

Office of Personnel Management
Retirement and Insurance Group



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Benefits Administration Letter

Number: 95-202

Date: January 10, 1995

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

The purpose of this letter is to transmit the attached memorandum to the Interagency Advisory Group to Insurance Officers and Retirement Counselors. Information about health benefits, life insurance, retirement, and effective dates is on pages 6 through 8.

Abby L. Block, Chief
Insurance Policy Division

Attachment

INTERAGENCY ADVISORY GROUP

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, DC 20415

Secretariat
1900 E St., NW

DEC. 7, 1994

MEMORANDUM FOR: DIRECTORS OF PERSONNEL

FROM: LEONARD R. KLEIN
ASSOCIATE DIRECTOR
CAREER ENTRY GROUP

SUBJECT: Implementing the New Uniformed Services
Employment and Reemployment Rights Act of
1994

On October 13, 1994, President Clinton signed into law the new Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353. This new law completely re-writes chapter 43 of title 38, United States Code, governing the rights of employees who perform military duty and makes many changes that will affect employees, agencies, and OPM. The purpose of this Memorandum is to alert you to the key provisions of the new law. We will also issue interim regulations to implement the law as it pertains to federal agencies and OPM. However, because our regulations must be consistent with the Department of Labor's regulations (governing the private sector and State and local governments) and must be coordinated with the Defense Department, we expect that this process will take some months. In the meantime, however, we urge that agency officials responsible for this area familiarize themselves with the new law, a copy of which is attached.

COVERAGE

- The new law covers persons who perform duty in the "uniformed services." This includes not only the armed forces but also the National Guard when engaged in active duty for training, inactive duty, or full-time National Guard duty, and the commissioned corps of the Public Health Service.

- The new law covers all employees except those serving in positions where there is "no reasonable expectation that employment will continue indefinitely or for a significant period." We anticipate providing by regulation that employees are covered if their appointments are for more than 1 year.

- For the first time, employees of the intelligence agencies

(CIA, FBI, NSA, etc.) are treated differently under this law.
Although these employees have substantially the same

restoration rights as other Federal employees under the law, they are not subject to OPM's regulations and do not have the same appeal rights as other employees.

MAXIMUM CUMULATIVE PERIOD OF SERVICE

- For the first time, the law makes clear that it is intended to protect the job rights of noncareer service persons. Accordingly, the law generally establishes a 5-year cumulative total on military service with a single employer (in this case, the Federal Government), with certain exceptions allowed for call-ups during emergencies, for Reserve drills and annually scheduled active duty for training, etc. USERRA also allows an employee to complete an initial period of active duty that exceeds 5 years. For example, enlistees in the Navy's nuclear power program are required to serve 6 years. Service that a person performed before starting Federal civilian employment does not count toward the 5-year total.

RESTORATION RIGHTS

- The new law accords restoration rights based on the duration of military service rather than the type of military duty performed (e.g., active duty for training, inactive duty, etc.). This is a more rational and equitable approach in that both the employee and the agency are primarily affected by the length of the absence, not the type of duty performed.

- Thus, under the new law, if the period of military service was for:

- o less than 91 days the employee must be placed in the position for which qualified that he would have attained had his employment not been interrupted;
- o more than 90 days the employee has the same restoration rights as above except that he can also be placed in a position of like seniority, status and pay.

- In either case, the employee can be returned to the position he left only if he is not qualified to perform the position to which he would otherwise be entitled after reasonable efforts by the agency to qualify the employee.

- If the employee has incurred a service-connected disability and thereby cannot qualify for the position to which he would otherwise be entitled after reasonable efforts by the agency to qualify him, he is entitled to be placed in a position of

like seniority, status and pay if qualified, or in a position that affords the nearest approximation thereof if not qualified, consistent with the circumstances in each case.

- While absent on military service, an employee is deemed to be on a furlough or leave of absence and is entitled to all the rights, benefits (other than seniority) normally given to other employees on a leave of absence. Upon reemployment, the employee is credited with all the seniority and any other rights and benefits that would have accrued had he not been absent.

- Upon reemployment, an employee is protected from discharge (except for cause) for a period of:

- o 1 year if the military service was for more than 180 days; and
- o 180 days if the military service was for more than 30 days, but less than 181 days.

NOTE: For this purpose, reduction in force is not considered to be "for cause." This means the employee would be protected in the event of a reduction in force.

REPORTING FOR DUTY

- An employee who has been absent for less than 31 days (including for purposes of an exam to determine fitness) is expected to report for duty at the beginning of the first full work day on the first full calendar day following the completion of service and the expiration of 8 hours after a period allowing for the safe travel to the person's residence, or as soon as possible after the expiration of the 8-hour period if the person is prevented from reporting through no fault of his own.

- An employee whose service was for more than 30 days but less than 181 days must submit an application for reemployment no later than 14 days after the completion of service.

- An employee whose service was for more than 180 days must submit an application for reemployment no later than 90 days after the completion of service.

- If the employee does not return when required, the agency cannot deny restoration rights on this basis, but may treat the failure to report as it would any other unexcused absence.

- The law does not specify how long an agency has to restore an employee following receipt of his application (in the case of absences of more than 30 days). We expect to continue to

provide in our regulations that such employees are entitled to be restored just as soon as practicable, but in no event later than 30 days.

ENFORCEMENT PROVISIONS

- For the first time, the Department of Labor's Veterans' Employment and Training Service (VETS) is directly involved, by law, in the restoration of Federal employees performing military duty. The law requires Labor to provide employment and reemployment assistance to any Federal employee or applicant who requests it.
- The new law also alters the appeals process. It requires Labor to accept and investigate complaints from applicants or employees who believe their rights have been denied. Informal resolution is encouraged by the law and agencies may therefore expect Labor to contact them directly in an effort to resolve complaints or differences that appear to have merit. If these informal efforts are unsuccessful, Labor may refer the complaint to the Office of the Special Counsel for litigation before MSPB. If the Special Counsel decides the complaint appears meritorious, the Special Counsel may act as an attorney for the complainant before the Board.
- Alternatively, an individual who believes an agency "has failed or refused" to comply with the provisions of USERRA may appeal directly to MSPB without going through Labor or the Special Counsel.

SPECIAL PLACEMENT PROVISIONS

- The new law requires OPM to place in the executive branch the following categories of employees:
 - o Executive branch employees when OPM determines that (1) their agencies no longer exist and the functions have not been transferred, or (2) it is otherwise "impossible or unreasonable" for their former agencies to reemploy them;
 - o Legislative and judicial branch employees when their agencies determine that it is "impossible or unreasonable" to reemploy them;
 - o National Guard technicians when the Adjutant General of a State determines that it is "impossible or unreasonable" to reemploy them; and
 - o Employees of the intelligence agencies (CIA, FBI, NSA, etc.), when their agencies determine that it is "impossible or unreasonable" to reemploy them.

- It is clear that Congress intended this placement provision to apply only in extraordinary circumstances and not as a convenient way for agencies to circumvent their responsibilities.

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Furthermore, the new law specifically provides that the Federal Government is to be a "model employer" with respect to the treatment accorded employees performing military duty. OPM therefore expects that there will be few requests for placement in other agencies under this provision. Nevertheless, when such a request arises, we expect to adopt the following procedure:

- o When an executive agency (other than an intelligence agency) is unable to place a returning employee, the agency will contact OPM's Associate Director for Career Entry with full information about the employee's qualifications and the reasons the employee cannot be placed. The Associate Director will make the determination whether, in fact, it is "impossible or unreasonable" for the agency to place the employee.
- o When an intelligence agency, an agency in the legislative or judicial branches, or a State employing a National Guard technician determines that it is impossible or unreasonable to reemploy a returning employee, the agency will contact OPM's Associate Director for Career Entry with full information about the employee's qualifications and the reasons the employee cannot be placed.
- o OPM's Associate Director for Career Entry will refer the case to the appropriate OPM Service Center, depending upon the employee's last place of employment.
- o The Service Center Director will make a qualifications determination and attempt to match the employee with an appropriate agency in the commuting area.
- o If a position that is equivalent in pay, grade, and status to the employee's last position exists, the agency will be ordered to place the employee. Failure to place the employee will give rise to the complaint procedure authorized for all employees under the law.

- Since almost all employees affected by these placement provisions will be in the excepted service, we are creating a Schedule A "when filled by" authority to place them in positions that would otherwise be in the competitive service.

- Needless to say, the success of these placement provisions depends directly on the cooperation of all agencies -- those that find they are unable to place a returning employee and those that are asked by OPM to place the individual.

HEALTH BENEFITS

- The new law allows an employee who is covered by an employer's group health plan to continue coverage for up to 18 months after entering on military duty. If the military service continues for more than 30 days the employee may be charged not more than 102 percent of the total premium.
- The Federal Employee Health Benefit (FEHB) law provides for continued coverage for up to 12 months for employees in leave-without-pay status during which time an employee pays only the employee share of the FEHB premium. Therefore, for the first 12 months, employees on a military leave of absence may continue FEHB coverage under the same terms as other Federal employees on leave without pay. For the last 6 months, employees on a military leave of absence would be required to pay 102 percent of the premium (i.e., the employee's share, plus the Government's share, plus a 2 percent administrative charge).
- Employees who were on a military leave of absence on the date the new law was enacted (October 13, 1994), may have their coverage reinstated for the remaining portion of the 18-month period following the date the absence from work began or the date the military service began, whichever is the shorter period. This means that employees who have been on a military leave of absence for less than 12 months and who have continued their FEHB coverage under current leave-without-pay rules may continue for an additional 6 months, provided they pay 102 percent of the premium. Employees who have been on a military leave of absence for 12 to 18 months may have their FEHB coverage reinstated for the remainder of the 18-month period, provided they pay 102 percent of the premium.
- Under the FEHB law, when the coverage terminates at the end of the 18-month period, the employee is entitled to a 31-day extension of coverage during which the employee may convert to a nongroup policy. Such an employee does not qualify for continued coverage under the temporary continuation of coverage (TCC) provision of law.
- Employees who separate to enter on military duty are considered to be on a military leave of absence for the purpose of health insurance coverage.

LIFE INSURANCE COVERAGE

- The new law makes no change in Federal Group Life Insurance (FEGLI) coverage for employees on a military leave of absence. FEGLI coverage continues for up to 12 months of leave without

pay at no cost to the employee. Employees who separate to enter on military duty are considered to be on a military leave of absence for the purpose of FEGLI coverage.

PENSION PLANS

- Federal civilian retirement systems have traditionally had liberal provisions dealing with military service. USERRA makes minor changes to the Civil Service Retirement System and Federal Employees Retirement System, primarily dealing with certain National Guard service and with service credit deposits for military service. The Retirement and Insurance Group will be issuing guidance shortly on the details of the new provisions.

THRIFT SAVINGS PLANS

- Under USERRA, employees entering on military duty may now make up contributions to the thrift savings plan missed because of military service. An agency must give an employee two times, and may give the employee up to four times, the length of his military service to make up the contributions. The employee is allowed to contribute the maximum amount he would have been allowed to contribute, subject to statutory maximums.

EFFECTIVE DATES

- The expanded nondiscrimination provision of the law is effective upon enactment (October 13, 1994) and Department of Labor is prepared to accept complaints under this section.
- The new law establishes a 60-day transition period from the date of enactment before most of the new provisions apply. Thus, the new law will apply to restorations initiated on or after December 12, 1994. Restorations effected before this date are subject to the provisions of the old law.
- In determining the 5-year total that may not be exceeded for purposes of exercising restoration rights, service performed prior to the effective date is considered only to the extent that it would have counted under the old law. For example, the service of a National Guard technician who entered on an Active Guard Reserve (AGR) tour under title 32, United States Code was not counted toward the 4-year time limit under the old law because it was specifically considered active duty for training. However, title 32 AGR service is not exempt from the cumulative time limits allowed under the new law. For persons who do not exercise restoration rights during the 60-day transition period, service since the effective date counts under USERRA rules. Thus, if a technician was on an AGR tour on October 13, 1994, but exercised restoration rights after December 11, 1994, AGR service prior to December 12 would not count in computing the

5-year total, but all service beginning with that date would count.

- The health care coverage provision is also effective on the date of enactment, except that an individual on active duty on the date of enactment would be able to elect to reinstate or continue insurance coverage for the remaining portion of the 18 months that began on the date of separation from civilian employment.
- The disability provisions of the law are retroactively effective to August 1, 1990.

MISCELLANEOUS PROVISIONS

- For the first time, the new law specifically requires that the employer be given advance notice of military duty, either by the employee or an appropriate military officer. The notice may be written or oral. If notice is not given, restoration rights may be denied. (No notice is required if military necessity prevents it or giving notice is otherwise impossible or unreasonable.)
- In determining an employee's entitlement to protection under the law, the timing, frequency, duration, and nature of the duty performed is not an issue so long as the employee gave proper notice and did not exceed the time limits specified.
- The new law broadens the nondiscrimination provisions of the old law and expressly forbids any discrimination in employment or promotion because of uniformed service.

WHERE TO GO FOR HELP

- For more information about specific aspects of the new law and its impact on agencies and employees, contact the nearest office of the Department of Labor's Veterans' Employment and Training Service, or call 1-800-442-2VET. Agencies may also contact any OPM Service Center, or the appropriate program office at OPM Headquarters.