

LABOR RELATIONS



January 9, 1997

JAN 1997

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Dear Bill:

This is in reference to your inquiry concerning health benefits for employees serving in Bosnia. Specifically, you wanted to know if special provisions are in place to afford employees in a leave without pay status due to active military duty, the opportunity to make changes to their health benefits provision upon return to duty.

Employees serving in Bosnia are covered under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, which was enacted into law on October 13, 1994. Under USERRA, employees who enter the Uniformed Services and are enrolled in the Federal Employees Health Benefits (FEHB) Program, may continue coverage for up to 18 months from the time the military service begins. Employees may change enrollment or register to enroll when coverage has been terminated, within 31 days after returning to duty. These provisions are outlined in interim regulations issued by the Office of Personnel Management (OPM).

Enclosed is a copy of the interim regulations implementing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, issued by the Office of Personnel Management (OPM).

I hope this satisfactorily addresses your concerns.

Sincerely,

A handwritten signature in dark ink, appearing to read "P. Sgro".

Peter A. Sgro
Acting Manager
Contract Administration APWU/NPMHU

Enclosure

of pay for GS-15, step 10, under the General Schedule (excluding locality pay or any other additional pay). The biweekly rate is computed by dividing the annual GS-15, step 10, rate by 2,087 hours to find the hourly rate of pay and by multiplying the hourly rate of pay by 80 hours.

§ 304.106 Pay and leave administration.

(a) The employing agency has the authority to adjust the pay of experts and consultants after initial appointment and to establish appropriate policies governing the amount and timing of any such adjustments, subject to the limitations of § 304.105. In addition to the factors listed in § 304.104(b), the agency may consider factors such as job performance, contributions to agency mission, and the general pay increases granted to other Federal employees. Experts and consultants are not entitled to receive automatic adjustments in their rates of basic pay at the time of general pay increases under 5 U.S.C. 5303 unless specifically provided for in the official appointing document. In the absence of such automatic entitlement, any pay adjustments are at the agency's discretion.

(b) Experts and consultants paid on a daily rate basis are not entitled to overtime pay under section 5542 of title 5, United States Code. Otherwise, experts and consultants qualify for premium pay under subchapter V of chapter 55 of title 5, United States Code, if they meet the applicable eligibility requirements (including the requirement that an employee have a regularly scheduled tour of duty, where applicable).

(c) Experts and consultants may be entitled to overtime pay under the Fair Labor Standards Act if they are nonexempt under OPM regulations implementing that Act for Federal employees. (See 5 CFR part 551).

(d) An expert or consultant may be paid for service on an intermittent basis in more than one expert or consultant position, provided the pay is not received for the same period of time (5 U.S.C. 5533(d)(1)).

(e) Experts and consultants are subject to the provisions of 5 U.S.C. 8344 and 8468 on reduction of basic pay by the amount of annuity received.

(f) Experts and consultants are subject to the provisions of 5 U.S.C. 5532 on reduction of retired military pay.

(g) Experts and consultants with a regularly scheduled tour of duty (i.e., not intermittent) are entitled to sick and annual leave in accordance with chapter 63 of title 5, United States Code, and to pay for any holiday occurring on a

workday on which they perform no work, provided that workday is part of the basic workweek. Those employed on an intermittent basis do not earn leave and are not entitled to paid holidays.

§ 304.107 Reports.

As required by 5 U.S.C. 3109(e), each agency shall report to the Office of Personnel Management on an annual basis:

(a) The number of days the agency employed each paid expert or consultant; and

(b) The total amount the agency paid each expert or consultant so employed. (Do not include payments for travel and related expenses.)

§ 304.108 Compliance.

(a) Each agency using 5 U.S.C. 3109 must establish and maintain a system of controls and oversight necessary to assure compliance with 5 U.S.C. 3109 and these regulations. The system must include—

(1) Appropriate training and information procedures to ensure that officials and employees using the authority understand the statutory and regulatory requirements; and

(2) Appropriate provision for review of expert and consultant appointments.

(b) OPM will, as necessary—

(1) Review agency employment of experts and consultants and agency controls and oversight to determine compliance; and

(2) Issue instructions and guidance to agencies on employing experts and consultants and on reporting procedures.

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5 CFR Parts 353, 670, and 890

RIN 3206-AG02

Restoration to Duty From Uniformed Service or Compensable Injury

AGENCY: Office of Personnel Management.

ACTION: Interim regulations with request for written comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations on the restoration rights of Federal employees who leave their employment to perform duty with the uniformed services. These regulations implement the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-

353, which was enacted into law on October 13, 1994. The new law revises and restructures the Veteran's Reemployment Rights law (codified in chapter 43 of title 38, United States Code), which governs the restoration rights of employees who perform military duty. USERRA clarifies, expands, and strengthens the rights and benefits of applicants and employees, alters the appeal procedures available Federal employees, and, for the first time, provides Federal employees Department of Labor assistance in processing claims. USERRA also requires OPM to place certain returning employees when their former agencies determine that it is "impossible or unreasonable" to reemploy them.

Although the sections have been renumbered, and in some cases renamed, there is no substantive change in the regulations governing the restoration rights of employees who sustain compensable injuries. However, in § 353.301(a), the word "may" has been changed to "must" to make clear that an agency must place an employee who fully recovers from a compensable injury within 1 year, even if it means placing the person in a different location. Also, § 353.301(d) makes clear that partially recovered employees are entitled to restoration rights only in the local commuting area, not agencywide (This provision was inadvertently omitted from the final regulations published in the Federal Register on January 13, 1995, that incorporated into the regulations various staffing provisions previously found only in the Federal Personnel Manual.)

These interim regulations also implement provisions that expand on the coverage of the affected employees under the Federal Employees' Group Life Insurance (FEGLI) Program and the Federal Employees Health Benefits (FEHB) Program. Both the FEGLI and the FEHB regulations are amended to show that employees who separate to perform military service under the provisions of this Act are considered to be employees in nonpay status. The FEHB regulations are further amended to show that FEHB coverage may continue for up to 18 months after the employee enters military service. DATES: Effective: September 1, 1995. Comments must be received on or before November 30, 1995.

ADDRESS: Send or deliver comments to: Leonard R. Klein, Associate Director for Employment, U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: For part 353: Raleigh M. Neville, (202) 606-

USERRA also expands retirement coverage to include all full-time National Guard duty if that duty interrupts creditable civilian service and is followed by reemployment that occurs after August 1, 1990. (Only National Guard service performed for the U.S. was covered under the old law.)

Under 38 U.S.C. 4316, employee benefits, other than health benefits, continue for employees covered by this Act in the same way as they do for other employees who are on leave without pay. Employees who leave their jobs to enter the uniformed services are considered to be employees on leave without pay so long as they meet the requirements for reemployment under this Act. Under the Federal Employees' Group Life Insurance (FELI) Program, employees may continue their life insurance coverage for up to 12 months in nonpay status at no cost to the employee. Therefore, the interim regulations amend 5 CFR 870.502 to show that an employee who separates from Federal service to enter the uniformed services is considered to be an employee in nonpay status for so long as the employee remains eligible for benefits under 38 U.S.C. 4316. As a result, life insurance coverage continues for up to one year for employees who do not separate, but go on military furloughs (nonpay status). For those who actually separate from their Federal jobs to enter the uniformed services, life insurance coverage continues for up to 12 months or until a date that is 90 days after the service with the uniformed services ends, whichever is earlier.

Under 38 U.S.C. 4317, employees who are covered by an employers' group health plan and who enter the uniformed services may elect to continue their coverage for up to 18 months after the date the absence to serve in the uniformed services begins. If the service continues for more than 30 days, the employee can be charged up to 102 percent of the premium. The Federal Employees Health Benefits (FEHB) law provides for continued coverage for up to 12 months for employees in leave without pay status. FEHB regulations provide that these employees may pay their respective shares of the premium; however, an employee may choose to incur a debt and postpone payment until he or she returns to pay and duty status. The employing agency must pay the Government contribution on a current basis. Therefore, for the first 12-months, employees entitled to benefits under 38 U.S.C. 4317 are charged only the employee share of the premium.

The interim regulations amend §§ 890.303 and 890.304 to provide that

the enrollment of an employee who enters on military furlough (nonpay status) may continue an additional 6 months after the coverage would otherwise stop due to the expiration of 365 days in nonpay status if the employee's eligibility for benefits under 38 U.S.C. 4317 continues. The enrollment of an employee who separates to enter the uniformed services may continue for up to 18 months if the employee's eligibility for benefits under 38 U.S.C. 4317 continues. (Eligibility for benefits under 38 U.S.C. 4317 ends the earlier of 18 months after the date the employee's absence due to service in the uniformed services began or 90 days after the service ends.) Employees on military furlough or in nonpay status to serve in the uniformed services on the date of enactment of Pub. L. 103-353, October 13, 1994, are also entitled to continued coverage under 38 U.S.C. 4317 for the balance of the 18-month period after their absence to enter the uniformed services began. An enrollment that had already terminated due to the expiration of 365 days in nonpay status may be reinstated for the balance of the 18-month period.

The interim regulations also amend 5 CFR 890.502(g) to provide that employees whose enrollment continues beyond 12 months in nonpay status because of their eligibility for benefits under 38 U.S.C. 4317 must pay 102 percent of the premium (the employee share plus the Government share, plus 2 percent of the total). In addition, the interim regulations amend the provision for waiving the employee share of the health benefits premium for employees who enter the uniformed services in support of Operations Desert Shield and/or Desert Storm by limiting its application to those who enter before the effective date of these interim regulations.

—Enhanced thrift savings plan coverage. The new law allows employees to make up contributions to the thrift savings plan missed because of military duty. Under the old law, employees who went on military duty were ineligible to make contributions to the thrift savings plan. (The Federal Retirement-Thrift Investment Board is issuing regulations on this aspect of the law.)

—Effective date. The new law applies to restorations effected on or after December 12, 1994.

Waiver of Notice of Proposed Rulemaking

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed

rulemaking. Specifically, the law which these regulations implement was enacted in October 1994 and became fully effective as of December 12, 1994.

Regulatory Flexibility Act

I certify that this regulation will not have a significant impact on a substantial number of small entities because it pertains only to Federal employees and agencies.

List of Subjects

5 CFR Part 353

Administrative practice and procedure, Government employees.

5 CFR Part 870

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management,

James B. King,

Director.

Accordingly, OPM is amending parts 353, 870, and 890 as follows:

1. Part 353 is revised to read as follows:

PART 353—RESTORATION TO DUTY FROM UNIFORMED SERVICE OR COMPENSABLE INJURY

Subpart A—General Provisions

Sec.

- 353.101 Scope.
- 353.102 Definitions.
- 353.103 Persons covered.
- 353.104 Notification of rights and obligations.
- 353.105 Maintenance of records.
- 353.106 Personnel actions during employee's absence.
- 353.107 Service credit upon reemployment.
- 353.108 Effect of performance and conduct on restoration rights.
- 353.109 Transfer of function to another agency.
- 353.110 OPM placement assistance.

Subpart B—Uniformed Service

- 353.201 Introduction.
- 353.202 Discrimination and acts of reprisal prohibited.
- 353.203 Length of service.
- 353.204 Notice to employer.
- 353.205 Return to duty and application reemployment.
- 353.206 Documentation upon return.
- 353.207 Position to which restored.

ascertaining his or her rights, and to seek reemployment within the time limits provided by chapter 43 of title 38, United States Code, for restoration after uniformed service, or as soon as he or she is able after a compensable injury.

§ 353.105 Maintenance of records.

Each agency shall identify the position vacated by an employee who is injured or leaves to enter uniformed service. It shall also maintain the necessary records to ensure that all such employees are preserved the rights and benefits granted by law and this part.

§ 353.106 Personnel actions during employee's absence.

(a) An employee absent because of service in the uniformed services is to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency, in which case the employee can be separated. (Note: A separation under this provision affects only the employee's seniority while gone; it does not affect his or her restoration rights.)

(b) An employee absent because of compensable injury may be carried on leave without pay or separated unless the employee elects to use sick or annual leave.

(c) Agency promotion plans must provide a mechanism by which employees who are absent because of compensable injury or uniformed service can be considered for promotion.

§ 353.107 Service credit upon reemployment.

Upon reemployment, an employee absent because of uniformed service or compensable injury is generally entitled to be treated as though he or she had never left. This means that a person who is reemployed following uniformed service or full recovery from compensable injury receives credit for the entire period of the absence for purposes of rights and benefits based upon seniority and length of service, including within-grade increases, career tenure, completion of probation, leave rate accrual, and severance pay.

§ 353.108 Effect of performance and conduct on restoration rights.

The laws covered by this part do not permit an agency to circumvent the protections afforded by other laws to employees who face the involuntary loss of their positions. Thus, an employee may not be denied restoration rights because of poor performance or conduct that occurred prior to the employee's departure for compensable

injury or uniformed service. However, separation for cause that is substantially unrelated to the injury or to the performance of uniformed service negates restoration rights. Additionally, if during the period of injury or uniformed service the employee's conduct is such that it would disqualify him or her for employment under OPM or agency regulations, restoration rights may be denied.

§ 353.109 Transfer of function to another agency.

If the function of an employee absent because of uniformed service or compensable injury is transferred to another agency, and if the employee would have been transferred with the function under part 351 of this chapter had he or she not been absent, the employee is entitled to be placed in a position in the gaining agency that is equivalent to the one he or she left. It shall also assume the obligation to restore the employee in accordance with law and this part.

§ 353.110 OPM placement assistance.

(a) *Employee returning from uniformed service.* (1) OPM will offer placement in the executive branch to the following categories of employees upon notification by the agency and application by the employee: (Such notification should be sent to the Associate Director for Employment, OPM, 1900 E Street, NW., Washington, DC 20415.)

(i) Executive branch employees (other than an employee of an intelligence agency) when OPM determines that:

(A) their agencies no longer exist and the functions have not been transferred,

or
(B) it is otherwise impossible or unreasonable for their former agencies to place them;

(ii) Legislative and judicial branch employees when their employers determine that it is impossible or unreasonable to reemploy them;

(iii) National Guard technicians when the *Adjutant General of a State* determines that it is impossible or unreasonable to reemploy them; and

(iv) Employees of the intelligence agencies (defined in 5 U.S.C.

2302(a)(2)(C)(ii)) when their agencies determine that it is impossible or unreasonable to reemploy them.
(2) OPM will determine if a vacant position equivalent (in terms of pay, grade, and status) to the one time the individual left exists, for which the individual is qualified, in the commuting area in which he or she was employed immediately before entering the uniformed services. If such a

vacancy exists, OPM will order the agency to place the individual. If no such position is available, the individual may elect to be placed in a lesser position in the commuting area, or OPM will attempt to place the individual in an equivalent position in another geographic location determined by OPM. If the individual declines an offer of equivalent employment, he or she has no further restoration rights.

(b) *Employee returning from compensable injury.* OPM will provide placement assistance to an employee with restoration rights in the executive, legislative, or judicial branches who cannot be placed in his or her former agency and who either has competitive status or is eligible to acquire it under 5 U.S.C. 3304(C). If the employee's agency is abolished and its functions are not transferred, or it is not possible for the employee to be restored in his or her former agency, OPM will provide placement assistance by enrolling the employee in OPM's Interagency Placement Program (or its successor) under part 330 of this chapter. This paragraph does not apply to an employee serving under a temporary appointment pending establishment of a register (TAPER).

Subpart B—Uniformed Service

§ 353.201 Introduction.

The Uniformed Services Employment and Reemployment Rights Act of 1994 revised and strengthened the existing Veterans' Reemployment Rights law, made the Department of Labor responsible for investigating employee complaints, required OPM to place certain returning employees in other agencies, established a separate restoration rights program for employees of the intelligence agencies, and altered the appeals rights process. The new law applies to persons exercising restoration rights on or after December 12, 1994.

§ 353.202 Discrimination and acts of reprisal prohibited.

A person who seeks or holds a position in the Executive branch may not be denied hiring, retention in employment, or any other incident or advantage of employment because of any application, membership, or service in the uniformed services. Furthermore, an agency may not take any reprisal against an employee for taking any action to enforce a protection, assist or participate in an investigation, or exercise any right provided for under chapter 43 of title 38, United States Code.

not later than 90 days after completing the period of service.

(d) An employee who is hospitalized or convalescing from an injury or illness incurred in, or aggravated during uniformed service is required to report for duty at the end of the period that is necessary for the person to recover, based on the length of service as discussed in paragraphs (a), (b), and (c) of this section, except that the period of recovery may not exceed 2 years (extended by the minimum time required to accommodate circumstances beyond the employee's control which make reporting within the period specified impossible or unreasonable).

(e) A person who does not report within the time limits specified does not automatically forfeit restoration rights, but, rather, is subject to whatever policy and disciplinary action the agency would normally apply for a similar absence without authorization.

§ 353.206 Documentation upon return.

Upon request, a returning employee who was absent for more than 30 days, or was hospitalized or convalescing from an injury or illness incurred in or aggravated during the performance of service in the uniformed services, must provide the agency with documentation that establishes the timeliness of the application for reemployment, and length and character of service. If documentation is unavailable, the agency must restore the employee until documentation becomes available.

§ 353.207 Position to which restored.

(a) *Timing.* An employee returning from the uniformed services following an absence of more than 30 days is entitled to be restored as soon as possible after making application, but in no event later than 30 days after receipt of the application by the agency.

(b) *Nondisabled.* If the employee's uniformed service was for less than 91 days, he or she must be employed in the position for which qualified that he or she would have attained if continuously employed. If not qualified for this position after reasonable efforts by the agency to qualify the employee, he or she is entitled to be placed in the position he or she left. For service of 91 days or more, the agency has the option of placing the employee in a position of like seniority, status, and pay. (Note: Upon reemployment, a term employee completes the unexpired portion of his or her original appointment.) If unqualified (for any reason other than disability incurred in or aggravated during service in the uniformed services) after reasonable efforts by the agency to qualify the employee for such

position or the position the employee left, he or she must be restored to any other position of lesser status and pay for which qualified, with full seniority.

(c) *Disabled.* An employee with a disability incurred in or aggravated during uniformed service and who, after reasonable efforts by the agency to accommodate the disability, is entitled to be placed in another position for which qualified that will provide the employee with the same seniority, status, and pay, or the nearest approximation consistent with the circumstances in each case. The agency is not required to reemploy a disabled employee if, after making due efforts to accommodate the disability, such reemployment would impose an undue hardship on the agency.

(d) *Two or more persons entitled to restoration in the same position.* If two or more persons are entitled to restoration in the same position, the one who left the position first has the prior right to restoration in that position. The other employee(s) is entitled to be placed in a position as described in paragraphs (b) and (c) of this section.

(e) *Relationship to an entitlement based on veterans' preference.* An employee's right to restoration under this part does not entitle the person to retention, preference, or displacement rights over any person with a superior claim based on veterans' preference.

§ 353.208 Use of paid leave during uniformed service.

An employee performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave (or sick leave, if appropriate), or military leave during such service. (Note, however, that under 5 U.S.C. 6323, military leave cannot be used for inactive duty, e.g., drills.)

§ 353.209 Retention protections.

(a) *During uniformed service.* An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered "for cause" under this subpart.) He or she is not a "competing employee" under § 351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay.

(b) *Upon reemployment.* Except in the case of an employee under time-limited appointment who finishes out the unexpired portion of his or her appointment upon reemployment, an employee reemployed under this

subpart may not be discharged, except for cause—

(1) If the period of uniformed service was more than 180 days, within 1 year; and

(2) If the period of uniformed service was more than 30 days, but less than 181 days, within 6 months.

§ 353.210 Department of Labor assistance to applicants and employees.

USERRA requires the Department of Labor's Veterans' Employment and Training Service (VETS) to provide employment and reemployment assistance to any Federal employee or applicant who requests it. VETS staff will attempt to informally resolve employment disputes brought to them. If informal dispute resolution proves unsuccessful, VETS may ask the Office of the Special Counsel to represent the individual in an appeal before the Merit Systems Protection Board (MSPB).

§ 353.211 Appeal rights.

An individual who believes an agency has not complied with the provisions of law and this part relating to the employment or reemployment of the person by the agency may—

(a) File a complaint with the Department of Labor, as noted in § 353.210, or

(b) Appeal directly to MSPB if the individual chooses not to file a complaint with the Department of Labor, or is informed by either Labor or the Office of the Special Counsel that they will not pursue the case.

Subpart C—Compensable Injury

§ 353.301 Restoration rights.

(a) *Fully recovered within 1 year.* An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the United States), is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. Although these restoration rights are agencywide, the employee's basic entitlement is to the former position or equivalent in the local commuting area the employee left. If a suitable vacancy does not exist, the employee is entitled to displace an employee occupying a continuing position under temporary appointment or tenure group III. If there is no such position in the local commuting area, the agency must offer the employee a position (as described above) in another location. This paragraph also applies when an injured employee accepts a lower-grade position