



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

DEC 8 2009

MEMORANDUM FOR CHIEF HUMAN CAPITAL OFFICERS

**FROM:** JOHN BERRY  
DIRECTOR 

**Subject:** Administrative Claims for Sunday Premium Pay as a Result of Decision in *Fathauer v. United States*

This memorandum provides U.S. Office of Personnel Management (OPM) guidance to assist agencies in processing employees' administrative claims for Sunday premium pay as a result of the decision in *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009). In a May 26, 2009, decision, the United States Court of Appeals for the Federal Circuit ruled that part-time employees are entitled to Sunday premium pay for work performed on Sundays under 5 U.S.C. 5546(a). This memorandum serves as notification that agencies are required to pay part-time employees Sunday premium pay when such employees meet the requirements for entitlement to such payments pursuant to 5 U.S.C. 5546(a). This memorandum also includes guidance to assist agencies in processing employees' administrative claims for Sunday premium pay as a result of this decision.

Based on the *Fathauer* decision, part-time employees are entitled to Sunday premium pay under 5 U.S.C. 5546(a) and accompanying regulations. See 5 CFR 550.171, 550.172.<sup>1</sup> Based on the Federal Circuit's reasoning in the *Fathauer* case, OPM has also determined that agencies are required to pay part-time prevailing rate systems employees Sunday premium pay when such employees meet the requirements for entitlement to such payments pursuant to 5 U.S.C. 5544(a) and 5 CFR 532.509.<sup>2</sup> Agencies should immediately begin to pay Sunday premium pay to all eligible part-time employees effective as of May 26, 2009.

In anticipation of additional claims for Sunday premium pay which may be filed following the *Fathauer* decision, we are advising agencies to inform employees of the

<sup>1</sup> Although the current regulation at 5 CFR 550.171(a) limits the entitlement to Sunday premium pay to full-time employees, agencies are instructed to disregard this limitation based on the decision in *Fathauer*. OPM will amend this regulation, consistent with the *Fathauer* decision. Both full-time and part-time employees may receive Sunday premium pay (where otherwise eligible), and all regulatory provisions relevant to the administration of Sunday premium pay apply for both full-time and part-time employees.

<sup>2</sup> Although 5 CFR 532.509 does not specifically limit entitlement to Sunday premium pay to full-time prevailing rate employees only, a limitation to full-time prevailing rate employees is contained in the Federal Wage System Appropriated Fund and Nonappropriated Fund Operating Manuals at subchapters S8-4e(3). Agencies are instructed to disregard this limitation. OPM will revise the Operating Manuals, consistent with the *Fathauer* decision.

holding under the *Fathauer* decision in order to give notice to potential claimants. Agencies may use OPM's memorandum to notify employees. Under the Barring Act of 1940, a pay claim against the Government must be received by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues. (See 31 U.S.C. 3702(b).) As a result, employing agencies should go back 6 years from the date the claim was filed and pay claims for any unpaid Sunday premium pay owed part-time employees for Sundays worked during that period. Appropriate interest on backpay under 5 U.S.C. 5596(b)(2) may be calculated using the tools found at <http://www.opm.gov/oca/pay/backpay/backpay.asp>.

As in all pay claims, the burden of proof is on the employee. In this instance, the employee's burden is to establish that he or she (1) worked part-time, (2) worked on a Sunday during the claims period, and (3) did not receive an appropriate amount of premium pay. If the agency was following OPM's regulations, no independent proof of the third element should be required. The employee should, however, provide documentation to the agency employing him or her showing when the Sunday work was performed. Such documentation includes, but is not limited to, the employee's orders, certification of attendance, time and attendance records, or other documentation, such as employee affidavits or supervisory records, which indicate that he or she engaged in part-time Sunday work during the applicable claims period described in the preceding paragraph. Part-time employees should specify the dates they performed Sunday work without receiving Sunday premium pay, and should provide evidence that in fact they were not paid Sunday premium pay for those Sundays. All claims should be made in writing and employing agencies should evaluate any relevant evidence provided by the claimant or in their possession to see if it supports the claim. Agencies may have relevant information in their own records that would negate the need for the employee to submit documents in support of his or her claim.

Employees who have retired or separated may file a claim with their former employing agency and must receive a lump-sum payment for any Sunday premium pay found to be unpaid as a result of that claim. Claims may also be accepted from representatives of current employees and of deceased or incompetent employees.

For additional information, agency Chief Human Capital Officers and/or Human Resources Directors should contact their assigned OPM Human Capital Officer. Employees should contact their agency human resources offices for information on procedures for filing a claim. Further guidance on Sunday premium pay may be found at <http://www.opm.gov/oca/WORKSCH/HTML/sunday.htm>.

cc: Human Resources Directors