

U.S. Army Corps of Engineers
Policy and Procedures for Determining Non-Exempt Status
under the Emergency Provisions of the Fair Labor Standards Act
(5 CFR 551.208)

1. During the past nine years, the U.S. Army Corps of Engineers has been one of only two agencies performing Mission Assignment work for FEMA under the Federal Response Plan who have utilized an Emergency provision of reference 1.a. to re-classify employees exempt from the provisions of the Fair Labor Standards Act (FLSA) (typically those at the GS-11 and above level) to non-exempt status as a result of the lower graded work being performed by that individual in their temporary emergency position. The duties of these positions are related to a Presidentially Declared Disaster under the provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended [42 United States Code (USC) 5121, *et seq.*]. These re-classification actions permitted Corps employees to be paid at the overtime rate of 1 2 times of their regular hourly rate of pay (i.e. a GS-12 step 5 making approximately \$26.50 per hour receives \$39.75 per hour). Employees who are exempt from the FLSA would be paid at 1 2 times the hourly rate of basic pay at the minimum rate for GS 10 (approximately \$26.65 for the locality pay area of Washington-Baltimore, DC-MD-VA-WV).
2. This situation, where Corps employees are in many cases working side by side with those of Other Federal Agencies (OFAs) but receiving significantly more in the way of overtime pay has strained the working relationship between ourselves and FEMA and other Federal agencies.
3. FEMA has issued a memorandum (copy enclosed) (which although dated 2 September 1997, we have just recently obtained) stating that they will not reimburse Federal departments and agencies performing mission assignments under the Stafford Act for labor costs for overtime which exceed the rate of pay for their position of record. In essence, FEMA will no longer reimburse Federal departments and agencies for overtime compensation computed under the emergency provision of 5 C.F.R. 551.208(d) which allows an employee to be reclassified as nonexempt from the overtime provisions of the FLSA (except in those extremely rare cases where FEMA determines such action to be prudent).
4. Since FEMA has the authority to declare an "emergency" under the Stafford Act, applicable to the FLSA provisions, we will coordinate any such declaration at the Headquarters level of both agencies. In cases where FEMA does declare an emergency, the exempt/nonexempt status under the FLSA for each responding employee will be decided locally. In those rare instances where the "emergency" provision is invoked, we will so advise you. If you are not so advised, no such determination has been made. All requests for volunteers must specify whether or not the circumstances for which they will be engaged meet the emergency definition.

5. If FEMA does not declare an "emergency" under the Stafford Act, and a division commander disagrees with that determination, they should prepare their recommendation and forward it through their Emergency Operations Center to the Headquarters Operations Center for review and decision by the Commander, USACE. If the Commander, USACE agrees with the division commander, they will then be in a position to make a determination regarding the exempt/nonexempt status under the FLSA.

6. The situations where an "emergency" exists will certainly not include work done involving recovery activities such as Quality Assurance (QA)/Quality Control (QC) oversight of contractor work or developing Damage Survey Reports (DSRs).