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**CHAPTER 353. RESTORATION TO DUTY****SECTION A. RESTORATION AFTER SERVICE WITH THE ARMED FORCES  
(To Be Used With 5 CFR, Part 353)****1. SCOPE**

This section applies to employees whose VA employment is voluntarily or involuntarily interrupted by active military duty, by reserve training activities or by examinations to determine their fitness for military service. As indicated, the specific actions and benefits which apply to employees depend primarily on the nature of their appointments and type of military duty for which they volunteer or to which they are ordered by the Armed Forces. No employee will be unavailable for active military duty for reason of his/her VA position or assignment (see MP-5, pt. I, ch. 303 and MP-1, pt. II ch. 13).

**2. SPECIFIC ACTIONS**

a. Military Leave. Military leave will be granted to VA employees who are members of the National Guard or reserve components of the Armed Forces when ordered by proper authority to active duty with the Armed Forces. (See 5CFR Part 630, subpart K, and MP-5, pt. I, ch. 630.)

(1) Employees serving under temporary (less than 1 year) or intermittent appointments who are members of the National Guard or reserve components of the Armed Forces are not entitled to military leave. Temporary employees may, however, be granted annual leave or leave without pay for performance of active or inactive duty.

(2) Part-time career employees covered by Chapter 34 of title 5, U.S.C., are entitled to accrue military leave on a percentage basis (PL 96-431). (See MP-5, pt. II, ch. 7, for VA policy concerning part-time employees appointed under authority of 38 U.S.C. 7405(a)(1)(A) to positions not limited to 1 year or less.)

(3) Neither military leave nor administrative leave will be granted to Reservists or National Guard personnel to attend inactive duty military drills scheduled during their normal working hours. Annual leave or leave without pay must be used in such instances. (See 32 Comp. Gen. 363, 47 Comp. Gen. 761, and 49 Comp. Gen. 233.)

(4) The employee is responsible for furnishing the supervisor with the yearly or quarterly schedule of inactive duty military drills as early as is possible so that adequate VA coverage may be arranged.

(5) The employee has an absolute right to take leave to attend scheduled inactive duty military drills and he/she may not be denied the leave. (See 5 CFR 353 and 38 U.S.C. 4324.)

b. Leave of Absence for Military Duty. Employees serving under career or career-conditional appointments in the competitive service and under permanent or indefinite appointments in the excepted service shall be granted leave of absence for the following reasons:

(1) For Induction or To Determine Physical Fitness to Enter the Armed Forces. An employee will be granted a leave of absence for the period of time required to report for the purpose of being inducted into, entering or determining physical fitness to enter the Armed Forces. When the purpose of the absence is to determine physical fitness, absence without charge to leave is authorized for 1 day unless military pay is received for that day. For additional days and for any day for which military pay is received, the absence is charged to appropriate leave.

(2) For Military Training. A leave of absence will be granted upon the request of an employee who, as a reservist or member of the National Guard, is ordered to duty for active or inactive duty training, to attend service schools, training courses, etc. This includes active duty for an initial period of training of at least twelve consecutive weeks. Such leave of absence will consist of military leave (if available and applicable), annual leave, leave without pay or any combination of these types of leave.

(3) For Extended Periods of Active Duty for Training. An employee entering on active duty for training purposes (service schools, etc.) for a period of time which extends beyond 1-year will, however, be separated with restoration rights described in this chapter.

c. Military Separations. In all other cases in which a reservist or member of the National Guard is inducted, enlists or is otherwise ordered to active duty for service for an extended period (usually more than 1 year) (38 U.S.C. 4321 or 4324(a) or (b)), the employee will be separated. However, the military separation date will be established so as to include any military leave to which the employee might be entitled. (See 5 CFR 353 and 4b below.)

### **3. ENTITLEMENT TO RESTORATION**

a. 5 CFR Part 353 describes the general conditions under which employees who are separated to perform military duties are entitled to restoration. Employees who meet these conditions and who apply for restoration within 90 days of release from active duty under honorable conditions, or discharge from hospitalization continuing for no more than 1 year after release from active duty must be restored within 30 days after the application is received in the appropriate Human Resources Management (HRM) office. If restoration is denied or is not accomplished within the time limit specified, the HRM Office must take the actions indicated in 5 CFR 353.

b. Reservists (including members of the National Guard) are also granted restoration rights under the provisions of 5 U.S.C. 3551. While the restoration rights granted by title 38 United States Code apply only to employees in other than temporary positions, 5 U.S.C. 3551 applies to permanent as well as temporary (not limited to 1 year) appointments. (See 5 CFR 353 and par. 6c, this section.) Employees who leave non-temporary positions in VHA (those appointed under authority of 38 U.S.C. 7306, 7401(1), and without time limit under 7405(a)(1)(A) to enter active military service) are entitled to reemployment rights under applicable laws and 5 CFR 353 (see MP-5, pt. II, ch. 2, par. B 13a).

#### 4. ACTIONS AT THE TIME OF SEPARATION

##### a. Resignation in Lieu of Separation--Military

(1) Employees entering on extended active duty for service who wish to resign must be allowed to do so. They will be advised that if they resign to enter the Armed Forces and then decide not to enter on active military duty, they may not be entitled to restoration rights. (See subpar. (2) below.) Except for this one fact, the action is considered the same as a "Separation--Military" and employees receive the same rights and benefits to which otherwise entitled.

(2) Employees who leave their positions for the purpose of enlisting into, entering or determining their physical fitness to enter the Armed Forces who are rejected or found not qualified shall be restored to positions for which they are qualified and which will provide them with like status and pay to their former position(s).

(3) Employees who leave their positions for reasons unrelated to military service and then enter the Armed Forces will not be entitled to restoration rights.

b. Separation Date. The effective date of separation of a reservist or National Guard member for military duty is the last day before the employee enters on active duty unless the employee is entitled to military leave. Before being separated the employee must be given the chance to use any military leave to which he/she is entitled. If he takes military leave and is then separated, the effective date of the separation should be the date of expiration of military leave. The personnel action will not be processed until after it is known that the employee has actually entered on active duty. The control for this date will be shown on the military orders.

c. Records. The specific actions required in 5 CFR 353, for checking and updating personnel records for employees covered by 38 U.S.C. 4321, et. seq., will also be taken for employees eligible under 5 U.S.C. 3551.

##### d. Information To Be Furnished Employees on Separation

(1) Employees will be advised of their responsibility for notifying the HRM office as soon as possible whether they actually enter on active duty and for keeping their mailing addresses current. The rights and benefits retained while absent for military service and available upon return to duty and the procedures for applying for restoration will also be explained with emphasis upon the time period for restoration following their separation date.

(2) Employees being separated will be advised that they will receive a lump-sum payment of annual leave unless they submit a written request to leave it in their account for use after they return to duty. They will also be told that if they elect to retain their leave, they may request a lump-sum payment at any time while they are on active duty, but once they receive the lump-sum payment the leave cannot be re-credited (22 Comp. Gen. 229). However, if the employees receive a lump-sum payment and return to civilian duty before the end of the period covered by annual leave, they will be required to repay that portion of the lump-sum payment covering the unused

leave (5 U.S.C. 630(a)). Sick leave automatically remains to their credit. When the employee returns, credit is given for military service in determining the accrual rate.

## 5. ACTIONS WHILE EMPLOYEES ARE ABSENT ON MILITARY DUTY

a. Promotions. Employees who have restoration rights under 38 U.S.C. 4321, et. seq., must be considered for all promotions for which they would normally have been considered had they not been absent. In instances where an employee was in a position which was classified to a higher grade during his/her absence due to (1) an increase in duties or responsibilities occurring before departure for military duty, (2) a correction of a classification error, or (3) a change in classification standards, the employee must be promoted to the grade of the re-graded position. However, if the position to which the employee was assigned was classified to a higher grade during his/her absence due to an increase in duties or responsibilities after his/her departure for military duty, there is no guarantee of promotion in the position; however, the employee must be considered for promotion to that position as though he/she were present. A promotion made while the employee is absent on military duty will be made on the day it would have been made had the employee been present. However, if the employee does not exercise his/her right to return, the promotion must be canceled. Personnel actions for separated employees will be recorded and approved on a request for personnel action form, which will be filed in the OPF (Official Personnel Folder). If the employee's position is abolished during his/her absence, he/she must be assigned to another position of like seniority, status and pay. Employees may indicate the specific position(s) that they wish to be considered for during their absence and submit the list to the Chief, HRM.

b. OPF Maintenance. The OPF will be maintained in an active file for employees separated for military service with restoration rights back to VA. When an employee does not exercise his/her restoration rights, or it is known sooner that the employee has been released from the military service and does not intend to return to VA, the personnel folder will be transferred to the National Personnel Records Center.

c. Effective Date. When the employee returns to duty, the notification of personnel action will be issued with the effective date established under regulations then in effect at the time of the action.

d. Salary Adjustment. The employee's salary is adjusted to include any change in rate of pay granted by law during the absence on military duty.

e. Civil Service Retirement. If the employee does not withdraw his/her retirement deductions, he/she may remain a member of the retirement system during military service, but not exceeding 5 years. This does not affect the employee's eligibility for deferred retirement if otherwise eligible (e.g., has not withdrawn retirement deductions and has at least 5 years of creditable service). If the retirement deductions are withdrawn, the employee loses all annuity unless there is later reemployment in a position subject to the retirement system.

f. Life Insurance. Life insurance continues during military service if the employee is on paid military leave from his/her civilian position. Although it stops when the individual enters other periods of active duty, life insurance protection continues for 31 days (but not accidental death and

dismemberment insurance) along with the right to convert to an individual life insurance policy without medical examination.

g. Health Insurance. If an employee enters on active duty in one of the uniformed services for a period of time not limited to 30 days or less, the health insurance enrollment is terminated subject to the 31 day temporary extension of coverage. The enrollment is reinstated if reemployment rights are exercised by the employee upon return from military service. If the employee returns but does not exercise reemployment rights, that person must register again as a new employee.

NOTE: Title 38 employees are also eligible for promotion consideration and salary adjustment but only at the time of their return to duty. (See VHA Supp. MP-5, pt. II, ch. 2.,)

## 6. ELIGIBILITY FOR RESTORATION AFTER MILITARY SEPARATION

The basic authority for restoring employees to duty after separation for active duty with the Armed Forces is 38 U.S.C. 4321 et. seq., (formerly section 9 of the Military Selective Service Act of 1967, as Amended).

a. Most employees who enter into the Armed Forces are eligible for restoration to duty under this law. To be eligible, they must, at the time they enter the Armed Forces, be serving in other than a temporary position. They may be inductees, enlistees, or members of the National Guard or a reserve component of the Armed Forces. Their right to restoration is lost if they are released from the service under other than honorable conditions, fail to apply within the time limit prescribed or serve in excess of the time limit prescribed by law and regulations. The time limits for returning from continuous active military service to be eligible for restoration are as follows:

(1) Inductees are covered for the full period of their inducted service.

(2) Enlistees are covered for 4 years unless extended at the request of the Federal government. Even if extended the coverage does not exceed 5 years. (5 CFR 353).

(c) Other employees who enter upon active duty (voluntarily or involuntarily) in response to an order or call to active duty are covered for 4 years plus any additional period in which they were unable to obtain orders relieving them from active duty.

b. Position to Which Restored Under 38 U.S.C. 4321, et. seq., Provision. An employee seeking restoration after military service has a right to a position of like status and pay unless unable to perform the duties of the position, in which case he/she will be restored to the best available position for which the employee meets the minimum qualification and physical requirements. The regulations do not require medical examinations of employees applying for restoration. Employees will normally be restored to the position they left. However, since the expiration of the Whitten Amendment there is no positive requirement for obligating a position vacated by a permanent employee called to military service. If the position was changed to a lower grade, is not available because it is filled by an employee with higher retention standing or has been abolished, the employee will be placed, if otherwise qualified, in another position of the same status and pay held at the time of separation. If the station has been deactivated, the specific department or staff office with field station units (i.e., Office of Inspector General, Office of

General Counsel) or if the position was not under any of the above, the Headquarters and Executive Resources Team will assume responsibility for assuring the employee is restored to a position of the same status and pay as the one left.

c. Time limit of applying. The time limit for inductees and enlistees for making application for restoration is within 90 days of the release from military service or discharge from hospitalization continuing for no more than 1 year from release.

## **7. APPEALS TO MSPB (MERIT SYSTEM PROTECTION BOARD)**

a. An eligible employee who is entitled to restoration under 5 CFR 353 and who properly applies for restoration may appeal within 20 calendar days of the agency action to the MSPB for any of the following:

(1) A failure by the department to restore the employee within 30 days after application provided an appeal is made within 20 calendar days of the expiration of the 30 day period,

(2) A determination by the department that it is infeasible to restore the employee,

(3) A refusal by the department to restore the employee, and

(4) An improper restoration by the department.

b. If the department is abolished and its functions not transferred, an employee is entitled to request that the OPM find him or her employment.



**CHAPTER 353. RESTORATION TO DUTY****SECTION B. RESTORATION OF EMPLOYEES RECOVERED  
FROM ON-THE-JOB INJURIES  
(To Be Used With 5 CFR, Part 353)****1. SCOPE**

Public Law 93-416 provides restoration rights to employees who sustain a compensable injury or disability under the provisions of chapter 81, subchapter 1 of Title 5, United States Code. VA employees who were separated or placed in a non-duty, non-pay status as a result of sustaining a compensable injury are entitled to restoration as provided in 5 CFR 353 and paragraph 2 below.

**2. ENTITLEMENT TO RESTORATION**

a. If employees have fully recovered within 1 year after the date compensation begins (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the U.S. Government), they are entitled to resume their former or an equivalent position. Employees must be restored unless they were separated because of reduction in force, for cause or for other reasons unrelated to the injury.

b. If full recovery takes longer than 1 year from the date compensation begins, the last employing station must make all reasonable efforts to place, and must accord priority to placing, employees in their former or an equivalent position. Injured employees who fully recover more than 1 year after they begin receiving compensation may appeal to the MSPB (Merit System Protection Board) as provided for in 5 CFR Parts 302 and 330.

c. In instances where agencies have employees who have partially recovered from injury or disability and are able to return to limited duty, every effort will be made to restore them to an appropriate position consistent with the circumstances in each case. According to OPM, this means that agencies are expected to make a good faith effort. Based on the OPM Guidelines, this means that, as a minimum, field facilities must treat these individuals substantially the same as other handicapped individuals are treated under the Rehabilitation Act of 1973 (i.e., they would qualify for consideration, as appropriate, in accordance with applicable provisions of our VA Affirmative Action Program for Employment of People with Disabilities). If employees cannot be restored, they will be notified of the reason and the right to appeal the decision to the MSPB.

d. If, because of compensable injury, an employee is disqualified for the position held or a comparable one, the employee is entitled, within 1 year of the date of beginning to receive compensation, to be restored to another position for which qualified. NOTE: Excepted service employees who are unable to return to their positions will not be converted to career-conditional appointments. The alternatives in cases of this nature are either reemployment in the excepted service or competitive appointment based on selection from a register. Persons being restored after recovering from a compensable injury are generally entitled to be treated as though they had never left. The entire period employees were receiving compensation or continuation of pay is creditable for purposes of rights and benefits based upon length of service, including within-grade increases, career tenure and completion of the probationary period. However, employees do not earn sick or

annual leave while in a non-pay status. Employees who sustain a compensable injury enjoy no special job protections as a result of the injury. Therefore, they are subject to reduction-in-force procedures just as are other agency employees. They must, however, be granted whatever rights they would have had to another job had they not been injured. (See 5 CFR 351 and MP-5, pt. I, ch. 351, for a discussion of an employee's reduction-in-force rights.)

### **3. ACTIONS AT THE TIME OF EXTENDING LWOP TO EMPLOYEES SUSTAINING A COMPENSABLE INJURY**

Employees sustaining a compensable injury will be advised of their restoration rights; how to exercise them; the time limits; and how, where, and when to appeal to obtain those rights. Employees going on leave of absence must know exactly when to report for work after recovering from injury. Where employees have several benefits options from which to choose, they should be given all the information available in order to make their decision(s). Examples of such options are rights under the life insurance and health benefits programs, right to be paid for annual leave or to have it remain to their credit until their return, and the right to leave their retirement deductions or take a refund. **NOTE:** An employee may not withdraw retirement or be paid for annual leave unless separated.

### **4. ACTIONS WHILE EMPLOYEES ARE ABSENT**

Employees on LWOP for compensable injury who are entitled to restoration are entitled for all placement and assignment actions as provided in FPM chapter 353, subchapter 3 and paragraph 4, section A, chapter 353, this part. Employees who are absent because of compensable injury are subject to the same terms and conditions of employment as though they had not been injured.

### **5. RESTORATION AFTER RECOVERY FROM COMPENSABLE JOB-RELATED ILLNESS OR INJURY**

- a. Restoration of an eligible employee who returns from an absence due to compensable illness or injury will be as outlined in 5 CFR 353.
- b. An eligible employee must be restored if there is an available appropriate position anywhere within VA.
- c. When an eligible employee applies for restoration, actions described in 5 CFR 353, will be accomplished.

### **6. LEAVE AND RETIREMENT ANNUITY**

- a. Entitlement and requesting leave of absence for employees who sustain a compensable illness or injury will be as outlined in 5 CFR 353.
- b. A complete discussion of an employee's election between retirement annuity and employee's compensation is discussed in CSRS and FERS Handbook, chapter 102.
- c. An employee's return from a leave of absence will be as outlined in 5 CFR 353.

**7. APPEALS**

Injured employees, who are covered by section 353.103 of the regulations, are entitled to appeal to MSPB as provided for in OPM regulations in part 353.