



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

December 29, 2009
CPM 2009-26

MEMORANDUM FOR: Heads of Executive Departments and Agencies

FROM: John Berry, Director

Subject: Recent Pay and Leave Legislative Changes

This is to inform you of several changes in Federal employee pay and leave administration resulting from the enactment of the National Defense Authorization Act (NDAA) for Fiscal Year 2010 (Public Law 111-84, October 28, 2009) (hereafter referred to as “the Act”). All of the sections listed below are effective on the date of enactment (October 28, 2009), unless otherwise stated.

Section 565 – Family and medical leave for family of servicemembers

Section 565(b) amends Family and Medical Leave Act (FMLA) provisions in 5 U.S.C. 6381-6383 to (1) provide an entitlement to qualifying exigency leave for Federal employees covered by the U.S. Office of Personnel Management’s (OPM’s) FMLA regulations parallel to the entitlement provided to employees covered by the Department of Labor’s (DOL’s) FMLA regulations and (2) amends the definitions of “covered servicemember” and “serious injury or illness” under the 26-week entitlement for an employee to care for a covered servicemember undergoing medical treatment, recuperation, or therapy, for a serious injury or illness.

Subsection (b)(1) adds a new subsection (a)(1)(E) to 5 U.S.C. 6382 to provide employees with an entitlement of up to 12 administrative workweeks of FMLA leave during any 12-month period “because of any qualifying exigency arising out of the fact that the spouse or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.”

Subsection (b)(2) adds veterans to the definition of “covered servicemember” in 5 U.S.C. 6381(8). Employees are now entitled to 26 administrative workweeks of FMLA leave during a single 12-month period to care for certain family members who are veterans and who are undergoing medical treatment, recuperation, or therapy, for a serious injury or illness. The veteran must have been a member of the Armed Forces (including the National Guard or Reserves) during the 5 years preceding the medical treatment, recuperation, or therapy.

Subsection (b)(3) expands the definition of “serious injury or illness” at 5 U.S.C. 6381(11) to add conditions existing prior to active duty that were aggravated by active duty and to add veterans to this definition. This subsection also adds a definition of “veteran” at 5 U.S.C. 6381(12) to mean a “veteran” as defined under 38 U.S.C. 101.

OPM will post guidance on its website to explain the provisions of the legislative changes in more detail and will issue revised FMLA regulations to implement the new statutory provisions.

Section 611 – 1-year extension of certain bonus and special pay authorities for reserve forces

Subsection 611(7) amends 37 U.S.C. 910(g) to extend the authority for the Reserve Income Replacement Program from December 31, 2009, to December 31, 2010. The Reserve Income Replacement Program provides income replacement payments for certain reserve component members experiencing extended and frequent mobilization for active duty service. This authority is administered by the Department of Defense (DOD).

Section 1106 – 1-year extension of authority related to Federal civilian employees working overseas

Section 1106 makes several amendments to section 1101 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) regarding the authority to waive the limitations on premium pay and aggregate limitation on pay for certain civilian employees working overseas.

Subsection 1106(a) amends subsection 1101(a) of Public Law 110-417 to extend the discretionary authority of agency heads to waive the premium pay limitations in 5 U.S.C. 5547 to calendar year 2010. As in calendar year 2009, this waiver authority in 2010 applies to certain civilian employees who perform work in an overseas location that (1) is in the area of responsibility of the Commander of the United States Central Command (CENTCOM) or (2) was formerly in the CENTCOM area of responsibility but has been moved to the area of responsibility of the Commander of the United States Africa Command (AFRICOM). The overseas work must continue to meet one of two additional qualifying conditions: (1) performance of work in direct support of or directly related to a military operation (including a contingency operation as defined in 10 U.S.C. 101(a)(13)), or (2) performance of work in direct support of or directly related to an operation in response to an emergency declared by the President.

The annual limitation on basic pay and premium pay allowed under the waiver authority is the annual rate of salary payable to the Vice President under 3 U.S.C. 104, which is \$227,300 in calendar year 2009.

Subsection 1106(b) amends subsection 1101(b) of Public Law 110-417 to provide the aggregate limitation on pay under 5 U.S.C. 5307 will not apply to any employee in calendar year 2010 if the employee is granted a waiver of the normally applicable premium pay limitations under subsection 1101(a). The aggregate limitation on pay is a limit on the total amount of allowances, differentials, bonuses, awards, or other similar payments authorized under title 5, United States Code, an employee may receive in a calendar year in addition to the employee's basic pay. When the aggregate limitation is applicable, payments (other than basic pay) in excess of the aggregate limitation must be deferred and are generally paid as a lump-sum payment at the beginning of the following calendar year. Thus, subsection 1106(b) continues to have the effect of allowing covered employees to receive applicable payments immediately without deferral.

Subsection 1106(b) also amends subsection 1101(b) of Public Law 110-417 to provide the head of an agency the authority to waive any applicable premium pay limitation that applies to employees not otherwise subject to 5 U.S.C. 5547. Employees are subject to the same conditions and limitations described in subsection 1101(a) and (c). Amended subsection 1101(b) provides that if such a premium pay limitation waiver is granted, the aggregate limitation on pay under 5 U.S.C. 5307 or similar authority will not apply in that calendar year.

Subsection 1101(c) of Public Law 110-417 continues to apply and provides that any payments made under the subsection 1101(a) waiver authority resulting in additional premium pay of a type normally creditable as basic pay will not be considered basic pay for any purpose (e.g., retirement). Also, such additional premium pay may not be used in computing lump-sum payments for accumulated and accrued annual leave under 5 U.S.C. 5551.

Subsection 1101(d) of Public Law 110-417 continues to provide the Director of OPM with the discretion to issue regulations for this waiver authority. OPM does not currently plan to issue regulations. However, each agency should establish policies for using this waiver authority if it has covered employees. To ensure agencies apply this discretionary authority consistently, we have developed a summary of key elements agencies should include in their policies implementing the waiver authority. (See Attachment.)

Section 1107 – Extension of certain temporary discretionary authority to grant allowances, benefits, and gratuities to personnel on official duty in Pakistan

Section 1107 amends section 1603(a)(2) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Public Law 109-234, June 15, 2006), as amended by section 1102 of the Duncan Hunter National Defense Authorization Act for FY 2009 (Public Law 110-417, October 14, 2008), to grant the head of an agency the discretionary authority to provide an individual employed by, or assigned or detailed to Pakistan, allowances, benefits, and gratuities comparable to those provided by the Secretary of State to members of the Foreign Service under section 413 and chapter 9 of title I of the Foreign Service Act of 1980. To receive these benefits, the civilian employee must be on official duty in Pakistan during fiscal years 2009, 2010 or 2011. This provision is retroactively effective to the beginning of FY 09.

The head of an agency continues to have the discretionary authority during fiscal years 2010 and 2011, to provide an individual employed by, or assigned or detailed to a combat zone, allowances, benefits, and gratuities comparable to those provided by the Secretary of State to members of the Foreign Service under section 413 and chapter 9 of title I of the Foreign Service Act of 1980. The civilian must be on official duty in a combat zone, as defined by section 112(c) of the Internal Revenue Code of 1986.

Section 1113 – Provisions relating to the National Security Personnel System

Section 1113 amends 5 U.S.C. 9902 to repeal the authority for the DOD National Security Personnel System (NSPS) and establish several new personnel authorities. Among the amendments and authorities, section 1113—

- Prohibits the expansion of NSPS to any DOD organization not included in NSPS as of March 1, 2009.
- Provides that regulations governing NSPS in effect as of the day before the date of enactment of the Act issued pursuant to 5 U.S.C. 9902 may not be modified on or after the date of enactment (except as necessary to implement section 1113) and such regulations cease to be effective as of January 1, 2012.
- Requires the Secretary of Defense to provide, beginning no later than 6 months after October 28, 2009, the date of enactment of the Act, for the orderly termination of NSPS and conversion of all employees and positions from NSPS, by not later than January 1, 2012. The Secretary must convert NSPS employees and positions to the pay system that last applied to such employees and positions, or to the pay system that would have applied if NSPS had never been established. No employee will suffer any loss of or decrease in pay because of such conversion.
- Provides that, at the time of any annual adjustment to the General Schedule under 5 U.S.C. 5303, the rate of basic pay for NSPS employees who receive a performance rating above unacceptable or who do not have a current rating of record for the most recently completed appraisal period will be adjusted by no less than 100 percent of the amount of such adjustment.
- Establishes new authorities to require the Secretary, in coordination with the Director of OPM, to promulgate regulations (1) regarding DOD performance appraisal systems and plans and (2) to redesign the DOD competitive appointment procedures.
- Establishes new authorities to allow (1) the Secretary to establish a “Department of Defense Civilian Workforce Fund” to be available for incentive payments for employees based on team or individual performance and incentive payments to attract or retain employees with particular or superior qualifications or abilities and (2) the Secretary, in coordination with the Director of OPM, to develop and submit a proposal to Congress not later than 6 months after the date of the enactment of the Act for additional personnel flexibilities and statutory waivers with respect to the General Schedule or exemptions from the General Schedule.

Section 1901 - Credit for unused sick leave

Section 1901 amends 5 U.S.C. 8415 to provide service credit for a percentage of an employee’s unused sick leave (for which the employee has not received payment) for an employee covered by the Federal Employees’ Retirement System (FERS). These days will not be counted in determining average pay or annuity eligibility. In the case of any employee who is excepted from coverage under the leave provisions in 5 U.S.C. chapter 63 by section 6301(2)(x) through (xiii) (i.e., chiefs of mission and certain political appointees), the employee’s days of unused sick leave include any days of sick leave standing to the employee’s credit when he or she was excepted from title 5 leave coverage. This new provision is not applicable to Veterans Health Administration nurses who are already entitled to full credit for unused sick leave under prior legislation.

The percentage of service credit towards the employee's basic annuity computation will be based on the date the entitlement to the annuity began—

- 50 percent in the case of an annuity entitlement, and based on a separation from service from October 28, 2009, through December 31, 2013, and
- 100 percent in the case of an annuity entitlement occurring after December 31, 2013.

**Subtitle B of Title XIX - Non-Foreign Area Retirement Equity Assurance Act of 2009
(sections 1911-1919)**

Subtitle B of Title XIX provides for the transition from paying a nonforeign cost-of-living allowance (COLA) under 5 U.S.C. 5941 to paying locality payments under 5 U.S.C. 5304 to employees in nonforeign areas. The nonforeign areas are Alaska, Hawaii, Puerto Rico, United States Virgin Islands, Guam, and the Commonwealth of the Northern Marianas. The legislation also extends locality pay to American Samoa and other territories and possessions. The COLA rates will gradually be reduced as locality pay increases. OPM will issue a separate memorandum to describe this legislative provision in more detail.

Additional Information

For additional information, agency Chief Human Capital Officers and/or Human Resources Directors should contact their assigned OPM Human Capital Officer. Employees should contact their agency human resources office for assistance.

Attachment

cc: Chief Human Capital Officers
Human Resources Directors

Attachment

Summary of Key Necessary Elements in Agency Policies Implementing Section 1106 of Public Law 111-84 for Calendar Years 2009 and 2010

The premium pay cap waiver authority under section 1106(a) may be applied in calendar years 2009 and 2010 to an employee who meets all of the following conditions for coverage eligibility:

The employee is covered by 5 U.S.C. 5547 (dealing with limitations on premium pay).

The employee is assigned to work in an overseas location that (1) is in the area of responsibility of the Commander of the U.S. Central Command (CENTCOM) or (2) was formerly in the CENTCOM area of responsibility but has been moved to the area of responsibility of the Commander of the United States Africa Command (AFRICOM) and remains in that location for at least 42 consecutive calendar days (unless an authorized agency official grants a waiver of the 42-day requirement in very limited circumstances). (If the employee meets the 42-day requirement, the section 1106 limitation may be applied to days before that requirement was satisfied, as long as the employee was performing work in a covered and approved category on those days. Although section 1106 applies only to payments payable in calendar year 2009, the 42-day period may overlap a calendar year—i.e., begins in 2008 and ends in 2009, begins in 2009 and ends in 2010, or begins in 2010 and ends in 2011.)

The employee performs work in direct support of, or directly related to, (1) a military operation (including a contingency operation, as defined in 10 U.S.C. 101(a)(13)) or (2) an operation in response to an emergency declared by the President. (“Military operation” is a Department of Defense (DOD) term of art, defined in the DOD Dictionary of Military and Associated Terms.) Prior to authorizing any premium pay cap waiver under section 1106 on the basis of a military operation, an agency must confirm any DOD operation in countries in which such a waiver is being considered meets the DOD definition. (Note: The State Department and DOD have determined all their employees serving in Iraq and Afghanistan are performing work in direct support of, or directly related to, a military operation. In other locations, they will make determinations on a case-by-case basis.)

The employee is in a category of employees for whom coverage under section 1106 has been approved by an authorized agency official. (Note: Section 1106 establishes a discretionary authority that agencies may exercise, not an entitlement.)

Employees who are granted a waiver under section 1106(a) in calendar years 2009 and 2010 will be covered by a higher annual premium pay cap in lieu of the normal biweekly and annual premium pay caps under 5 U.S.C. 5547. The employee will be entitled to premium payments identified in 5 U.S.C. 5547(a) to the extent it does not cause the employee’s combined payable amount of basic pay and premium pay for calendar years 2009 and 2010 to exceed the annual rate of salary payable to the Vice President under 3 U.S.C. 104, which is \$227,300 in 2009 and expected to be \$231,800 in 2010. (Like the section 5547 limitation, the section 1106 limitation is applied to premium payments that are “payable” during the calendar year—i.e., earned in a pay period for which the pay date falls in the calendar year.)

The higher annual limitation on premium pay established under section 1106(a) will continue to apply during calendar years 2009 and 2010 to an employee’s annual aggregate basic pay plus

premium pay even after the employee has stopped performing work covered by section 1106(a). After an employee stops performing covered work, the employee's earnings will again be subject to the biweekly premium pay limitation under 5 U.S.C. 5547, and the employee could receive payments up to the section 5547 biweekly premium pay limitation each pay period until the section 1106(a) annual limitation is reached.

Under section 1106(b), the aggregate limitation on pay under 5 U.S.C. 5307 will not apply in a calendar year to any employee who is granted a waiver under section 1106(a) (i.e., premium pay cap waiver) in that calendar year (2009 or 2010). When the aggregate limitation on pay under 5 U.S.C. 5307 is applied, payments (other than basic pay) in excess of the aggregate limitation must be deferred and are generally paid as a lump-sum payment at the beginning of the following calendar year. However, if section 1106(b) applies to an employee in calendar years 2009 and 2010, the employee is entitled to receive applicable payments immediately without deferral.

Section 1101(c) of Public Law 110-417 (Duncan Hunter National Defense Authorization Act of FY 2009) continues to apply. Under section 1101(c), any additional pay that results from application of the higher premium pay cap under section 1101(a), may not be considered basic pay for retirement or any other purpose, nor may it be used in computing a lump-sum payment for accumulated and accrued annual leave under 5 U.S.C. 5551. Under 5 U.S.C. 5547 and 5 CFR 550.107, various types of premium pay creditable for retirement and other purposes are always subject to a biweekly cap, even in emergencies that would normally trigger the annual premium pay limit. Thus, in applying section 1101(a), an agency should consider any premium pay that is basic pay for retirement or other purposes as being paid before any other premium payment and apply the biweekly cap to determine the amount of basic pay for retirement and other purposes. In other words, section 1101(a) would allow these types of premium payments to exceed the normally applicable biweekly limit, but any excess beyond the biweekly limit would be attributable to section 1101(a) and therefore would not be treated as basic pay for retirement or other purposes.

COUNTRIES IN CENTCOM OVERSEAS AREA OF RESPONSIBILITY

1. Egypt
2. Jordan
3. Saudi Arabia
4. Yemen
5. Oman
6. United Arab Emirates
7. Qatar
8. Bahrain
9. Kuwait
10. Pakistan
11. Iran
12. Iraq
13. Afghanistan
14. Tajikistan
15. Kyrgyzstan
16. Kazakhstan

17. Uzbekistan
18. Turkmenistan
19. Syria
20. Lebanon

COUNTRIES IN AFRICOM OVERSEAS AREA OF RESPONSIBILITY

(formerly in CENTCOM overseas area of responsibility)

1. Djibouti
2. Eritrea
3. Sudan
4. Kenya
5. Ethiopia
6. Somalia
7. Seychelles

Section 1101 of Public Law 110-417, October 14, 2008, as amended by section 1106 of Public Law 111-84, October 28, 2009

SEC. 1101. AUTHORITY TO WAIVE ANNUAL LIMITATION ON PREMIUM PAY AND AGGREGATE LIMITATION ON PAY FOR FEDERAL CIVILIAN EMPLOYEES WORKING OVERSEAS.

(a) **WAIVER AUTHORITY.**— During calendar years 2009 and 2010, and notwithstanding section 5547 of title 5, United States Code, the head of an executive agency may waive, the premium pay limitations established in that section up to the annual rate of the salary payable to the Vice President under section 104 of title 3, United States Code, for an employee who performs work while in an overseas location that is in the area of responsibility of the Commander of the United States Central Command, or an overseas location that was formerly in the area of responsibility of the Commander of the United States Central Command but has been moved to the area of responsibility of the Commander of the United States Africa Command, in direct support of or directly related to—

- (1) a military operation, including a contingency operation; or
- (2) an operation in response to an emergency declared by the President.

(b) **APPLICABILITY OF AGGREGATE LIMITATION ON PAY.**—

- (1) **IN GENERAL.**—Section 5307 of title 5, United States Code, shall not apply to any employee in any calendar year in which that employee is granted a waiver under subsection (a).
- (2) **OTHER LIMITATIONS.**—In the case of any employees who (disregarding subparagraph (A)) would otherwise be subject to a limitation on premium pay similar to one set forth in section 5547 of title 5, United States Code (as determined by the head of the Executive agency in or under which such employees are employed)—

- (A) the agency head may waive that otherwise applicable limitation, to the same extent and in the same manner as would be allowable under subsection (a) if those employees were instead subject to such section 5547; and
 - (B) if a waiver under subparagraph (A) is granted with respect to such employees, then, neither section 5307 of title 5, United States Code, nor any other similar limitation (as determined by the agency head) shall apply with respect to such employees for purposes of any calendar year for which such waiver is so granted.
- (c) **ADDITIONAL PAY NOT CONSIDERED BASIC PAY.**— To the extent that a waiver under subsection (a) results in payment of additional premium pay of a type that is normally creditable as basic pay for retirement or any other purpose, such additional pay shall not be considered to be basic pay for any purpose, nor shall it be used in computing a lump-sum payment for accumulated and accrued annual leave under section 5551 of title 5, United States Code.
- (d) **REGULATIONS.** — The Director of the Office of Personnel Management may issue regulations to ensure appropriate consistency among heads of executive agencies in the exercise of the authority granted by this section.