DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY TRAINING AND DOCTRINE COMMAND
950 JEFFERSON AVENUE
FORT EUSTIS, VIRGINIA 23604-5700

REPLY TO
ATTENTION OF

ATBO-C

20 JUN 2014

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: TRADOC Policy Letter 12, Fair Labor Standards Act (FLSA)

1. Reference Title 5, Code of Federal Regulations, Parts 550 and 551.

2. Overtime entitlements for Civilian employees depend on their status under FLSA. The Civilian Human Resources Agency is responsible for making FLSA determinations for general schedule (GS) positions based on the duties and responsibilities in the position descriptions (PDs). However, employee entitlements under FLSA are driven by actual duties performed. It is therefore critical that PDs and actual duties are aligned and match. It is management's responsibility to make sure PDs are updated when major duties assigned to employees change. PD accuracy is critical to ensuring FLSA status determinations are correct.

3. A major aspect in determining an employee's FLSA status is the amount of discretion and independent judgment an employee has in making decisions. Be aware that this must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources. This degree of independent judgment must also be clearly identified in the PD. The enclosure explains in more detail how to determine if the position to which an employee is assigned truly exercises discretion and independent judgment as described in 5 CFR.206 and the enclosed guidance.

4. As leaders, you must ensure subordinate managers and supervisors are diligent in their efforts to keep PDs accurate. Supervisors must be mindful of FLSA laws when assigning or allowing overtime work. Supervisors must be aware of the key differences in overtime provisions for exempt and non-exempt FLSA employees and act appropriately, as these differences affect employee compensation.

5. Be aware that employees covered by the FLSA (non-exempt employees) are entitled to overtime compensation for hours worked in excess of 40 in a workweek (unless on an alternate work schedule) for all work which management approves or "suffers or permits" to be performed over the normal 80 hours in a pay period. "Suffered or permitted" work means any work performed by an employee for the benefit of an agency, whether requested or not, appropriately approved or not, when the employee's supervisor accepts the benefits of that performed work.

6. The enclosure provides an outline of some key differences in compensation and premium pay entitlements for GS employees covered by FLSA and those exempt from FLSA provision as well as guidance on reaching "discretion and independent judgment" decisions. Your local Civilian Personnel Advisory Center can also assist you and your subordinate supervisors in understanding and applying FLSA provisions.

7. This policy letter is effective until superseded or rescinded.

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DAVID G. PERKINS
General, U.S. Army
Commanding

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Guidance on Discretion and Independent Judgment and Key Impacts of FLSA on Overtime Work and Compensation

Discretion and Independent Judgment:

New interpretations of the "discretion and independent judgment" component of FLSA have had major impacts on positions throughout the Army and TRADOC. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.

The Civilian Human Resources Agency (CHRA) is charged with making all FLSA exemption determinations when classifying positions. When determining the exemption status of a position, they must consider whether the work described in the PD meets the discretion and independent judgment test. Keep in mind that discretion and independent judgment also applies to work actually performed and not just work described. Managers must remain cognizant of this. Below are examples of elements of an employee's work that would qualify as discretion and independent judgment as well as regulatory guidance on discretion and independent judgment.

Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to, whether the employee:

(1) Has authority to formulate, affect, interpret, or implement management policies or operating practices.

(2) Carries out major assignments in conducting the operations of the organization.

(3) Performs work that affects the organization's operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the organization.

(4) Has authority to commit the employer in matters that have significant financial impact.

(5) Has authority to waive or deviate from established policies and procedures without prior approval.

(6) Has authority to negotiate and bind the organization on significant matters.

(7) Provides consultation or expert advice to management.

(8) Is involved in planning long- or short-term organizational objectives.

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(9) Investigates and resolves matters of significance on behalf of management.

(10) Represents the organization in handling complaints, arbitrating disputes, or resolving grievances.

Further Regulatory Guidance from 5 CFR 551.206:

"(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, an employee can exercise discretion and independent judgment even if the employee's decisions or recommendations are reviewed at a higher level. Thus, the term *discretion and independent judgment* does not require that decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment."

"(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources."

Key Impacts of FLSA Status on Overtime Work and Compensation

	Covered by the FLSA (Non-Exempt)	Exempt from the FLSA (EXEMPT)
Basics	FLSA grants overtime when a full-time, part-time or intermittent work schedule Federal employee performs hours of work in excess of either hours in a daily tour of duty or in excess of 40 hours in the weekly tour of duty.	Title 5 grants overtime to full-time, part-time or intermittent work schedule employees when work is officially ordered and approved in excess of 8 hours in a day or 40 hours in an administrative workweek.
Overtime Rate	The rate at which employees are paid overtime is at a rate equal to one and a half times the employee's hourly regular rate of pay.	For an employee whose basic pay does not exceed GS-10 step one, the overtime hourly rate of pay is generally equal to one and one-half times the hourly rate of basic pay of the employee. For an employee whose basic pay exceeds GS-10, step one, the overtime hourly rate of pay is generally equal to the greater of one and one-half times the GS-10, step one hourly rate or the hourly rate of basic pay for the employee.
Compensation Requirements	Must be compensated for all hours of work they perform that is "suffered and permitted" to occur by management. Overtime work by FLSA-covered employees is "suffer and permitted" if : 1) The employee performs work that was neither ordered nor approved in advance by management; 2) Management is aware that the employee is performing the work and 3) Management fails to act in a reasonable time to stop the employee from performing the work.	Overtime work hours must be ordered and approved in order to be compensable. This approval must be in writing by an officer or employee to whom authority has been specifically delegated.
Compensatory Time	Granted at THE REQUEST of the employee in lieu of overtime payment. Management may not require the employee to accept compensatory time in lieu of overtime premium pay under any circumstances.	May be granted at the request of the employee for irregular or occasional overtime work. Management may require an employee whose rate of basic pay exceeds the maximum rate for GS-10 to earn compensatory time (instead of overtime premium pay) for overtime work.