

Office of Personnel Management
Retirement and Insurance Group



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Number: 95-101

Date: January 27, 1995

SUBJECT Public Law 103-353, the "Uniformed Services Employment and Reemployment Rights Act of 1994"

Public Law 103-353, the "Uniformed Services Employment and Reemployment Rights Act of 1994" (USERRA), approved October 13, 1994, made two substantial amendments to the FERS and CSRS provisions under title 5. In addition, it made amendments to title 38 (Veterans' Benefits), which are expressly applicable to Federal retirement systems.

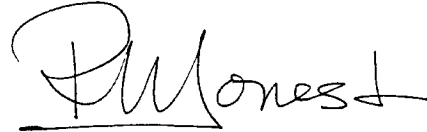
Under title 5, the first change makes certain National Guard service creditable for the first time. The other relates to the service credit deposits required for certain military service which interrupts civilian Federal service. Both of these provisions have applicability for certain service performed in the past.

USERRA requires that OPM's regulations provide at least as liberal benefits for Federal employees as the regulations which will be prepared by the Department of Labor and which will be applicable to the private sector. Nevertheless, since Labor now estimates that it will be at least a year before its regulations are issued, it is necessary for OPM to proceed before Labor's regulations are issued.

In addition, other parts of OPM are currently working on the substantive and procedural aspects of the law, and their work will affect retirement procedures, particularly in the area of documentation. We thus cannot yet complete our analysis of the effects of the law. However, as soon as possible, we will be preparing regulations, as well as updates to chapters 22 and 23 of the CSRS and FERS Handbook. Nevertheless, at this time, it is important to advise agencies of those aspects of the law which are reasonably clear. We will advise you of specific procedures as they are prepared.

Attached to this Benefits Administration Letter is a copy of a December 7, 1994, Interagency Advisory Group memorandum to agency directors of personnel. This memorandum discusses USERRA and its obligations more generally.

Attachment

A handwritten signature in black ink, appearing to read "RM Jones, Jr.", with a horizontal line underneath the signature.

Reginald M. Jones, Jr.
Assistant Director
for Retirement Policy Development

National Guard Service

Under 5 U.S.C. §§ 8331(13) and 8401(31), the definition of "military service" previously did not include service in the National Guard except when ordered to active duty in the service of the United States. USERRA now adds:

full-time National Guard duty (as such term is defined in section 101(d) of title 10) if such service interrupts creditable civilian service under this subchapter and is followed by reemployment in accordance with chapter 43 of title 38 that occurs on or after August 1, 1990

to both of these definitions. Since non-covered service is creditable only under CSRS, such National Guard service which interrupts non-FERS covered service is creditable under FERS only if it is part of a CSRS component of a FERS annuity. Since there must be reemployment in the civilian service on or after August 1, 1990 (the day before Iraq invaded Kuwait), the number of such cases will be very low.

Section 101(d)(5) of 10 U.S.C. provides:

The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

We have been informally advised by the National Guard Bureau that the cited title 32 sections cover all active duty National Guard service.

Putting the requirements of these two sections together, the rules for crediting National Guard service (other than when ordered to active duty in the service of the United States) are that the service MUST meet ALL of the following conditions:

- N It must interrupt civilian service creditable under CSRS or FERS, as appropriate.
- N It must be followed by reemployment in accordance with chapter 43 of title 38 that occurs on or after August 1, 1990.
- N It must be full-time (and not inactive duty).

- N It must be performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia.
- N It must be under one of the enumerated sections.
- N The individual must be entitled to pay from the U.S. (or have waived pay from the U.S.) for the service.

Service in the National Guard (except when ordered to active duty in the service of the United States) IS NOT CREDITABLE IF ANY OF THE REQUIREMENTS ARE NOT MET. For example, such service which precedes Federal employment is not creditable. Similarly, if such service meets all of the requirements except that it is not followed by reemployment in accordance with chapter 43 of title 38 that occurs on or after August 1, 1990, it is not creditable, even if it is followed by reemployment by the Government (for example, this could occur if the individual has served longer than the statutory maximum for reemployment rights).

As is the case for military deposits in general, the deposits required for such service must be collected by the employing agency. Thus, the agency must insure that all of the requirements are met. The agency must use personnel records to ensure that the separation and reemployment meet the statutory requirements. While there will need to be changes in Subchapter 22C of the CSRS and FERS Handbook, the basic procedures are already in place there for obtaining certification from the appropriate National Guard offices as to whether the remaining requirements are met.

There is an additional factor which will need to be considered in some of these cases. When Federal employees have entered into National Guard state service, they have sometimes been placed on leave-without-pay (LWOP) status from their civilian positions. In LWOP cases, since the National Guard service itself has been neither military service nor Federal civilian employment, the individuals have been entitled to civilian service credit for the period of LWOP, subject to the "six-month" rule, with no service credit deposit required.

If that National Guard service is now military service under the amendments to 5 U.S.C. §§ 8331(13) or 8401(31), a different rule will apply. Service credit will be available for the period of National Guard service during LWOP if and only if the military service credit deposit is paid. As with other periods of military furlough, the "six-month" rule will not apply, and there can be no civilian service credit for the period.

In other cases where Federal employees have been separated from their civilian positions to enter National Guard state service, no service credit is provided for the period of separation. Unless that National Guard service is now military service under the amendments to 5 U.S.C. §§ 8331(13) or 8401(31), such periods remain non-creditable.

Military Service Credit Deposits

Prior to USERRA, service credit deposits were based on a set percentage (7% under CSRS and 3% under FERS) of the amount of military basic pay, plus interest under specified conditions. The rules for charging interest have not changed. However, under USERRA, the pre-interest base for certain of these deposits is now subject to a limit, found at 5 U.S.C. §§ 8334(j)(1)(B) and 8422(e)(1)(B), which both provide:

In any case where military service interrupts creditable civilian service under this subchapter and reemployment pursuant to chapter 43 of title 38 occurs on or after August 1, 1990, the deposit payable under this paragraph may not exceed the amount that would have been deducted and withheld under subsection (a)(1) from basic pay during civilian service if the employee had not performed the period of military service.

Thus, under both CSRS and FERS, in computing the military deposit for service which meets the described criteria, the agency must make two calculations: (1) 3% or 7% of the military basic pay, and (2) an alternative calculation of what the CSRS or FERS employee contributions would have been for the civilian service had the individual not entered into the military.

USERRA provides guidance as to how the civilian base pay should be computed. If it is possible to determine what the employee's base pay would have been for the period of absence (including locality pay, premium pay which constitutes basic pay, promotions, annual increases, step increases and other base pay increases to which the individual would have been entitled) then those rates should be used. However, if, as in the case of intermittent employees, it is not reasonably possible to determine what the individual's base pay would have been for the period of absence, then the rate of pay to be used is the average rate of base pay during the 12-month period immediately preceding the absence (or, if shorter, the period of employment immediately preceding the absence).

In all other cases, that is, where military service did not interrupt creditable civilian service, or where there was not reemployment pursuant to chapter 43 of title 38 which occurred on or after August 1, 1990, then the prior deposit rules apply. It will be up to the employing agency to ascertain whether the criteria apply, and to make all calculations.

Effective Date

USERRA does not provide any specific effective date for the changes to the title 5 provisions. However, there is a long-standing rule that, absent explicit statutory provisions to the contrary, individuals' benefits are based upon the law in effect on the date of their separation with title to annuity benefits, or the annuity commencing date, whichever is earlier. Accordingly, these changes apply only to individuals whose separation with title to annuity benefits from retirement covered service AND whose annuity commencing date is subsequent to the enactment of the law.

- N Individuals separated from October 4 through 12, with a November 1 annuity commencing date are not covered by USERRA.
- N In some cases (such as some disability retirements), individuals may have a choice of annuity commencing dates if they are separated on or after October 13, 1994, but with a last day of pay prior to that date. An individual in such circumstances will be entitled to the benefits of USERRA only if he or she elects the later annuity commencing date.
- N Individuals not covered by USERRA are not entitled to the benefit of the changes in the law unless they are again employed and gain a new annuity title based upon a subsequent separation.
- N A reemployed annuitant can become covered only if he or she works a sufficient period and meets the deposit requirement for a redetermined annuity.

Summary

An individual covered by USERRA will be entitled to make a deposit and receive service credit for previously non-creditable National Guard service. An individual covered by USERRA who made a service credit deposit is entitled to a refund of the difference between what his or her service credit deposit would have been under the old and new laws, regardless of when the deposit was made. Covered individuals are entitled to these benefits even if they are separated or retired at this time. An individual in a category listed as not covered by USERRA is not entitled to either of these benefit improvements. The following summarizes who is and is not covered by USERRA:

- N Date of separation: On or before October 12, 1994
- Annuity commencing date: On or before October 12, 1994
- USERRA status:
- NOT COVERED

N Date of separation: On or before October 12, 1994
Annuity commencing date: After October 12, 1994
USERRA status:
NOT COVERED

N Date of separation: After October 12, 1994
Annuity commencing date: On or before October 12, 1994
USERRA status:
NOT COVERED

N Date of separation: After October 12, 1994
Annuity commencing date: After October 12, 1994
USERRA status:
COVERED

As noted above, OPM will issue detailed instructions as soon as possible. These will include procedures for documenting a recomputed deposit on an Individual Retirement Record (SF2806 or SF3100), refunds of an overpaid deposit for which an agency has the records, and refunds of an overpaid deposit for which OPM has the records.

Attachment

The Interagency Advisory Group memorandum to agency directors of personnel has been distributed as an attachment to Benefits Administration Letter 95-202, dated January 10, 1995.