

LAW ENFORCEMENT AVAILABILITY PAY (LEAP)

INTRODUCTION

Federal law enforcement officers (LEOs) who are criminal investigators receive availability pay to compensate them for substantial amounts of unscheduled overtime duty based on the needs of the agency. “Unscheduled duty” means those hours during which a criminal investigator is required to work, or determined by the agency to be *available* to work, which are outside the criminal investigator’s basic 40-hour workweek and are not regularly scheduled overtime hours. “Availability hours” are hours designated by the agency during which the criminal investigator is directed to be available and reasonably accessible to perform unscheduled duty based on the needs of the agency. There are also instances when the investigator places himself or herself in an availability status to meet the needs of the agency, subject to agency policies and procedures. Unscheduled duty hours are compensated by availability pay which is equal to 25 percent of a criminal investigator’s rate of basic pay. This reference guide describes three conditions that an employee must meet to receive this special type of premium pay.

ELIGIBILITY

Availability pay applies to each employee who meets the definition of “criminal investigator” in 5 CFR 550.103 and fulfills the requirements and conditions of 5 U.S.C. 5545a and 5 CFR 550.181 through 550.186. In the Department of Defense, a criminal investigator means a law enforcement officer whose position is properly classified in the GS-1811 (Criminal Investigations) and GS-1812 (Game Law Enforcement) series.

The employee must also meet the definition of “law enforcement officer” (LEO) in 5 U.S.C. 5541(3) and 5 CFR 550.103, which generally requires that the employee be covered under the early retirement provisions for law enforcement officers, and subsequently 5 U.S.C. 8331(20) or 8401(17). An investigator meets the definition of “law enforcement officer” when the employee’s primary duties are “the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States.” According to the OPM Fact Sheet on Availability Pay, “a criminal investigator is also entitled to availability pay if he or she holds a supervisory or administrative position that has been officially approved as a “secondary position” under the LEO retirement provisions, even if the criminal investigator is ineligible for LEO retirement coverage.”

Finally, in determining whether a criminal investigator qualifies for availability pay, the agency must determine whether the investigator is expected to work, or be available to work, an annual average of 2 or more hours of unscheduled duty for each regular workday. Only criminal investigators who meet the “substantial hours” requirement receive availability pay.

SUBSTANTIAL HOURS REQUIREMENT

Each newly appointed criminal investigator who will receive availability pay and the appropriate supervisor makes an initial certification to the head of the agency (or designee) that the investigator is expected to meet the “substantial hours” requirement in the upcoming 1-year period. Thereafter, each criminal investigator who is receiving availability pay and the appropriate supervisor must make an

annual certification that the investigator currently meets and is expected to meet the requirement in the upcoming 1-year period. (5 CFR 550.184)

To determine whether a criminal investigator is meeting the substantial hours requirement, the total number of unscheduled duty hours for the annual period is divided by the number of regular workdays. (5 CFR 550.183)

- regular workday means each day in the investigator's basic workweek when the investigator works at least 4 hours, excluding overtime compensated under 5 U.S.C. 5542 and 5 CFR 550.111, unscheduled duty hours compensated by availability pay, hours spent in approved training, official travel, approved leave, excused absence, and holidays.
- total unscheduled duty hours means any unscheduled duty hours on a regular workday and any unscheduled duty hours actually worked by an investigator on days that are not regular workdays.

Organizations must ensure that an investigator is required to be available (generally and reasonably accessible) a sufficient number of unscheduled duty hours to allow the investigator to meet the minimum requirement. (5 CFR 550.182(e))

EXCEPTIONS

Availability pay may be suspended under the following conditions:

- The investigator voluntarily "opts-out" and requests not to be assigned any overtime hours (including unscheduled duty) for a designated period because of a family or personal hardship. (5 CFR 550.182(f))
- The investigator who is certified for availability pay does not perform a sufficient amount of unscheduled duty as assigned or reported to meet the substantial hours requirement. (An involuntary suspension of availability pay as a result of a denial or cancellation of an availability certification is an adverse action under 5 U.S.C. 7512(4) and 5 CFR part 752.) (5 CFR 550.184(e))
- The investigator is unable to perform unscheduled duty for an extended period due to a physical or health condition. (5 CFR 550.182(g)(2))

PAYMENT OF AVAILABILITY PAY

Availability pay is fixed at 25% of a criminal investigator's rate of basic pay (as defined in 5 CFR 550.103) or the maximum amount that may be paid to avoid exceeding the biweekly maximum earnings limitation on premium pay under 5 U.S.C. 5547. It is considered full payment for the first 2 hours of overtime work on a regular workday, regardless of whether it is scheduled or approved, and all irregular or occasional overtime work. Availability pay is paid only when a criminal investigator is receiving basic pay, including periods of approved training, approved leave, holidays, official travel, and excused absence for relocation. Components may pay availability pay during initial periods of training, i.e., training provided by the agency to "law enforcement officer interns" before they are expected to perform the duties of law enforcement officers. (5 CFR 550.185)

Availability pay is considered basic pay for advances in pay, severance pay, workers' compensation, retirement, TSP, life insurance, and lump-sum payments for annual leave. (5 CFR 550.186(b) and 5 CFR 550.1205(b)(5)(ii))

Criminal investigators who receive availability pay are not covered by the Fair Labor Standards Act overtime and minimum wage provisions. (5 CFR 550.186(c))

Availability pay replaces administratively uncontrollable overtime (AUO) and standby duty pay for criminal investigators.

FREQUENTLY ASKED QUESTIONS

1. Is a criminal investigator who works a compressed 5-4/9 schedule entitled to one hour of overtime pay if he works three hours beyond his daily tour of duty? He receives law enforcement availability pay (LEAP).

No, the availability pay law assumes a 40-hour basic workweek consisting of five 8-hour workdays. According to the Office of Personnel Management, alternative work schedules are intended for employees who work a regular schedule, not for those employees who may be required to work large amounts of unscheduled overtime. Should it be necessary for an investigator to work three hours of unscheduled duty beyond his or her 8-hour workday, those hours are covered by availability pay. The 25- percent premium covers the first 2 hours of overtime work on a basic workday and 1 hour of unscheduled duty. To correct this problem, management needs to place the investigator on a 40-hour work schedule, reconstruct what he should have received, and determine if there is any indebtedness on the part of the employee or the Government.

2. Are criminal investigators who are receiving availability pay eligible for any other premium payments?

Criminal investigators who are receiving availability pay may not be paid any other premium pay based on unscheduled duty hours because these hours are compensated by LEAP. However, they are eligible to receive other types of title 5 premium pay based on hours other than unscheduled duty hours, including regularly scheduled overtime pay, night, Sunday, and holiday premium pay. (See 5 U.S.C. 5545a(c).) However, the overtime standard for regularly scheduled overtime work that is paid under 5 U.S.C. 5542(d) is different. Overtime work means actual work that is scheduled in advance of the administrative workweek in excess of 10 hours on a day containing hours that are part of an investigator's basic 40-hour workweek or on a day outside the basic 40-hour workweek. (See 5 CFR 550.111(f)(1).)

3. Each criminal investigator who is receiving availability pay and the appropriate supervisor must make an annual certification that the investigator has met, and is expected to meet, the annual average of 2 or more hours of unscheduled duty per regular workday. Under what circumstances may an agency deny or cancel a certification?

5 CFR 550.184(d) identifies only two circumstances in which an agency may deny or cancel a certification: (1) when an investigator has failed to perform unscheduled duty as assigned or reported; or (2) when he or she is unable to perform scheduled duty for an extended period due to physical or health reasons.

REFERENCES

- 5 U.S.C. 5542(d) and (e), 5 U.S.C. 5545a
- 5 CFR 550.181-187, 5 CFR 550.103 (definitions of criminal investigator and law enforcement officer)
- OPM Fact Sheet: Availability Pay

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