

115TH CONGRESS
2D SESSION

S. 2338

To amend chapter 55 of title 5, United States Code, to reform the manner in which Border Patrol agents are compensated.

IN THE SENATE OF THE UNITED STATES

JANUARY 25, 2018

Mr. TESTER introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To amend chapter 55 of title 5, United States Code, to reform the manner in which Border Patrol agents are compensated.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Border Patrol Agent
5 Pay Reform Technical Amendments Act of 2018”.

6 **SEC. 2. BORDER PATROL RATE OF PAY.**

7 Section 5550 of title 5, United States Code, is
8 amended—

9 (1) in subsection (a)(1), by inserting “agent”
10 after “applicable border patrol”;

1 (2) in subsection (b)—

2 (A) in paragraph (1)—

3 (i) in subparagraph (A)—

4 (I) by striking “Not later than
5 30 days before the first day of each
6 year beginning after the date of enact-
7 ment of this section,” and inserting
8 “Not later than December 1 of each
9 year,”; and

10 (II) by striking “for that year”
11 and inserting “for the next annual pe-
12 riod beginning on the first day of the
13 first pay period that commences on or
14 after January 1”;

15 (ii) in subparagraph (C), by striking
16 “Not later than 60 days before the first
17 day of each year beginning after the date
18 of enactment of this section,” and insert-
19 ing “Not later than November 1 of each
20 year,”;

21 (iii) in subparagraph (D)—

22 (I) in clause (iii), by inserting
23 “due to loss of law enforcement au-
24 thority” after “this section”; and

1 (II) in clause (v), by striking “or
 2 the level 2 border patrol rate of pay”;
 3 (iv) in subparagraph (E)—

4 (I) in clause (i), by striking “or
 5 the level 2 border patrol rate of pay”;

6 (II) in clause (ii), by striking
 7 “the analysis conducted under section
 8 2(e) of the Border Patrol Agent Pay
 9 Reform Act of 2014” and inserting “a
 10 written staffing analysis by the Com-
 11 missioner of U.S. Customs and Bor-
 12 der Protection”; and

13 (III) by adding at the end the
 14 following:

15 “(iv) EXCLUSION OF CERTAIN EM-
 16 PLOYEES.—In applying any percentage
 17 limit under clause (i) or (ii) to a base pop-
 18 ulation, U.S. Customs and Border Protec-
 19 tion shall exclude from such population
 20 any border patrol agent who—

21 “(I) is assigned a basic border
 22 patrol rate of pay under paragraph
 23 (iii) or (iv) of subparagraph (D); or

24 “(II) would reach the premium
 25 pay cap under section 5547 if as-

1 signed a level 1 border patrol rate of
2 pay.

3 “(v) APPLICATION FREQUENCY.—The
4 10 percent limit under clause (i) or an al-
5 ternative percentage limit under a waiver
6 under clause (ii) shall be applied at the be-
7 ginning of the first pay period beginning
8 on or after January 1 of each year.”; and
9 (v) by striking subparagraphs (F) and
10 (G) and inserting the following:

11 “(F) CANINE CARE.—For a border patrol
12 agent assigned to provide care for a canine
13 while not on duty and assigned to the level 1
14 border patrol rate of pay in accordance with
15 subparagraph (D)(ii)—

16 “(i) that rate of pay covers all such
17 care and no other pay shall be paid to the
18 border patrol agent for such care except as
19 set forth in clauses (ii) through (v);

20 “(ii) the agent shall be credited with
21 1 hour of such care for each calendar day
22 on which such care occurs (without regard
23 to the actual duration of such care);

24 “(iii) 1 hour of canine care credited
25 under clause (ii), as available, shall be sub-

stituted for 1 hour of scheduled overtime
that the agent is obligated to perform
under paragraph (2)(A)(ii) on the same
regular work day;

“(iv) 1 hour of canine care credited
under clause (ii), if not needed to sub-
stitute for scheduled overtime under clause
(iii), shall be paid to the border patrol
agent as scheduled overtime for which the
agent shall receive monetary compensation
pursuant to the payment of overtime under
section 5542(a)(4); and

“(v) for canine care hours credited
under clause (ii) on a day other than a
regular workday, or on a regular workday
on which an agent has no obligation to
perform scheduled overtime work, the
agent shall be credited with 1 scheduled
overtime work hour paid as monetary com-
pensation under section 5542(a)(4) (de-
fined as 1 hour of overtime work under
section 5542(g)(1)(B)(i)) for each hour of
credited canine care.”;

(B) in paragraph (2)—

1 (i) in subparagraph (C), by amending
2 clause (i) to read as follows:

3 “(i) any compensation under this sec-
4 tion or under any other provision of law in
5 addition to the compensation provided
6 under subparagraph (B); or”;

7 (ii) in subparagraph (E), by striking
8 “paid leave” and inserting “leave”;

9 (iii) in subparagraph (F)(ii), by strik-
10 ing “and” at the end; and

11 (iv) by striking subparagraph (G) and
12 inserting the following:

13 “(G) if the border patrol agent participates
14 in a day of advanced training, but does not per-
15 form the required amount of scheduled overtime
16 work under subparagraph (A)(ii) on that day,
17 the border patrol agent shall be deemed to have
18 performed scheduled overtime work during non-
19 work periods to the extent necessary to reach
20 the required amount; and

21 “(H) any overtime obligation that the bor-
22 der patrol agent has incurred can be met
23 through the use of any accrued compensatory
24 time accrued for travel pursuant to section
25 5550b.”; and

1 (C) in paragraph (3)—

2 (i) in subparagraph (C), by amending
3 clause (i) to read as follows:

4 “(i) any compensation under this sec-
5 tion or under any other provision of law in
6 addition to the compensation provided
7 under subparagraph (B); or”;

8 (ii) in subparagraph (E)—

9 (I) by striking “paid leave” and
10 inserting “leave”; and

11 (II) by striking “excused” and
12 inserting “absent”;

13 (iii) in subparagraph (F)(ii); by strik-
14 ing “and” at the end;

15 (iv) by amending subparagraph (G) to
16 read as follows:

17 “(G) if the border patrol agent participates
18 in a day of advanced training, but does not per-
19 form the required amount of scheduled overtime
20 work under subparagraph (A)(ii) on that day,
21 the border patrol agent shall be deemed to have
22 performed scheduled overtime work during non-
23 work periods to the extent necessary to reach
24 the required amount;” and

25 (v) by adding at the end the following:

1 “(H) if the border patrol agent is assigned
 2 to provide canine care or assigned to marine
 3 duty and participates in a day of advanced
 4 training and performs more than the required
 5 amount of scheduled overtime work under sub-
 6 paragraph (A)(ii) on that day, the border patrol
 7 agent shall be compensated for all of the hours
 8 worked on that day; and

9 “(I) any overtime obligation that the bor-
 10 der patrol agent has incurred can be met
 11 through the use of any accrued compensatory
 12 time accrued for travel pursuant to section
 13 5550b.”;

14 (3) by amending subsection (d) to read as fol-
 15 lows:

16 “(d) TREATMENT AS BASIC PAY.—

17 “(1) IN GENERAL.—Any overtime supplement
 18 in addition to the basic border patrol rate of pay for
 19 a border patrol agent resulting from the application
 20 of the level 1 border patrol rate of pay or the level
 21 2 border patrol rate of pay shall be treated, subject
 22 to paragraphs (2) and (3), as part of basic pay sole-
 23 ly—

24 “(A) for purposes of the definition of basic
 25 pay in sections 8331(3) and 8401(4) and the

1 provisions in chapters 83 and 84 that rely on
2 those definitions;

3 “(B) for purposes of sections 5595(c) (re-
4 lating to severance pay) and 8704(c) (relating
5 to conversion of pay), except as otherwise pro-
6 vided in paragraph (3);

7 “(C) for the purpose of section 8114(e)
8 (relating to computation of pay); and

9 “(D) for any other purpose that the Direc-
10 tor of the Office of Personnel Management may
11 prescribe, by regulation, subject to paragraph
12 (2) and any limitation established in accordance
13 with paragraph (3).

14 “(2) TREATMENT OF OVERTIME SUPPLE-
15 MENT.—The overtime supplement described in para-
16 graph (1) may not be treated as part of basic pay
17 for purposes not described in paragraph (1), includ-
18 ing the purposes of calculating—

19 “(A) overtime pay, night pay, Sunday pay,
20 or holiday pay under sections 5542, 5545, and
21 5546;

22 “(B) locality-based comparability payments
23 under section 5304 or special rate supplements
24 under section 5305; or

1 “(C) cost-of-living allowances in nonforeign
2 areas under section 5941.

3 “(3) LIMITATIONS.—

4 “(A) IN GENERAL.—During the control pe-
5 riod described in subparagraph (B), the amount
6 of the overtime supplement that is considered
7 basic pay under subparagraphs (A) and (B) of
8 paragraph (1) may not exceed the amount com-
9 puted by multiplying the border patrol agent’s
10 basic border patrol rate of pay by the percent-
11 age representing the agent’s career average of
12 assigned overtime supplement percentages (in-
13 cluding 0 percent for periods of time during
14 which no overtime supplement was payable).
15 The career average percentage shall be com-
16 puted under this subparagraph without regard
17 to the effect of the limitation on premium pay
18 under section 5547. The premium pay limita-
19 tion remains applicable in determining the dol-
20 lar amount of any overtime supplement com-
21 puted using the career average percentage.

22 “(B) CONTROL PERIOD.—The control pe-
23 riod referred to in subparagraphs (A) and (C)
24 is the period beginning 3 years before the date
25 on which a border patrol agent will meet age

1 and service requirements associated with enti-
2 tlement to an immediate annuity and ending on
3 the last day of the individual's career as a bor-
4 der patrol agent.

5 “(C) CAREER AVERAGE PERCENTAGE.—

6 For purposes of subparagraph (A), a border pa-
7 trol agent's initial career average of assigned
8 overtime supplement percentages is the average
9 for the border patrol agent's career before the
10 beginning of the control period. During the con-
11 trol period, the career average shall be recom-
12 puted at the end of each annual period (as de-
13 scribed in subsection (b)(1)(A)). In computing
14 the career average percentage, any periods of
15 service as a border patrol agent before the first
16 day of the first pay period beginning on or after
17 January 1, 2016, shall be included, and the
18 agent's assigned overtime supplement during
19 such periods shall be deemed to be 25 percent.
20 If the career average percentage is less than 25
21 percent, the precise amount of the career aver-
22 age percentage shall be used for purposes of
23 this subsection.

24 “(4) LUMP-SUM ANNUAL LEAVE PAYMENT.—In

25 computing an agent's lump-sum annual leave pay-

1 ment under section 5551 or 5552, the pay the agent
 2 is projected to receive shall include a deemed over-
 3 time supplement under this paragraph, which—

4 “(A) shall be based on the lower of—

5 “(i) the agent’s actual overtime sup-
 6 plement percentage in effect at separation;
 7 or

8 “(ii) the average percentage of the
 9 agent’s overtime supplement during the 26
 10 biweekly pay periods immediately pre-
 11 ceding such separation; and

12 “(B) may not exceed the amount that is,
 13 or would be, payable under the premium pay
 14 limitation under section 5547.”;

15 (4) in the subsection (f) heading, by striking
 16 “AND SUBSTITUTION OF HOURS” and inserting
 17 “DURING REGULAR TIME; GUARD AND RESERVIST
 18 DUTIES; ABSENCES DURING SCHEDULED OVER-
 19 TIME”; and

20 (5) by adding at the end the following:

21 “(h) LEAVE WITHOUT PAY DURING REGULAR TIME;
 22 GUARD AND RESERVIST DUTIES; ABSENCES DURING
 23 SCHEDULED OVERTIME.—

24 “(1) AT LEAST 1 WORKDAY.—If a border patrol
 25 agent takes leave without pay for a period of at least

1 1 workday, the agent shall not receive any pay for
2 the hours during which the border patrol agent took
3 leave without pay.

4 “(2) NO ACCRUAL OF OVERTIME DEBT.—A bor-
5 der patrol agent shall not accrue an overtime debt
6 for any full workdays during which a border patrol
7 agent uses leave without pay, regardless of the bor-
8 der patrol rate of pay to which the border patrol
9 agent is assigned.

10 “(3) CALCULATION OF PAY.—

11 “(A) IN GENERAL.—For pay periods dur-
12 ing which a border patrol agent takes one or
13 more full days of leave without pay, the amount
14 of border patrol pay that the agent would nor-
15 mally receive shall be reduced proportionally by
16 the amount of overtime hours that the agent
17 has not worked due to being on leave without
18 pay.

19 “(B) PERCENTAGE DECREASE.—The total
20 amount of border patrol pay that a border pa-
21 trol agent would normally receive in a pay pe-
22 riod described in subparagraph (A) shall be de-
23 creased based on the percentage of work days
24 for which the border patrol agent takes leave
25 without pay.

1 “(i) COMPRESSED WORK SCHEDULE.—

2 “(1) IN GENERAL.—Notwithstanding any other
3 provision of this section or section 6101, the Com-
4 missioner of U.S. Customs and Border Protection
5 may assign a border patrol agent a compressed work
6 schedule under this subsection, subject to any regu-
7 lations prescribed by the Director of the Office of
8 Personnel Management.

9 “(2) LEVEL 1 BORDER PATROL RATE OF PAY.—

10 A border patrol agent receiving the level 1 border
11 patrol rate of pay may, in lieu of the standard work
12 schedule described in subsection (b)(2)(A), be as-
13 signed a compressed work schedule under the fol-
14 lowing terms and conditions:

15 “(A) The compressed work schedule shall
16 be a regular tour of duty consisting of four 10-
17 hour workdays per week as his or her regular
18 schedule and shall include, in each pay period,
19 8 workdays of 10 hours of regular time per
20 workday and a total of 20 additional hours of
21 scheduled overtime on the other days within the
22 pay period in which the agent does not perform
23 regular time.

24 “(B) Subparagraphs (B) through (G) of
25 subsection (b)(2) shall apply to an agent as-

signed a compressed work schedule under this paragraph. References in this section to regular time under subsection (b)(2)(A)(i) and scheduled overtime under subsection (b)(2)(A)(ii) shall be deemed to be references to regular time and scheduled overtime, respectively, described in subparagraph (A).

“(3) LEVEL 2 BORDER PATROL RATE OF PAY.—

A border patrol agent receiving the level 2 border patrol rate of pay may, in lieu of the standard work schedule described in subsection (b)(3)(A), be assigned a compressed work schedule under the following terms and conditions:

“(A) The compressed work schedule shall be a regular tour of duty consisting of 9 workdays per biweekly pay period, including—

“(i) 8 workdays of 9 hours of regular time per workday and 1 additional hour of scheduled overtime for each day the agent performs work during such regular time; and

“(ii) 1 workday of 8 hours of regular time per workday and 2 additional hours of scheduled overtime when the agent performs work during such regular time.

“(B) Subparagraphs (B) through (H) of subsection (b)(3) shall apply to an agent assigned a compressed work schedule under this paragraph. References in this section to regular time under subsection (b)(3)(A)(i) and scheduled overtime under subsection (b)(3)(A)(ii) shall be deemed to be references to regular time and scheduled overtime, respectively, described in subparagraph (A).

“(4) BASIC BORDER PATROL RATE OF PAY.—A border patrol agent receiving the basic border patrol rate of pay, in lieu of the standard work schedule described in subsection (b)(4)(A), may be assigned a compressed work schedule that is a regular tour of duty consisting of 4 workdays per week with 10 hours of regular time per workday.

“(5) SUNDAY PAY; PREMIUM PAY.—A border patrol agent assigned to a compressed work schedule under this subsection may receive, as applicable—

“(A) Sunday pay for up to 8 hours of regular time associated with a given Sunday, in accordance with section 5546(a);

“(B) premium pay for work on a holiday for up to 8 hours of regular time associated

1 with a given holiday, in accordance with section
2 5546(b); and

3 “(C) basic pay for all regular time hours
4 that qualify for holiday time off pay when an
5 agent is relieved or prevented from working
6 during such regular time on a day designated
7 as a holiday by Federal statute or Executive
8 order.

9 “(6) WORKDAY.—In applying sections 6303(a),
10 6304, 6307(a), 6307(d), 6323, 6326, 6327, and
11 8339(m) to an employee assigned a compressed
12 work schedule under this subsection, references to a
13 day or a workday (or to multiples or parts thereof)
14 shall be considered to be references to 8 hours (or
15 to the respective multiples or parts thereof).

16 “(7) NEGOTIATIONS.—The provisions set forth
17 in this subsection shall be subject to collective bar-
18 gaining negotiations with the border patrol agents’
19 collective bargaining representative.

20 “(j) RULEMAKING.—The Director of the Office of
21 Personnel Management shall promulgate regulations to
22 carry out this section, including regulations governing—

23 “(1) elections and assignments of a border pa-
24 trol rate of pay for newly hired border patrol agents

1 who complete initial training during an annual pe-
2 riod;

3 “(2) situations in which an agent receives more
4 than 1 type of border patrol rate of pay in a bi-
5 weekly pay period or is employed as a border patrol
6 agent for only part of a biweekly pay period; and

7 “(3) the treatment of hours that are substituted
8 for nonpay status hours during regular time.”.

○