform other overtime work for each hour he or she is absent. The intent of this section is not to penalize Border Patrol agents who can otherwise use allowable leave to cover absences during regularly scheduled workdays, but rather to provide a mechanism for allowing agents who must take unanticipated leave in the middle of a regularly scheduled workday to make up the overtime hours that they did not work that day.

- (b)(2)(G) When an agent who is paid at the level 1 Border Patrol rate of pay is assigned to work that is classified as advanced training, the agent will be paid at the level 1 rate for the first 60 days of advanced training in a calendar year. If an agent's advanced training exceeds 60 days, the days beyond 60 will be paid at the basic Border Patrol rate of pay.
- (b)(3) *Level 2 Border Patrol Rate of Pay*
  - (b)(3)(A) Agents electing the level 2 Border Patrol rate of pay will be compensated at 1.125 times the agent's hourly rate of pay for the ten shifts they are assigned to work each pay period. Under this system, an agent is scheduled to work 5 days per week, and each shift lasts 9 hours—or 8 hours regular time plus 1 additional hour of scheduled overtime per day. Agents choosing the level 2 Border Patrol rate of pay will thus work 90 hours per pay period.
  - (b)(3)(B) The level 2 Border Patrol rate of pay compensates agents for working the 8 hours of regular time each work day at 1.125 times their base pay for these 8 hours.
  - (b)(3)(C) Agents electing the level 2 Border Patrol rate of pay will also be scheduled to work an additional hour of overtime per work day. The agent shall not receive any additional compensation under this section nor compensatory time for these work hours.
  - (b)(3)(D) If an agent works over 90 hours in a pay period, he or she will receive compensatory time off for unscheduled overtime or pay at the overtime hourly rate for scheduled overtime.
  - (b)(3)(E) If an agent is absent from work during regular time, he or she will be charged the corresponding amount of paid leave, compensatory time off, or other paid time off.
  - (b)(3)(F) If an agent is absent during scheduled overtime, he or she will accrue an obligation to perform other overtime work for each hour he or she is absent. The intent of this section is not to penalize Border Patrol agents who can otherwise use allowable leave to cover absences during regularly scheduled workdays, but rather to provide a mechanism for allowing agents who must take unanticipated leave in the middle of a regularly scheduled workday to make up the overtime hours that they did not work that day.
  - (b)(3)(G) When an agent who is paid at the level 2 Border Patrol rate of pay is assigned to work that is classified as advanced training, the agent will be paid at the level 2 rate for the first 60 days of advanced training in a calendar year. If an agent's advanced training exceeds 60 days, the days beyond 60 will be paid at the basic Border Patrol rate of pay.
- (b)(4) *Basic Border Patrol Rate of Pay*
  - (b)(4)(A) For the basic Border Patrol rate of pay, an agent is scheduled to work 5 days per week and 8 hours of regular time per workday.
  - (b)(4)(B) If an agent at the basic rate of pay works over 80 hours during a two-week pay period, he or she will receive compensatory time off for unscheduled overtime or pay at the overtime hourly rate for additional scheduled overtime.

§ 5550 (c) *Eligibility for Other Premium Pay*

- (c)(1) Border Patrol agents generally will continue to be eligible to receive premium pay for night shifts, holiday and Sunday shifts, except as described below.
- (c)(1)(A) Border Patrol agents are not eligible to receive premium pay for night, Sunday, or holiday work for hours of regularly scheduled overtime work covered by the level 1 or level 2 Border Patrol rate of pay.
- (c)(1)(B) Any additional overtime worked on Sundays, holidays or at night will be compensated with compensatory time off for unscheduled overtime and pay at the overtime hourly rate for additional scheduled overtime.
- (c)(2/3) Border Patrol agents are not eligible for any other form of premium pay, except hazardous duty pay.

§ 5550 (d) *Treatment of Basic Pay*

- (d)(1) Level 1 and level 2 pay will be treated as basic pay for calculating retirement, worker's compensation and severance, as well as any other purpose that the Office of Personnel Management may prescribe.
- (d)(2) Level 1 and level 2 pay will not be treated as part of basic pay for the purposes of calculating overtime pay, night pay, Sunday pay, or holiday pay.

§ 5550 (e) *Travel Time*

- Travel time to and from an agent's home and duty station is not considered hours of work under any provision of law.

§ 5550 (f) *Leave Without Pay and Substitution of Hours*<sup>44</sup>

- (f)(1) *Regular Time*. In order to be compensated for a period of leave without pay during an agent's regular work time, and within a particular pay period, an agent may substitute an equal period of work outside of the agent's regular time paid at the regular rate, but those hours cannot be credited as overtime hours for any purpose.
- (f)(2) *Overtime Work*. In order to be compensated for a period of leave without pay during regularly scheduled overtime within a particular pay period, he or she must complete an equal period of work in the same pay period. This additional work will be substituted and credited as scheduled overtime. It cannot count as overtime hours under any other provision of law.
- (f)(3) *Application of Compensatory Time*. When an agent wishes to substitute work hours for a period of leave without pay, if an agent does not have enough additional work within a work period to substitute for his or her hours of absence during scheduled overtime, any accrued compensatory time off will be applied to make up for the hours of obligation.
- (f)(4) *Insufficient Hours*. If an agent wishes to substitute work hours for a period of leave without pay and still owes scheduled overtime hours after applying paragraphs (2) and (3), any additional work in subsequent pay periods that would otherwise be credited as compensatory time, will be applied towards the owed hours until the agent's obligation is satisfied.

§ 5550 (g) *Authority To Require Overtime Work*

<sup>44</sup>For information on leave without pay generally, see <http://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/leave-without-pay/>, last visited August 13, 2014.

- Nothing in this section shall be construed to limit CBP's authority to require agents to work overtime in accordance with Agency needs, including in the event of a local or national emergency.

(c) *Overtime Work*

- (g)(1) If an agent is assigned the level 1 rate of pay, and he or she works over 100 hours in a pay period, the additional hours will be overtime work. The agent will receive pay at the overtime hourly rate of pay for hours that are officially ordered or approved in advance. For unscheduled overtime work up to 10 hours per pay period and 240 hours per year, the agent will receive compensatory time off.
- (g)(2) If an agent is assigned the level 2 rate of pay, and he or she works over 90 hours in a pay period, the additional hours will be overtime work. The agent will receive pay at the overtime hourly rate of pay for hours that are officially ordered or approved in advance. For unscheduled overtime work up to 10 hours per pay period and 240 hours per year, the agent will receive compensatory time off.
- (g)(3) If an agent is assigned the basic rate of pay, and he or she works over 80 hours in a pay period, the additional hours will be overtime work. The agent will receive pay at the overtime hourly rate of pay for hours that are officially ordered or approved in advance. For unscheduled overtime work up to 10 hours per pay period and 240 hours per year, the agent will receive compensatory time off.
- (g)(4)(A) Except when the limit is waived in writing by CBP, during a pay period, an agent cannot earn more than 10 hours of compensatory time off.
- (g)(4)(B) At the agent's request, CBP can waive the 10 hour limit per pay period for individual agents for hours of irregular or occasional overtime work. Such a request must be approved in writing in advance of the work by a manager. If an agent's waiver request is denied, he or she cannot be ordered to perform the associated overtime work.
- (g)(5) An agent cannot earn more than 240 hours of compensatory time during a leave year and any accrued compensatory time expires at the end of the 26th pay period after the pay period in which it was earned. An agent must use one hour of compensatory time for each hour of regular time he or she does not work. A Border Patrol agent is not entitled to any cash value and will not receive credit toward the computation of his or her annuity for compensatory time off earned under section 5550. An agent cannot receive compensatory time off if its value would cause the agent's total premium pay to exceed the statutory limits.<sup>45</sup>

(c)(2) *Minimization of Overtime*

- U.S. Customs and Border Protection shall, to the maximum extent practicable, avoid the use of scheduled overtime work by Border Patrol agents.

(d) *Retirement*—This section amends 5 U.S.C. § 8331(3) to include the amount of supplemental pay from the level 1 and level 2 Bor-

<sup>45</sup> See 5 U.S.C. § 5547.

der Patrol rate of pay as part of agents' basic pay for the purposes of calculating their retirement pay.

(e) *Comprehensive Staffing Analysis*

- (e)(1) *CBP Analysis*—Not later than one year after the date of enactment of this Act, CBP shall conduct a comprehensive analysis examining the staffing requirements of the U.S. Border Patrol and reporting on how to most effectively meet its operational requirements at each Border Patrol duty station. The analysis must include estimates of the cost of the staffing requirements at each Border Patrol duty station. CBP shall submit the report to the Government Accountability Office (GAO).
- (e)(2) *Independent Validator*—Not later than 90 days after GAO receives CBP's report GAO shall submit to the appropriate committees of Congress a report examining CBP's methodology and analysis; and indicating whether GAO concurs with CBP's findings.
- (e)(3) *Definition*—in this subsection, the term “appropriate committees of Congress” means the Committee on Homeland Security and Governmental Affairs and the Committee on Appropriations of the Senate; and the Committee on Oversight and Government Reform and the Committee on Appropriations of the House of Representatives.

(f) *Rules of Construction.* Nothing in this section or the amendments made by this section shall be construed to—

- (f)(1) limit CBP's right to assign both scheduled and unscheduled work to a Border Patrol agent in excess of the hours of work normally applicable under the election of the Border Patrol agent, regardless of what the Border Patrol agent might otherwise have elected;
- (f)(2) require compensation of a Border Patrol agent other than for hours during which the Border Patrol agent is actually performing work or using approved paid leave or other paid time off; or
- (f)(3) exempt a Border Patrol agent from any limitations on pay, earnings, or compensation, including the limitations on premium pay.

(g) *Technical and Conforming Amendments.* This subsection makes technical and conforming amendments.

(h) *Regulations.* The Director of the Office of Personnel Management shall promulgate regulations to carry out this Act and the amendments made by this Act.

## V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

## VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JULY 30, 2014.

Hon. TOM CARPER,  
*Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1691, the Border Patrol Agent Pay Reform Act of 2014.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

*S. 1691—Border Patrol Agent Pay Reform Act of 2014*

S. 1691 would establish a new system for determining overtime compensation for agents of the border patrol in U.S. Customs and Border Protection (CBP). CBO estimates that implementing S. 1691 could save about \$100 million annually, assuming future appropriations are reduced consistent with the bill's provisions. Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Under current law, border patrol agents are eligible for Administratively Uncontrollable Overtime (AUO), which compensates employees for unscheduled but necessary overtime. Generally, the agents themselves are responsible for identifying circumstances that require them to remain on duty beyond regular hours. Under AUO, most agents earn up to 25 percent of their base salary for time worked in excess of 80 hours in a pay period. Agents may earn additional overtime compensation required by the Fair Labor Standards Act (FLSA) and the Federal Employee Pay Act (FEPA) that is generally paid at 50 percent above the regular rate. Total overtime costs for border patrol agents, including pay and benefits, was \$627 million in 2013, while total compensation costs for those agents was \$3.1 billion in 2013.

S. 1691 would replace AUO with three options that agents would choose from: (1) work 100 hours each pay period and increase base salary by 25 percent; (2) work 90 hours each pay period and increase base salary by 12.5 percent; or (3) work no overtime. Agents would no longer be eligible for overtime pay under the FLSA. In addition, the legislation would provide compensatory time off for unscheduled overtime above 80, 90, or 100 hours per pay period, depending on the option chosen. That compensatory time would be limited to 240 hours a year and could not be redeemed for monetary compensation.

The bill would generally require 90 percent of border patrol agents to work 100 hours each pay period, while CBP expects that most remaining agents would work 90 hours per pay period. According to the agency, if the overtime pay system in S. 1691 had been implemented for fiscal year 2013, then total overtime costs would have been about \$525 million, or about \$100 million lower than the actual overtime expense for that year. Costs would decline under S. 1691 mostly because border patrol agents would no longer receive compensation required under the FLSA.

Budgetary savings under S. 1691 could be smaller or larger than CBO estimates. Potential savings in future years could be influenced by unanticipated incidents at U.S. borders that cause overtime use to be more or less than has occurred in the past. In addition, the CBP could curtail unnecessary use of AOU under current law or allow it to be used to a greater extent than it has been used in the past. Finally, under the bill, CBP would have the discretion to allow agents to earn FEPA overtime pay in addition to the options to increase base pay described earlier. This estimate assumes CBP would not approve the use of FEPA overtime pay under the bill beyond a few million dollars expended for that purpose in 2013.

S. 1691 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING STATUTE MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1691, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**TITLE V—GOVERNMENT ORGANIZATION AND EMPLOYEES**

\* \* \* \* \*

**CHAPTER 55—PAY ADMINISTRATION**

\* \* \* \* \*

**Subchapter V—Premium Pay**

\* \* \* \* \*

**§ 5542—Overtime rates; computation**

(a) \* \* \*

\* \* \* \* \*

(g) *In applying subsection (a) with respect to a Border Patrol agent covered by section 5550, the following rules apply:*

*(1) Notwithstanding the matter preceding paragraph (1) in subsection (a), for a Border Patrol agent who is assigned to the level 1 Border Patrol rate of pay under section 5550—*

*(A) hours of work in excess of 100 hours during a 14-day biweekly pay period shall be overtime work; and*

*(B) the Border Patrol agent—*

*(i) shall receive pay at the overtime hourly rate of pay (as determined in accordance with paragraphs (1) and (2) of subsection (a)) for hours of overtime work that are officially ordered or approved in advance of the workweek; and*

- (ii) except as provided in paragraphs (4) and (5), shall receive compensatory time off for an equal amount of time spent performing overtime work that is not overtime work described in clause (i).
- (2) Notwithstanding the matter preceding paragraph (1) in subsection (a), for a Border Patrol agent who is assigned to the level 2 Border Patrol rate of pay under section 5550—
- (A) hours of work in excess of 90 hours during a 14-day biweekly pay period shall be overtime work; and
- (B) the Border Patrol agent—
- (i) shall receive pay at the overtime hourly rate of pay (as determined in accordance with paragraphs (1) and (2) of subsection (a)) for hours of overtime work that are officially ordered or approved in advance of the workweek; and
- (ii) except as provided in paragraphs (4) and (5), shall receive compensatory time off for an equal amount of time spent performing overtime work that is not overtime work described in clause (i).
- (3) Notwithstanding the matter preceding paragraph (1) in subsection (a), for a Border Patrol agent who is assigned to the basic Border Patrol rate of pay under section 5550—
- (A) hours of work in excess of 80 hours during a 14-day biweekly pay period shall be overtime work; and
- (B) the Border Patrol agent—
- (i) shall receive pay at the overtime hourly rate of pay (as determined in accordance with paragraphs (1) and (2) of subsection (a)) for hours of overtime work that are officially ordered or approved in advance of the workweek; and
- (ii) except as provided in paragraphs (4) and (5), shall receive compensatory time off for an equal amount of time spent performing overtime work that is not overtime work described in clause (i).
- (4)(A) Except as provided in subparagraph (B), during a 14-day biweekly pay period, a Border Patrol agent may not earn compensatory time off for more than 10 hours of overtime work.
- (B) U.S. Customs and Border Protection may, as it determines appropriate, waive the limitation under subparagraph (A) for an individual Border Patrol agent for hours of irregular or occasional overtime work, but such waiver must be approved in writing in advance of the performance of any such work for which compensatory time off is earned under paragraph (1)(B)(ii), (2)(B)(ii), or (3)(B)(ii). If a waiver request by a Border Patrol agent is denied, the Border Patrol agent may not be ordered to perform the associated overtime work.
- (5) A Border Patrol agent—
- (A) may not earn more than 240 hours of compensatory time off during a leave year;
- (B) shall use any hours of compensatory time off not later than the end of the 26th pay period after the pay period during which the compensatory time off was earned;
- (C) shall be required to use 1 hour of compensatory time off for each hour of regular time not worked for which the Border Patrol agent is not on paid leave or other paid time

*off or does not substitute time in accordance with section 5550(f);*

*(D) shall forfeit any compensatory time off not used in accordance with this paragraph and, regardless of circumstances, shall not be entitled to any cash value for compensatory time earned under section 5550;*

*(E) shall not receive credit towards the computation of the annuity of the Border Patrol agent for compensatory time, whether used or not; and*

*(F) shall not be credited with compensatory time off if the value of such time off would cause the aggregate premium pay of the Border Patrol agent to exceed the limitation established under section 5547 in the period in which it was earned.*

\* \* \* \* \*

**§ 5547. Limitation on premium pay**

(a) An employee may be paid premium pay under sections 5542, 5545 (a), (b), and (c), 5545a, [and] 5546 (a) and (b), and 5550 only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed the greater of—

- (1) the maximum rate of basic pay payable for GS-15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or
- (2) the rate payable for level V of the Executive Schedule.

(b) \* \* \*

\* \* \* \* \*

*(e) Any supplemental pay resulting from receipt of the level 1 Border Patrol rate of pay or the level 2 Border Patrol rate of pay under section 5550 shall be considered premium pay in applying this section.*

\* \* \* \* \*

**§ 5550. Border patrol rate of pay**

(a) *DEFINITIONS.—In this section—*

- (1) *the term ‘basic Border Patrol rate of pay’ means the hourly rate of basic pay of the applicable Border Patrol, as determined without regard to this section;*
- (2) *the term ‘Border Patrol agent’ means an individual who is appointed to a position assigned to the Border Patrol Enforcement classification series 1896 or any successor series, consistent with classification standards established by the Office of Personnel Management;*
- (3) *the term ‘level 1 Border Patrol rate of pay’ means the hourly rate of pay equal to 1.25 times the otherwise applicable hourly rate of basic pay of the applicable Border Patrol agent;*
- (4) *the term ‘level 2 Border Patrol rate of pay’ means the hourly rate of pay equal to 1.125 times the otherwise applicable hourly rate of basic pay of the applicable Border Patrol agent; and*

(5) the term 'work period' means a 14-day biweekly pay period.

(b) RECEIPT OF BORDER PATROL RATE OF PAY.—

(1) VOLUNTARY ELECTION.—

(A) IN GENERAL.—Not later than 30 days before the first day of each year beginning after the date of enactment of this section, a Border Patrol agent shall make an election whether the Border Patrol agent shall, for that year, be assigned to—

- (i) the level 1 Border Patrol rate of pay;
- (ii) the level 2 Border Patrol rate of pay; or
- (iii) the basic Border Patrol rate of pay, with additional overtime assigned as needed by U.S. Customs and Border Protection.

(B) REGULATIONS.—The Director of the Office of Personnel Management shall promulgate regulations establishing procedures for elections under subparagraph (A).

(C) INFORMATION REGARDING ELECTION.—Not later than 60 days before the first day of each year beginning after the date of enactment of this section, U.S. Customs and Border Protection shall provide each Border Patrol agent with information regarding each type of election available under subparagraph (A) and how to make such an election.

(D) ASSIGNMENT IN LIEU OF ELECTION.—Notwithstanding subparagraph (A)—

(i) a Border Patrol agent who fails to make a timely election under subparagraph (A) shall be assigned to the level 1 Border Patrol rate of pay;

(ii) a Border Patrol agent who is assigned a canine shall be assigned to the level 1 Border Patrol rate of pay;

(iii) if at any time U.S. Customs and Border Protection concludes that a Border Patrol agent is unable to perform overtime on a daily basis in accordance with this section, U.S. Customs and Border Protection shall assign the Border Patrol agent to the basic Border Patrol rate of pay until such time as U.S. Customs and Border Protection determines that the Border Patrol agent is able to perform scheduled overtime on a daily basis;

(iv) unless the analysis conducted under section 2(e) of the Border Patrol agent Pay Reform Act of 2013 indicates that, in order to more adequately fulfill the operational requirements of U.S. Customs and Border Protection, such Border Patrol agents should be allowed to elect or be assigned to the level 1 Border Patrol rate of pay or the level 2 Border Patrol rate of pay, a Border Patrol agent shall be assigned to the basic Border Patrol rate of pay if the agent works—

(I) at U.S. Customs and Border Protection headquarters;

(II) as a training instructor at a U.S. Customs and Border Protection training facility;

(III) in an administrative position; or

(IV) as a fitness instructor; and

(v) a Border Patrol agent may be assigned to the level 1 Border Patrol rate of pay or the level 2 Border Patrol rate of pay in accordance with subparagraph (E).

**(E) FLEXIBILITY.—**

(i) *IN GENERAL.*—Except as provided in clauses (ii) and (iii), and notwithstanding any other provision of law, U.S. Customs and Border Protection shall take such action as is necessary, including the unilateral assignment of Border Patrol agents to the level 1 Border Patrol rate of pay or the level 2 Border Patrol rate of pay, to ensure that not more than 10 percent of the Border Patrol agents stationed at a location are assigned to the level 2 Border Patrol rate of pay or the basic Border Patrol rate of pay.

(ii) *WAIVER.*—U.S. Customs and Border Protection may waive the limitation under clause (i) on the percent of Border Patrol agents stationed at a location who are assigned to the level 2 Border Patrol rate of pay or the basic Border Patrol rate of pay if, based on the analysis conducted under section 2(e) of the Border Patrol agent Pay Reform Act of 2013, U.S. Customs and Border Protection determines it may do so and adequately fulfill its operational requirements.

(iii) *CERTAIN LOCATIONS.*—Clause (i) shall not apply to Border Patrol agents working at the headquarters of U.S. Customs and Border Protection or a training location of U.S. Customs and Border Protection.

**(F) CANINE CARE.**—For a Border Patrol agent assigned to provide care for a canine and assigned to the level 1 Border Patrol rate of pay in accordance with subparagraph (D)(ii)—

(i) that rate of pay covers all such care;

(ii) for the purposes of scheduled overtime under paragraph (2)(A)(ii), such care shall be counted as 1 hour of scheduled overtime on each regular workday without regard to the actual duration of such care or whether such care occurs on the regular workday; and

(iii) no other pay shall be paid to the Border Patrol agent for such care.

**(G) PAY ASSIGNMENT CONTINUITY.—**

(i) *IN GENERAL.*—Not later than 1 year after the date of enactment of the Border Patrol agent Pay Reform Act of 2013, and in consultation with the Office of Personnel Management, U.S. Customs and Border Protection shall develop and implement a plan to ensure, to the greatest extent practicable, that the assignment of a Border Patrol agent under this section during the 3 years of service before the Border Patrol agent becomes eligible for immediate retirement are consistent with the average Border Patrol rate of pay level to which the Border Patrol agent has been assigned during the course of the career of the Border Patrol agent.

(ii) *IMPLEMENTATION.*—Notwithstanding any other provision of law, U.S. Customs and Border Protection

may take such action as is necessary, including the unilateral assignment of Border Patrol agents to the level 1 Border Patrol rate of pay, the level 2 Border Patrol rate of pay, or the basic Border Patrol rate of pay, to implement the plan developed under this subparagraph.

(iii) *REPORTING.*—U.S. Customs and Border Protection shall submit the plan developed under clause (i) to the appropriate committees of Congress.

(iv) *GAO REVIEW.*—Not later than 6 months after U.S. Customs and Border Protection issues the plan required under clause (i), the Comptroller General of the United States shall submit to the appropriate committees of Congress a report on the effectiveness of the plan in ensuring that Border Patrol agents are not able to artificially enhance their retirement annuities.

(v) *DEFINITION.*—In this subparagraph, the term ‘appropriate committees of Congress’ means—

(I) the Committee on Homeland Security and Governmental Affairs and the Committee on Appropriations of the Senate; and

(II) the Committee on Homeland Security, the Committee on Oversight and Government Reform, and the Committee on Appropriations of the House of Representatives.

(vi) *RULE OF CONSTRUCTION.*—Nothing in this subparagraph shall be construed to limit the ability of U.S. Customs and Border Protection to assign Border Patrol agents to Border Patrol rates of pay as necessary to meet operational requirements.

(2) *LEVEL 1 BORDER PATROL RATE OF PAY.*—For a Border Patrol agent who is assigned to the level 1 Border Patrol rate of pay—

(A) the Border Patrol agent shall have a regular tour of duty consisting of 5 workdays per week with—

(i) 8 hours of regular time per workday, which may be interrupted by an unpaid off-duty meal break; and

(ii) 2 additional hours of scheduled overtime during each day the agent performs work under clause (i);

(B) for paid hours of regular time described in subparagraph (A)(i), the Border Patrol agent shall receive pay at the level 1 Border Patrol rate of pay;

(C) compensation for the hours of regularly scheduled overtime work described in subparagraph (A)(ii) is provided indirectly through the 25 percent supplement within the level 1 Border Patrol rate of pay, and the Border Patrol agent may not receive for such hours—

(i) any compensation in addition to the compensation under subparagraph (B) under this section or any other provision of law; or

(ii) any compensatory time off;

(D) the Border Patrol agent shall receive compensatory time off or pay at the overtime hourly rate of pay for hours of work in excess of 100 hours during a work period, as determined in accordance with section 5542(g);

(E) the Border Patrol agent shall be charged corresponding amounts of paid leave, compensatory time off, or other paid time off for each hour (or part thereof) the agent is absent from work during regular time (except that full days off for military leave shall be charged when required);

(F) if the Border Patrol agent is absent during scheduled overtime described in subparagraph (A)(ii)—

(i) the Border Patrol agent shall accrue an obligation to perform other overtime work for each hour (or part thereof) the Border Patrol agency is absent; and

(ii) any overtime work applied toward the obligation under clause (i) shall not be credited as overtime work under any other provision of law; and

(G) for the purposes of advanced training, the Border Patrol agent—

(i) shall be paid at the level 1 Border Patrol rate of pay for the first 60 days of advanced training in a calendar year; and

(ii) for any advanced training in addition to the advanced training described in clause (i), shall be paid at the basic Border Patrol rate of pay.

(3) **LEVEL 2 BORDER PATROL RATE OF PAY.**—For a Border Patrol agent who is assigned to the level 2 Border Patrol rate of pay—

(A) the Border Patrol agent shall have a regular tour of duty consisting of 5 workdays per week with—

(i) 8 hours of regular time per workday, which may be interrupted by an unpaid off-duty meal break; and

(ii) 1 additional hour of scheduled overtime during each day the agent performs work under clause (i);

(B) for paid hours of regular time described in subparagraph (A)(i), the Border Patrol agent shall receive pay at the level 2 Border Patrol rate of pay;

(C) compensation for the hours of regularly scheduled overtime work described in subparagraph (A)(ii) is provided indirectly through the 12.5 percent supplement within the level 2 Border Patrol rate of pay, and the Border Patrol agent may not receive for such hours—

(i) any compensation in addition to the compensation under subparagraph (B) under this section or any other provision of law; or

(ii) any compensatory time off;

(D) the Border Patrol agent shall receive compensatory time off or pay at the overtime hourly rate of pay for hours of work in excess of 90 hours during a work period, as determined in accordance with section 5542(g);

(E) the Border Patrol agent shall be charged corresponding amounts of paid leave, compensatory time off, or other paid time off for each hour (or part thereof) the agent is excused from work during regular time (except that full days off for military leave shall be charged when required);

(F) if the Border Patrol agent is absent during scheduled overtime described in subparagraph (A)(ii)—

(i) the Border Patrol agent shall accrue an obligation to perform other overtime work for each hour (or part thereof) the Border Patrol agency is absent; and

(ii) any overtime work applied toward the obligation under clause (i) shall not be credited as overtime work under any other provision of law; and

(G) for the purposes of advanced training, the Border Patrol agent—

(i) shall be paid at the level 2 Border Patrol rate of pay for the first 60 days of advanced training in a calendar year; and

(ii) for any advanced training in addition to the advanced training described in clause (i), shall be paid at the basic Border Patrol rate of pay.

(4) BASIC BORDER PATROL RATE OF PAY.—For a Border Patrol agent who is assigned to the basic Border Patrol rate of pay—

(A) the Border Patrol agent shall have a regular tour of duty consisting of 5 workdays per week with 8 hours of regular time per workday; and

(B) the Border Patrol agent shall receive compensatory time off or pay at the overtime hourly rate of pay for hours of work in excess of 80 hours during a work period, as determined in accordance with section 5542(g).

(c) ELIGIBILITY FOR OTHER PREMIUM PAY.—A Border Patrol agent—

(1) shall receive premium pay for nightwork in accordance with subsections (a) and (b) of section 5545 and Sunday and holiday pay in accordance with section 5546, without regard to the rate of pay to which the Border Patrol agent is assigned under this section, except that—

(A) no premium pay for night, Sunday, or holiday work shall be provided for hours of regularly scheduled overtime work described in paragraph (2)(A)(ii) or (3)(A)(ii) of subsection (b), consistent with the requirements of paragraph (2)(C) or (3)(C) of subsection (b); and

(B) section 5546(d) shall not apply and instead eligibility for pay for, and the rate of pay for, any overtime work on a Sunday or a designated holiday shall be determined in accordance with this section and section 5542(g);

(2) except as provided in paragraph (3) or section 5542(g), shall not be eligible for any other form of premium pay under this title; and

(3) shall be eligible for hazardous duty pay in accordance with section 5545(d).

(d) TREATMENT AS BASIC PAY.—Any pay in addition to the basic Border Patrol rate of pay for a Border Patrol agent resulting from application of the level 1 Border Patrol rate of pay or the level 2 Border Patrol rate of pay—

(1) subject to paragraph (2), shall be treated as part of basic pay solely for—

(A) purposes of sections 5595(c), 8114(e), 8331(3)(I), and 8704(c);

(B) any other purpose that the Director of the Office of Personnel Management may by regulation prescribe; and

(C) any other purpose expressly provided for by law; and

(2) shall not be treated as part of basic pay for the purposes of calculating overtime pay, night pay, Sunday pay, or holiday pay under section 5542, 5545, or 5546.

(e) TRAVEL TIME.—Travel time to and from home and duty station by a Border Patrol agent shall not be considered hours of work under any provision of law.

(f) LEAVE WITHOUT PAY AND SUBSTITUTION OF HOURS.—

(1) REGULAR TIME.—

(A) IN GENERAL.—For a period of leave without pay during the regular time of a Border Patrol agent (as described in paragraph (2)(A)(i), (3)(A)(i), or (4)(A) of subsection (b)) within a work period, an equal period of work outside the regular time of the Border Patrol agent, but in the same work period—

(i) shall be substituted and paid for at the rate applicable for the regular time; and

(ii) shall not be credited as overtime hours for any purpose.

(B) PRIORITY FOR SAME DAY WORK.—In substituting hours of work under subparagraph (A), work performed on the same day as the period of leave without pay shall be substituted first.

(C) PRIORITY FOR REGULAR TIME SUBSTITUTION.—Hours of work shall be substituted for regular time work under this paragraph before being substituted for scheduled overtime under paragraphs (2), (3), and (4).

(2) OVERTIME WORK.—

(A) IN GENERAL.—For a period of absence during scheduled overtime (as described in paragraph (2)(F) or (3)(F) of subsection (b)) within a work period, an equal period of additional work in the same work period—

(i) shall be substituted and credited as scheduled overtime; and

(ii) shall not be credited as overtime hours under any other provision of law.

(B) PRIORITY FOR SAME DAY WORK.—In substituting hours of work under subparagraph (A), work performed on the same day as the period of absence shall be substituted first.

(3) APPLICATION OF COMPENSATORY TIME.—If a Border Patrol agent does not have sufficient additional work in a work period to substitute for all periods of absence during scheduled overtime (as described in paragraph (2)(F) or (3)(F) of subsection (b)) within that work period, any accrued compensatory time off under section 5542(g) shall be applied to satisfy the hours obligation.

(4) INSUFFICIENT HOURS.—If a Border Patrol agent has a remaining hours obligation of scheduled overtime after applying paragraphs (2) and (3), any additional work in subsequent work periods that would otherwise be credited under section 5542(g) shall be applied towards the hours obligation until that obligation is satisfied.

(g) AUTHORITY TO REQUIRE OVERTIME WORK.—Nothing in this section shall be construed to limit the authority of U.S. Customs and Border Protection to require a Border Patrol agent to perform

*hours of overtime work in accordance with the needs of U.S. Customs and Border Protection, including if needed in the event of a local or national emergency.*

**CHAPTER 83—RETIREMENT**

\* \* \* \* \*

**Subchapter 3—Civil Service Retirement**

\* \* \* \* \*

**§ 8331—Definitions**

- (1) \* \* \*
- (2) \* \* \*
- (3) “basic pay” includes—
  - (A) \* \* \*

\* \* \* \* \*

(B) with respect to a customs officer (referred to in subsection (e)(1) of section 5 of the Act of February 13, 1911), compensation for overtime inspectional services provided for under subsection (a) of such section 5, but not to exceed 50 percent of any statutory maximum in overtime pay for customs officers which is in effect for the year involved; **[and]**

(C) any amount received under section 5948 (relating to physicians comparability allowances); *and*

(D) *with respect to a Border Patrol agent, the amount of supplemental pay received through application of the level 1 Border Patrol rate of pay or the level 2 Border Patrol rate of pay for scheduled overtime within the regular tour of duty of the Border Patrol agent as provided in section 5550;*

but does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation except as provided by **[subparagraphs (B) through (H)]** *subparagraphs (B) through (I)* of this paragraph retroactive pay under section 5344 of this title in the case of a retired or deceased employee, uniform allowances under section 5901 of this title, or lump-sum leave payments under subchapter VI of chapter 55 of this title. For an employee paid on a fee basis, the maximum amount of basic pay which may be used is \$10,000;

- (4) \* \* \*

\* \* \* \* \*

**TITLE XXIX—LABOR**

\* \* \* \* \*

**CHAPTER 8—FAIR LABOR STANDARDS**

\* \* \* \* \*

**§ 213—Exemptions**

- (a) **MINIMUM WAGE AND MAXIMUM HOUR REQUIREMENTS**

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) \* \* \*

\* \* \* \* \*

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; **or**

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour~~...~~; or

(18) any employee who is a Border Patrol agent, as defined in section 5550(a) of title 5, United States Code.

