



RESERVE AFFAIRS

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
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MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY FOR MANPOWER
AND RESERVE AFFAIRS
ASSISTANT SECRETARY OF THE NAVY FOR MANPOWER
AND RESERVE AFFAIRS
ASSISTANT SECRETARY OF THE AIR FORCE FOR
MANPOWER AND RESERVE AFFAIRS
DIRECTOR OF RESERVE AND TRAINING, USCG

SUBJECT: Rights and Benefits for Federal Civilian Employees Called to Active Duty

In the attached memorandum, the Office of Personnel Management issued guidance regarding the rights and benefits of Reservist-Federal employees who are called to active duty pursuant to Executive Order 13233 of September 14, 2001, which authorized the Secretary of Defense and the Secretary of Transportation to order members of the Ready Reserve to active duty in response to the continuing and immediate threat of further terrorist attacks on the United States. The guidance encourages federal agencies to make sure that their friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected.

The guidance addresses the employee's right to use military leave authorized under section 6323(a) of title 5, United States Code (U.S.C.), while absent to perform military duty. Leave under this authority allows the employee to be paid his or her federal civilian salary in addition to the member's military salary. The guidance also describes the 22 days of military leave authorized under section 6323(b) if the purpose of the member's duties is to assist domestic civilian authorities to enforce the law or protect life and property. To clarify those duties that would qualify federal employees for use of military leave under section 6323(b), we requested a DoD General Counsel opinion. That opinion is attached.

The General Counsel has opined that members of the National Guard ordered to full time military service under 32 U.S.C. 502(f) to support homeland defense, such as providing additional security at airports, would qualify for military leave under section 6323(b). However, the General Counsel did recognize that some members of the National Guard may be called to full-time National Guard duty under 32 U.S.C. 502(f), for a purpose other than to enforce the law or provide assistance to civil authorities. To distinguish between those members of the National Guard who are called to full-time National Guard duty for the intended purpose described in 5 U.S.C. 6323(b) and other unrelated purposes, I strongly encourage you to include an appropriate statement on the orders that makes it clear which members are called to full-time National Guard duty under section 502(f) to enforce the law or provide assistance to civil authorities.



Regarding Reserve component members ordered to active duty under 10 U.S.C. 12302, the General Counsel opined that they do not qualify for the additional 22 days of military leave, even if they performed duties in support of civil authorities. The underlying basis for this decision is that the purpose of the call up under section 12302 is to provide a general augmentation to active duty forces, and not to provide assistance to civil authorities.

If you have any questions, please contact Mr. Tom Bush at (703) 693-7483.



Craig W. Duehring
Principal Deputy

Attachments:

As stated

cc:

Director, Army National Guard
Chief, Army Reserve
Director, Naval Reserve
Assistant Deputy Commandant,
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Director, Air National Guard
Chief, Air Force Reserve
Director, Reserve and Training, USCG



Office of the Director

United States
Office of Personnel Management
Washington, DC 20415-0001

September 14, 2001

CPM 2001-09

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

FROM KAY COLES JAMES
Director

SUBJECT Rights and Benefits of Reservists Called to Active Duty

Under title 10, United States Code, and Executive Order 13223 of September 14, 2001, the President has authorized the Department of Defense and the Department of Transportation to respond to the continuing and immediate threat of further attacks on the United States by ordering any unit and any member of the Ready Reserve to active duty for not more than 24 consecutive months.

The Federal Government is by far the largest single employer of members of the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis. Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected. Federal law provides many important rights and benefits for Federal employees who perform active military duty. An overview of these rights and benefits, as required by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), is provided in attachment 1. I urge agencies to share this information with all affected employees as soon as possible.

Attachment 2 reminds agencies of their authority and obligation to provide certain premium pay benefits to civilian employees who perform emergency work in support of this national emergency.

Attachment 1

EMPLOYMENT RIGHTS AND BENEFITS OF FEDERAL CIVILIAN EMPLOYEES WHO PERFORM ACTIVE MILITARY DUTY

Civilian Federal employees who are members of the Uniformed Services and who are called to active duty (or volunteer for active duty) are entitled to the following rights and benefits:

1. **EMPLOYEE ASSISTANCE PROGRAMS (EAPs).** Employee Assistance Programs can be very helpful to employees and their families in coping with the stress and disruption associated with a call to active military duty. EAPs provide short-term counseling and referral services to help with financial, emotional, and dependent care problems. These services are available to employees who have been called to active military duty (or who volunteer for such duty) and to employees who are family members of those who are performing active military duty. In addition, many EAPs offer services to family members of employees.

2. **PAY.** Employees performing active military duty will receive compensation from the Armed Forces in accordance with the terms and conditions of their military enlistment or commission. They will not receive any compensation from their civilian employing agency unless they elect to use military leave or annual leave as described in paragraphs 3 and 4, below. As usual, agencies should continue the payment of availability pay for criminal investigators and annual premium pay for administratively uncontrollable overtime (AUO) work, or regularly scheduled standby duty, on days of military leave or annual leave.

3. **MILITARY LEAVE.** Employees who perform active military duty may request paid military leave, as specified in 5 U.S.C. 6323(a). Under the law, an eligible full-time employee accrues 15 days (120 hours) of military leave each fiscal year. In addition, an employee may carry over up to 15 days (120 hours) of unused military leave from one fiscal year to the next. When the 15 days of military leave that are carried over are combined with the 15 days of military leave accrued at the beginning of the new fiscal year, this produces a maximum military leave benefit of 30 days in a fiscal year. However, since an employee cannot carry over more than 15 calendar days to the next fiscal year, any unused military leave in excess of 15 days will be forfeited at the beginning of the next fiscal year. Part-time career employees accrue military leave on a prorated basis. Employees who elect to use military leave will receive full compensation from their civilian position for each hour charged to military leave, in addition to their military pay for the same period. We remind agencies that 5 U.S.C. 6323 was amended in 2001 to require charges for military leave to be made on an hour for hour basis for all hours the employee would have worked. This does not apply to employees of the United States Postal Service. Additional information on charging military leave can be found in OPM's memorandum of January 25, 2001, at OPM's website at www.opm.gov/oca/compmemo/2001/cpm2001-2.html.

Employees who perform active military duty may be granted an additional 22 days of military leave under 5 U.S.C. 6323(b) if such leave is granted for the purpose of providing military aid to assist domestic civilian authorities to enforce the law or protect life and property.

4. **ANNUAL LEAVE.** Employees who perform active military duty may request the use of accrued and accumulated annual leave to their credit (under 5 U.S.C. 6303 and 6304), and such requests must be

granted by the agency. In addition, requests for advanced annual leave may be granted at the agency's discretion. Employees who use annual leave will receive compensation from their civilian position for all hours charged to annual leave in addition to their military pay for the same period.

5. LEAVE WITHOUT PAY (LWOP). The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) generally requires an agency to place an employee entering the military on LWOP unless the employee chooses to be placed on military leave or annual leave, as appropriate, or the employee requests to be separated. Full-time employees do not earn annual or sick leave in a pay period in which they have accumulated 80 hours of LWOP. In addition, part-time employees on LWOP also earn less annual and sick leave, since they earn leave based on the number of hours in a pay status.

6. LUMP-SUM LEAVE PAYMENTS. Employees who enter into active military duty may choose to (1) have their annual leave remain to their credit until they return to their civilian position, or (2) receive a lump-sum payment for all accrued and accumulated annual leave. However, an agency must make a lump-sum payment for any restored annual leave under 5 U.S.C. 6304(d). There is no requirement to separate from a civilian position in order to receive a lump-sum leave payment under 5 U.S.C. 5552.

Return to Active Federal Service. When an employee who has been on military duty returns to active Federal service prior to the end of the period covered by the lump-sum payment, the employee must refund an amount equal to the pay that covers the period between the date of reemployment and the expiration of the lump-sum leave period. Agencies may not recredit any restored annual leave to the employee's leave account. Further guidance on the repayment of a lump-sum payment for annual leave can be found at <http://www.opm.gov/oca/leave/html/lumpsum.pdf>.

7. HEALTH BENEFITS. Employees who are put in a nonpay status while on military duty can keep their Federal Employees Health Benefits (FEHB) coverage for up to 18 months. During the first 365 days, they are responsible for paying the "regular" employee amount of the premium; they can either pay the premiums on a current basis, or they can incur a debt to the Government and repay it when they return to active Federal service. During the remainder of the 18 months, employees are responsible for the full premium (employee share, plus the Government share), plus a 2 percent administrative fee; these premiums must be paid on a current basis.

Termination. At the end of 18 months, FEHB coverage terminates. Employees get a free 31-day extension of coverage during which they can convert to a nongroup policy. (These employees are not eligible for TCC (Temporary Continuation of Coverage). If an employee doesn't want to continue the FEHB coverage while he/she is in nonpay status, the employee can elect in writing to have the FEHB coverage terminated. (The employee still gets the free 31-day extension and the right to convert).

Return to Active Federal Service. When an employee who has been on military duty returns to active Federal service, he or she can enroll in an FEHB plan within 60 days of the return to service (as long as the position is not excluded from coverage).

8. LIFE INSURANCE. Employees who are put in a nonpay status while on military duty can keep their Federal Employees' Group Life Insurance (FEGLI) coverage for up to 12 months. This coverage is free. At the end of 12 months in nonpay status, the coverage terminates. Employees get a free 31-day extension of coverage and have the right to convert to a nongroup policy.

If a Federal employee with FEGLI is called-up to active military duty and is killed, death benefits are

payable to the employee's beneficiaries. Accidental death and dismemberment benefits are also payable under Basic insurance (and Option A, if the employee had that coverage) unless the employee was in actual combat at the time. Accidental death benefits are in addition to regular death benefits. Even if accidental death benefits are not payable, regular death benefits ARE payable.

Return to Active Federal Service. When an employee who has been on military duty returns to active Federal service, he or she gets back whatever types of life insurance he or she had before going into nonpay status (as long as the position is not excluded from coverage).

9. **RETIREMENT.** An employee who is placed in an LWOP status while performing active military duty continues to be covered by the retirement law--i.e., the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS). Death benefits will be paid as if he or she were still in the civilian position. If the employee becomes disabled for his or her civilian position during the LWOP and has the minimum amount of civilian service necessary for title to disability benefits (5 years for CSRS, 18 months for FERS), the employee will become entitled to disability benefits under the retirement law. Upon eventual retirement from civilian service, the period of military service is creditable under either CSRS or FERS, subject to the rules for crediting military service.

If an employee separates to enter active military duty, he or she generally will receive retirement credit for the period of separation when the employee exercises restoration rights to his or her civilian position. If the separated employee does not exercise the restoration right, but later re-enters Federal civilian service, the military service may be credited under the retirement system, subject to the rules governing credit for military service. However, if an employee covered by CSRS is separated to enter active military duty during a period of war or national emergency as declared by Congress or proclaimed by the President, the employee is deemed not to be separated from his or her civilian position for retirement purposes, unless the employee applies for and receives a refund of his or her retirement deductions.

Thrift Savings Plan. For purposes of the Thrift Savings Plan (TSP), no contributions can be made, either by the agency or the employee, for any time in an LWOP status or for a period of separation. Agencies should refer to the Thrift Savings Plan Bulletin for Agency TSP Representatives, No. 01-22, dated May 3, 2001. For additional information, agency representatives may contact the Federal Retirement Thrift Investment Board at (202) 942-1460. Employees should refer to the TSP Fact Sheet - Effect of Nonpay Status on TSP Participation. Both issuances are available from the TSP Internet web site at <http://www.tsp.gov>.

If employees are subsequently reemployed in, or restored to, a position covered by FERS or CSRS pursuant to 38 U.S.C. chapter 43, they may make up missed contributions. FERS employees are entitled to receive retroactive Agency Automatic (1 percent) Contributions and, if they make up their own contributions, retroactive Agency Matching Contributions.

Also, if FERS employees separate and their Agency Automatic (1 percent) Contributions and associated earnings are forfeited because they did not meet the TSP vesting requirement, the employees are entitled to have these funds restored to their accounts after they are reemployed. In addition, if employees separate and their accounts are disbursed as automatic cashouts, the employees may return to the TSP an amount equal to the full amount of the payment after they are reemployed. For additional information see the TSP Fact Sheet -- Benefits that Apply to Members of the Military Who Return to Federal

Civilian Service” at <http://www.tsp.gov>.

10. RETURN TO CIVILIAN DUTY. An employee who enters active military duty (voluntarily or involuntarily) from any position, including a temporary position, has full job protection, provided he or she applies for reemployment within the following time limits:

(A) Employees who served less than 31 days must report back to work at the beginning of the next scheduled workday following their release from service and the expiration of 8 hours after a time for safe transportation back to the employee=s residence.

(B) Employees who served more than 30 days, but less than 181 days, must apply for reemployment within 14 days of release by the military.

(C) Employees who served more than 180 days have 90 days to apply for reemployment.

Employees who served less than 91 days must be restored to the position for which qualified that they would have attained had their employment not been interrupted. Employees who served more than 90 days have essentially the same rights, except that the agency has the option of placing an employee in a position for which qualified of like seniority, status, and pay.

Upon return or restoration, an employee generally is entitled to be treated as though he or she had never left for purposes of rights and benefits based upon length of service. This means that the employee must be considered for career ladder promotions, and the time spent in the military will be credited for seniority, successive within-grade increases, probation, career tenure, annual leave accrual rate, and severance pay. An employee who was on a temporary appointment serves out the remaining time, if any, left on the appointment. (The military activation period does not extend the civilian appointment.)

An employee performing active military duty is protected from reduction in force (RIF) and may not be discharged from employment for a period of 1 year following separation (6 months in the case of a Reservist called to active duty under 10 U.S.C. 12304 for more than 30 days, but less than 181 days, or ordered to an initial period of active duty for training of not less than 12 consecutive weeks), except for poor performance or conduct or for suitability reasons.

NOTE: Employees in the intelligence agencies have substantially the same rights, but are covered under agency regulations, rather than the Office of Personnel Management=s regulations, and have different appeal rights.

11. APPEAL RIGHTS. An employee or former employee of an agency in the executive branch (including the U.S. Postal Service) who is entitled to restoration in connection with military duty may appeal an agency's failure to properly carry out the law directly to the Merit Systems Protection Board (MSPB), or the employee may first submit a complaint to the Department of Labor, which will attempt to resolve it. If resolution is not possible, the Department may present the case to the Office of the Special Counsel, which may represent the employee in an appeal to the MSBP. Appeals to the Board must be submitted within 30 calendar days after the effective date of the action being appealed.

12. DOCUMENTING PERSONNEL ACTIONS.

Leave without Pay. LWOP must be documented on an SF 50, Notification of Personnel Action, with nature of action **473/LWOP-US** and legal authority **Q3K/5 CFR 353**. This same authority must also be used on the **292/RTD** action when the reservist returns to civilian employment.

Health Benefits and Life Insurance.

For those reservists with health benefits coverage while absent for reasons related to military duty, enter in block 45 of the SF 50 remark **B66**:

Health benefits coverage will continue for 18 months unless you elect to terminate coverage. Contact your servicing Human Resources Office or see the FEHB Handbook at <http://www.opm.gov/insure> for detailed information.

For those reservists with Federal Employees' Group Life Insurance (FEGLI) coverage, enter in block 45 of the SF 50 remark **B72**.

FEGLI coverage continues until a reservist's time in nonpay status totals 12 months. Reservists should contact their servicing Human Resources Office or see the FEGLI Handbook at <http://www.opm.gov/insure> for detailed information.

Separations. If a reservist requests separation rather than LWOP, the separation must be documented with nature of action **353/Separation-US** and legal authority **Q3K/5 CFR 353**. Follow the instructions in Chapter 9 or 11 (as appropriate) of *The Guide to Processing Personnel Actions*, to document the reservist's restoration upon completion of his or her military service.

13. CONTACTS. For further information on employment rights and benefits of civilian Federal employees who perform active military duty, agencies should contact the following offices:

- For information on pay and leave, contact OPM=s Pay and Leave Administration Division, (202) 606-2858, or email payleave@opm.gov.
- For information on health benefits, life insurance, and retirement, contact the Insurance Officer or Retirement Counselor of your agency. Retirement Counselors may contact OPM=s Benefits Officers Resource Center, (202) 606-0788. Insurance Officers may contact the Office of Insurance Programs, Insurance Policy and Information Division, (202) 606-0191.
- For information on the Thrift Savings Plan, agency headquarters personnel offices may contact the Federal Retirement Thrift Investment Board, (202) 942-1460. Field installations should contact their headquarters TSP Coordinator for guidance.
- For information on return to civilian duty and appeal rights, contact OPM=s Staffing and Restructuring Policy Division at 606-0960.
- For information on documenting actions related to entering active military duty, contact OPM=s Personnel Records and Systems Division, (202) 606-1126.

- For information on labor-management relations issues, contact OPM=s Office of Labor and Employee Relations, (202) 606-2930.

September 14, 2001 (7:20PM)

Attachment 2

PREMIUM PAY FOR FEDERAL CIVILIAN EMPLOYEES WHO PERFORM EMERGENCY WORK IN SUPPORT OF THE NATIONAL EMERGENCY DECLARED BY PRESIDENTIAL PROCLAMATION OF SEPTEMBER 14, 2001

The purpose of this attachment is to provide information about premium pay for civilian employees who perform emergency work in support of the National Emergency declared by Presidential Proclamation of September 14, 2001.

Agencies are reminded of their authority under the law (5 U.S.C. 5547(b)) and OPM regulations (5 CFR 550.106) to make exceptions to the biweekly premium pay limitation. (Please note that overtime pay under the Fair Labor Standards Act of 1938, as amended, does not count toward this limitation.) When the head of an agency or his or her designee determines that an emergency posing a direct threat to life or property exists, an employee who is performing work in connection with the emergency must be paid premium pay under the annual limitation of GS-15, step 10, rather than the GS-15, step 10, biweekly limitation. However, employees who meet the definition of Law enforcement officer@ in 5 U.S.C. 5541(3) are covered by the higher biweekly limitation in 5 U.S.C. 5547(c) and are not covered by the authority to apply the annual limitation during emergencies.

OPM encourages agencies to exercise their authority in the case of employees (other than LEOs) who perform emergency work in connection with this National Emergency. Agency heads are required to make a determination as soon as practicable and to make entitlement to premium pay under the annual limitation effective as of the first day of the pay period in which the emergency began. Questions may be referred to OPM's Pay and Leave Administration Division on (202) 606-2858 or email payleave@opm.gov.