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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 213, 353, 870, and 890

RINS 3206–AG02 and 3206–AH15

Reemployment Rights of Employees Performing Military Duty

AGENCY: Office of Personnel Management.

ACTION: Final regulations.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to implement the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) which was enacted into law on October 13, 1994. The law and these regulations safeguard the job rights of Federal employees who leave their employment to perform duty with the uniformed services.

These regulations also implement provisions that expand on the coverage of the affected employees under the Federal Employees' Group Life Insurance (FEGLI) Program and the Federal Employees Health Benefits (FEHB) Program. The regulations were developed in consultation with the Departments of Labor and Defense.

EFFECTIVE DATE: July 12, 1999.

FOR FURTHER INFORMATION CONTACT: For parts 213 or 353: Raleigh M. Neville, (202) 606–0830. For parts 870 or 890: Abby L. Block, (202) 606–0004.

SUPPLEMENTARY INFORMATION: OPM published for comment on September 1, 1995 (at 60 FR 45650), and October 30, 1995 (at 60 FR 55173), interim regulations implementing the new USERRA law.

Comments on Part 353

We received comments from two agencies on the restoration-to-duty aspect of the law in 5 CFR part 353. We also received two comments from an agency on the health and life insurance changes in parts 870 and 890.

Section 4314 of title 38, United States Code, enacted as part of USERRA, requires OPM to place in other agencies a National Guard technician when the adjutant general of a State determines that it is ''impossible or unreasonable'' to reemploy the person in a dual status military/civilian technician position.

One commenter suggested that we make clear in the final regulations that National Guard technicians who fail to maintain active military membership in the Guard for reasons within their control (such as misconduct, military retirement, failure to meet weight or security requirements, etc.) are not eligible for the special mandatory placement in other agencies provided under section 4314 of title 38.

We agree that the law was not intended to provide a mandatory placement right in other agencies for Guard technicians who lose their military membership for reasons within their control. To do so would be to extend an extraordinary employment benefit to Guard technicians far beyond that accorded to any other group—including disabled combat veterans and others who have lost Federal jobs for reasons outside their control. Such a placement provision would also be contrary to the stated purpose of USERRA—which is to encourage and protect ''noncareer service'' that lasts no more than a cumulative total of 5 years, with some exceptions for training and emergency call-ups. (See 38 U.S.C. 4301)

Such a policy would also be inconsistent with 5 U.S.C. 3329—a provision that was enacted specifically to protect long-term Guard members, but which, significantly, provides only for priority placement in the Department of Defense, not mandatory placement in other agencies. (This is just one of a number of special protections already provided for technicians; for example, 5 U.S.C. 3304 gives technicians who are removed involuntarily a 1-year window of opportunity to be appointed noncompetitively to another civil service job.)

Finally, National Guard technicians knew that they were making a career decision when they volunteered for extended active duty with the Guard. These technicians were not merely absent from their technician positions (as envisioned by the law); rather, they had abandoned their jobs in order to pursue careers in the military. Interruption of that career for reasons within the individual's control should no more entitle the Guard member to mandatory job rights in another agency than would loss of Reserve membership for a Reservist or, for that matter, loss of a career choice for any other Government or private sector employee. We have, therefore, amended final regulation 5 CFR 353.110(a)(1)(iii) accordingly.

This commenter also suggested that we amend 5 CFR 353.211 to make clear that, because the term ''employer,'' as it pertains to National Guard technicians, means the Adjutant General of a State, these technicians may no longer appeal to the Merit Systems Protection Board (MSPB) a State's failure to reemploy them; they must now go to court. We have made this change. (Note, however, that this does not affect a technician's right to appeal to MSPB OPM's failure to place the individual under 38 U.S.C. 4314(d).)

A commenter suggested that we delete the word ''substantially'' in the third sentence in 5 CFR 353.108 (pertaining to the effect of performance and conduct on restoration rights for both injured employees and those on military duty), saying that this ''will eliminate the suggestion that something less than substantial is acceptable.'' Actually, this section says that an employee may not be denied restoration rights unless he or she was separated ''for cause that is substantially unrelated to the injury or to the performance of uniformed service.'' There is no implication that restoration can be denied when the separation was something less than ''substantially unrelated'' to the injury or military duty. This standard will be maintained.

This commenter also suggested that in 5 CFR 353.109 (concerning a transfer of function to another agency), we substitute the words from the statute ''of like seniority, status, and pay'' for ''equivalent'' in denoting the position to which the position to which the person is entitled. Actually, ''equivalent position,'' in this context, has long been interpreted as ''like seniority, status, and pay.'' We note, too, that ''seniority'' is already included in the definition of ''status.'' We did not include the term

separately, here, however, because seniority is not typically a factor for Federal positions and is thus not commonly used.

This commenter also questions whether OPM should create a 30-day standard in 5 CFR 353.207 by which time agencies must restore an employee who has been absent on military duty for more than 30 days. The agency suggests that it may be preferable to require prompt or reasonable reemployment, instead. The 30-day standard has been in effect for many years and has been consistently applied by MSPB in such a way as to require prompt and reasonable reemployment by an agency. In this connection, it should be noted that 30 days is the maximum an agency can delay a restoration. It is conceivable that by changing this to a standard without a definite time limit, situations may devolve in which it may be considered ''reasonable'' for an agency to restore someone long after 30 days have elapsed.

Because of questions about the applicability of USERRA and other laws to U.S. citizens located outside of the United States, one commenter suggested that we clarify what USERRA does, in fact, cover civil service employees stationed overseas. We have amended 5 CFR 353.103 to do so.

Other comments dealt with editorial and clerical errors.

Comments on Parts 870 and 890

OPM received two comments from a Federal agency on the interim regulations. One commenter suggested that the sentence added at the end of 5 CFR 870.501(d) be added to section 870.501(a) instead. Although we did not accept this suggestion as stated, we amended paragraph section 870.501(a) to clarify that the last sentence of section 870.501(d) is an exception. We also eliminated the words ''in nonpay status'' from the last sentence of section 870.501(d) because it is possible to be in a pay status and eligible for USERRA benefits at the same time.

These changes were incorporated into the final FEGLI regulations that were published in the **Federal Register** on September 17, 1997 (62 FR 48731).

One commenter objected to three phrases in 5 CFR 890.303(i) and one in section 890.304: (1) ''on the date that the absence to serve in the uniform services begins,'' (2) ''enters on military furlough or,'' (3) ''provided the employee continues to be entitled to benefits under part 353,'' and (4) ''or the date entitlement to of this chapter.'' Since these phrases reflect the requirements of USERRA, we cannot accept this suggestion. For example, under the provisions of USERRA a separated employee who leaves military service and does not return to his or her civilian position within the time limit set by the law loses eligibility for continued health benefits coverage.

One commenter suggests we delete the words ''but not earlier than the date the enrollment would otherwise terminate under paragraph (a)(1)(v)'' as not applicable to employees with continued coverage under USERRA. (See 5 CFR 390.304) Paragraph (a)(1)(v) reflects the provisions of the FEHB law and regulations giving employees who are in nonpay status continued entitlement to FEHB coverage for 365 days. The FEHB entitlement remains even if entitlement to coverage under USERRA is lost. Therefore, we have not accepted this suggestion.

One commenter suggests amending the interim regulations to specify that the regulations apply to employees who met the requirements of USERRA on October 13, 1994, so that they would cover employees whose insurance terminated due to separation for military service, but who met the USERRA requirements on or after that date. We have amended the interim regulations to clarify that they apply to separated employees as well as employees in nonpay status who met the USERRA requirements on October 13, 1994.

Both commenters object to the requirement that the employee pay the full premium (both employee and Government shares) plus an additional 2 percent after the initial 365 days of coverage. One commenter also objects to the requirement that the employee pay premiums on a current basis after the first 365 days. There is no statutory authority for the Government to pay its share for coverage beyond 365 days, nor is there statutory authority for OPM to waive the Government share after 365 days in nonpay status. Therefore, employees must pay it. Further, since USERRA is patterned after COBRA, 29 U.S.C. 1161, *et seq.*, (which requires private sector employers to provide continued group health coverage to separated employees for a period of 18 months at a cost to the individual of up to 102 percent of the premium), we have patterned these regulations after the temporary continuation of coverage (TCC) provision of the FEHB law, 5 U.S.C. 8905(a), (the FEHB equivalent to COBRA) to the extent applicable. The TCC provisions are not applicable for the first 365 days because, under FEHB law and regulation, the employees and the Government continue to pay their respective shares for that period.

Both the FEGLI and FEHB regulations have been amended to show that employees who separate to perform military service are considered to be employees for the purpose of continuing these benefits. The FEHB regulations have also been amended to show that FEHB coverage may continue for up to 18 months after the employee enters military service.

In addition to these changes, we added the phrase ''or similar authority'' each time we refer to 5 CFR part 353 in the FEGLI and FEHB regulations. This change clarifies that the FEGLI and FEHB provisions also apply to entities covered by the FEGLI and FEHB regulations but not by part 353.

The interim regulations for part 870 were adopted as final and published in the **Federal Register** on September 17, 1997.

Technical and Clarifying Amendments

We have amended the final regulations to reflect perfecting changes made by the Veterans' Benefits Improvements Act of 1996 (which includes USERRA technical amendments), enacted into law on October 9, 1996.

We have also amended 5 CFR 353.106(c) to provide that agencies not only have an obligation to consider employees absent on military duty for any promotion they may have been entitled to, but also to any ''incident or advantage of employment.''

These regulations were developed in consultation with the Departments of Labor and Defense.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because it pertains only to Federal agencies.

List of Subjects in Parts 213, 353, 870, and 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, OPM is adopting the interim regulations amending 5 CFR parts 213, 353, 870, and 890, which were published at 60 FR 45650 and 60 FR 55173 on September 1, 1995, and October 30, 1995, respectively, as final regulations with the following changes:

PART 353—RESTORATION TO DUTY FROM UNIFORMED SERVICE OR COMPENSABLE INJURY

1. The authority citation for 5 CFR part 353 continues to read as follows:

Authority: 38 U.S.C. 4301 et. seq., and 5 U.S.C. 8151.

2. Section 353.103 is amended by revising the first sentence in paragraph (a) to read as follows:

§ 353.103 Persons covered.

(a) The provisions of this part pertaining to the uniformed services cover each agency employee who enters into such service regardless of whether the employee is located in the United States or overseas. * * *

* * * * *

3. Section 353.106 is amended by adding a new sentence at the end of paragraph (c) and by adding paragraphs (c)(1), (c)(2), and (c)(3) to read as follows:

§ 353.106 Personnel actions during employee's absence.

* * * * *

(c) * * * In addition, agencies have an obligation to consider employees absent on military duty for any incident or advantage of employment that they may have been entitled to had they not been absent. This is determined by:

(1) Considering whether the ''incident or advantage'' is one generally granted to all employees in that workplace and whether it was denied solely because of absence for military service;

(2) Considering whether the person absent on military duty was treated the same as if the person had remained at work; and

(3) Considering whether it was reasonably certain that the benefit would have accrued to the employee but for the absence for military service.

4–5. In § 353.110 paragraph (a)(2) is amended by removing the word ''time'' from the first sentence and paragraph (a)(1)(iii) is revised to read as follows:

§ 353.110 OPM placement assistance.

(a) * * *

(1) * * *

(iii) National Guard technicians when the Adjutant General of a State determines that it is impossible or unreasonable to reemploy a technician otherwise eligible for restoration under 38 U.S.C. 4304 and 4312 (pertaining to character and length of service), and the technician is a noncareer military member who was separated invountarily from the Guard for reasons beyond his or her control; and

* * * * *

6. Section 353.203(a)(4)(ii) is revised to read as follows:

§ 353.203 Length of service.

(a) * * *

(4) * * *

(ii) Ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress, as determined by the Secretary concerned.

* * * * *

§ 353.208 [Amended]

7. Section 353.208 is amended by removing the number 6 before the word ''permitted'' in the first sentence of the section.

8. Section 353.210 is revised to read as follows:

§ 353.210 Department of Labor assistance to applicants and employees.

USERRA requires the Department of Labor's Veterans' Employment and Training Service [VETS] to provide employment and reemployment assistance to any Federal employee or applicant who requests it. VETS staff will attempt to resolve employment disputes brought to investigate. If dispute resolution proves unsuccessful, VETS will, at the request of the employee, refer the matter to the Office of the Special Counsel for representation before the Merit Systems Protection Board (MSPB).

9. In § 353.211 paragraph (b) is amended by adding two new sentences at the end to read as follows:

§ 353.211 Appeal rights.

* * * * *

(b) * * * However, National Guard technicians do not have the right to appeal to MSPB a denial of reemployment rights by the Adjutant General. Technicians may file complaints with the appropriate district court in accordance with 38 U.S.C. 4323 (USERRA).

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

10. The authority citation for part 890 is revised to read as follows:

Authority: 5 U.S.C. 8913; § 890.102(f) also issued under sec. 153 of Pub. L. 104–134, 110 Stat 1321; section 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L is also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended.

11. Section 890.303 is amended by revising paragraph (i) to read as follows:

§ 890.303 Continuation of enrollment.

* * * * *

(i) *Service in the uniformed services.* The enrollment of an individual who separates to enter the uniformed services under conditions that entitle him or her to benefits under part 353 of this chapter, or similar authority, may continue for the 18-month period beginning on the date that the absence to serve in the uniformed services begins, provided that the individual continues to be entitled to benefits under part 353 of this chapter, or similar authority. The enrollment of an employee who enters on military furlough or is placed in nonpay status to serve in the uniformed services may continue for the 18-month period beginning on the date that the absence to serve in the uniformed service begins, provided that the employee continues to be entitled to benefits under part 353 of this chapter, or similar authority. An employee in nonpay status is entitled to continued coverage under paragraph (e) of this section if the employee's entitlement to benefits under part 353 of this chapter, or similar authority, ends before the expiration of 365 days in nonpay status. The enrollment of an employee who met the requirements of chapter 43 of title 38, United States Code, on October 13, 1994, may continue for the 18-month period beginning on the date that the absence to serve in the uniformed services began, provided that the employee continues to be entitled to continued coverage under part 353 of this chapter, or similar authority. If the enrollment of such an employee had terminated due to the expiration of 365 days in nonpay status or because of the employee's separation from service, it may be reinstated for the remainder of the 18-month period beginning on the date that the absence to service in the uniformed service began, provided that the employee continues to be entitled to continued coverage under part 353 of this chapter, or similar authority.

12. In § 890.304 paragraphs (a)(1)(vi), (a)(1)(vii), and (a)(1)(viii) are revised to read as follows:

§ 890.304 Termination of enrollment.

(a) * * *

(1) * * *

(vi) The day he or she is separated, furloughed, or placed on leave of absence to serve in the uniformed services under conditions entitling him or her to benefits under part 353 of this chapter, or similar authority, for the purpose of performing duty not limited to 30 days or less, provided the employee elects in writing to have the enrollment so terminated.

(vii) For an employee who separates to serve in the uniformed services under

conditions entitling him or her to benefits under part 353 of this chapter, or similar authority, for the purpose of performing duty not limited to 30 days or less, the date that is 18 months after the date that the absence to serve in the uniformed services began or the date entitlement to benefits under part 353 of this chapter, or similar authority, ends, whichever is earlier, unless the enrollment is terminated under paragraph (a)(1)(vi) of this section.

(viii) For an employee who is furloughed or placed on leave of absence under conditions entitling him or her to benefits under part 353 of this chapter, or similar authority, the date that is 18 months after the date that the absence to serve in the uniformed services began or the date entitlement to benefits under part 353 of this chapter, or similar authority, ends, whichever is earlier, but not earlier than the date the enrollment would otherwise terminate under paragraph (a)(1)(v) of this section.

* * * * *

13. In § 890.305 paragraph (a) is revised to read as follows:

§ 890.305 Reinstatement of enrollment after military service.

(a) The enrollment of an employee or annuitant whose enrollment was terminated under § 890.304(a)(1)(vi), (vii), or (viii) or § 890.304(b)(4)(iii) is automatically reinstated on the day the employee is restored to a civilian position under the provisions of part 353 of this chapter, or similar authority, or on the day the annuitant is separated from the uniformed services, as the case may be.

* * * * *

14. In § 890.501 paragraphs (e), (f), and (g) are revised to read as follows:

§ 890.501 Government contributions.

* * * * *

(e) Except as provided in paragraphs (f) and (g) of this section, the employing office must make a contribution for an employee for each pay period during which the enrollment continues.

(f) Temporary employees enrolled under 5 U.S.C. 8906a must pay the full subscription charge including the Government contribution. Employees with provisional appointments under § 316.403 of this chapter are not considered to be enrolled under 5 U.S.C. 8906a for the purposes of this paragraph.

(g) The Government contribution for an employee who enters the uniformed services and whose enrollment continues under § 890.303(i) ceases after 365 days in nonpay status.

15. In § 890.502 paragraph (f) is revised to read as follows:

§ 890.502 Employee withholdings and contributions.

* * * * *

(f) *Uniformed services.* (1) Except as provided in paragraph (f)(2) of this section, an employee whose coverage continues under § 890.303(i) is responsible for payment of the employee share of the cost of enrollment for every pay period for which the enrollment continues for the first 365 days of continued coverage as set forth under paragraph (b) of this section. For coverage that continues after 365 days in nonpay status, the employee must pay, on a current basis, the full subscription charge, including both the employee and Government shares, plus an additional 2 percent of the full subscription charge.

(2) Payment of the employee's share of the cost of enrollment is waived for the first 365 days of continued coverage in the case of an employee whose coverage continues under § 890.303(e) following furlough or placement on leave of absence under the provisions of part 353 of this chapter, or similar authority, or under § 890.303(i) if the employee was ordered to active duty before September 1, 1995, under section 12301, 12304, 12306, 12307, or 688 of title 10, United States Code, in support of Operation Desert Storm.

[FR Doc. 99–14846 Filed 6–10–99; 8:45 am]

BILLING CODE 6325–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–273–AD; Amendment 39–11192; AD 99–12–08]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–200C Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to all Boeing Model 737–200C series airplanes, that currently requires a one-time external detailed visual inspection to detect cracks of the fuselage skin in the lower lobe cargo compartment; repetitive internal detailed visual inspections to detect cracks of the frames in the lower lobe cargo compartment; and repair of cracked parts. That AD also provides for an optional preventative modification that constitutes terminating action for the repetitive inspections. This amendment requires accomplishment of the previously optional terminating modification. This amendment is prompted by reports of cracking in the body frames between stringers 19 left and 25 left and at body stations 360 to 500B. The actions specified by this AD are intended to prevent opening or loss of the cargo door during flight, and consequent rapid decompression of the airplane.

DATES: Effective July 16, 1999.

The incorporation by reference of Boeing Alert Service Bulletin 737–53A1160, dated October 24, 1991; and Boeing Service Bulletin 737–53A1160, Revision 1, dated April 29, 1993; as listed in the regulations, was approved previously by the Director of the Federal Register as of August 9, 1993 (58 FR 36863, July 9, 1993).

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Nenita Odesa, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2557; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 93–13–02, amendment 39–8615 (58 FR 36863, July 9, 1993), which is applicable to all Boeing Model 737–200C series airplanes, was published in the **Federal Register** on February 1, 1999 (64 FR 4791). The action proposed to continue to require a one-time external detailed visual inspection to detect cracks of the fuselage skin in the lower lobe cargo compartment; repetitive internal detailed visual inspections to detect cracks of the frames in the lower lobe cargo compartment; and repair of cracked parts. The action also proposed to require accomplishment of the previously optional terminating modification.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due