

# NIH Policy Manual

## 2300-550-1 - Title 38 Premium Pay

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### Transmittal Notice

1. **Explanation of Material Transmitted:** This Chapter, 2300-550-1, is established to state the NIH policy for the payment of premium pay to the employees at the NIH under Title 38 United States Code, Chapter 74.
2. **Filing Instructions:**
  - a. **Insert:** Manual Issuance 2300-550-1, dated 12/13/2018.
3. **PLEASE NOTE:** For information on:
  - a. Content of this chapter, contact the issuing office listed above.
  - b. NIH Policy Manual, contact the Division of Management Support, OMA on 301-496-4606, or enter this URL: <https://oma.od.nih.gov/DMS/Pages/Manual-Chapters.aspx>

### A. Purpose

The purpose of this manual chapter is to provide the policy regarding the payment of Title 38 premium pay to employees at the National Institutes of Health (NIH) who are assigned to occupations that have been approved for receipt of Title 38 premium pay by the Director, Office of Human Resources. The list of occupations eligible for Title 38 premium pay is included at Appendix 1.

### B. Background

The U.S. Office of Personnel Management (OPM), under the authority of sections 1104 and 5371 of Title 5, United States Code (USC), §§ 1104 and 5371, authorized the Department of Health and Human Services (HHS) to use certain personnel authorities for health care occupations under 38 USC, Chapter 74. The Director, NIH, also received statutory authority to compensate health care professionals subject to the provisions of 38 USC, Chapter 74. These authorities are normally reserved for use within the Department of Veterans Affairs. The approved occupations are health care occupations that provide direct patient care services or services incident to direct patient care. HHS has delegated to HHS OPDIVs the

discretionary use of the Title 38 authorities. If one of the Title 38 authorities is used, the comparable authority in Title 5 is waived.

The use of the delegated Title 38 authorities, including the authorities authorizing the payment of premium pay, must adhere to the provisions of the Delegation Agreement between HHS and OPM, and the provisions of 38 USC, chapter 74.

## **C. Scope**

### **1. Eligibility**

- a. Title 38 premium pay is authorized for employees paid under the General Schedule (GS/GM) pay system and employees in the NIH Clinical Center's Clinical Research Support (CRS). The CRS program no longer supports new hires, but some Clinical Center employees remain in the program and receive premium pay in accordance with Title 38 premium pay rules. Employees must provide direct patient care services or services incident to patient care and must be in one of the approved occupations for receipt of Title 38 premium pay (See Appendix 1). No other occupations are approved to receive Title 38 premium pay at the NIH. Employees may be on permanent or temporary appointments, and may be on full-time, part-time and intermittent schedules.

### **2. Ineligible Employees**

- a. Medical or Dental Officers who have been approved to receive Title 38 Physician and Dentist Pay
- b. Senior Executive Service (SES), Executive Schedule (EX), Senior Level/Scientific (SL/ST), Senior Biomedical Research Service (SBRS), or other senior-level systems positions
- c. Positions employed or paid under a Title 42 authority (with the exception of CRS legacy employees in the Clinical Center)
- d. Other Administratively Determined positions (AD), (with the exception of CRS legacy employees in the Clinical Center) or
- e. Commissioned Corps officers (CC)

## **D. Policy**

### **1. Title 38 Premium Pay Framework**

- a. Employees in positions covered by NIH's list of occupations that have been approved to receive Title 38 premium pay must be paid accordingly when scheduled and approved to work during hours covered by the premium pay components, including overtime, night differential, Saturday/Sunday differential, holiday pay, and on-call pay.
- b. All forms of Title 38 premium pay are available to all tours of duty (full-time, part-time, and intermittent). There is not a special approval process for certain

occupations to be eligible for Saturday differential or On-Call pay, for which there are no counterparts under Title 5 pay.

- c. Title 38 premium pay replaces the comparable premium pay under Title 5, Chapter 55, Subchapter V. Employees do not receive both Title 38 and Title 5 premium pay rates.
- d. Employees in occupations not approved for Title 38 premium pay will receive premium pay in accordance with Title 5 regulations and the Fair Labor Standards Act (FLSA).

2. Title 38 Premium Pay Rates and Provisions. The following guidance derives from 38 USC, Chapter 74, regarding the payment of premium pay and represents the NIH policy on Title 38 premium pay. A summary of the Title 38 premium pay rates is provided in the link in Appendix 2.

a. Title 38 Premium Pay Hourly Rate of Pay

- i. For purposes of computing the Title 38 overtime rate and all other premium pays, the Title 38 premium pay hourly rate of pay is used. This rate is derived by dividing the employee's annual rate of basic pay by 2080. The Title 38 premium pay hourly rate differs from the regular hourly rate of basic pay used for all other pay administration purposes, which is calculated by dividing the annual rate of basic pay by 2087.

b. Overtime Rate

- i. The Title 38 overtime rate is one and a half times the premium pay hourly rate of pay. Overtime is received for service in excess of eight hours in one day or forty hours in an administrative workweek.
- ii. Alternative Work Schedules: For employees on a Compressed Work Schedule, overtime refers to all officially ordered and approved hours of work in excess of the schedule. For employees on a Flexible Work Schedule, overtime refers to hours worked beyond eight hours in one day or forty hours in an administrative workweek that were officially ordered in advance. For example, an employee who participates in a Compressed Work Schedule of four ten-hour workdays in one week will receive Title 38 overtime for hours ordered and approved in excess of ten hours in one day or forty hours in the week. An employee with a Flexible Work Schedule will receive Title 38 overtime for hours ordered and approved in excess of eight hours in any one day or forty hours in an administrative workweek.
- iii. Overtime must be at least fifteen minutes long in one day to be creditable for overtime pay. Overtime that is less than fifteen minutes long in one day is not creditable for overtime pay.

c. Holiday Pay

- i. The Title 38 holiday pay rate is the regular hourly rate plus the premium pay hourly rate of pay. For example, one hour of Title 38 holiday pay consists of the sum of annual pay divided by 2087 hours (the regular hourly rate) and annual pay divided by 2080 hours (the Title 38 premium pay hourly rate). All hours worked on a holiday, including overtime hours, are paid at this rate.
- ii. Employees who are required to work on a holiday are entitled to at least two hours of holiday pay even if they work less than two hours.
- iii. Holiday pay is payable for legal Federal holidays and for other days declared to be a holiday by Federal statute or Executive Order. When a holiday falls on a non-workday outside of a full-time employee's workweek, the employee is entitled to holiday pay for work performed on his/her designated "in lieu of" holiday. For instance, if New Year's Day (a federal holiday) falls on a Sunday and that is outside the employee's workweek, the "in lieu of" holiday is the following day and the employee is entitled to holiday pay for any hours worked that day. However, an employee will not have an "in lieu of" holiday if the employee works on the actual holiday, as the employee is paid holiday premium pay for work on that day. For instance, if the employee works on New Year's Day, the employee is paid holiday pay for working on Sunday but does not have an "in lieu of" holiday and is paid the regular hourly rate of pay for hours worked on Monday.

d. Night Differential

- i. Night differential is an additional 10 percent of the premium pay hourly rate of pay. Employees receive night differential premium pay for their entire tour of duty if at least four hours are performed between 6pm and 6am. If less than four hours are performed between 6pm and 6am, night differential premium pay is paid for only the work performed during those hours.

e. Sunday Differential

- i. Sunday differential is an additional 25 percent of the premium pay hourly rate of pay. Employees receive Sunday differential premium pay for the entire scheduled tour that includes service between midnight on Saturday and midnight on Sunday.

f. Saturday Differential

- i. Saturday differential is an additional 25 percent of the premium pay hourly rate of pay. Employees receive Saturday differential premium pay for the entire scheduled tour that includes service between midnight on Friday and midnight on Saturday.

#### g. On-Call Pay

- i. On-call pay is granted when an employee is scheduled as ready to return to work when contacted and ready for duty either outside regular work hours, or on a holiday. On-call pay is an additional ten percent of the employee's overtime rate of pay for each hour of on-call duty on a designated Federal holiday or for overtime on-call duty.
- ii. For part-time and intermittent employees, on non-holidays, it should be verified that the basic overtime requirement has been met. For example, a part-time employee who completes six hours of work on a non-holiday would not be eligible for on-call pay unless he/she has already completed forty hours in the administrative workweek.
- iii. Employees who are on-call must be accessible by phone or other device, available to return to the worksite within a designated response time, and be in a physical condition that allows them to perform work. In the event of incapacitation or unavailability during a period of on-call duty, an employee must contact the supervisor to be released from on-call duty. If released from on-call duty, the employee will not be paid on-call pay for the period of time he/she was relieved from duty.
- iv. On-call pay is suspended during periods of actual call-back overtime or call-back holiday duty. On-call resumes after the call-back period is complete if there is any scheduled on-call duty remaining. See section h for a definition of Call-back pay.
- v. Relationship of Title 38 On-Call pay to Regularly Scheduled Standby Duty Pay under Title 5

1. Regularly scheduled standby duty pay is premium pay approved for a position on an annual basis under 5 USC 5545(c)(1). It is paid when an employee is regularly required to remain at or within the confines of his/her worksite during longer-than-ordinary periods of duty, a substantial part of which consists of remaining in standby status rather than performing work.
2. While both Title 5 standby duty pay and Title 38 on-call pay provide that employees are paid to stand ready to work, the conditions under which the premium pay is granted and the restrictions on the employee's location and activities differ significantly.
3. Standby duty pay is paid on an annual basis for regularly scheduled overtime work, i.e., overtime work that is regularly assigned and scheduled before the beginning of the administrative workweek. Standby duty pay is determined by a percentage of the employee's annual basic salary which may not exceed 25% of the basic rate of a GS-10, Step 1 employee, including any applicable locality-based comparability payment or special rate. Conversely, on-call pay is paid on a biweekly basis for on-call duty on an overtime basis or on a holiday. On-call duty does not need not be regularly scheduled, i.e., it may be scheduled at any time before it is worked.

4. While on standby duty, employees are not allowed to leave their worksite. By contrast, under Title 38 on-call pay, employees may leave their worksite as long as they carry a phone/other device on which they may be quickly reached.

#### h. Call-Back Pay

- i. Call-back pay is paid for work performed outside regular work hours for which an employee is required to remain at the worksite at the end of the tour, return to the worksite to perform, or report on a day for which he/she was not scheduled to work. Part-time and intermittent employees are eligible for call-back pay as well. Call-back pay starts when the employee reports to work. If the employee was on-call prior to the call-back, on-call pay is suspended during the time an employee works the callback. Call-back is paid for a minimum of two hours and is paid at the Title 38 overtime rate for service in excess of eight hours in a day, the employee's compressed work schedule or 40 hours in a week. For non-overtime hours, call-back pay is paid at the regular rate or at the holiday rate for service on a holiday.

### 3. Compensatory Time-Off from Duty

- a. When compensatory time-off has been authorized in lieu of overtime pay, the amount of the compensatory time off will equal the amount of time worked in an overtime status, except for call-back overtime, in which case the employee is entitled to a minimum of two hours of compensatory time-off for each call back.

### 4. Interrelationship of Title 38 Premium Pay Provisions

- a. Employees eligible for Title 38 premium pay may receive two or more types of premium pay for the same period of service. For example, an employee scheduled to work from 3pm Sunday to 11pm on Sunday is eligible for both Sunday differential at twenty five percent and night differential at ten percent of the employee's Title 38 premium pay hourly rate of basic pay.
- b. Employees who perform overtime on a holiday are entitled to the holiday rate of pay for each hour of overtime work, instead of the Title 38 base overtime rate of pay for those hours. Other forms of premium pay continue to be available for work on a holiday, e.g., night differential, weekend differential, etc.

### 5. Title 38 Premium Pay Limitations

- a. Eligible employees may receive Title 38 premium pay even if the receipt of this premium pay causes the employees' aggregate pay for any pay period to exceed the maximum rate payable to GS-15 (GS-15, step 10). The Title 5 biweekly limitation on premium pay, under 5 USC 5547(a) and 5 CFR 550.105, does not

apply to Title 38 premium pay.

## **E. Resonsibilities**

The responsibility for the Title 38 premium pay policy is shared among several offices within the NIH. The primary roles and responsibilities of various positions are described below:

1. Director, Office of Human Resources

- a. Determines the occupations eligible for Title 38 premium pay in accordance with Title 38, Chapter 74.
- b. Oversees the NIH Title 38 premium pay program and ensures compliance with law and with the OPM-HHS Delegation Agreement.

2. Human Resources Specialists, Office of Human Resources

- a. Communicate Title 38 premium pay eligibility with program area upon recruitment, new hire actions or other applicable personnel actions. Inform the program area if there are any changes to Title 38 premium pay eligibility if any employee converts to another position.
- b. Accurately record Title 38 premium pay eligibility in the HR processing system when processing all HR actions for eligible employees.

3. Timekeepers, Institutes/Centers

- a. Ensure that eligible employees' profiles in the NIH time and attendance system reflect eligibility for Title 38 premium pay. Advise supervisors and employees regarding Title 38 premium pay policies and procedures.

4. Supervisors/Managers, Institutes/Centers

- a. Ensure that employees who are eligible for Title 38 premium pay are advised how Title 38 premium pay differs from Title 5 premium pay. Verify and approve the hours worked by employees in the NIH time and attendance system.

## **Appendix 1 – NIH Approved Occupations for Title 38 Premium Pay**

| <b>Series</b> | <b>Occupation</b>                                    | <b>Series</b> | <b>Occupation</b>                          |
|---------------|------------------------------------------------------|---------------|--------------------------------------------|
| <b>101</b>    | <b>Licensed Professional Mental Health Counselor</b> | <b>647</b>    | <b>Diagnostic Radiologic Technologist</b>  |
| <b>101</b>    | <b>Marriage and Family Therapist</b>                 | <b>648</b>    | <b>Therapeutic Radiologic Technologist</b> |
| <b>180</b>    | <b>Psychologist</b>                                  | <b>649</b>    | <b>Medical Instrument Technician</b>       |
| <b>185</b>    | <b>Social Worker</b>                                 | <b>651</b>    | <b>Respiratory Therapist (Certified)</b>   |
| <b>601</b>    | <b>Blind Rehabilitation Outpatient Specialist</b>    | <b>651</b>    | <b>Respiratory Therapist (Registered)</b>  |

|            |                                               |            |                                                  |
|------------|-----------------------------------------------|------------|--------------------------------------------------|
| <b>601</b> | <b>Blind Rehabilitation Specialist</b>        | <b>660</b> | <b>Pharmacist</b>                                |
| <b>603</b> | <b>Physician Assistant</b>                    | <b>661</b> | <b>Pharmacy Technician</b>                       |
| <b>610</b> | <b>Certified Registered Nurse Anesthetist</b> | <b>665</b> | <b>Audiologist</b>                               |
| <b>610</b> | <b>Nurse</b>                                  | <b>665</b> | <b>Audiologist-Speech Pathologist</b>            |
| <b>620</b> | <b>Licensed Practical or Vocational Nurse</b> | <b>665</b> | <b>Speech Pathologist</b>                        |
| <b>621</b> | <b>Nurse Assistant</b>                        | <b>667</b> | <b>Orthotist-Prosthetist</b>                     |
| <b>630</b> | <b>Dietitian</b>                              | <b>669</b> | <b>Medical Records Administration Specialist</b> |
| <b>631</b> | <b>Occupational Therapist</b>                 | <b>669</b> | <b>Medical Records Administrator</b>             |
| <b>633</b> | <b>Physical Therapist</b>                     | <b>672</b> | <b>Prosthetic Representative</b>                 |
| <b>635</b> | <b>Kinesiotherapist</b>                       | <b>675</b> | <b>Medical Records Technician</b>                |
| <b>636</b> | <b>Occupational Therapy Assistant</b>         | <b>681</b> | <b>Dental Assistant</b>                          |
| <b>636</b> | <b>Physical Therapy Assistant</b>             | <b>682</b> | <b>Dental Hygienist</b>                          |
| <b>642</b> | <b>Nuclear Medicine Technologist</b>          | <b>858</b> | <b>Biomedical Engineer</b>                       |
| <b>644</b> | <b>Medical Technologist</b>                   |            |                                                  |

Please note that OPM and NIH policy allows for some variations in occupational titles such as “Nurse” vs. “Advanced Practice Nurse” and the use of parenthetical titles. All of these titles would be eligible for Title 38 premium pay. Also note that some series cover multiple occupations and only the occupations listed in this Appendix are eligible for Title 38 premium pay.

## **Appendix 2 – Procedures for Authorizing Title 38 Premium Pay**

OHR has prepared a Standard Operating Procedure (SOP) which gives guidance on identifying employees eligible for Title 38 premium pay and entering eligibility information into the HR processing system and the time and attendance system. This SOP also provides a comparison chart of premium pay rates under Title 5 versus under Title 38. This SOP may be accessed at: <https://intrahr.od.nih.gov/policyguidance/sops/documents/pay/SOP-Title38PremiumPay.pdf>

## **Appendix 3 – Definitions**

The following terms are used in this manual chapter:

1. Administrative work week is the period of seven consecutive calendar days beginning at midnight Sunday and ending at midnight the following Saturday.
2. Basic overtime requirement means work in excess of eight hours in one day or forty hours in the administrative workweek for employees on a regular work schedule or a flexible work schedule. Basic overtime means all officially ordered and approved hours of work in excess of the schedule for employees on a compressed work schedule.

3. Basic rate of pay is the rate of pay fixed by law or administrative action for the position held by the employee. It includes Title 5 and Title 38 special salary rates or locality based comparability pay under 5 USC 5304, but does not include other pay components outside of basic pay such as retention/recruitment incentives, cash awards, premium pay, etc.
4. Basic hourly rate is the annual rate of pay divided by 2087.
5. Title 38 premium pay hourly rate is the annual rate of basic pay divided by 2080.
6. Call-back work is overtime work performed outside regular work hours for which an employee is required to:
  - a. Remain at the worksite at the end of specified tour, or
  - b. Return to worksite, or
  - c. Report on a day for which he/she was not scheduled to work.
7. Holiday Duty is work on a holiday designated by Federal statute or Executive Order. Holiday duty is also performed on a day that is designated as a holiday for an individual employee, instead of a legal holiday or a day declared to be a holiday by legislation or Executive Order.
8. Night work is work performed on a tour of duty, any part of which is within the period beginning at 6pm and ending at 6am.
9. On-Call Duty is officially scheduled duty outside of regular work hours or on a holiday during which an employee stands ready to return to worksite upon notification of need.
10. Regularly scheduled work is work scheduled before the beginning of the administrative workweek.
11. Tour of duty is the hours of a day and the days of the administrative workweek for which an employee is scheduled to work, including overtime hours.
12. Weekend work is work performed on a tour of duty, any part of which is within the period beginning midnight on Friday and ending at midnight on Sunday.

## Appendix 4 – References

The following references are used in this manual chapter:

1. OPM-HHS Delegation Agreement:  
<https://hr.nih.gov/sites/default/files/public/documents/benefits/pay/title-38-pay/pdf/title38delegationagreement.pdf>
2. 38 USC, chapter 74: <https://www.law.cornell.edu/uscode/text/38/part-V/chapter-74>
3. 42 USC, section 282(b)(22): <https://www.law.cornell.edu/uscode/text/42/282>
4. 5 USC, sections 1104 and 5371: <https://www.law.cornell.edu/uscode/text/42/282> and <https://www.law.cornell.edu/uscode/text/5/5371>
5. 5 Code of Federal Regulations (CFR), Part 550, Subpart A and 5 CFR Part 551, Subpart B 551: <https://www.law.cornell.edu/cfr/text/5/part-550/subpart-A> and <https://www.law.cornell.edu/cfr/text/5/part-551/subpart-B>
6. HHS Instruction 550-1, Premium Pay (Title 5):  
<https://www.hhs.gov/sites/default/files/hr-resource-library-550-1.pdf>

7. HHS Guide for Timekeeping: <https://intranet.hhs.gov/hr/leavepaytime/timekeeping-guide/chapter-13.html>
8. NIH Delegation of Authority, HR: Pay, No. 16: Title 38/Premium Pay: <https://delegations.nih.gov/DOADetails?id=1931> (pending revision)