



SUPERVISOR'S GUIDE TO MILITARY LEAVE

OCTOBER 2019



DISCLAIMER

The purpose of this Supervisor’s Guide is to provide agencies with an overview of those aspects of the administration of paid military leave, and reemployment rights, for West Virginia state government which are most commonly encountered in the course of business.

This guide is intended to provide managers with a general understanding of those provisions and is not intended to be all-inclusive. The general information it contains should not be construed to supersede any law, rule, or policy. In the case of any inconsistencies, the statutory and regulatory provisions shall prevail.

This guide is written with the understanding that the West Virginia Division of Personnel is not engaged in rendering legal services. If legal advice or assistance is required, the services of an attorney should be sought. Supervisors should also consult with the human resources office within his or her respective agency. For technical assistance concerning specific situations, employees and employers may contact the Division of Personnel’s Employee Relations Section at (304) 414-1853.



Introduction

Administration of paid military leave, and reemployment rights, for West Virginia state government employees is dictated by W. VA. CODE §15-1F-1 (Attachment A) and §15-1F-8 (Attachment B). To ease interpretation of the applicable code, subsection 14.9 of the *West Virginia Division of Personnel Administrative Rule*, W. VA. CODE R. §143-1-1 *et seq.*, (“the Rule”) incorporates the statutory revisions. Compliance with the Rule (Attachment C) will ensure compliance with state statute.

Subsection 14.9.a of the Administrative Rule

Leave entitlement under this provision is referred to as “subpart (a) days”, from their statutory designation found in (§15-1F-1(a)). Subsection 14.9.a. or subpart (a) provides all officers and employees of the State, county or municipal government hired for permanent employment who are members of the National Guard or of any of the reserve components of the armed forces of the federal government, are entitled to a leave of absence from employment without loss of pay, status, or efficiency rating, on all days during which they are engaged in drills or parades, or for examination to determine fitness for duty, inactive duty training, funeral, service schools, active duty for training or active service for the State during business hours all to include reasonable travel time to and from the duty location, for a maximum period of thirty (30) scheduled work days in any one (1) calendar year, not to exceed two hundred forty (240) hours, when ordered or authorized by proper authority.

To be eligible for military leave allotment under subpart (a) the qualifying employee service member must be in a paid status with the employer (i.e., paid annual leave, paid sick leave, paid subpart (a) State military duty, or working). Unless he or she is in an unpaid status with the employer (i.e., leave of absence without pay or suspension) or on active duty status (paid or unpaid) under subpart (b), the employee becomes eligible for the 30 days on January 1 of each calendar year. Except as provided below any unused time expires at the end of the calendar year. Time used under subpart (a) is most often taken to attend weekend drills, training classes, and occasionally for special extended periods for, by example, flood mitigation or fighting forest fires.

The term “without loss of pay” means that the employee continues to receive his or her salary or compensation, notwithstanding the fact that the employee may have received other compensation during the same period. Additionally, a service member cannot be required to use accumulated leave benefits against his or her will. Sick leave may not be used for absences for military duty.

Subsection 14.9.b of the Administrative Rule

Leave entitlement under this provision is referred to as “subpart (b) days”, from their statutory designation found in (§15-1F-1(b)). Subsection 14.9.b. or subpart (b) provides for an additional 30 days (not to exceed 240 hours) paid leave for each single call to federal active duty for training, initial active duty for training, or full-time National Guard duty. All eligible officers and employees of the State called to federal active duty or full-time National Guard duty who have not used all or some portion of the thirty (30) scheduled work days of military leave granted by subdivision (a) of this subsection are eligible to use those unused days in the same calendar year prior to using the thirty (30) workdays for which they are



eligible under subpart (b); up to a maximum of sixty (60) scheduled workdays for a single call to active duty. Time allotted for federal active duty under subpart (b) does not expire and may continue into the next calendar year. Employees on extended federal active duty or full-time National Guard duty, under the provisions of subpart (b), must be released by the military and return to State employment and payroll before becoming eligible for the 30-day leave entitlement in the new calendar year under subpart (a).

Continuing orders, revised orders, extensions of the service period, and consecutive orders DO NOT constitute new orders and there is no additional Subpart (b) military leave eligibility. There must be a break (discharge) between orders and normally a return to work before additional Subpart (b) leave eligibility is credited for a subsequent call to military duty.

Circumstances in which an employee service member may not return to work prior to subsequent activation, but is still entitled to additional Subpart (b) military leave upon subsequent activation, include paid or unpaid medical leave of absence or time off for readjustment prior to returning to work as provided in the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) and/or federal Family and Medical Leave Act. Employees may be permitted to work while under military orders, upon request, based upon the specific needs of the agency and the responsibilities of the position.

The specific amount permitted for each call to duty is dependent upon the authority under which the employee is called or ordered to duty, the timing of the call in the calendar year, the amount of military leave standing to his or her credit at the time of the call to duty, the manner in which the employee prefers to use his or her Subpart (a) and (b) military leave, and any use of accumulated annual leave, if requested. A servicemember cannot be required to use accumulated leave benefits against his or her will.

Specific guidance for determining eligibility for Subpart (a) and/or Subpart (b) Military Leave is provided in the *Supervisor’s Guide for Determining Paid Military Leave Category* which is located on the Division of Personnel, [Supervisor’s Toolboxes](#) web page.

State Service Credit, Length of Service

Under the provisions of USERRA, returning service members may, for a period of readjustment, postpone their return to employment. The period permitted for reemployment, as noted below, is determined by the length of the service-connected absence. Time spent on military leave (paid and unpaid) and/or leave used for readjustment before returning to work under the provisions of USERRA is considered as time worked/qualifying service when computing service calculations for experience, annual leave accruals, annual increment payments, eligibility for salary increase, and length of service. Eligible employees should receive the Annual Incremental Payment on the normally scheduled payment date regardless of payroll status.

Leave Accrual

While on a Military Leave of Absence, employees in a paid leave status, through the use of accumulated annual leave or paid leave allotment, continue to accrue annual and sick leave. Employees on a Military Leave of Absence without pay do not accrue annual or sick leave during the time they are off the payroll.



Upon completion of and discharge from the armed services, eligible employees returning to employment shall be credited all sick and annual leave not used at the commencement of his or her military leave. Annual leave accruals shall be restored up to the employee's maximum carry forward rate in accordance with subsection 14.3 of the Rule.

Uniform Services Employment and Reemployment Rights Act

USERRA is a Federal law that establishes rights and responsibilities for uniformed service members, veterans, and their civilian employers. USERRA provides that returning service members must be promptly reemployed in the same position that they would have attained had they not been absent for military service, with the same seniority, status and pay, as well as other rights and benefits determined by seniority. USERRA also requires that reasonable efforts (such as training or retraining) be made to enable returning Service members to qualify for reemployment. If the Service member cannot be reemployed in the same position previously occupied, he or she must be reemployed in a position that is the nearest approximation to the pre-service position, for which they qualify.

The time limits for a returning Service member to apply to return to work are as follows:

- Less than 31 days service: By the beginning of the first regularly scheduled work period after the end of the calendar day of duty, plus time required to return home safely and an eight-hour rest period. If this is impossible or unreasonable, then as soon as possible.
- 31 to 180 days: The employee must apply for reemployment no later than 14 days after completion of military service. If this is impossible or unreasonable through no fault of the employee, then as soon as possible.
- 181 days or more: The employee must apply for reemployment no later than 90 days after completion of military service.
- Service-connected injury or illness: Reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing.

Provided that the eligibility standards set forth in USERRA have been satisfied, in accordance with subsection 12.6.b of the Rule, within two (2) weeks of receiving the reemployment request, the appointing authority shall reinstate qualifying employees to their former position or to a position of like class, tenure and pay. Appointing authorities shall also reinstate, at the end of their recovery periods, all qualifying employees who are hospitalized for, or convalescing from, illnesses or injuries incurred in, or aggravated during, the performance of military service.

The Military Family Leave Provisions under the Family and Medical Leave Act

The military family leave provisions of the federal Family and Medical Leave Act (FMLA) entitle eligible employees of covered employers to take FMLA leave to care for a covered Service member with a serious injury or illness or for any "qualifying exigency" arising from the foreign deployment of the employee's



spouse, son, daughter, or parent with the Armed Forces, or to care for a service member with a serious injury or illness if the employee is the Service member's spouse, son, daughter, parent or next of kin.

Qualifying Exigency Leave

A covered employer must grant an eligible employee up to 12 workweeks of unpaid, job-protected leave during any 12-month period for qualifying exigencies that arise when the employee's spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call or order to covered active duty.

Qualifying exigencies for which an employee may take FMLA leave include making alternative childcare arrangements for a child of the deployed military member, attending certain military ceremonies and briefings, or making financial or legal arrangements to address the military member's absence. Additional information about qualifying exigencies under the FMLA may be found in the [Division of Personnel's Reference Guide to Federal Family and Medical Leave & WV Parental Leave Acts](#).

Military Caregiver Leave

A covered employer must grant an eligible employee up to a total of 26 workweeks of unpaid, job-protected leave during a "single 12-month period" to care for: a current member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is in outpatient status, or is on the temporary disability retired list, for a serious injury or illness; a veteran of the Armed Forces (including the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy for a qualifying serious injury or illness. A veteran who was dishonorably discharged does not meet the FMLA definition of a covered Service member.

The employee must be the spouse, son, daughter, parent, or next of kin of the covered Service member. Additional information about Military Caregiver Leave may be found in the [Division of Personnel's Reference Guide to Federal Family and Medical Leave & WV Parental Leave Acts](#).



ELIGIBILITY FOR SUBSEQUENT YEAR MILITARY LEAVE ALLOTMENTS

PAY STATUS WITH EMPLOYER	MILITARY LEAVE TYPE	
	SUBPART (a)	SUBPART (b)
PAID (Working or on paid sick or annual leave)	YES, 30 Subpart (a) Days Posted January 1	YES, 30 Subpart (b) Days Per Activation
PAID SUBPART (a) DUTY (Paid State Active Duty & Reserve)	YES, 30 Subpart (a) Days Posted January 1	YES, 30 Subpart (b) Days Per Activation
PAID SUBPART (B) DUTY (Paid Federal Active Duty)	NO, 30 Subpart (a) Days Not Posted until released by the military and returned to State employment in an Active Pay Status	NO, 30 Subpart (b) Days Not Posted until released by the military and returns to State employment in an Active Pay Status
UNPAID (Leave of Absence, Suspension, or Unpaid Federal or State Duty)	NO, 30 Subpart (a) Days Not Posted until released by the military and returns to State employment in an Active Pay Status	NO, 30 Subpart (b) Days Not Posted until released by the military and returns to State employment in an Active Pay Status

***NOTE: The maximum number of days of paid Military Leave for a single call to federal active duty is 60 days.**



EXAMPLES

The Subpart (a) and (b) examples provided on the following pages are based on the calendars below:

NOVEMBER						
Su	Mo	Tu	We	Th	Fr	Sa
						1
2	3	4 H	5	6	7	8
9	10	11 H	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	4 – Election 11 – Veterans 27/28 - Thanksgiving					

DECEMBER						
Su	Mo	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24 H½	25 H	26	27
28	29	30	31 H½	24/25 – Christmas Eve/Day 31 – New Year’s Eve		

JANUARY						
Su	Mo	Tu	We	Th	Fr	Sa
				1 H	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19 H	20	21	22	23	24
25	26	27	28	29	30	31
1 -New Year’s Day 19 – Martin Luther King Day						

SUBPART (a) – STATE DUTY:

The following examples assume that the Service member is activated (for 45 days) on December 15, 2xxx, for State duty to participate in flood mitigation.

Example 1 - The employee uses 11 days of his or her 2xxx Subpart (a) military leave allotment and does not exhaust the Subpart (a) days for calendar year 2xxx, however, they expire at the end of the day on December 31.

- Since the employee is still in active pay status at the close of business on December 31, 2xxx, the 30-day allotment of Subpart (a) military leave for the following calendar year may be credited and used.



Example 2 - The employee uses the 7 remaining days of his or her 2xxx Subpart (a) military leave allotment and is removed from the payroll at the close of business on December 23, 2xxx.

- Since the employee is not in active pay status at the close of business on December 31, 2xxx, the allotment of Subpart (a) military leave for the following calendar year may not be credited until the Service member is released from duty and returns to work or paid status.

Example 3 - The employee uses the 7 remaining days of his or her 2xxx Subpart (a) military leave allotment and uses 4 days of accrued annual leave for December 24-31, 2xxx.

- Since the employee is still in active pay status at the close of business on December 31, 2xxx, the 30-day allotment of Subpart (a) military leave for the following calendar year may be credited and used.

Example 4 - The employee uses the 7 remaining days of his or her 2xxx Subpart (a) military leave allotment and is on an unpaid leave of absence for December 24-30, 2xxx. The employee requests and is afforded (by using 4 hours of accrued annual leave) a return to the State payroll on December 31, 2xxx (the last scheduled workday in the calendar year).

- Since the employee is in active pay status at the close of business on December 31, 2xxx, the 30-day allotment of Subpart (a) military leave for the following calendar year may be credited and used.

SUBPART (b) – FEDERAL ACTIVE DUTY:

The following examples assume that a Service member is activated November 7, 2xxx, for federal active duty for overseas deployment.

Example 1 - The employee uses the 15 days remaining of his or her 2xxx Subpart (a) military leave allotment and uses 30 days of Subpart (b) military leave. The employee is removed from the payroll at the close of business on January 15, 2xxx the following year.

- The employee is not eligible for the new calendar year allotment of Subpart (a) or Subpart (b) military leave until the Service member is released from federal active duty and returns to work or paid status.

Example 2 - The employee uses the 5 days remaining of his or her 2xxx Subpart (a) military leave allotment and uses 30 days of Subpart (b) military leave. The employee is removed from the payroll at the close of business on December 29, 2xxx, at noon.



- The employee is not eligible for the following calendar year allotment of Subpart (a) or Subpart (b) military leave until the Service member is released from federal active duty and returns to work or paid status.

Example 3 - The employee uses the 5 days remaining of his or her 2xxx Subpart (a) military leave allotment and uses 30 days of Subpart (b) military leave and 8 days of accrued annual leave for December 29, 2xxx, at noon – January 8, of the following calendar year. The employee is removed from the payroll at the close of business on January 9.

- The employee is not eligible for the new calendar year allotment of Subpart (a) or Subpart (b) military leave until the Service member is released from federal active duty and returns to work or paid status since he or she is on federal active duty.



WEST VIRGINIA CODE

CHAPTER 15. PUBLIC SAFETY.

ARTICLE 1F. PRIVILEGES AND PROHIBITIONS.

§15-1F-1. Leave of absence for public officials and employees for drills, parades, active duty, etc.

(a) Any officer or employee of state, county or municipal government hired for permanent employment who is a member of the National Guard or armed forces reserve, is entitled to a military leave of absence from his or her respective office or employment without loss of pay, status or efficiency rating, on the days during which he or she is ordered, by properly designated authority, to be engaged in drills, inactive duty training, parades, funeral details, service schools or other duty, during business hours, field training, annual training or other full-time National Guard duty pursuant to Title 10 or Title 32 of the United States Code, or active service of the state, for a maximum period of thirty working days, not to exceed two hundred forty hours in any one calendar year.

(b) Any officer or employee of state, county or municipal government hired for permanent employment ordered or called to active duty for a mobilization or deployment under Title 10 of the United States Code or in support of a contingency operation as defined in 10 U.S.C. §101(a)(13) by the properly designated federal authority is entitled to a military leave of absence from his or her respective office or employment without loss of pay, status or efficiency rating for a maximum period of thirty working days, not to exceed two hundred forty hours for a single call to active duty: Provided, that an officer or employee of state, county or municipal government called to active duty who has not used all or some portion of the thirty working days of military leave of absence granted by subsection (a) of this section is entitled to add the number of unused days from that calendar year to the thirty working days, not to exceed two hundred forty hours granted by this subsection, up to a maximum of sixty days for a single call to active duty: Provided, however, That none of the unused days of military leave of absence granted by subsection (a) of this section may be carried over and used in the next calendar year.

(c) The term "without loss of pay" means that the officer or employee shall continue to receive his or her normal salary or compensation, notwithstanding the fact that the officer or employee may have received other compensation from federal or state sources during the same period.



WEST VIRGINIA CODE

CHAPTER 15. PUBLIC SAFETY.

ARTICLE 1F. PRIVILEGES AND PROHIBITIONS.

§15-1F-8. Reemployment rights of members of the organized militia.

Members of the organized militia in the active service of the state or another state shall be entitled to the same reemployment rights granted to members of the reserve components of the Armed Forces of the United States by applicable federal law, including rights protected by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), as amended, 38 U. S. C. §§ 4301-4334.



WEST VIRGINIA ADMINISTRATIVE RULE
DIVISION OF PERSONNEL
Chapter 29-6-10
Series I, 2016 Amended

§143-1-14. Attendance and Leave.

14.9. Military Leave.

14.9.a. State Active Duty and Reserve Military Service. All officers and employees of the State, county or municipal government hired for permanent employment who are members of the National Guard or of any of the reserve components of the armed forces of the federal government are entitled to a leave of absence from employment without loss of pay, status, or efficiency rating, on all days during which they are engaged in drills or parades, or for examination to determine fitness for duty, inactive duty training, funeral, service schools, active duty for training or active service for the State during business hours all to include reasonable travel time to and from the duty location, for a maximum period of thirty (30) scheduled work days in any one (1) calendar year, not to exceed two hundred forty hours, when ordered or authorized by proper authority. The term "without loss of pay" means that the employee continues to receive his or her normal salary or compensation, notwithstanding the fact that the employee may have received other compensation during the same period. An employee need not exhaust any or all annual leave or sick leave. Furthermore, the leave of absence is considered as time worked for the agency in computing tenure, eligibility for salary increase and experience with the agency. The terms of this subdivision do not apply under the provisions of any military selective service act. An employee shall provide to the appointing authority advance written or verbal notification of an obligation or intention to perform military duty and such written orders or other documentation, if available, in support of the request for military leave. None of the unused days of military leave for which an officer or employee is eligible under this subdivision may be carried over and used in the next calendar year. An employee on extended federal active duty or full-time National Guard duty is eligible for leave provided in this subdivision only in the year he or she is called to active duty, and in subsequent years only after he or she has been discharged from military duty and returned to State employment.

14.9.b. Federal Active Duty. All officers and employees of the State county or municipal government hired for permanent employment who are ordered or called to active duty by properly designated federal authority are eligible for an additional leave of absence from employment without loss of pay, status, or efficiency rating for a maximum period of thirty (30) scheduled work days, not to exceed two hundred forty hours, for each single call to active duty, active duty for training, initial active duty for training, or full-time National Guard duty, all to include reasonable travel time to and from the duty location. All eligible officers and employees of the State called to federal active duty or full-time National Guard duty who have not used all or some portion of the thirty (30) scheduled work days of military leave granted by subdivision a. of this subsection are eligible to use those unused days in the same calendar year prior to using the thirty (30) scheduled work days for which they are



eligible under this subdivision, up to a maximum of sixty (60) scheduled work days for a single call to active duty. None of the unused days for which an officer or employee is eligible under subdivision a. may be carried over and used in the next calendar year. An employee on extended federal active duty or full-time National Guard duty is eligible for leave provided in subdivision a. of this subsection only in the year he or she is called to active duty, and, in subsequent years, only for a subsequent call to duty and only after he or she has been discharged from military duty and returned to employment. The term "without loss of pay" means that the employee shall continue to receive his or her normal salary or compensation, notwithstanding the fact that the employee may have received other compensation from federal or state sources during the same period.

14.9.c. Other than as provided in subdivision b. of this subsection, any employee hired for permanent employment entering the United States armed services in time of war, national emergency or under compulsory provisions of law of the United States in time of peace shall be granted a leave of absence from his or her service with the agency. Upon completion of and discharge from the armed services and within the applicable time period prescribed by federal statute, rule, or regulation regarding return to employment, the employee has the right to resume his or her service with the agency without any prejudice to his or her status, merit rating or standing by reason of the absence, in accordance with subdivision 12.6.b. of this rule. An employee shall be credited with all annual leave and sick leave not used at the commencement of his or her military leave in accordance with subdivision 12.6.c. of this rule. This subdivision shall not be construed:

14.9.c.1. As providing that the salary paid by the agency shall continue to be paid to the employee while he or she is not performing the duties of his or her position with the state because of the services with the armed forces of the United States; or,

14.9.c.2. As having precedence over the provisions of any applicable federal statute, rule, or regulation regarding military leave or re-employment rights with which this subdivision is inconsistent or in conflict including, but not limited to, the Uniformed Services Employment and Reemployment Rights Act.