



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

Wednesday, April 13, 2011
CPM 2011-06

MEMORANDUM FOR: Heads Of Executive Departments And Agencies

FROM: John Berry, Director

Subject: Reservist Differential Policy Update

In the U.S. Office of Personnel Management's (OPM's) policy guidance (dated January 8, 2010) on reservist differentials paid under 5 U.S.C. 5538, we stated we would provide further guidance regarding agencies' obligation, if any, to pay the reservist differential for a period after completion of active duty and prior to the effective date of a statutory amendment made by section 745 of Public Law 111-117 (December 16, 2009). In response to an OPM request, the Office of Legal Counsel, Department of Justice, reviewed the legal issues regarding the treatment of post-active duty periods under the reservist differential law prior to the effective date of the December 2009 amendment to 5 U.S.C. 5538. On June 28, 2010, the Office of Legal Counsel issued its opinion. (See justice.gov/olc/2010/reservist-pay.pdf.) Based on that opinion, we have developed the attached Reservist Differential Policy Guidance Supplement.

We will revise the reservist differential policy guidance posted on our website at www.opm.gov/reservist to incorporate the attached supplement and related conforming changes.

Additional Information

Inquiries on the reservist differential authority may be sent to OPM at pay-leave-policy@opm.gov. This special email address is for comments and questions from you and your staff in your agency headquarters-level human resources office. Component and local human resources offices should contact their agency headquarters human resources office with any questions. Employees should contact their local human resources office.

cc: Chief Human Capital Officers
Human Resources Directors

Attachment

Attachment

Reservist Differential Policy Guidance Supplement

Treatment of Post-Active Duty Periods Prior to Effective Date of December 16, 2009, Amendment to 5 U.S.C. 5538

Section 745 of Public Law 111-117 clarified that, effective on the first day of the first pay period beginning on or after December 16, 2009, (December 20 for employees on the standard biweekly pay period cycle), a reservist differential would not be payable for periods of time following completion of active duty. OPM requested an opinion from the Office of Legal Counsel, Department of Justice, regarding the interpretation of the reservist differential law prior to the effective date of the December 2009 amendment with respect to the treatment of post-active duty periods. On June 28, 2010, the Office of Legal Counsel issued its opinion. It concluded that the pre-amendment version of 5 U.S.C. 5538 (hereafter referred to as “section 5538”) entitled an employee to receive reservist differential payments for qualifying periods following completion of active duty during which the employee had reemployment rights under 38 U.S.C. 4312(e), which is a provision of the Uniformed Services Employment and Reemployment Rights Act (USERRA). This opinion covered post-active duty periods falling between the original effective date of section 5538 (March 15, 2009, for most employees) and the effective date of the December 2009 amendment (December 20, 2009, for most employees).

The period during which an employee has reemployment rights under 38 U.S.C. 4312(e) ceases when the employee exercises those rights and returns to civilian duty following completion of active duty. Thus, the qualifying post-active duty period for purposes of eligibility for a reservist differential payment would be limited not only by applicable USERRA time limits, but also by the employee’s action to return to civilian duty. By law, the reservist differential is payable for a period during which civilian employment is interrupted as a result of qualifying active duty. The interruption ends when, following completion of active duty, the employee returns to civilian duty. If an employee uses accrued civilian leave or other accrued civilian paid time off during a qualifying post-active duty period before returning to civilian duty, the employee remains covered by USERRA and the reservist differential law. However, the reservist differential law expressly bars payment of the reservist differential during any period for which the employee receives civilian basic pay, including by taking paid time off. (See section 5538(b)(2), as amended.) Accordingly, any paid time off must be accounted for by making an adjustment for paid hours, as described in section VII.B of the OPM Policy Guidance Regarding Reservist Differential Under 5 U.S.C. 5538.

During the post-active duty period, the employee would be entitled to zero amount of military pay and allowances. Thus, the reservist differential would equal the full amount of the civilian basic pay which would otherwise have been payable to the employee for the qualifying post-active duty period in question.

See the Attachment to this Policy Guidance Supplement for additional guidance provided in question and answer format.

Questions and Answers

Treatment of Post-Active Duty Periods Prior to Effective Date of December 16, 2009, Amendment to 5 U.S.C. 5538

Note: These Qs and As are focused on the treatment of post-active duty periods during the period between the original effective date of the reservist differential law in 5 U.S.C. 5538 and the effective date of the December 16, 2009, amendment to section 5538. For a more complete understanding of reservist differential payments, please visit the reservist differential website at <http://www.opm.gov/reservist>.

Q1. During what period of time may eligible employees receive a reservist differential for periods following completion of active duty?

A1. Employees may receive reservist differential payments for post-active duty periods only if those periods occur on or after the original effective date of the reservist differential law in 5 U.S.C. 5538 (i.e., first day of first pay period beginning on or after March 11, 2009—March 15, 2009, for employees on the standard biweekly payroll cycle) and before the effective date of the December 16, 2009, amendment to section 5538 (i.e., first day of the first pay period beginning on or after December 16, 2009, which is December 20, 2009, for employees on the standard biweekly payroll cycle). Thus, for most employees, the relevant period is March 15-December 19, 2009.

Q2. Under the December 2009 amendment to section 5538, how are post-active duty periods treated?

A2. Beginning with the effective date of the December 2009 amendment to section 5538 (December 20, 2009, for most employees), employees may receive a reservist differential only for periods while the employee is serving qualifying active duty in the uniformed services; no differential is payable for post-active duty periods.

Q3. When does the qualifying post-active duty period end?

A3. For employees covered by the pre-amendment section 5538, the qualifying post-active duty period ends when the employee's reemployment rights end under 38 U.S.C. 4312(e), which is a provision of the Uniformed Services Employment and Reemployment Act (USERRA). Those rights expire on the earlier of—

- (1) at the end of the applicable time period under 38 U.S.C. 4312(e) and 5 CFR 353.205 (e.g., 90 days after completion of service for those who serve more than 180 days of active duty); or
- (2) when an employee exercises his or her right to return to Federal civilian duty.

However, since the statutory provision allowing reservist differential payments for post-active duty periods was removed by a December 2009, amendment, any otherwise qualifying post-active duty period would cease to be qualifying at the end of the day before the effective date of

the amendment. As explained in Q&A 1, that effective date is December 20, 2009, for most employees, so the latest qualifying date for most employees would be December 19, 2009.

Agencies can use the final military leave and earnings statement (LES) and DD Form 214, Certificate of Release or Discharge from Active Duty (DD-214), to determine the last day of military active duty which is needed to determine the length of time an employee has to return to work under USERRA.

Q4. What constitutes a return to duty?

A4. For USERRA purposes, a return to duty (or return to employment) is generally considered to have occurred when an employee physically reports to work. As explained in Q&A 5, use of accrued paid leave or other accrued paid time off is not considered a return to duty. For employees whose period of service in the uniformed services was more than 30 days, an employee must submit an application for reemployment, as provided in 38 U.S.C. 4312(e) and 5 CFR 353.205(c)-(d).

However, an employee is considered to have returned to duty for USERRA purposes when the employee applies for reemployment and is granted excused absence immediately before physically returning to work. Excused absence is not an accrued leave entitlement of the type addressed by USERRA. Excused absence is not earned by the employee but is granted at the discretion of the employing agency or the President in lieu of requiring the employee to physically report to work; thus, for USERRA purposes, an employee must be treated as having returned to duty when on excused absence. (See OPM Compensation Policy Memorandum, CPM 2008-21, December 16, 2008, and accompanying Qs and As—in particular, Q&A 4. See <https://www.chcoc.gov/content/minimum-service-requirement-receive-5-days-excused-absence-employees-returning-active>)

Q5. What is the effect of an employee using accrued paid leave during a qualifying post-active duty period before returning to work?

A5. Use of accrued civilian paid leave or other accrued civilian paid time off following completion of active duty in the uniformed services is not considered a return to employment or duty under the USERRA law, as interpreted by the Department of Labor and OPM. Employees are viewed as having the right to use accrued leave both (1) during service in the uniformed service and (2) during the USERRA reemployment rights period following such service. Thus, eligibility for the reservist differential is not extinguished by the use of accrued civilian paid leave or other accrued paid time off. However, section 5538(b)(2), as amended, expressly provides that the reservist differential is not payable for periods during which the employee is using civilian paid leave or other paid time off. To implement this requirement, OPM policy guidance requires an adjustment for paid hours, as provided in section VII.B of the OPM Policy Guidance Regarding Reservist Differential under 5 U.S.C. 5538.

Q6. May employees who used paid leave or other paid time off during the post-active duty period now decide to cancel retroactively the paid leave and receive reservist differential payments instead?

A6. No. Employees cannot retroactively cancel any paid leave or other paid time off taken during post-active duty periods that occurred prior to the effective date of the December 2009 amendment to section 5538.

Q7. What happens if part of the post-active duty period is prior to the effective date of the December 2009 amendment and part of the post-active duty period is on or after the effective date of the amendment?

A7. Reservist differential payments for post-active duty periods are payable only through the day before the effective date of the December 16, 2009, amendment, even if the post-active period ended after that effective date. For most employees, the day before the effective date of the amendment is December 19, 2009. Thus, for most employees, December 19, 2009, is the last day of post-active duty that may be used as a basis for a reservist differential payment. (See also the Q&A 3.)

Q8. How are reservist differential payments computed during a qualifying post-active duty period that occurred prior to the effective date of the December 2009 amendment to section 5538?

A8. Since individuals do not receive any military pay and allowances during the post-active duty period, their military pay and allowance amount will be zero, and they will no longer receive an LES. For civilian pay, agencies should use the civilian basic pay normally payable for the post-active duty period if the employee were working. This means eligible employees may receive reservist differential payments equal to the full amount of civilian basic pay (as defined in Appendix C of the reservist differential policy guidance provided at www.opm.gov/reservist/ReservistDifferentialPolicyGuidance.pdf) for qualifying days during post-active duty periods that occurred prior to the December 2009 amendment to section 5538. However, as explained in Q&A 5, the reservist differential is not payable for periods during which the employee used civilian paid leave or other paid time off.