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AR 3-18 EMPLOYMENT AND REEMPLOYMENT OF MEMBERS IN THE UNIFORMED SERVICES (Formerly AR 20-6)

HR - Agency Regulation Series 3 (Workforce/Human Resources) Published on 22 April 2008

Regulation Summary

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I. (U) Policy

REVISION SUMMARY: 22 April 2008

This regulation supersedes AR 20-6, dated 20 June 2006.

AR 20-6 provides updated policy and guidance on leave and reemployment provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA). This regulation incorporates policy contained in AN 20-43-49. AR 20-6 describes protections against discrimination because of voluntary or involuntary military service, and contains information regarding Agency payment of health premiums for employees called to active duty. In addition, this revision has been updated to include an organizational title change of DS/CSC/HR/Strategy and Programs Group to Corporate Human Resources Programs/Policy Staff.

AN 20-43-49 is hereby rescinded.

Boldfaced text in this regulation indicates revisions.

This regulation was written by the Corporate Human Resources Programs/Policy Staff, [redacted]

(b)(3)

6. (U//~~FOUO~~) EMPLOYMENT AND REEMPLOYMENT OF MEMBERS OF THE UNIFORMED SERVICES

SYNOPSIS. This regulation explains the leave and reemployment provisions of the Uniformed Services Employment and

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Reemployment Rights Act and describes its protections against discrimination and retaliation because of voluntary or involuntary military service. The regulation applies to Agency employees only and not to industrial or independent contractors.

a. (U) AUTHORITY. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4333, as amended; 5 U.S.C. §8906 (e)(3); National Security Act of 1947 § 104(g), 50 U.S.C. § 403-4a(e), as amended.

b. (U) DEFINITIONS

- (1) **BENEFIT.** Any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.
- (2) **HEALTH PLAN.** An insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which health services for individuals are provided or the expenses of such services are paid.
- (3) **LEAVE OF ABSENCE.** Military leave, annual leave, leave without pay (LWOP), furlough, or any combination of these.
- (4) **MILITARY SERVICE.** The performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Military service includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty. Military service includes service in the Armed Forces, the Army National Guard, and the Air National Guard when

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engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For the Army National Guard and the Air National Guard, this only includes service performed under Federal authority.

c. (U) ABSENCE DUE TO MILITARY SERVICE

- (1) Employees must give advance written or verbal notice of military service to the Agency. As a matter of Agency policy, the preferred method of notice is via a memorandum for the record to the employee's supervisor(s), which will be maintained in each employee's official personnel file. No notice is required, however, if giving of such notice is precluded by military necessity (as determined by an appropriate military authority), or if under all relevant circumstances, the giving of such notice is otherwise impossible or unreasonable.
- (2) The Agency will grant an unpaid leave of absence to employees who are performing military service. Employees may elect to use accrued annual leave, military leave, or sick leave, if appropriate, during the period of military service. See AR 20-30 for military leave. If an employee elects not to use accrued leave or the accrued leave is exhausted, the employee will be placed on LWOP status.
- (3) The Agency will grant an excused absence to an employee for purposes of determining fitness for duty for military service. This excused absence usually should not exceed 1 day, unless otherwise required by a longer examination. Supervisors may also grant an excused absence, not to exceed 4 days, to allow an employee to pack-out household effects prior to military service.
- (4) If an employee knowingly provides written notice of intent not to return to a position of employment after military service, the employee can be separated from employment but will retain the reemployment rights set forth in section (e) below.

UNCLASSIFIED//~~FOUO~~**d. (U) ELIGIBILITY AND APPLICATION FOR REEMPLOYMENT**

- (1) An Agency employee has the right to return to Agency employment following a period of absence necessitated by reason of military service if he or she meets the following criteria:
 - (a) The Agency employment from which the employee leaves to perform military service is other than for a brief non-recurrent period for which there is no reasonable expectation that the employment would continue indefinitely or for a significant period.
 - (b) The employee provides the Agency with notice of the employee's military service in accordance with paragraph c(1) above;
 - (c) The cumulative length of absence and of all previous absences because of military service does not exceed 5 years, unless the employees military service meets any of the criteria set forth in 38 U.S.C. § 4312(c);
 - (d) The employee did not separate from military service with a discharge under other than honorable conditions, a dishonorable or bad conduct discharge, or other disqualifying separation set forth in 38 U.S.C. § 4304; and
 - (e) The employee timely reports to the Agency or timely notifies the Agency of his or her intent to return to employment with the Agency in accordance with paragraphs d(2) or d(3) below. Even if the employee fails to comply with the time limits imposed by paragraph d(2) or d(3) below, the employee does not automatically forfeit his or her reemployment rights under section e. or benefits under section f. Rather, the employee will be considered absent without leave and may be subject to discipline. See AHB 20-1.
 - (f) If the employee's period of military service exceeds 30 days, the employee is required to submit documentation, if readily available, to show that he or she meets the above criteria in paragraphs (c) through (e) immediately above. Following reemployment, if documentation becomes available that establishes that the

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employee does not meet one or more of the criteria set forth in paragraphs (c) through (e), then the Agency may terminate the employee's employment and any rights or benefits afforded to the employee under this regulation.

- (2) Reporting to Work or Written Notice of Intent to Return to Employment.** Whether the employee is required to report to work or submit to his or her component HR officer a written notice of intent to return to employment depends on the length of military service as follows:
- (a) If the period of military service was fewer than 31 days or if the employee was absent for any length of time for the purpose of an examination to determine fitness to perform military service, the employee must report back to the Agency not later than the beginning of the first full regularly-scheduled work day on the first full calendar day following the completion of the military service, and the expiration of 8 hours after a period allowing for safe transportation from the place of service to the employee's residence. If reporting within this 8-hour period is impossible or unreasonable through no fault of the employee, then the employee shall report back to the Agency as soon as possible after the expiration of this period.
 - (b) For a period of service more than 30 days but fewer than 181 days, the employee must submit a written notice to the component HR officer expressing his or her intent to return to the Agency not later than 14 days after the completion of military service. If submitting such notice within this 14-day period is impossible or unreasonable through no fault of the employee, then the employee shall submit the notice the next full calendar day which it becomes possible to do so. Due to security and medical recertification requirements, the employee also should provide notice to the component HR officer of his or her anticipated return date prior to submitting this written notice.
 - (c) For a period of military service more than 180 days, the employee

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must submit a written notice to the component HR officer expressing his or her intent to return to the Agency not later than 90 days after the completion of service. Due to security and medical recertification requirements, the employee should also provide notice to the component HR officer of his or her anticipated return date prior to submitting this written notice.

- (3) **Hospitalization.** If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of military service, the employee is required to report to work or submit written notice of intent to return to employment at the end of the period necessary to recover from the illness or injury. Whether the employee is required to report to work or submit written notice of intent to return to employment depends on the length of military service described in paragraphs 2(a)-(c) immediately above. The period of recovery may not exceed 2 years from the date of the completion of military service, unless extended by the minimum time required to accommodate circumstances beyond the employee's control that make reporting within the 2 year period impossible or unreasonable.

e. (U//~~FOUO~~) REEMPLOYMENT RIGHTS

- (1) An employee, whether on LWOP or separated from employment during military service, will be reemployed as soon as practicable, but not later than 30 days following the Agency's receipt of the employee's written notice of intent to return to employment, provided the employee meets all eligibility criteria outlined in paragraph d(1) above and has obtained all required medical and security recertification.
- (2) An employee whose period of military service was for fewer than 91 days must be employed in the position for which he or she is qualified and would have attained if continuously employed. If not qualified for this position after reasonable efforts by the Agency to qualify the employee, the employee is entitled to the position he or she left prior to military service. If the employee is not qualified for either position, the employee is entitled to any other position that is the nearest

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approximation of either of these positions, if qualified for that position.

- (3) For an employee whose period of military service was 91 days or more, the Agency has the option of placing the employee in the position for which he or she is qualified and would have attained if continuously employed or in a position of like status and pay. If not qualified for either of these positions after reasonable efforts by the Agency to qualify the employee, the employee is entitled to the position he or she left prior to military service or a position of like status and pay. If the employee is not qualified for any of these positions, the employee is entitled to any other position that is the nearest approximation to these positions, if qualified for that position.
- (4) If an employee has a disability incurred in, or aggravated during, the period of military service, and after reasonable efforts by the Agency to accommodate the disability, is not qualified due to such disability to be employed in the position he or she would have attained if continuously employed, the employee is entitled to employment in another position of like status and pay, if qualified for that position. If the employee is not employed in such a position, the employee is entitled to employment in the position that is the nearest approximation in terms of status and pay consistent with the circumstances of the employee's case.
- (5) The component HR Officer must:
 - (a) Notify the **Office of Security** and the Office of Medical Services to assist the employee in obtaining required security and medical recertification upon the employee's return to Agency duty;
 - (b) Identify the position to which the employee is to be assigned upon reemployment;
 - (c) Assist the employee in determining if any health or life insurance benefits were terminated, and if so, assist the employee in submitting reenrollment paperwork in a timely manner; and
 - (d) Counsel the employee about reenrollment in the Medical Leave

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Bank, if applicable, and assist with enrollment forms if necessary.

- (6) If the component HR officer cannot identify a possible position for the employee in the component, then the case should be referred to the Chief, Human Resources (C/HR) or designee to identify an equivalent position within the Agency. If a suitable position cannot be identified, the C/HR or designee may determine that reemployment of the employee is impossible or unreasonable under certain circumstances. These circumstances include, but are not limited to, those where assisting the employee in becoming qualified for reemployment would cause an undue hardship for the Agency.

If such a determination is made, the C/HR or designee shall notify the employee and the Director of the Office of Personnel Management of the determination. This determination is not subject to judicial review.

- (7) On an annual basis, the Director of the Central Intelligence Agency (D/CIA) shall submit the number of persons whose reemployment was determined to be impossible or unreasonable, and the reasons for such determinations, to the Senate Select Committee on Intelligence, Committee on Veterans' Affairs of the Senate, House Permanent Select Committee on Intelligence, and the Committee on Veterans' Affairs of the House of Representatives.

f. (U) BENEFITS

- (1) **GENERALLY.** Employees on a leave of absence during military service are generally entitled to the rights and benefits provided by the Agency to other employees with similar status and pay that are on a leave of absence. See AR 20-30 and AR 20-31. On reemployment, the employee is treated as not having a break in service with the Agency for purposes of within-grade increases; leave rate accrual; completion of trial period; participation, vesting, and accrual of benefits for a pension plan; and other benefits based on length of service.

(2) HEALTH PLAN

- (a) **Continuation of Coverage.** During the period of military service,

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employees are entitled to continue coverage for themselves and their dependents under an Agency-sponsored health plan. (An employee may not initiate new health plan coverage at the beginning of a period of military service if the employee did not previously have such coverage.) The plan must allow the employee to elect to continue coverage for a period of time that is the lesser of:

- (1) The 24-month period beginning on the date on which the employee's absence for the purpose of performing services begins; or
- (2) The period beginning on the date on which the employee's absence for the purpose of performing service begins and ending on the day after the date on which the employee fails to return to, or apply for, a position of reemployment (as determined under paragraph d(2) or d(3) above).

For the first 12 months of any LWOP, the employee may continue coverage by paying the employee's share of the premium. See AR 20-43c.4 for health insurance coverage during non-pay status. Beyond the first 12 months and up to the 24-month limit, the employee may continue coverage provided that the employee pays 102 percent of the premium. If health plan coverage for an employee or dependent was terminated because of military service, the coverage will be reinstated upon request at reemployment.

(b) Agency Payment of Health Plan Premiums. The Agency will pay both the employee's and the government's share of the Agency-sponsored health plans, for a period not to exceed 24 months, if the employee meets the following conditions:

- (1) The employee must be enrolled in an approved Agency-sponsored health benefits plan;
- (2) The employee must be a member of a reserve component of the Armed Forces;

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- (3) The employee must be called or ordered into active duty in support of a contingency operation;
- (4) The employee must be placed on leave without pay or separated from service to perform active duty; and
- (5) The employee must serve on active duty for a period of more than 30 consecutive days.

This authority applies to employees called to active duty on or after September 14, 2001.

- (3) **THRIFT SAVINGS PLAN.** Employees on LWOP status during military service may maintain their Thrift Savings Plan (TSP) account; however, neither the Agency nor the employee can make contributions to the account during LWOP. Upon return to the Agency, employees are eligible to make up (and if under FERS, or FERS Special, receive) those contributions that they could have made (or received) if they had remained at the Agency. If an employee makes up such contributions, the Agency will match the contributions retroactively. For additional details on the effect of military service on an employee's TSP account, see the Federal Retirement Thrift Investment Board's USERRA regulations, published at 5 C.F.R., Chapter VI.
- (4) **VOLUNTARY INVESTMENT PLAN.** Employees in the Voluntary Investment Plan (VIP) must maintain their account in an inactive status while on LWOP.

g. (U) ANTI-DISCRIMINATION AND ANTI-RETALIATION

- (1) The Agency may not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of membership, application for membership, performance of service, application for service, or obligation for military service.
- (2) The Agency may not retaliate against an employee because the employee has taken action to enforce a protection afforded under USERRA; testified or otherwise made a statement in or in connection

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with a proceeding under USERRA; assisted or participated in a USERRA investigation; or, exercised a right provided for by USERRA.

- (3) These anti-discrimination and anti-retaliation provisions apply to all Agency employees, including an employee described in paragraph d(1)(a) above.

h. (U) RETENTION. Except in the case of an employee under a time-limited appointment who finishes out the unexpired part of his or her appointment upon reemployment, any employee reemployed by the Agency under this regulation shall not be discharged from employment, except for cause:

- (1) within 6 months of the date of reemployment, if the employee's period of military service was more than 30 days but less than 181 days; or
- (2) within 1 year of the date of reemployment, if the employee's period of military service was more than 180 days.

i. (U//~~AIUO~~) Notwithstanding any provision of this regulation or any other regulation, law, or policy, the D/CIA may, in his discretion, terminate the employment of any officer or employee of the CIA whenever the D/CIA deems such termination necessary or advisable in the interests of the United States. See AR 13-8.

j. (U) COMPLIANCE. The Office of the Inspector General investigates and resolves alleged USERRA violations. See AR 1-3a.