

**PPP-23 Military Leave**

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All employees who are members of any reserve component of the armed forces of the United States or of the Tennessee National Guard shall be entitled to a leave of absence from their duties for all periods of military service during which they are engaged in the performance of duty or training in the service of this State, or of the United States, under competent orders as stipulated in U.S.C. Title 38, § 4311-4318 and T.C.A. § 8-33-101 through 8-33-109 and 58-1-106.

An employee or applicant for employment, who performs, applies to perform, or has an obligation to serve in a uniformed service shall not, on that basis, be denied employment or reemployment or be discriminated or retaliated against for such service or application for service in any manner.

### **I. Definitions**

"Military Duty" means (i) training and service performed by an inductee, enlistee, or reservist or any entrant into a temporary component of the armed forces for the United States; and (ii) time spent in reporting for and returning from such training and service, or if a rejection occurs, from the place of reporting for such training and service. "Military Duty" also includes active duty training as a reservist in the armed forces of the United States or as a member of the national guard of the United States when the call is for training only.

### **II. Military Leave with Pay**

- A. Each employee who is on military leave shall be paid his or her salary or compensation for a period, or periods, not exceeding twenty (20) working days in any one (1) calendar year.
- B. Holidays and scheduled off duty days do not count toward the twenty (20) workdays allowed.
- C. During the 20 day period the employee continues to earn regular pay, service credit, and applicable annual and/or sick leave accruals. All other rights and benefits continue to which the employee is otherwise entitled.
- D. A regular employee who has exhausted the 20 days of paid leave in any one calendar year may elect to use accrued annual leave. In addition, a regular employee may use accrued sick leave if the employee provides proof to the president or his/her designee that he/she was sick while serving in the armed forces.
- E. An employee on terminal leave is entitled to use his/her twenty (20) days of paid military leave with no loss of rights or benefits to which the employee is otherwise entitled.
- F. Employees must furnish certification from competent military authority of the dates active duty was actually performed.
- G. Longevity credit will not be affected.
- H. Employees are entitled to additional paid leave if called to active duty pursuant to T.C.A. § 58-1-106

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### III. Military Leave with Partial Pay

- A. Military Leave with Partial Pay shall be granted to all employees who are called to active duty by the President of the United States or under the authority of a Governor as members of the Reserve or National Guard as provided by applicable Tennessee Executive Orders.
- B. Partial pay shall be the difference between the employee's regular state salary and the employee's full-time military salary.
- C. Affected employees shall remain state employees while on such active duty for the purpose of (a) accruing sick leave, (b) accruing annual leave, (c) accruing longevity pay which shall continue to be paid to the employee annually, and (d) accruing retirement time. Earnable compensation and retirement benefits shall be not increased or decreased by any partial payment made pursuant to this section. The period of absence while on military duty shall count toward the minimum twelve (12) months and 1,250 hours required that an employee work for eligibility for leave under the Family Medical Leave Act.

Current Executive Orders 4, 9, 12, 17, 20, 26 and 40 relating to Military Leave with Partial Pay can be found at: [www.state.tn.us/sos/pub/execorders/index](http://www.state.tn.us/sos/pub/execorders/index)

### IV. Military Leave Without Pay

- A. Military leave without pay shall be granted to all employees for periods of active duty or training activity with the armed forces of the United States, its reserve components or the Tennessee National Guard for periods beyond the twenty (20) days of paid leave in a calendar year.
- B. Military leave without pay shall be granted to employees voluntarily entering the regular components of the Armed Forces of the United States.
- C. During a period of unpaid military leave, a regular employee retains all accumulated annual and/or sick leave.
- D. Longevity credit will not be affected.

### V. Reemployment rights

- A. With exceptions noted in the regulations, an employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights. (20 C.F.R. 1002.99 " 1002.103)
- B. An employee leaving for military service must give his/her employer advance notice of his/her intent to leave the employment position for uniformed service unless giving such notice is prevented by military necessity or is otherwise impossible or unreasonable under all the circumstances. The notice may be either verbal or written, may be informal, and does not need to follow any particular format. (20 C.F.R. 1002.85 " 1002.86)
- C. An employee leaving for military service cannot be required to decide at that time whether he/she intends to return to that employer but may defer that decision until after completing the period of

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service. An employee who indicates intent not to seek reemployment following military service may change his/her mind and not forfeit reemployment rights. (20 C.F.R. 1002.88)

- D. Reemployment must occur promptly, no later than within two weeks of the employee's application for reemployment.
- E. An employee on military leave of absence who is relieved or discharged from military duty under circumstances other than dishonorable shall be entitled to reemployment rights as follows:
  - 1) if the employee served less than 31 days, or was absent for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the employer not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight (8) hours after a period allowing for safe transportation from the place of that service to the employee's residence. For example, if the employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the employer as soon as possible after the expiration of the eight-hour period.
  - 2) if the employee served between 31 and 180 days and makes an oral or written request for reemployment no more than 14 days after completing service.
  - 3) if the employee served more than 180 days and makes an oral or written request for reemployment no more than 90 days after completing service.

Source: Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, amended 1/18/06 (20 C.F.R. 1102.115)

- F. An injured employee must comply with the notification procedures determined by the length of service, after the time period required for the person's recovery. The recovery period may not exceed two (2) years unless circumstances beyond the person's control make notification within the two-year period impossible or unreasonable. (20 C.F.R. 1002.116)
- G. An employee who fails to report or apply for reemployment within the timeframes described above does not automatically forfeit entitlement to reemployment, but will be subject to the System's policy regarding unauthorized absence from work. 20 C.F.R. 1002.117
- H. The president or his/her designee may request that employees applying for reemployment submit documentation to substantiate that:
  - 1) the employee's application is timely; and
  - 2) the employee's entitlement to reemployment has not been terminated due to dishonorable or bad conduct discharges.
  - 3) the employee has been fully discharged to return to employment.

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- I. If the employee fails to provide requested documentation,
  - 1) it shall not be a basis for denying reemployment if the documentation does not exist or is not readily available at the time requested by the employer;
  - 2) the employer may terminate the employee and any rights or benefits provided under this policy should documentation become available that establishes the employee does not meet one or more of the requirements in Section V.D above.

## VI. Reemployment to Position

- A. An employee who was released under conditions other than dishonorable shall be eligible for reemployment as follows:
  - 1) As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. (20 C.F.R. 1002.191)
  - 2) Once the escalator position is determined, other factors and elements may have to be considered to determine the appropriate reemployment position. This may include the employee's length of service, qualifications, and disability, if any, as well as seniority, status, and rate of pay that the employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. (20 C.F.R. 1002.192-193)
  - 3) If an opportunity for promotion or eligibility for promotion requiring a skills test was missed, the employee will receive a reasonable amount of time to adjust to the employment position prior to the skills test being administered. (20 C.F.R. 1002.192-193)
  - 4) The USERRA does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. (20 C.F.R. 1002.194)
  - 5) If the employee's period of service was less than 91 days, the employee is reemployed in the escalator position. If the employee is not qualified for the escalator position, and after reasonable efforts by the employer, remains not qualified, the employee will be employed in the position he or she was employed on the date that the period of service began. If the employee is not qualified to perform either the escalator position or the pre-service position, after reasonable efforts by the employer, the employee will be reemployed in any other position that is the nearest approximation first to the escalator position, and then to the pre-service position. In all instances, the employee must be qualified to perform the duties of this position and the employer must make reasonable efforts to help the employee become qualified to perform the duties of the position (20 C.F.R. 1002.196)
  - 6) If the employee's period of service was more than 91 days, the employee is reemployed in the escalator position, or a like position. If the employee is not qualified for the escalator position or the like position, and after reasonable efforts by the employer, remains not qualified, the employee will be employed in the position he or she was employed on the date that the period of service began, or a like position. If the employee is not qualified for any of the above referenced positions, the employee will be reemployed in any other position that is the nearest

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approximation first to the escalator position, and then to the pre-service position. In all instances, the employee must be qualified to perform the duties of this position and the employer must make reasonable efforts to help the employee become qualified to perform the duties of the position (20 C.F.R. 1002.197)

- 7) Efforts required of the employer to help the employee become qualified for the reemployment position(s) must be reasonable. TBR is not required to reemploy an employee upon his or her return from service if he or she cannot qualify for the appropriate reemployment position. If the employee cannot become qualified for the escalator position, the employee must be reemployed in a position of equivalent seniority, status and pay that the employee is qualified to perform or could reasonably become qualified to perform. If no such position exists, the employee must be placed in a job that is similar in terms of seniority, status and pay consistent with the employee's circumstances.
  - a) "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.
  - b) Whether a task is essential depends on several factors, and these factors include but are not limited to:
    - (i) The employer's judgment as to which functions are essential;
    - (ii) Written job descriptions developed before the hiring process begins;
    - (iii) The amount of time on the job spent performing the function;
    - (iv) The consequences of not requiring the individual to perform the function;
    - (v) The terms of a collective bargaining agreement;
    - (vi) The work experience of past incumbents in the job; and/or
    - (vii) The current work experience of incumbents in similar jobs.
  - c) Only after the employer makes reasonable efforts, as defined in (20 C.F.R. 1002.5(i)), may it determine that the employee is not qualified for the reemployment position. These reasonable efforts will be made at no cost to the employee. Source: 20 C.F.R. 1002.198
- 8) Consideration of seniority in re-employment decisions is limited to situations involving re-employment following a period of documented military leave. Although provided for by the state military leave statute, "seniority" is not a factor in employment decisions unrelated to military leave, nor is seniority (apart from longevity) recognized under TBR system or institutional policy.
  - B. If two or more persons are entitled to reemployment in the same position and more than one of them has reported for reemployment, the person who left the position first shall have the right to the position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been employed, according to the rules that normally determine a reemployment position, as set out above. (20 C.F.R. 1002.199)

## VII. Retention Rights

If the employee's most recent period of service in the uniformed services was more than 30 days, he or

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she must not be discharged except for cause:

- A. for 180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days, but less than 181 days; or
- B. for one (1) year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days. (20 C.F.R. 1002.247)

### VIII. Continuation of Benefits

A returning employee is entitled to the same rights and benefits he/she would have had if employment had been continuous.

#### A. Insurance

- 1) If elected, medical insurance coverage may be continued during a period of military service for the lesser of:
  - a) 24 months following the beginning of the military leave;
  - b) the period beginning on the date on which the employee's absence begins until the day after the date on which the employee fails to report to work or apply for employment as determined in Section IV.A.; or,
  - c) unless state law or Executive Order provides for greater benefits.
- 2) If coverage is continued, the employee will be required to pay premiums as follows:
  - a) 30 or less days of service - employee's portion of the premium only or
  - b) more than 30 days of service " up to 102%. This includes the employee's and employer's portion of the premium, and 2% for administrative costs. (20 C.F.R. 1002.166)
  - c) If the employee elects to discontinue insurance coverage, a waiting period may not be imposed for reinstatement of coverage upon reemployment if a waiting period would not have been imposed had coverage not been terminated.
  - d) USERRA allows a health plan to impose an exclusion or waiting period for illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during the performance of military duty. (20 C.F.R. 1002.168)
  - e) Continuation of other State insurance plans will be determined by the State Division of Insurance Administration. Continuation of System plans will be in accordance with the provisions of the plan(s).

#### B. Retirement

For retirement purposes, a returning employee is considered as not having a break in service, except as noted in Section IV.B.

- 1) Following an employee's return to work, the institution/technology center/central office will make retirement contributions which would have been made if employment had been continuous, not to exceed five (5) years.

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- 2) Contributions shall be made at the rate that would have been made if employment had been continuous.

**C. Rate of Pay**

If the employee is reemployed in the escalator position, the employee must be compensated at the rate of pay associated with the escalator position by taking into account any pay increases, differentials, step increases, merit increases or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. Any pay adjustments must be made effective as of the date it would have occurred had the employee's employment not been interrupted by uniformed service. (20 C.F.R. 1002.236)

**D. Longevity**

During a period of military leave, a regular employee continues to earn service credit for longevity pay. Upon reemployment, and in accordance with the employer's payroll procedures, the employee will receive all longevity pay that would have been paid if employment had been continuous. (Refer to TBR Longevity Guideline P-120.) However, pursuant to the current Executive Order, payments must continue to be made annually.

**E. Leave Accrual**

A returning employee will begin to accrue leave at the rate(s) that would have been in effect if employment had been continuous.

*Source: Tennessee Board of Regents Personnel Policy No. 5:01:01:04*