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Date

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**DEPARTMENT OF COMMERCE
OFFICE OF HUMAN RESOURCES MANAGEMENT**

HUMAN RESOURCES (HR) BULLETIN #117, FY10

SUBJECT: Reservist Differential Pay

EFFECTIVE DATE: Retroactive from March 15, 2009

EXPIRATION DATE: Effective until canceled or superseded

SUPERSEDES: N/A

BACKGROUND: Title 5, United States Code (U.S.C.) § 5538, as amended by section 745 of the Consolidated Appropriations Act, 2010 (Public Law 111-117), requires Federal agencies to provide a payment referred to as “reservist differential” equal to the amount by which an employee’s projected civilian “basic pay” for a covered pay period exceeds the employee’s actual military “pay and allowances” allocable to that pay period. Title 5, U.S.C. § 5538, became effective on the first day of the first pay period beginning on or after March 11, 2009.

PURPOSE: The purpose of this HR Bulletin is to notify servicing human resources offices (SHRO) of the requirement for bureaus to pay a reservist differential when employees meet the requirements for entitlement to such payments pursuant to 5 U.S.C. § 5538.

COVERAGE: In order to receive reservist differential pay, an individual must be a member of the Reserve or National Guard who is a federal civilian employee in the executive, legislative, or judicial branches (unless excluded from coverage by other provisions of the law¹); ordered to perform active duty in a uniformed service under qualifying law; and entitled to reemployment rights under the Uniformed Services Employment and Reemployment Act (USERRA).

¹ Employees of FAA (who are not covered by 5 U.S.C § 5538 based on 49 U.S.C. 40122(g)); employees of TSA (who are not covered by 5 U.S.C. § 5538 based on Title 49 U.S.C. §114(n)); any other category of employee who is excluded from coverage under 5 U.S.C. § 5538 by operation of law; and any category of individuals for whom there is a statutory provision expressly stating that the individual is not considered an employee of the Federal Government for any purpose (or is considered an employee of the Federal Government for limited purposes, not including 5 U.S.C. § 5538).

PROCEDURES: SHRO must identify and notify affected employee-reservists, and the affected employee-reservists' budget office, of their possible eligibility for a reservist differential. SHRO should establish one or more points of contact who can answer employee-reservists' questions and to whom they can submit required documentation for the reservist differential authority.

Documentation - In order to claim reservist differential pay, the employee-reservist must provide his or her SHRO with a copy of his or her military orders, as well as information verifying entitlement to USERRA reemployment rights. The following situations require SHRO to take certain actions as follows:

- *Employees not currently on active duty who have received qualifying military orders or are anticipating receipt of such orders* - SHRO must notify employees who are or may be members of the Reserve or National Guard who are not currently on active duty, of the reservist differential authority and inform them that they must be prepared to provide a copy of each of their monthly military Leave and Earning Statements (LEs) during the qualifying period of active duty service. Copies of military LEs should be provided as soon as possible after they are issued. The preferred method for employee-reservists to send their monthly LEs securely is via Proofpoint - <https://sft.doc.gov>. Proofpoint is available to all Department of Commerce employees.
- *Employees already on active duty* - SHRO must request eligible employee-reservists to provide them with a copy of each of their monthly military LEs for the time period between March 15, 2009, and the current date.
- *Employees no longer with the Department of Commerce* – SHRO must notify former employees who are or may be members of the Reserve or National Guard and notify them of the reservist differential authority.

Once SHRO have received the military orders, they must review them for each affected employee-reservist to determine whether the active duty call or order meets the applicable eligibility conditions under Title 5, U.S.C. § 5538 (see Appendix 1). Once a determination has been made, SHRO should notify each employee-reservist of whether he or she meets the eligibility requirements for coverage under the reservist differential provision.

QUALIFYING PERIODS: Reservist differential is payable to an employee-reservist during a qualifying period during which the employee-reservist meets **both** of the following conditions:

- The covered employee is absent from his or her Federal civilian position in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in Title 10, U.S.C. § 101(a)(13)(B) and is serving on such active duty; and
- The employee is entitled to reemployment rights under USERRA.

A qualifying period may begin or end in the middle of an employee's civilian biweekly pay period. The computation of military pay and allowances and projected civilian basic pay for a pay period will be based solely on days worked within the qualifying period.

Reservist differential is not payable for periods following completion of active duty.

Exceptions to Qualifying Periods

- If an employee is in military non-pay status for conduct-related reasons (e.g., absent without leave, confinement, or desertion) during qualifying active duty, the days on which the employee has such status are not considered to be qualifying days for the purpose of computing the reservist differential.
- If an individual is separated from military service for misconduct or other reasons that terminate USERRA reemployment rights, entitlement to the reservist differential would also terminate at the time of such separation.
- If an employee receives basic pay for either the performance of work or the use of any kind of paid leave or other paid time off², he or she may not receive a reservist differential for those periods. In addition, reservist differential is not payable for periods of excused absence, since it is a form of paid time off³.

CIVILIAN LEAVE STATUS: Reservist differential does not cause the employee-reservist to be placed in a paid leave status; rather, it provides a special type of payment during periods of unpaid leave. The Office of Personnel Management (OPM) considers the employee-reservist to be in a leave without pay (LWOP) status unless he or she substitutes paid leave or other paid time off for specific hours. Other provisions and entitlements that are linked to an employee's pay and leave status are not affected by the reservist differential.

The employee-reservist will be considered to be in a civilian pay status during periods of paid time off. During civilian paid time off, the employee-reservist receives full military pay and full civilian pay, except that civilian pay is offset by military pay when an employee uses military leave under Title 5 U.S.C. § 6323(b). An employee-reservist may continue to use military leave, as applicable⁴.

Holidays and Excused Absences

An employee-reservist is entitled to pay for a holiday (as a separate payment under the normal holiday pay provisions) only if he or she is in civilian pay status on the workday before or after the holiday. If the employee-reservist is entitled to holiday pay, the reservist differential would not be payable for that holiday, since holiday pay is a form of paid time off. Regardless of whether or not the employee is entitled to actual pay for a holiday under the normal holiday pay provisions, the regular basic pay for the holiday would be included as part of projected civilian basic pay that is compared to military pay and allowances in computing any reservist differential.

² Paid time off includes military, annual, sick, and other applicable paid leave; excused absence; holiday, award, and compensatory time off; credit hours; or any other paid time off to the employee's credit.

³ The policy on excused absence for employees returning home from active duty (see OPM Compensation Policy Memoranda (CPM) 2008-12 and 2008-21) after each deployment in support of an Overseas Contingency Operation continues until that policy is modified or rescinded.

⁴ There are two types of military leave that may be used by civilian employees during qualifying military active duty: (1) Regular military leave under Title 5, U.S.C. § 6323(a) – providing 15 days of leave each fiscal year with no military pay offset (i.e., full military and civilian pay); and (2) Additional military leave for contingency operations or law enforcement purposes under Title 5, U.S.C. § 6323(b) – providing up to 22 days of leave each calendar year, but with civilian pay offset by the amount of military pay allocated to those leave days, as required by Title 5, U.S.C. § 5519.

COMPUTATION OF RESERVIST DIFFERENTIAL PAY

1. *Civilian Tour of Duty*

The first step in determining a reservist differential involves determining the employee-reservist's civilian tour of duty established for leave usage purposes. The second step is gathering information on the amount of civilian leave (including military leave and annual leave) or other paid time off the employee-reservist takes, if any, for each civilian biweekly pay period during the qualifying period of active duty.

2. *Projected Civilian Basic Pay*

Computation of the reservist differential requires projecting the gross amount of civilian "basic pay" that would otherwise have been payable to an employee for each pay period within a qualifying period if the employee-reservist's civilian employment had not been interrupted by military active duty⁵. Only "basic pay," as defined in OPM guidance, is considered. For steps needed to project an employee's civilian basic pay, please refer to:
<http://www.opm.gov/reservist/guidance/projected.asp>.

Note: Reservist differential is not civilian basic pay for any purpose (e.g., retirement, life insurance, and severance pay). Furthermore, receiving a reservist differential does not affect an employee-reservist's civilian pay status.

3. *Military Pay and Allowances*

Using the monthly military LESSs, SHRO must determine the actual paid gross amount of military pay and allowances allocable to each pay period in a qualifying period. Military pay and allowances are payable on a monthly basis. For each affected month, a daily rate will be computed by dividing the monthly total by 30 days for full months or by the actual number of days for partial months. Military pay and allowances will be allocated to a civilian pay period (usually a 2-week period) based on the applicable daily rate for days within the pay period. The definition of "military pay and allowances" can be found at:
<http://www.opm.gov/reservist/guidance/appendixd.asp>.

4. *Reservist Differential Computation*

For each civilian biweekly pay period, compare the projected civilian basic pay to the allocated military pay and allowances. If the allocated military pay and allowances are greater than or equal to the projected civilian basic pay for any biweekly pay period, then no reservist differential is payable for that pay period. If the projected civilian basic pay is greater than the allocated military pay and allowances for any biweekly pay period, the difference represents the *unadjusted* reservist differential. Before paying a reservist differential, SHRO must reduce the unadjusted reservist differential to take into account any paid hours. Please visit <http://www.opm.gov/reservist/guidance/computation.asp> for an example.

⁵ This includes general, locality pay, and within-grade increases. It could also include certain career-ladder promotion increases and performance-based basic pay increases, if the reasonable certainty standard is met.

PAYMENT: Bureaus must pay the reservist differential from the same appropriation or fund that would have been used to pay the employee civilian salary had it not been for the interruption to perform military duty. Furthermore, reservist differentials should be paid at the same frequency as regular civilian salary payments (i.e., on a biweekly basis).

Reservist differential is considered due and payable on a scheduled date that is no later than 8 weeks (4 biweekly pay periods) after the normal civilian salary payment date for a given pay period. If the employee-reservist does not provide the SHRO with a copy of military orders and LESs on a timely basis, the scheduled payment date may be pushed to 8 weeks from the date of receipt of the military orders and LESs, after the normal salary payment. This delayed scheduled payment date is considered to be the date when the reservist differential is due and payable for all purposes, including determining any back pay interest liability.

When SHRO identify errors in computing the reservist differential for past pay periods, they may adjust a current reservist differential payment to correct the error, as long as that differential is for a pay period within the same qualifying period. An overpayment may be recouped from a later reservist differential payment for the same qualifying period by reducing that later payment. SHRO, should resolve any underpayment by increasing later reservist differential payments for the same qualifying period. If the qualifying period has ended, SHRO should make a supplemental payment to the employee-reservist as soon as possible. Back pay interest will accrue from the scheduled date of the affected payment if the SHRO does not make the back payment within 30 days. For pay periods beginning before the issuance date of OPM's policy guidance (January 8, 2010), a late payment will not be charged and no Back Pay Act interest will accrue for such late payments. The scheduled payment date for the first pay period beginning on or after the issuance date of OPM's guidance should be treated as the scheduled payment date for earlier pay periods.

Taxability

Reservist differentials are taxable income for Federal income tax purposes and are treated as wages for Federal income tax withholding purposes, regardless of the length of the active duty. Reservist differentials are not subject to FICA (Social Security and Medicare) taxes if those differential payments are paid for periods of active duty exceeding 30 days. For W-2 purposes, reservist differential will be reported in Box 1, "Wages, Tips, and Other Compensation." Interest payments on Internal Revenue Service (IRS) Form 1099 will be reported in Box 1, "Interest." If the interest is less than \$600, Form 1099 will not be issued.

NATURE OF ACTION CODE AND LEGAL AUTHORITY: The nature of action code (NOAC) "Absent – Uniformed Service" (NOAC 473) is to be used to describe employees who are performing service in a uniformed service and who have USERRA reemployment rights (the prior term "LWOP-US" is now obsolete). In addition, for employees who qualify for reservist differential, a new legal authority "QRD/5 U.S.C. 5538" is used in combination with legal authority Q3K to document that qualifying service (effective March 28, 2010).

GUIDE TO PERSONNEL RECORDKEEPING (GPR): OPM is updating section 3-B of Chapter 3 "Filing Documents in the Personnel Folder" to state that military orders must be retained/filed on the right side of the Official Personnel Folder.

GUIDE TO DATA STANDARDS (GDS): OPM's new Guide to Data Standards (Update 01, issued March 1, 2010) redefines the "Pay Status" data element, now called "Pay Status / USERRA Status", to create a new "Q" code that will identify employees performing service that is qualifying for the reservist differential. This new "Q" code is effective March 28, 2010.

NATIONAL FINANCE CENTER (NFC) PROCESSING: Effective pay period 8, beginning April 19, 2010, reservist differential payments may be processed manually via the Special Payroll Processing System (SPPS). NFC added transaction code (TC) 56, Prefix 10, Reservist Differential-No FICA Withheld, and TC 56, Prefix 11, Reservist Differential-No FICA Withheld to the Table Management System (TMGT) Table 032. Modifications were made to NFC's time and assistance validation system (TIME) Messages to accommodate these changes. For more information, please refer to the following NFC Bulletins which can be found at the end of HR Bulletin #117, FY10: *Title I, 10-7, Reservist Differential Payments Processed in the Web-Based Special Payroll Processing System (SPPS Web)* and *Title I, 10-11, Changes for Documenting Reservist Differential based upon Office of Personnel Management (OPM) Update 52.*

webTA PROCESSING: There will be no modifications to the Department's time and attendance system webTA for reservist differential payments. This is because these transaction codes are manual transaction codes only to be used for manual processing through the SPPS Web.

REFERENCES: Title 5, United States Code (U.S.C.) § 5538; Title, 10 U.S.C. §§ 688, 10147, 12301(a), 12302, 12304, 12305, 12319, 12406, 12503, and chapter 15 (which includes sections 331, 332, and 333); 32 U.S.C. § 502(a)(1) and 115; *OPM Policy Guidance Regarding Reservist Differential under 5 U.S.C. 5538*, issued on December 8, 2009, via memorandum to agency Chief Human Capital Officers, and amended on December 22, 2009.

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Appendix 1: Active Duty-Qualifying Military Duty

Active Duty Authorities. As referred to in Title 10, U.S.C. § 101(a)(13)(B), includes active duty under an order:

1. Issued by a Secretary of one of the military services to a retired member of the service or the service's Reserve under Title 10, U.S.C. § 688;
2. Issued by a Secretary of a military service or a designee in time of war or national emergency declared by Congress, or when otherwise authorized by law, to units and reservists not assigned to units, under Title 10, U.S.C. § 12301(a);
3. Issued by a Secretary of a military service or a designee in times of national emergency declared by the President, or when otherwise authorized by law to units and reservists not assigned to units in the Ready Reserve, under Title 10, U.S.C. § 12302;
4. Issued by the Secretary of Defense or the Secretary for Homeland Security for the Coast Guard, under the authority of the President, when the President determines that it is necessary to augment the active forces for any operational mission, or that it is necessary to provide assistance in responding to an emergency involving a use or threatened use of a weapon of mass destruction, or a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property, to units, reservists not attached to units, and members of the Individual Ready Reserve, under Title 10, U.S.C. § 12304;
5. Already issued under Title 10, U.S.C. §§ 12301(a), 12302, or 12304, covering a period of time when an individual reservist would have been separated or retired, but for the suspension by the President for the individual reservist of a law relating to promotion, retirement, or separation, because the President has determined he or she is essential to the national security of the United States under the authority of Title 10, U.S.C. § 12305;
6. From the President, issued through the governors of the States or, through the commanding general of the National Guard of the District of Columbia, calling into Federal service members and units of the National Guard of any State to repel an invasion or danger of invasion of the United States, its Commonwealths, or its territories, to suppress rebellion or the danger of rebellion against the authority of the United States, or to execute the laws of the United States, under Title 10, U.S.C. § 12406;
7. From the President calling the militia of any State into Federal service to put down an insurrection in any State, under Title 10, U.S.C. § 331 (a section within chapter 15);
8. From the President calling into Federal service such of the militia of any State, or using such of the armed forces, when he considers it necessary to enforce Federal law or to suppress rebellion because of unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, under Title 10, U.S.C. § 332 (a section within chapter 15); and
9. From the President to the Armed Forces, including the National Guard in Federal service, to restore public order and enforce the laws of the United States in situations of natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, or to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, under Title 10, U.S.C. § 333 (a section within chapter 15).

Inactive Duty Authorities. These include the following:

1. Inactive Duty Training: Authorized training performed by a member of a Reserve component not on active duty or active duty for training, consisting of regularly scheduled unit training assemblies, additional training assemblies, periods of appropriate duty or equivalent training, and any special additional duties authorized for Reserve component personnel by the Secretary concerned, and performed by them in connection with the prescribed activities of the organization in which they are assigned with or without pay. Does not include work or study associated with correspondence courses under Title 10, U.S.C. § 10147 and Title 32, U.S.C. § 502(a)(1).
2. Muster Duty: Annual IRR Screening (Muster Duty) consists of collecting personnel and medical data. It is a screening to update personal information and receive briefings/information on Civilian Employment Information, career opportunities, benefits, etc. under Title 10, U.S.C. § 12319.
3. Funeral Honors Duty: Members of the funeral honors detail fold and present the American flag to the veteran's survivor and Taps is sounded. Members of the Ready Reserve or retired military personnel who are part of a military funeral detail may receive pay, allowances, travel, and transportation reimbursements. Ready Reserve personnel may also receive service credit for performing this duty, under Title 10, U.S.C. § 12503 and Title 32, U.S.C. § 115.