

State of Wisconsin

DEPARTMENT OF EMPLOYMENT RELATIONS

- COMPENSATION AND LABOR RELATIONS BULLETIN -

Date: October 26, 2001

Locator No: CLR/PP-216/MRS-220/OS-86

Subject: Rights and Benefits of Employees Called Up for Active Military Duty

I. INTRODUCTION

The purpose of this bulletin is to provide guidance to agencies regarding the administration of military leave and other benefit provisions provided by state statute, collective bargaining agreements and federal law. This bulletin applies when state employees, who are members of the Reserve Component Forces of the United States (including the National Guard), are called up for active state or federal military service or for military training as a result of mobilization or, when ordered by the President to assist in a federal emergency. The term “active duty” is applied to all members of the active and Reserve Forces serving on military duty, for reasons other than training. “**Extended** active duty” is performance of military duty after an initial tour of active duty has been completed.

All U.S. Reserve force members called to active duty are entitled to reemployment rights and benefits as referred to in this bulletin whether they volunteer for duty and/or training or are involuntarily ordered. In general, federal law supersedes state law unless the state law or labor contracts provide greater protection or benefits.

IMPORTANT NOTE: Due to the complexity of this subject, any questions regarding procedural aspects of military leave or employee payment of certain benefit premiums while on military leave should be directed to agency Human Resources staff. As this bulletin provides guidance only, employers should read the actual federal laws, statutes, rules and collective bargaining agreements and rely upon them when making decisions. DER legal and collective bargaining staff are available to advise agency Human Resources staff.

II. PAID ANNUAL MILITARY LEAVE

Nonrepresented Employees

Paid military leave for nonrepresented employees is covered by s. 230.35(3)(a), Wis. Stats., which states, in pertinent part:

Officials and employees of the state who have permanent status and who are members of the national guard, the state defense force, or any other reserve component of the military forces of the United States or this state now or hereafter organized or constituted under federal or state law, **are entitled to leaves of absence without loss of time in the service of the state**, to enable them to attend military schools and annual field training or annual active duty for training, and any other state or federal tours of active duty, except extended active duty or service as a member of the active armed forces of the United States) which have been duly ordered **but not exceeding 30 days**, excluding Saturdays, Sundays and holidays enumerated in sub. (4) **in the calendar year** in which so ordered and held. During this leave of absence, each state official or employee shall

receive base state pay less the base military pay received for and identified with such attendance but such reduction shall not be more than the base state pay. Other than for a leave of absence for the adjutant general and any deputy adjutants general, **such leave shall not be granted for absences of less than 3 days**. A state official or employee serving on state active duty as a member of the national guard or state defense force, may elect to receive pay from the state under s. 20.465(1) in an amount equal to base state salary for such period of state active duty. Leave granted by this section is in addition to all other leaves granted or authorized by any other law. For the purpose of determining seniority, pay or pay advancement and performance awards the status of the employee shall be considered uninterrupted by such attendance.

Emphasis added in bold.

Also, ER 18.08 Wis. Adm. Code pertains to Military service and states in pertinent part:

For project employees, eligibility for annual military leave under s. 230.35(3), Stats., shall be earned after completion of the first 6 months of employment in a project position. If prior eligibility has been attained in a permanent, seasonal, sessional or unclassified position and the employee has been appointed to the project position without an interruption of continuous service, such prior eligibility shall be retained.

Section 230.35(3)(a), Wis. Stats., and ER 18.08 Wis. Adm. Code, are summarized in the following table:

Eligibility	Paid Leave	Limitation	Exception
Officials & state employees with permanent status & certain project employees under 18.08 Wis. Adm. Code.	Up to 30 work days per calendar year	Leave not granted for less than three (3) consecutive days of active duty.	No paid leave granted if employee is on extended active duty (duty beyond an initial tour) or if a member of the active armed forces.

Represented Employees

Under most of the state’s collective bargaining agreements, represented employees are provided 30 days of military leave without loss of pay and benefits in each calendar year under provisions largely similar to, but not in all cases identical to, the provisions for non-represented employees. The Wisconsin State Attorneys Association contract only provides for 120 hours of paid military leave. The Milwaukee Graduate Assistants Association and the Teaching Assistants’ Association contracts do not address military leave. Please review the applicable collective bargaining agreement for the provisions covering represented bargaining unit employees.

III. UNPAID MILITARY LEAVE

All officials and classified employees of the State are eligible for unpaid military leave. This includes project employees, seasonal and sessional employees, employees serving a probationary period, and elected officials. (This generally does not include Limited Term Employees [LTEs]. However, LTEs employed by an agency every year to perform certain cyclical jobs may have reemployment rights if they meet the federal test of being in a position considered "other than temporary.") Leave without pay should not be provided until all paid military leave time is exhausted. Once paid military leave is exhausted the

employee should be placed on unpaid military leave. Employees are eligible to use accrued annual leave to remain on the payroll.

IV. MILITARY LEAVE OF ABSENCE

Under s. 230.32 (3)(a), Wis. Stats., “[a]ny classified employee who leaves state service and enters the armed forces of the United States shall . . . , be granted written **military leave of absence** by the appointing authority. Notice of such leave from state service and the terms of any such leave shall be given in writing by the appointing authority to the DER secretary for purposes of record.” Emphasis added. See s. 230.32(3)(b), Wis. Stats., for rights of employees who leave state service for civilian employment in response to a federal government request or order.

Although **unclassified** employees are not eligible for formal leaves of absence, the period of time between their termination of employment for active duty and their return to state employment, shall be treated as if it were a formal leave of absence. The termination of employment will not affect an **unclassified** employee's rights to reemployment or restoration upon discharge from active duty. He or she will retain his or her seniority, pay, and pay advancement as though state service were uninterrupted.

V. NOTICE OF MILITARY OBLIGATION

Employees shall provide reasonable advance notice of their military obligation (dates and projected duration of duty) to their supervisor, either by furnishing a copy of their orders or other appropriate verification, as soon as possible after receipt. Reasonable advance notice implies a good faith effort on the part of the employee to notify the employer of the projected absence. Failure to provide reasonable notice does not relieve the employer of the obligation to release employees, nor can the employee be subject to disciplinary action for failure to provide advance notice to the employer when such notice cannot be provided for reasons beyond the control of the employee. For strategic and security reasons, when an employee receives military orders, he/she may be required to leave without telling the employer in advance. For this reason, employers are advised to ask the employee in advance how to contact the employee's commanding officer to obtain information if such a situation were to arise.

VI. BENEFITS WHILE ON MILITARY LEAVE OR ACTIVE DUTY: PAID & UNPAID

Note: Section 978.12(6), Wis. Stats., allows for District Attorneys and Deputy and Assistant District Attorneys employed by a county on December 31, 1989, who were receiving any form of fringe benefit other than retirement as a county employee to continue with the benefit program offered by the county of employment when they became State employees. These employees should check with the appropriate county agency to determine what coverage and rights they have during military leave (e.g., life insurance, health insurance).

The following applies only to state employees who are participants in the state offered benefit package.

A. Annual Leave

Under s. 230.32(2)(a), Wis. Stats., “Any employee with permanent status in class who leaves state service [to serve in the military] and who has used the yearly vacation in anticipation of a full year's employment is presumed not to have interrupted employment as far as vacation pay is concerned and any portion of the vacation for which the employee was paid which is unearned at the time of being called to duty may be made up upon return to state service. If the employee does not return to the state service, the employee shall within 2 years after termination of leave repay the state the amount not earned. . . .”

Agencies may allow a returning employee to repay the used vacation time by deducting the time from the new leave balance rather than having the employee reimburse the state by cash payment.

When an employee is restored upon return from military leave, the time spent on active duty must be counted when determining years of service for purposes of annual leave earning level.

Employees on **paid military leave**, continue to accrue annual leave. Employees on **unpaid military leave** shall have their annual leave prorated for the period of the leave without pay. Employees on military leave may carry over any annual leave to the following calendar year.

Employees who have not attained permanent status and take a leave to serve in the armed forces and who have used their annual leave in anticipation of a full year of service, shall have a deduction made to his/her last pay check to repay the unearned leave.

B. Personal Holidays

Employees on paid military leave who have not used their yearly personal holidays may, at the discretion of the appointing authority, carry this time over into the following calendar year.

Employees who take unpaid military leave and will return to state service in the same calendar year, shall have their personal holidays restored upon return. Employees who are not sure when they will be returning to employment should check with their agency payroll office regarding the options available regarding personal holidays.

C. Sick Leave

Employees continue to accrue sick leave during paid military leave only. When an employee on unpaid military leave returns to state service, his/her sick leave balance shall be restored.

D. Length of Service Payments (LOSP)

Length of service payments are prorated based on the number of hours in pay status in an eligible position in the preceding fiscal year. However, the unpaid military leave required as the result of active duty will be included when determining an employee's full years of service and annual payment rate.

E. Seniority

Employees continue to accrue seniority during military leave.

Note: Benefit information contained in F through J, below is provided for general information only. These benefits are administered by the Department of Employee Trust Funds (ETF). Contact ETF for questions of interpretation and administration.

F. Health Insurance

During **paid** military leave, an employee continues to be insured, and the employee's and employer's respective shares of health insurance premiums continue to be paid by each party as before. Generally, under s. 40.05(4g), Wis. Stats., state employees on an **unpaid** military leave may, within 60 days of military activation, elect to continue state health insurance coverage. If the employee elects to continue state health insurance, coverage, including employer contributions, will

continue for the duration of the employee's military active duty, provided the employee contributions are paid by the employee as required.

For specific provisions concerning health insurance coverage while on an unpaid military leave, go to the Employee Trust Funds website found at:

<http://badger.state.wi.us/agencies/etf/empl/ebs100901.htm>.

This website contains a form for making the Health Insurance Election for Military Service Personnel.

For represented employees, note that under s. 111.93 (3), Wis. Stats., the health insurance provisions under s. 40.05, Wis. Stats., supersede the provisions of collective bargaining agreements, and therefore, apply to represented and nonrepresented employees.

Note: When an employee is on active duty for more than 30 days, he/she is eligible for a health insurance program provided by the military for military personnel, their spouses and dependent children. Employees requesting information concerning the military's health insurance program should be directed to the military unit's commanding officer.

G. Retirement

Active military service may be creditable toward an employee's retirement benefit if certain criteria are met. Employees should contact their agency payroll office on return from military leave regarding this benefit.

H. Life Insurance

Employer payment of life insurance premiums is continued for employees who are on paid military leave. Once the employee goes on unpaid military leave, the employee has the option of prepaying the premiums for up to 36 months. Employee premiums must be paid in advance for periods of at least 3 months and each payment must be received by the employer prior to the end of the period for which premiums had previously been paid. The employer must continue to pay the required employer contributions during the leave as long as the employee continues to make premium payments.

I. Income Continuation Insurance (ICI)

Employees on unpaid military leave may continue ICI coverage for up to 36 months. Employer contributions towards premiums continue for the first three months of the leave. The employee must pay the entire premium for the remainder of the leave.

J. Employee Reimbursement Account (ERA)

Under the provisions of the ERA program, employees have three options when going on unpaid military leave: (1) make arrangements to have the remaining balance taken from their last paycheck to maintain the pretax basis of the payment; (2) arrange to make monthly payments with after-tax dollars by filing a Continuation of Coverage form; or (3) terminate coverage, effective with the date of the last regular paycheck.

Participants who choose not to continue the ERA coverage while on unpaid military leave may elect to resume coverage when they return to work.

Employees should discuss the available options with their payroll representative to help determine the best choice to make on an individual basis and for other information on the any of the above benefits.

VII. REEMPLOYMENT AND RESTORATION RIGHTS

Federal law makes no distinction between voluntary and involuntary military service in regard to reemployment/restoration rights. However, state law does distinguish between classified and unclassified employees with regard to reemployment/restoration rights. Whether the employee serves on state or federal active duty, classified employees are covered by s. 230.32, Wis. Stats., whereas unclassified employees are covered by s. 45.50 Wis. Stats. **For federal active duty only**, both classified and unclassified employees are also covered by the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) (Title 38, U.S. Code, chapter 43) for reemployment and restoration purposes. For this reason, it is important to know whether the employee you are advising/restoring held a classified or unclassified appointment and served on state or federal active duty before you determine reemployment and restoration rights. For federal active duty, under USERRA, where state and federal law address the same subject, the provision more beneficial to the employee shall apply. The guidance below combines elements of both state and federal law to provide the more beneficial rights to the employee.

A. Restoration or Reemployment

Upon return from active service in the armed forces or emergency federal service, a classified employee, including a seasonal/sessional employee and an employee serving an original probationary period, or an unclassified employee, shall be restored to the same or similar position (same shift, shift rotation, job location, etc.) in which the person would have been employed if the continuous employment had not been interrupted by such service. Employment shall not be considered interrupted by such leave except for receipt of pay or other compensation, accumulation of sick leave and accumulation of vacation for the period of such absence.

Upon restoration/reemployment, the employee shall be given all the benefits of seniority, status, pay, pay advancement, performance awards and pension rights as though the employment were continuous, if he/she meets the following criteria:

1. The employee presents to the appointing authority a certificate or other evidence documenting satisfactory completion for the period of service, and discharge is for reasons other than dishonorable, or other than by reason of general court martial.
2. The period of service is not more than 5 years (4 years for state active duty) unless the employee was involuntarily retained.
3. The employee is qualified to perform the duties of such position.

IMPORTANT NOTE: USERRA provides additional reemployment/restoration rights if the person can become qualified for the same or similar position after reasonable efforts by the employer to qualify the person. These rights may also depend upon the length of an employee's military service and/or if the employee incurred a disability during service. A full explanation of those rights can be found at the following web pages.

http://www.elaws.dol.gov/userra/wren/emperob_c8.htm
http://www.elaws.dol.gov/userra/wren/emperob_c9.htm
http://www.elaws.dol.gov/userra/wren/emperob_c15.htm

4. The employee makes application for reemployment or restoration within 180 days for classified employees, or within 90 days for unclassified employees, after release from service or from hospitalization because of injuries or sickness resulting from such service (s. 230.32 and s. 45.50, Wis. Stats.).

Note: Under USERRA, reemployment application deadlines may be extended for two years or more when an employee suffers service-related injuries that prevent him/her from applying for reemployment or when circumstances beyond the employee's control make reporting within the time limits impossible or unreasonable.

5. The circumstances of the employing agency have not changed so as to make it impossible or unreasonable to restore the employee. Under federal law, the circumstances under which this would occur for classified employees are extremely limited. The factor to consider for a returning unclassified employee is whether or not his/her position was one which was reasonably expected to continue beyond the date at which the service member applies for reemployment. If it was mutually understood when the unclassified employee first accepted the position that the position was temporary, and that temporary period has expired, then the employee has no reemployment rights to the position. Under s. 45.50 (2), Wis. Stats., an unclassified employee eligible for restoration shall not be discharged from the position without cause within one year after restoration.

Note: Under s. 230.32 (4), Wis. Stats., any person appointed to fill the position of an employee on such military or civilian leave shall be designated as a substitute or replacement employee. Please refer to the statute for information about the rights of these substitute or replacement employees.

B. Pay, Pay Advancement, Performance Awards

To determine eligibility for pay, pay advancement and performance awards, the courts have developed a "reasonable certainty" test. If it is "reasonably certain" that an employee would have been promoted, reclassified, reallocated, or demoted had he/she not been called to military duty, he/she must be promoted, reclassified, reallocated, or demoted upon his/her return.

Reclassifications of positions are not automatic, but rather require a logical and gradual change in the duties performed and satisfactory performance for a minimum of six months. Under federal law, employers must make reasonable efforts to provide the training necessary for the returning service member to qualify for the position he or she would have reasonably been expected to attain if he or she had not been called into active duty.

When an employee returns from military service his/her rate of pay should be computed at the previous rate plus any intervening pay adjustments including any performance pay that the employee would have received with "reasonable certainty" had the employee remained in state service instead of military service. For example: If it is reasonably certain that an employee would have performed satisfactorily, had he/she been employed for the entire time period, the employee would be eligible for the guaranteed minimum award for satisfactorily performing employees. The same applies if an employee historically has been an outstanding performer. He/she should get the rate of award that other outstanding performers received.

VIII. REQUEST TO PROVIDE INFORMATION TO DER ON ACTIVATED EMPLOYEES

- A. Why this information is needed?

Information on employees activated for federal duty is required to monitor the impact of the call up on state functions and to help plan for the effective operations of state services during the absence of these employees. The information will be made available to all DER divisions for use within the respective program areas. Because employees may be using various paid leave time to cover a portion of the period of active duty, data from the payroll systems will not provide a complete picture of how many employees are affected and how long these employees are absent from their jobs.

B. Which agencies must provide this information?

Any agency with any classified employee who has been, or is, called up for federal active service must provide the requested information. Additionally any agency with unclassified employees who are covered by the annual leave provisions of s. 230.35(1) and (1m), Wis. Stats., and ER 18.02, Wis. Adm. Code, must provide the requested information for those employees who have been, or are, activated. (WPM chapter 732 contains a chart summarizing who is covered by these provisions.) For the most part, this means all agencies except the state court system, the faculty/academic staff of the University of Wisconsin system, and the state legislature and legislative service agencies are required to provide the requested information.

Note: Reports are not required of agencies that do not have any employees who have been activated. However, all agencies should be aware of the need to report activated employees. We advise that all agencies review their records monthly to ensure that reports are filed covering those months in which any employee of the agency is activated or returns to state employment. Most agencies are aware of which employees are members of the National Guard or Reserves and should be able to identify newly activated or returned employees without imposing significant administrative burdens if appropriate line staff, such as supervisors or timekeepers, are aware of the need to report information for these employees.

C. What information must be reported?

The following information must be provided for each affected employee: name, classification, bargaining unit, type of orders (if known), length of orders (if known), and the effective date of the activation. Once employees return to state service, information regarding the length of the tour of active duty and how the absence was covered for pay purposes must be reported. **Attachment A** provides a sample format in which the information could be reported.

D. When the information must be reported?

An initial report must be filed with DER by December 10, 2001, for employees who have already been called up for duty. The initial report should include those employees who were called up and served but who have already returned to their state positions.

After the initial report, and until further notice, a monthly update report must be submitted by the tenth of the following month (i.e., March 10 for February, April 10 for March, etc.). The update report will include only those employees who were newly activated since the last report was filed and those who returned to state service since the last reporting period.

E. Where to send the information?

Please send the requested information by the specified dates to: Bureau of Collective Bargaining, Division of Compensation and Labor Relations, 345 West Washington Ave., Madison, WI.

IX. ADJUSTMENT OF PAY UPON RETURN FROM MILITARY DUTY

Pursuant to s. 230.35(3)(a), Wis. Stats., and applicable collective bargaining agreements, each state official or employee on paid military leave shall receive his/her base state pay less the base military pay received for such military duty but such reduction shall not be more than the base state rate. This deduction is usually taken from the returning employee's first paycheck upon return. For consistency, agencies are required to use the following procedure for calculating the difference between state pay and military pay for both nonrepresented and represented employees who were on paid military leave.

PROCEDURE

When an employee returns to state service following paid military leave, he/she shall provide to the agency payroll coordinator a copy of the military pay vouchers for the period of time he/she was on paid military leave. In the event an employee does not return on his/her scheduled date due to extended duty, hospitalization, or other reasons which are due to his/her military service, he/she may mail this voucher or the payroll office may obtain a copy from the employee's branch of military service. These vouchers will contain a monthly base rate or a partial monthly base rate. You are required to use the military pay voucher appropriate to the time period in which paid military leave was used rather than using a single voucher as being representative of the total time period. This may result in a different daily rate for each month or partial month.

To determine the military daily base rate, divide the military monthly (or partial month) base rate by the number of days in that month that the employee was on active duty. Then multiply the resulting military daily base rate by the number of days of paid military leave the employee took during the time period covered by the voucher. Military base pay includes all remuneration exclusive of any special allowances.

The employee's gross state pay is determined by multiplying the employee's scheduled hours of work in a two week period by the employee's base rate; this amount is divided by 10 to determine the employee's daily state rate. All full-time employees are considered to be on a standard 8 hour day/5 day workweek schedule during the period of military duty. The daily state rate is then multiplied by the number of days of paid military leave taken during the time period covered by the military pay voucher. When an employee's military pay equals or exceeds his/her state pay on a daily basis, the employee will reimburse the state for the entire amount of state wages. In most cases the state pay will be greater than the military pay, in which case the employee will repay the amount received as military pay. If the amount to be repaid by the employee upon return to state employment is quite large, agencies may and are encouraged to permit employees to spread out the repayment over two or more pay periods so that the employee is not placed in hardship. Repayment by personal check, rather than paycheck deduction, is prohibited.

Example:

State Pay = 80.0 hours at \$10.00/hour
 Gross Pay = \$800.00
 Daily Rate = \$80.00
 Military Leave = 14 days
 Military Pay = \$635.17
 Military Daily Rate: \$635.17 divided by 14 = \$45.37/day
 \$45.37 x 10 paid military leave work days (80 hrs) = \$453.70
 \$800.00 - \$453.70 = \$346.30

The employee would receive \$346.30 in state pay.

During paid military leave employees continue to accrue vacation, sick leave and any other benefits as if state service were uninterrupted.

XII. REFERRAL OF QUESTIONS

Questions regarding nonrepresented employees should be directed to John Wiesman at (608) 266-3381, email at John.Wiesman@der.state.wi.us, or Paul Ostrowski at (608) 267-0343, email at Paul.Ostrowski@der.state.wi.us, or Lynn Maulbetsch at (608) 267-5164, email at Lynn.Maulbetsch@der.state.wi.us, in the Bureau of Compensation. You can also fax the Bureau of Compensation at (608) 267-1020.

Questions regarding represented employees should be addressed to Allen Cottrell at (608) 267-7240, email at Allen.Cottrell@der.state.wi.us, or Mark Wild at (608) 266-9564, email at Mark.Wild@der.state.wi.us, in the Bureau of Collective Bargaining (BCB). You can also fax BCB at (608) 267-1020.

Questions regarding application for reemployment or restoration of classified employees upon return from active duty should be directed to Denny Huett, Division of Merit Recruitment and Selection (DMRS) at (608) 266-7296, email at Denny.Huett@der.state.wi.us. You can also fax DMRS at (608) 267-1000.

Peter D. Fox, Secretary
Department of Employment Relations

James A. Pankratz, Administrator
Division of Compensation and Labor Relations

Michael Soehner, Assistant Administrator
Division of Merit Recruitment and Selection

Attachment: Attachment A

State of Wisconsin
 Department of Employment Relations
 Division of Compensation and Labor Relations

**INFORMATION REGARDING EMPLOYEES
 CALLED UP OR RETURNED FROM FEDERAL ACTIVE DUTY**

Information for period beginning _____ and ending _____

Agency _____

Person completing report _____

Phone # _____

Date completed _____

EMPLOYEES CALLED TO FEDERAL ACTIVE DUTY IN THIS REPORTING PERIOD

<u>Employee name</u>	<u>Classification</u>	<u>Bargaining Unit</u>	<u>Type of orders</u>	<u>Date duty started</u>	<u>Expected duration</u>
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EMPLOYEES RETURNED FROM FEDERAL ACTIVE DUTY IN THIS REPORTING PERIOD

<u>Employee name</u>	<u>Classification</u>	<u>Bargaining Unit</u>	<u>Type of orders</u>	<u>Date duty started</u>	<u>Date duty ended</u>	<u>Date returned to State</u>	<u>How time covered</u>
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Return this form to the Bureau of Collective Bargaining, Division of Compensation and Labor Relations, Department of Employment Relations, 345 West Washington Ave., Madison, WI by the tenth of each month.