

July 14, 2011

**MEMORANDUM NO: 061-11HR**

**TO:** Agency Administrators

**FROM:** Bobbie Chappell, Director of Human Resources

**VIA:** Rip Colvin, Executive Director

**RE: Policy Clarification 2011-#005: Layoff of Career Service Employees on Military Leave**

The Workforce Design and Compensation Team have issued Policy Clarification: 2011-#005, *Layoff of Career Service Employees on Military Leave*. **This is for informational purposes.**

The question asked: How should Career Service Employees currently on Military Leave (with or without pay) who have not been discharged from active military service be treated in a layoff situation?

Attached you will find the Policy Clarification that goes into detail about the issue, policy, background, and applicable statutes and rule citations.

Please contact Andy Snuggs at [SnuggsA@justiceadmin.org](mailto:SnuggsA@justiceadmin.org) if you have any questions.

Thank you.

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Department of Management Services  
Division of Human Resource Management

# POLICY CLARIFICATION

**STATUTORY/RULE REFERENCE NUMBER:**

*Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, 38 U.S.C. § 4301 - 4335.*  
*Section 115.08, F.S., Definitions.*  
*Section 115.14, F.S., Employees.*  
*Section 250.01, F.S., Definitions.*  
*Section 250.48, F.S., Leaves of Absence.*  
*Section 250.482, F.S., Troops ordered into active service, not to be penalized by employers and post secondary institutions.*  
*Section 295.07, F.S., Preference in appointment and retention.*  
*Rule 60L-33.004, F.A.C., Layoff and Employee Transition.*  
*Rule 60L-34.0062, F.A.C., Military Leave.*  
*Rule 55A-7.015, F.A.C., Preference in Retention.*

**TRACKING NUMBER:**

2011- #005

**SUBJECT:** *Layoff of Career Service Employees on Military Leave*

**APPROVAL SIGNATURE:** Sharon D. Larson, Director

**EFFECTIVE DATE:**

July 13, 2011

**Issue:**

How should Career Service employees currently on military leave (with or without pay) who have not been discharged from active military service be treated in a layoff situation?

**Policy:**

Career Service Employees on military leave shall be treated as if they had remained continuously employed in their positions and are to be considered equally with other employees during the layoff process. If they are in a competitive area designated for layoff, they shall be assessed equally with all other employees affected by the layoff.

**1. Do these employees receive any veterans' preference in accordance with Rule 55A-7.015, F.A.C. because they are on military leave?**

No. Only those employees who have previous active military service, from which they have been discharged and have received a DD Form 214 or equivalent document, may be eligible to receive veterans' preference in each step of the retention process. Otherwise, no veterans' preference is provided in the retention of employees currently on military leave.

**2. Can the agency consider the employee's current military leave status as part of their assessment during the layoff process?**

No. These employees shall be assessed as if they had remained continuously employed in their positions and shall be assessed equally with all other employees.

**3. If these employees have been on military leave for an extended period of time, how is their performance evaluated?**

The most recent performance evaluation of these employees, regardless of the date of the evaluation, shall be used in their assessments. In the event that an employee did not receive an evaluation prior to going on military leave, the employee shall be considered to have received an Overall Rating of "Satisfactory." For more information on performance evaluations for employees on extended leave, see Rule Interpretation 60L-35-2010-#001.

**4. How should reasonable notice be provided to these employees?**

Notification of the layoff and associated rights should be sent to the employee's military address if known and to the employee's current mailing address. Other methods of notification can also be utilized as long as they include a mechanism to show receipt. Regardless of the communication method, agencies must make every effort to notify the employee of the intended action and verify/document that the employee has received the notice.

**5. Are these employees entitled to receive at least the ten day notice or a combination of notice and pay?**

Yes. Even though these employees are on military leave, they must receive the minimum 10 day notice. The verification/documentation of receipt or attempted delivery of the notice will determine the required combination of notice and full state pay pursuant to Chapter 60L-33.004(4), F.A.C.

**6. Are these employees entitled to the opportunity of the right of first interview?**

Yes. However, from a practicable standpoint, these employees may not be able to identify vacancies and apply for them. Likewise, these employees may not be able to participate in a traditional face to face interview for positions. Although under no obligation to do so, agencies may consider alternative interview methods for these employees for agency vacancies for which they are qualified. Otherwise, in most instances, the employee will have to be returned from military leave in order to fully exercise the right of first interview.

**7. Can these employees be recalled even though they are still on military leave?**

Yes. If positions become available, employees may be recalled pursuant to applicable collective bargaining agreements even though they remain on military leave.

**8. Are there any differences in the benefits provided to laid off employees on military leave and those provided to other laid off employees?**

No. The benefits provided to these employees are the same as other employees who are being laid off.

**9. What happens when these employees are released from active military service?**

Once employees are released from active military service, they should notify their agencies so that they can be considered for any new or additional first interview or recall opportunities that may have been identified. In addition, employees can be provided information on external placement assistance from the Agency for Workforce Innovation's Reemployment and Emergency Assistance Coordination Team.

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**Background:**

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is the federal law intended to ensure that persons who serve or have served in the Armed Forces, Reserves, National Guard or other "uniformed services:" 1) are not disadvantaged in their civilian careers because of their service; 2) are promptly reemployed in their civilian jobs upon return from duty; and 3) are not discriminated against in employment based on past, present, or future military service.

Florida statutes and rules complement and expand on the federal law in the treatment of employees who are called to active federal military service and to state active military service.

Notwithstanding these protections afforded by federal and state law, employees on military leave for either federal or state active military service may be subject to workforce reductions. Agencies faced with budget cuts, program reductions resulting from outsourcing or privatization efforts, or program phase-outs must treat employees on military leave as if they had remained continuously in their positions. As noted in Section V.C.5 of the Program Guideline on Active Duty Military Leave of Absence ("Military Leave"), reemployment is not guaranteed in these instances and, thus, these employees may be laid off consistent with layoff provisions in statutes and rules.

**Pertinent Applicable Statute/Rule Citation:****Federal Law****Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, 38 U.S.C. § 4312, Reemployment rights of persons who serve in the uniformed services.**

(d)(1) An employer is not required to reemploy a person under this chapter if--

(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer;

**State Law****Section 115.08, F.S., Definitions.**

(1) The term "active military service" as used in this chapter shall signify active duty in the Florida defense force or federal service in training or on active duty with any branch of the Armed Forces or Reservists of the Armed Forces, the Florida National Guard, the Coast Guard of the United States, and service of all officers of the United States Public Health Service detailed by proper authority for duty with the Armed Forces, and shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of active military service" as used in this chapter shall begin with the date of entering upon active military service, and shall terminate with death or a date 30 days immediately next succeeding the date of release or discharge from active military service, or upon return from active military service, whichever shall occur first.

(3) The term "servicemember" as used in this chapter shall have the same meaning as provided in s. 250.01.

**Section 115.14, F.S., Employees.**

All employees of the state, the several counties of the state, and the municipalities or political subdivisions of the state shall be granted leave of absence under the terms of this law; upon such leave of absence being granted said employee shall enjoy the same rights and privileges as are hereby granted to officials under this law, insofar as may be, including, without limitation, receiving full pay for the first 30 days. Notwithstanding the provisions of s. 115.09, the employing authority may supplement the military pay of its officials and employees who are reservists called to active military service after the first 30 days in an amount necessary to bring their total salary, inclusive of their base military pay, to the level earned at the time they were called to active military duty. The employing authority shall continue to provide all health insurance and other existing benefits to such officials and employees as required by the Uniformed Services Employment and Reemployment Rights Act, chapter 43 of Title 38 U.S.C.

**Section 250.01, F.S., Definitions.**

(21) "State active duty" means full-time duty in active military service of the State of Florida when ordered by the Governor or Adjutant General in accordance with s. 250.06, s. 250.10, or s. 250.28 to preserve the public peace, execute the laws of the state, suppress insurrection, repel invasion, enhance security and respond to terrorist threats or attacks, respond to an emergency as defined in s. 252.34 or to imminent danger of an emergency, enforce the law, carry out counter-drug operations, provide training, provide for the security of the rights or lives of the public, protect property, or conduct ceremonies. The term includes the duties of officers or enlisted personnel who are employed under the order of the Governor in recruiting; making tours of instruction; inspecting troops, armories, storehouses, campsites, rifle ranges, or military property; sitting on general or special courts-martial, boards of examination, courts of inquiry, or boards of officers; or making or assisting in physical examinations. The term shall also include the period during which a person in active military service is absent from duty as a result of illness, being wounded, being on leave, or other lawful cause.

**Section 250.48, F.S., Leaves of absence.**

Any officer or employee of the state, of any county or school district of the state, or of any municipality or political subdivision of the state who is a member of the Florida National Guard is entitled to leave of absence from his or her respective duties, without loss of pay, time, or efficiency rating, on all days during which the officer or employee is engaged in active state duty for a named event, declared disaster, or operation pursuant to s. 250.28 or s. 252.36. However, a leave of absence without loss of pay granted under this section may not exceed 30 days for each emergency or disaster, as established by executive order.

**Section 250.482, F.S., Troops ordered into state active service; not to be penalized by employers and postsecondary institutions.**

(1) If a member of the National Guard is ordered into state active duty pursuant to this chapter, a private or public employer, or an employing or appointing authority of this state, its counties, school districts, municipalities, political subdivisions, career centers, community colleges, or universities, may not discharge, reprimand, or in any other way penalize such member because of his or her absence by reason of state active duty.

(2)(a) Upon the completion of state active duty, a member of the National Guard shall promptly notify the employer of his or her intent to return to work.

(b) An employer is not required to allow a member of the National Guard to return to work under this section if:

1. The employer's circumstances have so changed as to make employment impossible or unreasonable;
2. Employment would impose an undue hardship on the employer;
3. The employment from which the member of the National Guard leaves to serve in state active duty is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period; or
4. The employer had legally sufficient cause to terminate the member of the National Guard at the time he or she left for state active duty.

The employer has the burden of proving the impossibility or unreasonableness, undue hardship, the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period, or the legally sufficient cause to terminate the person at the time he or she left for state active duty.

**Section 295.07, F.S., Preference in appointment and retention.**

- (1) The state and political subdivisions in the state shall give preference in appointment and retention in positions of employment to:
- (a) Those disabled veterans:
1. Who have served on active duty in any branch of the Armed Forces of the United States, have been separated there from under honorable conditions, and have established the present existence of a service-connected disability which is compensable under public laws administered by the U.S. Department of Veterans' Affairs, or
  2. Who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the U.S. Department of Veterans' Affairs and the Department of Defense.
- (b) The spouse of any person who has a total disability, permanent in nature, resulting from a service-connected disability and who, because of this disability, cannot qualify for employment, and the spouse of any person missing in action, captured in line of duty by a hostile force, or forcibly detained or interned in line of duty by a foreign government or power.
- (c) A veteran of any war as defined in s. 1.01(14). The veteran must have served at least 1 day during a wartime period to be eligible for veterans' preference. Active duty for training shall not be allowed for eligibility under this paragraph.
- (d) The unmarried widow or widower of a veteran who died of a service-connected disability.
- (2) The Department of Veterans' Affairs shall adopt rules to ensure that veterans are given special consideration in the employing agency's selection and retention processes. The rules must include the award of point values as articulated in s. 295.08, if applicable, or, where point values are not relevant, must include procedures to ensure that veterans are given special consideration at each step of the employment selection process, unless the sponsoring governmental entity is a party to a collective bargaining agreement, in which case the collective bargaining agreement must comply within 90 days following ratification of a successor collective bargaining agreement or extension of any existing collective bargaining agreement.
- (3) Preference in employment and retention may be given only to eligible persons who are described in subsection (1) and who are residents of this state.
- (4) The following positions are exempt from this section:
- (a) Those positions that are exempt from the state Career Service System under s. 110.205(2); however, all positions under the University Support Personnel System of the State University System as well as all Career Service System positions under the Florida Community College System and the School for the Deaf and the Blind, or the equivalent of such positions at state universities, community colleges, or the School for the Deaf and the Blind, are included.
- (b) Positions in political subdivisions of the state which are filled by officers elected by popular vote or persons appointed to fill vacancies in such offices and the personal secretary of each such officer, members of boards and commissions, persons employed on a temporary basis without benefits, heads of departments, positions that require licensure as a physician, licensure as an osteopathic physician, licensure as a chiropractic physician, and positions that require that the employee be a member of The Florida Bar.

**Rules****Rule 60L-33.004, F.A.C., Layoff and Employee Transition.**

(1) Agencies may effect a layoff for a variety of reasons, including budget cuts, program reductions resulting from outsourcing or privatization efforts, or program phase-outs. Agencies shall accomplish a layoff in an orderly, systematic, and uniform manner in accordance with this rule.

(2) Each agency shall have a Department-approved workforce transition plan. The goal of the plan is to ensure that the agency makes reasonable efforts to provide a smooth transition for the career service employees adversely affected by the layoff. The plan shall identify the steps the agency will take during the layoff to advance this goal. The following steps are reasonable and shall be included in any plan, unless the plan justifies in writing why they are not included:

(a) Appoint a workforce transition team, which is responsible for overseeing and administering the layoff.

(b) Develop a communications plan, designed to ensure open, honest, and frequent communication regarding staffing changes. Provide clear avenues for employees to seek and obtain information and assistance. Address necessary communications with the Department, the Agency for Workforce Innovation, and unions.

(c) Assess the positions to be deleted and the mission and goals of the residual program (that is, the program area that will remain after the deletion of functions and positions). Identify the employees and programs or services that will be affected by the layoff. Identify the knowledge, skills, and abilities that employees will need to carry out the residual program.

(d) Assess employees.

1. If the layoff affects law enforcement or correctional officers, firefighters, or professional health care providers, develop procedures to establish the relative merit and fitness of these employees. Include a formula for uniform application within a competitive area, taking into consideration the type of appointment, the length of service, and the evaluation of the employee's performance within the last five years of employment. The Department may authorize selective competition within the competitive area, based upon specific qualifications deemed necessary for a position, if the duties and responsibilities requiring such qualifications are clearly reflected in the official position description on file with the agency.

2. If the layoff affects any other career service employee, develop assessment procedures on objective measures that include comparative merit, demonstrated skills, experience and length of service in the State Personnel System. In determining which employees to retain, consider which employees will best enable the agency to advance its mission; in this context, consider how each employee fares with respect to the following factors: commitment, cooperation, excellence, fairness,

honesty/integrity, initiative, respect, and teamwork.

(3) A career service employee with permanent status in their current position facing layoff shall have an opportunity for first interview within any agency for a vacancy for which the employee is qualified and has applied.

(4) Before laying off a career service employee with permanent status in their current position, an agency shall provide the employee reasonable notice of the intended action. Where possible, the agency shall provide at least thirty days notice, and in all cases the agency shall provide at least ten days notice or, in lieu thereof, pay or a combination of notice and pay.

(5) The Agency for Workforce Innovation through its existing programs shall make available placement assistance to affected agencies and employees.

(6) Agencies shall prepare and maintain a workforce transition spreadsheet and provide the spreadsheet to the Department upon request.

(7) A layoff is not a disciplinary action therefore, it may not be appealed to the Public Employees Relations Commission.

#### **Rule 60L-34.0062, F.A.C., Military Leave.**

(1) An employee, except an employee who is a commissioned reserve officer or reserve enlisted personnel in the United States military or naval service or member of the National Guard, or who is employed in a temporary position or employed on a temporary basis, who is drafted or who volunteers for active military service shall be granted leave beginning with the date of induction and ending up to one year after the date of separation from the military service or from hospitalization continuing after discharge. Active military service includes active duty with any branch of the United States Army, Navy, Air Force, Marines, or Coast Guard, of the National Guard of the State, or of any other service as provided in Sections 115.08 and 115.09, Florida Statutes. The leave of absence shall be verified by official orders or appropriate military certification, which shall be filed in the employee's personnel file.

(2) An employee, who is a commissioned reserve officer or reserve enlisted personnel in the United States military or naval service or a member of the National Guard, shall be granted leave in accordance with Section 115.07, Florida Statutes.

(3) An employee, who is a member of the Florida National Guard, shall be granted leave in accordance with Section 250.48, Florida Statutes.

(4) An employee, except an employee employed in a temporary position or employed on a temporary basis, who is a commissioned reserve officer or reserve enlisted personnel in the United States military or naval service or member of the National Guard, who is ordered to active military duty under Title 10 of the United States Code, Section 673b, shall be granted leave beginning with the day ordered to duty and ending up to thirty-one days after the date of release from the military service or from hospitalization continuing after discharge. Active military service includes active duty with any branch of the United States Army, Navy, Air Force, Marines, or Coast Guard, of the National Guard of the State, or of any other service as provided in Sections 115.08 and 115.09, Florida Statutes. The leave of absence shall be verified by official orders or

appropriate military certification, which shall be filed in the employee's personnel file.

**Rule 55A-7.015, F.A.C., Preference in Retention.**

(1) In all covered positions where layoffs are necessitated, special consideration in the retention of employees shall be given first to those persons included under subsections 55A-7.008(1) and (2), F.A.C., and second to those persons included under subsections 55A-7.008(3), (4) and (5), F.A.C., of this chapter. The point system procedures described in Rule 55A-7.010, F.A.C., may also be utilized by covered employers. In the event that a point system is not utilized by the covered employer, the employer must demonstrate how special consideration was afforded at each step in the retention process.

(2) Each covered employer shall ensure that records are maintained which document the manner of the retention and the propriety of the retention process and decision in accordance with federal and state laws.

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