

115TH CONGRESS  
2D SESSION

# S. 2338

To amend chapter 55 of title 5, United States Code, to reform the manner in which Border Patrol agents are compensated.

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IN THE SENATE OF THE UNITED STATES

JANUARY 25, 2018

Mr. TESTER introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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## A BILL

To amend chapter 55 of title 5, United States Code, to reform the manner in which Border Patrol agents are compensated.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Border Patrol Agent  
5 Pay Reform Technical Amendments Act of 2018”.

6 **SEC. 2. BORDER PATROL RATE OF PAY.**

7 Section 5550 of title 5, United States Code, is  
8 amended—

9 (1) in subsection (a)(1), by inserting “agent”  
10 after “applicable border patrol”;

1 (2) in subsection (b)—

2 (A) in paragraph (1)—

3 (i) in subparagraph (A)—

4 (I) by striking “Not later than  
5 30 days before the first day of each  
6 year beginning after the date of enact-  
7 ment of this section,” and inserting  
8 “Not later than December 1 of each  
9 year,”; and

10 (II) by striking “for that year”  
11 and inserting “for the next annual pe-  
12 riod beginning on the first day of the  
13 first pay period that commences on or  
14 after January 1”;

15 (ii) in subparagraph (C), by striking  
16 “Not later than 60 days before the first  
17 day of each year beginning after the date  
18 of enactment of this section,” and insert-  
19 ing “Not later than November 1 of each  
20 year,”;

21 (iii) in subparagraph (D)—

22 (I) in clause (iii), by inserting  
23 “due to loss of law enforcement au-  
24 thority” after “this section”; and

1 (II) in clause (v), by striking “or  
2 the level 2 border patrol rate of pay”;  
3 (iv) in subparagraph (E)—

4 (I) in clause (i), by striking “or  
5 the level 2 border patrol rate of pay”;

6 (II) in clause (ii), by striking  
7 “the analysis conducted under section  
8 2(e) of the Border Patrol Agent Pay  
9 Reform Act of 2014” and inserting “a  
10 written staffing analysis by the Com-  
11 missioner of U.S. Customs and Bor-  
12 der Protection”; and

13 (III) by adding at the end the  
14 following:

15 “(iv) EXCLUSION OF CERTAIN EM-  
16 PLOYEES.—In applying any percentage  
17 limit under clause (i) or (ii) to a base pop-  
18 ulation, U.S. Customs and Border Protec-  
19 tion shall exclude from such population  
20 any border patrol agent who—

21 “(I) is assigned a basic border  
22 patrol rate of pay under paragraph  
23 (iii) or (iv) of subparagraph (D); or

24 “(II) would reach the premium  
25 pay cap under section 5547 if as-

1 signed a level 1 border patrol rate of  
2 pay.

3 “(v) APPLICATION FREQUENCY.—The  
4 10 percent limit under clause (i) or an al-  
5 ternative percentage limit under a waiver  
6 under clause (ii) shall be applied at the be-  
7 ginning of the first pay period beginning  
8 on or after January 1 of each year.”; and  
9 (v) by striking subparagraphs (F) and  
10 (G) and inserting the following:

11 “(F) CANINE CARE.—For a border patrol  
12 agent assigned to provide care for a canine  
13 while not on duty and assigned to the level 1  
14 border patrol rate of pay in accordance with  
15 subparagraph (D)(ii)—

16 “(i) that rate of pay covers all such  
17 care and no other pay shall be paid to the  
18 border patrol agent for such care except as  
19 set forth in clauses (ii) through (v);

20 “(ii) the agent shall be credited with  
21 1 hour of such care for each calendar day  
22 on which such care occurs (without regard  
23 to the actual duration of such care);

24 “(iii) 1 hour of canine care credited  
25 under clause (ii), as available, shall be sub-

1           stituted for 1 hour of scheduled overtime  
2           that the agent is obligated to perform  
3           under paragraph (2)(A)(ii) on the same  
4           regular work day;

5           “(iv) 1 hour of canine care credited  
6           under clause (ii), if not needed to sub-  
7           stitute for scheduled overtime under clause  
8           (iii), shall be paid to the border patrol  
9           agent as scheduled overtime for which the  
10          agent shall receive monetary compensation  
11          pursuant to the payment of overtime under  
12          section 5542(a)(4); and

13          “(v) for canine care hours credited  
14          under clause (ii) on a day other than a  
15          regular workday, or on a regular workday  
16          on which an agent has no obligation to  
17          perform scheduled overtime work, the  
18          agent shall be credited with 1 scheduled  
19          overtime work hour paid as monetary com-  
20          pensation under section 5542(a)(4) (de-  
21          fined as 1 hour of overtime work under  
22          section 5542(g)(1)(B)(i)) for each hour of  
23          credited canine care.”;

24          (B) in paragraph (2)—

1 (i) in subparagraph (C), by amending  
2 clause (i) to read as follows:

3 “(i) any compensation under this sec-  
4 tion or under any other provision of law in  
5 addition to the compensation provided  
6 under subparagraph (B); or”;

7 (ii) in subparagraph (E), by striking  
8 “paid leave” and inserting “leave”;

9 (iii) in subparagraph (F)(ii), by strik-  
10 ing “and” at the end; and

11 (iv) by striking subparagraph (G) and  
12 inserting the following:

13 “(G) if the border patrol agent participates  
14 in a day of advanced training, but does not per-  
15 form the required amount of scheduled overtime  
16 work under subparagraph (A)(ii) on that day,  
17 the border patrol agent shall be deemed to have  
18 performed scheduled overtime work during non-  
19 work periods to the extent necessary to reach  
20 the required amount; and

21 “(H) any overtime obligation that the bor-  
22 der patrol agent has incurred can be met  
23 through the use of any accrued compensatory  
24 time accrued for travel pursuant to section  
25 5550b.”; and

1 (C) in paragraph (3)—

2 (i) in subparagraph (C), by amending  
3 clause (i) to read as follows:

4 “(i) any compensation under this sec-  
5 tion or under any other provision of law in  
6 addition to the compensation provided  
7 under subparagraph (B); or”;

8 (ii) in subparagraph (E)—

9 (I) by striking “paid leave” and  
10 inserting “leave”; and

11 (II) by striking “excused” and  
12 inserting “absent”;

13 (iii) in subparagraph (F)(ii); by strik-  
14 ing “and” at the end;

15 (iv) by amending subparagraph (G) to  
16 read as follows:

17 “(G) if the border patrol agent participates  
18 in a day of advanced training, but does not per-  
19 form the required amount of scheduled overtime  
20 work under subparagraph (A)(ii) on that day,  
21 the border patrol agent shall be deemed to have  
22 performed scheduled overtime work during non-  
23 work periods to the extent necessary to reach  
24 the required amount;”;

25 (v) by adding at the end the following:

1           “(H) if the border patrol agent is assigned  
2           to provide canine care or assigned to marine  
3           duty and participates in a day of advanced  
4           training and performs more than the required  
5           amount of scheduled overtime work under sub-  
6           paragraph (A)(ii) on that day, the border patrol  
7           agent shall be compensated for all of the hours  
8           worked on that day; and

9           “(I) any overtime obligation that the bor-  
10          der patrol agent has incurred can be met  
11          through the use of any accrued compensatory  
12          time accrued for travel pursuant to section  
13          5550b.”;

14          (3) by amending subsection (d) to read as fol-  
15          lows:

16          “(d) TREATMENT AS BASIC PAY.—

17                 “(1) IN GENERAL.—Any overtime supplement  
18                 in addition to the basic border patrol rate of pay for  
19                 a border patrol agent resulting from the application  
20                 of the level 1 border patrol rate of pay or the level  
21                 2 border patrol rate of pay shall be treated, subject  
22                 to paragraphs (2) and (3), as part of basic pay sole-  
23                 ly—

24                         “(A) for purposes of the definition of basic  
25                         pay in sections 8331(3) and 8401(4) and the



1 provisions in chapters 83 and 84 that rely on  
2 those definitions;

3 “(B) for purposes of sections 5595(c) (re-  
4 lating to severance pay) and 8704(c) (relating  
5 to conversion of pay), except as otherwise pro-  
6 vided in paragraph (3);

7 “(C) for the purpose of section 8114(e)  
8 (relating to computation of pay); and

9 “(D) for any other purpose that the Direc-  
10 tor of the Office of Personnel Management may  
11 prescribe, by regulation, subject to paragraph  
12 (2) and any limitation established in accordance  
13 with paragraph (3).

14 “(2) TREATMENT OF OVERTIME SUPPLE-  
15 MENT.—The overtime supplement described in para-  
16 graph (1) may not be treated as part of basic pay  
17 for purposes not described in paragraph (1), includ-  
18 ing the purposes of calculating—

19 “(A) overtime pay, night pay, Sunday pay,  
20 or holiday pay under sections 5542, 5545, and  
21 5546;

22 “(B) locality-based comparability payments  
23 under section 5304 or special rate supplements  
24 under section 5305; or

1           “(C) cost-of-living allowances in nonforeign  
2 areas under section 5941.

3           “(3) LIMITATIONS.—

4           “(A) IN GENERAL.—During the control pe-  
5 riod described in subparagraph (B), the amount  
6 of the overtime supplement that is considered  
7 basic pay under subparagraphs (A) and (B) of  
8 paragraph (1) may not exceed the amount com-  
9 puted by multiplying the border patrol agent’s  
10 basic border patrol rate of pay by the percent-  
11 age representing the agent’s career average of  
12 assigned overtime supplement percentages (in-  
13 cluding 0 percent for periods of time during  
14 which no overtime supplement was payable).  
15 The career average percentage shall be com-  
16 puted under this subparagraph without regard  
17 to the effect of the limitation on premium pay  
18 under section 5547. The premium pay limita-  
19 tion remains applicable in determining the dol-  
20 lar amount of any overtime supplement com-  
21 puted using the career average percentage.

22           “(B) CONTROL PERIOD.—The control pe-  
23 riod referred to in subparagraphs (A) and (C)  
24 is the period beginning 3 years before the date  
25 on which a border patrol agent will meet age

1 and service requirements associated with enti-  
2 tlement to an immediate annuity and ending on  
3 the last day of the individual's career as a bor-  
4 der patrol agent.

5 “(C) CAREER AVERAGE PERCENTAGE.—

6 For purposes of subparagraph (A), a border pa-  
7 trol agent's initial career average of assigned  
8 overtime supplement percentages is the average  
9 for the border patrol agent's career before the  
10 beginning of the control period. During the con-  
11 trol period, the career average shall be recom-  
12 puted at the end of each annual period (as de-  
13 scribed in subsection (b)(1)(A)). In computing  
14 the career average percentage, any periods of  
15 service as a border patrol agent before the first  
16 day of the first pay period beginning on or after  
17 January 1, 2016, shall be included, and the  
18 agent's assigned overtime supplement during  
19 such periods shall be deemed to be 25 percent.  
20 If the career average percentage is less than 25  
21 percent, the precise amount of the career aver-  
22 age percentage shall be used for purposes of  
23 this subsection.

24 “(4) LUMP-SUM ANNUAL LEAVE PAYMENT.—In  
25 computing an agent's lump-sum annual leave pay-

1 ment under section 5551 or 5552, the pay the agent  
 2 is projected to receive shall include a deemed over-  
 3 time supplement under this paragraph, which—

4 “(A) shall be based on the lower of—

5 “(i) the agent’s actual overtime sup-  
 6 plement percentage in effect at separation;

7 or

8 “(ii) the average percentage of the  
 9 agent’s overtime supplement during the 26  
 10 biweekly pay periods immediately pre-  
 11 ceding such separation; and

12 “(B) may not exceed the amount that is,  
 13 or would be, payable under the premium pay  
 14 limitation under section 5547.”;

15 (4) in the subsection (f) heading, by striking  
 16 “AND SUBSTITUTION OF HOURS” and inserting  
 17 “DURING REGULAR TIME; GUARD AND RESERVIST  
 18 DUTIES; ABSENCES DURING SCHEDULED OVER-  
 19 TIME”; and

20 (5) by adding at the end the following:

21 “(h) LEAVE WITHOUT PAY DURING REGULAR TIME;  
 22 GUARD AND RESERVIST DUTIES; ABSENCES DURING  
 23 SCHEDULED OVERTIME.—

24 “(1) AT LEAST 1 WORKDAY.—If a border patrol  
 25 agent takes leave without pay for a period of at least

1 1 workday, the agent shall not receive any pay for  
2 the hours during which the border patrol agent took  
3 leave without pay.

4 “(2) NO ACCRUAL OF OVERTIME DEBT.—A bor-  
5 der patrol agent shall not accrue an overtime debt  
6 for any full workdays during which a border patrol  
7 agent uses leave without pay, regardless of the bor-  
8 der patrol rate of pay to which the border patrol  
9 agent is assigned.

10 “(3) CALCULATION OF PAY.—

11 “(A) IN GENERAL.—For pay periods dur-  
12 ing which a border patrol agent takes one or  
13 more full days of leave without pay, the amount  
14 of border patrol pay that the agent would nor-  
15 mally receive shall be reduced proportionally by  
16 the amount of overtime hours that the agent  
17 has not worked due to being on leave without  
18 pay.

19 “(B) PERCENTAGE DECREASE.—The total  
20 amount of border patrol pay that a border pa-  
21 trol agent would normally receive in a pay pe-  
22 riod described in subparagraph (A) shall be de-  
23 creased based on the percentage of work days  
24 for which the border patrol agent takes leave  
25 without pay.

1 “(i) COMPRESSED WORK SCHEDULE.—

2 “(1) IN GENERAL.—Notwithstanding any other  
3 provision of this section or section 6101, the Com-  
4 missioner of U.S. Customs and Border Protection  
5 may assign a border patrol agent a compressed work  
6 schedule under this subsection, subject to any regu-  
7 lations prescribed by the Director of the Office of  
8 Personnel Management.

9 “(2) LEVEL 1 BORDER PATROL RATE OF PAY.—

10 A border patrol agent receiving the level 1 border  
11 patrol rate of pay may, in lieu of the standard work  
12 schedule described in subsection (b)(2)(A), be as-  
13 signed a compressed work schedule under the fol-  
14 lowing terms and conditions:

15 “(A) The compressed work schedule shall  
16 be a regular tour of duty consisting of four 10-  
17 hour workdays per week as his or her regular  
18 schedule and shall include, in each pay period,  
19 8 workdays of 10 hours of regular time per  
20 workday and a total of 20 additional hours of  
21 scheduled overtime on the other days within the  
22 pay period in which the agent does not perform  
23 regular time.

24 “(B) Subparagraphs (B) through (G) of  
25 subsection (b)(2) shall apply to an agent as-

1 signed a compressed work schedule under this  
2 paragraph. References in this section to regular  
3 time under subsection (b)(2)(A)(i) and sched-  
4 uled overtime under subsection (b)(2)(A)(ii)  
5 shall be deemed to be references to regular time  
6 and scheduled overtime, respectively, described  
7 in subparagraph (A).

8 “(3) LEVEL 2 BORDER PATROL RATE OF PAY.—  
9 A border patrol agent receiving the level 2 border  
10 patrol rate of pay may, in lieu of the standard work  
11 schedule described in subsection (b)(3)(A), be as-  
12 signed a compressed work schedule under the fol-  
13 lowing terms and conditions:

14 “(A) The compressed work schedule shall  
15 be a regular tour of duty consisting of 9 work-  
16 days per biweekly pay period, including—

17 “(i) 8 workdays of 9 hours of regular  
18 time per workday and 1 additional hour of  
19 scheduled overtime for each day the agent  
20 performs work during such regular time;  
21 and

22 “(ii) 1 workday of 8 hours of regular  
23 time per workday and 2 additional hours  
24 of scheduled overtime when the agent per-  
25 forms work during such regular time.

1           “(B) Subparagraphs (B) through (H) of  
2 subsection (b)(3) shall apply to an agent as-  
3 signed a compressed work schedule under this  
4 paragraph. References in this section to regular  
5 time under subsection (b)(3)(A)(i) and sched-  
6 uled overtime under subsection (b)(3)(A)(ii)  
7 shall be deemed to be references to regular time  
8 and scheduled overtime, respectively, described  
9 in subparagraph (A).

10           “(4) BASIC BORDER PATROL RATE OF PAY.—A  
11 border patrol agent receiving the basic border patrol  
12 rate of pay, in lieu of the standard work schedule  
13 described in subsection (b)(4)(A), may be assigned a  
14 compressed work schedule that is a regular tour of  
15 duty consisting of 4 workdays per week with 10  
16 hours of regular time per workday.

17           “(5) SUNDAY PAY; PREMIUM PAY.—A border  
18 patrol agent assigned to a compressed work schedule  
19 under this subsection may receive, as applicable—

20           “(A) Sunday pay for up to 8 hours of reg-  
21 ular time associated with a given Sunday, in ac-  
22 cordance with section 5546(a);

23           “(B) premium pay for work on a holiday  
24 for up to 8 hours of regular time associated



1 with a given holiday, in accordance with section  
2 5546(b); and

3 “(C) basic pay for all regular time hours  
4 that qualify for holiday time off pay when an  
5 agent is relieved or prevented from working  
6 during such regular time on a day designated  
7 as a holiday by Federal statute or Executive  
8 order.

9 “(6) WORKDAY.—In applying sections 6303(a),  
10 6304, 6307(a), 6307(d), 6323, 6326, 6327, and  
11 8339(m) to an employee assigned a compressed  
12 work schedule under this subsection, references to a  
13 day or a workday (or to multiples or parts thereof)  
14 shall be considered to be references to 8 hours (or  
15 to the respective multiples or parts thereof).

16 “(7) NEGOTIATIONS.—The provisions set forth  
17 in this subsection shall be subject to collective bar-  
18 gaining negotiations with the border patrol agents’  
19 collective bargaining representative.

20 “(j) RULEMAKING.—The Director of the Office of  
21 Personnel Management shall promulgate regulations to  
22 carry out this section, including regulations governing—

23 “(1) elections and assignments of a border pa-  
24 trol rate of pay for newly hired border patrol agents

1 who complete initial training during an annual pe-  
2 riod;

3 “(2) situations in which an agent receives more  
4 than 1 type of border patrol rate of pay in a bi-  
5 weekly pay period or is employed as a border patrol  
6 agent for only part of a biweekly pay period; and

7 “(3) the treatment of hours that are substituted  
8 for nonpay status hours during regular time.”.

○