OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND
READINESS

JUN 14 2010

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Implementation of Reservist Differential under 5 U.S.C. 5538

The attached Department of Defense (DoD) guidance implements section 5538, of title 5, United States Code. Under 5 U.S.C. 5538, the Department of Defense must pay a reservist differential payment to eligible DoD civilian employees who are members of the Reserve or National Guard called or ordered to active duty under certain provisions of law.

On March 11, 2009, 5 U.S.C. 5538, Nonreduction in Pay While Serving in the Uniformed Services or National Guard was enacted. This law was later amended by section 745 of the Consolidated Appropriations Act of 2010 on December 16, 2009. The Office of Personnel Management (OPM) issued initial implementing guidance on December 8, 2009, and later revised the guidance on January 8, 2010.

The attached guidance serves as a supplement to the implementing guidance issued by OPM, and provides direction for processing payments from the date of this memo forward, as well as for processing retroactive differential payments back to March 15, 2009.

This memorandum is effective immediately.

Marilee Fitzgerald
Acting Deputy Under Secretary
Civilian Personnel Policy

DISTRIBUTION: ASSISTANT G-1 FOR CIVILIAN PERSONNEL POLICY
(DEPARTMENT OF THE ARMY)
DEPUTY ASSISTANT SECRETARY, CIVILIAN HUMAN
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(DEPARTMENT OF THE AIR FORCE)
DIRECTOR FOR MANPOWER AND PERSONNEL (J1)
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(UNIFORMED SERVICES UNIVERSITY OF THE HEALTH
SERVICES)
DIRECTOR FOR PERSONNEL & SECURITY
(WASHINGTON HEADQUARTERS SERVICES)

Initial Implementing Guidance
Regarding Reservist Differential under 5 U.S.C. 5538

Note: This guidance supplements information provided by the Civilian Personnel Management Service Human Resources Business, Information, and Technology Solutions (HR-BITS) staff on May 18, 2010.

1. Overview

   a. Under 5 U.S.C. 5538, the Department of Defense (DoD) must pay a reservist differential payment to eligible DoD civilian employees who are members of the Reserve or National Guard called or ordered to active duty under certain specified provisions of law. The differential payment will be equal to the amount by which an employee's projected civilian basic pay for a qualifying period exceeds the employee's actual military pay and allowances allocable to that pay period as defined in Appendix D of the Office of Personnel Management's (OPM) Agency Implementation Guidance, dated January 8, 2010. This differential amount will be reduced if an employee uses paid civilian leave. Non-pay days in the military position will also reduce the differential amount.

   b. Section 5538 became effective on the first day of the first pay period beginning on or after March 11, 2009, however, OPM did not issue guidance to Federal agencies until December 8, 2009. The guidance was revised January 8, 2010, to incorporate changes to the law in section 745 of Pubic Law 111-117.

   c. This implementing guidance provides direction for processing payments from the date of this issuance forward, as well as for processing retroactive differential payments back to March 15, 2009. As DoD refines its procedures for processing payments under this authority, further implementation guidance may be issued.

2. Eligibility

   a. A reservist differential under section 5538 is payable to an employee for a qualifying period during which the employee meets both of the following conditions:

      1) An employee is absent from a Federal civilian position in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B), and is serving on such active duty under one of the following authorities:

         1.10 USC 331

2.10 USC 332
3.10 USC 333
4.10 USC 688
5.10 USC 12301(a)
6.10 USC 12302
7.10 USC 12304
8.10 USC 12305
9.10 USC 12406; and

2) The employee is entitled to reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA – 38 U.S.C. chapter 43) for such active duty.

3. Processing Current Payments. The following steps are applicable when processing Reserve Differential payments.

a. **SUBMIT COPY OF ACTIVATION ORDERS TO HUMAN RESOURCES OFFICE (Employee Responsibility)**. The civilian employee is responsible for providing a copy of his/her activation orders at least 4 weeks prior to the scheduled date of deployment and any modified or amended orders thereafter. The orders may be presented to the employee's administration office or directly to the Human Resources Office (HRO). If submitted to the administration office, the orders should be sent to the HRO with the Request for Personnel Action, requesting that the employee be placed in an Absent-US status (formerly LWOP-US), with Nature of Action 473. If the employee does not submit a copy of the activation orders at least four weeks prior to activation, the scheduled reservist differential payment date may be delayed. A copy of the activation orders must be retained in the employee's Official Personnel Folder.

b. **DETERMINE EMPLOYEE ELIGIBILITY FOR RESERVE DIFFERENTIAL (HR Professional Responsibility)**. The HR Professional will review the activation order and determine the employee's entitlement for a reservist differential using the criteria identified in 2.a. of this guidance.

If the order/call to active duty is under an authority other than one of the nine listed identified in section 2.a. of this guidance, the employee is not eligible for reservist differential.

If the employee chooses Separation-US (NOA 353) instead of Absent-US, he/she is not eligible for reservist differential, regardless of the authority used to call or order the employee to active duty. The employee should be advised of this before finalizing any decision to separate, vice going on Absent-US. If the employee

separates from his or her civilian position while in an Absent-US status, reservist differential eligibility will cease on the effective date of the separation.

c. **INPUT ACTION INTO DCPDS (HR Professional Responsibility).** All actions that place an employee in an Absent-US status must be processed through the Defense Civilian Personnel Data System (DCPDS). When processing such an action for employees who are eligible for reserve income differential, use Nature of Action 473 and two Legal Authority Codes (LACs): Q3K and QRD. LAC QRD is a new code, which was available for use in DCPDS as of March 28, 2010. See the Guide to Processing Personnel Actions (GPPA), Chapters 15 & 16, for instructions on documenting placement in Absent-US.

d. **SUBMIT INFORMATION TO THE DEFENSE FINANCE AND ACCOUNTING SERVICE (DFAS) (HR-BITS Responsibility).** HR-BITS staff will generate monthly reports from DCPDS identifying those employees who: 1) were newly placed in an Absent-US (NOA 473) status with LAC Q3K and QRD, 2) have been and still are currently activated, and 3) have been returned to civilian status (NOA 292). These reports will be forwarded to DFAS monthly, on the last Thursday of each month following the month for which the data was collected.

e. **RECONCILE MILITARY AND CIVILIAN PAY AMOUNTS (DFAS Responsibility).** DFAS staff will reconcile civilian and military pay records for those employees identified on the spreadsheets sent to them by HR-BITS. DFAS will submit a report to HR-BITS that details for each employee the military and civilian pay amounts and the differential, if any, that needs to be processed. That data will then be provided by HR-BITS to Components for further distribution to HR points of contact for processing.

f. **PROCESSING PAYMENT (HR Professionals Responsibility).** Upon receipt of the spreadsheet with the reservist differential amount that must be paid, the HR Professional will follow the instructions in the accompanying Personnel/Payroll Interface Workaround document for processing a remedy ticket.

g. **TERMINATING PAYMENTS UPON COMPLETION OF ACTIVATION ORDERS (HR Professional Responsibility).** Upon return to duty of the reservist who is entitled to a differential, the HR Professional processes a Return to Duty (RTD) action, NOA 292, with LACs, Q3K and QRD. (NOTE: You may have employees who left on LWOP-US (now Absent–US) before this 2nd LAC was available, but return after it is available. **Do** use QRD for the NOA 292 if the order/call to active duty was involuntary, even if QRD was not on the NOA 473 action). Upon the employees' return, a reconciliation of their military/civilian pay, over the entire time they were activated, will be conducted. *Roles/responsibilities*

and processes for conducting this reconciliation are still being finalized. The employee must be made aware that given the complexities of this process, the reconciliation process may result in a change in differential amount received, which could result in determination of an overpayment that would be subject to normal debt collection procedures or result in a correction of an underpayment. The employee should provide a copy of their DD 214 form to confirm the active duty end date.

4. Record of Payment.

   Payment of a reservist differential will appear in the Current Earnings block of the civilian Leave and Earning Statement as "RSV/STF DIFF."

5. Back Pay Interest.

   Interest on retroactive reservist differential payments began accruing February 14, 2010. For current and ongoing reservist differential payments, a reservist differential is considered due and payable on a scheduled date that is no later than 8 weeks (4 biweekly pay periods) after the normal civilian salary payment date for a given pay period. (See OPM Guidance Section VII, C)

6. Informing Employees.

   Employees should be informed of this new differential payment and provided the Frequently Asked Questions (FAQ's) supplementing this guidance.

7. Processing Retroactive Differential Payments

   a. Section 5538 became effective on the first day of the first pay period beginning on or after March 11, 2009; final implementing guidance was not issued until January 2010. Accordingly, there are a number of retroactive claims that will need to be processed.

   b. Retroactive payments for reservist differential for most employees who were in a LWOP-US status sometime during the period March 15, 2009 through April 24, 2010 have been or are in process.

   c. To ensure no employee was erroneously omitted from this centralized process, HROs should notify civilian employees who have been activated during/since March 15, 2009 to ensure they are aware of this new entitlement.

d. The centralized process for identifying those eligible for retroactive payments and the amount they were to be paid follows:

1) DCPDS was queried to identify those employees who were in an LWOP-US status (now called Absent-US) anytime during the March 15, 2009-April 24, 2010 timeframe.

2) The DCPDS employee listing was sent to the staff of the Office of the Assistant Secretary of Defense for Reserve Affairs (RA), who reviewed the listing to further identify those employees who were activated under one of the eligible authority codes.

3) A spreadsheet of those employees who were identified as being called/ordered to active duty under an eligible authority code was forwarded to DFAS.

4) DFAS pulled military and civilian records for identified employees and compared actual military pay and allowances and the applicable projected civilian basic pay. Those employees who earned less military pay and allowances than what they would have received in their civilian position (as determined in accordance with OPM guidance) were determined to be entitled to a reservist differential payment.

5) DFAS annotated the spreadsheets with the amount of differential, if any, due the employee and returned the sheet to HR-BITS.

6) HR-BITS distributed/will distribute the spreadsheets to the Component for subsequent distribution to the owning HR processing office for processing of payment.

7) HR processing office processes payments through a remedy ticket process. Instructions for completing the remedy ticket are provided in the Personnel/Payroll Interface Workaround that accompanies the distributed spreadsheets.

8) Upon submission of the remedy ticket to payroll, HR processing office retains the spreadsheet containing the affected employees, the amount(s) of differential as determined by DFAS, and the time period for the payments. NOTE: there may be multiple time periods and varying amounts for a single individual, depending on changes in either military or civilian pay and/or usage of paid leave (military, annual, holiday, comp time, time-off award, etc.) taken while Absent-US.

9) Civilian employees who were in an LWOP-US status as of March 15, 2009 should submit a copy of their activation orders (if they have not done so already) to their servicing HRO to be retained in their Official Personnel File (OPF).

ADDITIONAL INFORMATION

The Office of Personnel Management- Policy Guidance, Summary Description, and Implementation Guidance can be found by visiting: http://www.opm.gov/reservist/

Reservist Differential FAQ's for DoD Employees

1. **Q: What is a reservist differential?**

A: A reservist differential under the 5 U.S.C. 5538, is a payment equal to the amount by which an employee's projected civilian basic pay for a specified pay period exceeds the employee's actual military pay and allowances allocable to that pay period, and is paid to eligible Federal civilian employees who are members of the Reserve or National Guard called or ordered to active duty under certain provisions of law.

2. **Q: How do I know if I am eligible for this payment?**

A: If you are absent from a DoD civilian position in order to perform active duty in the uniformed services, and your activation orders identify one of the following as your call or order to active duty:

1. 10 USC 331
2. 10 USC 332
3. 10 USC 333
4. 10 USC 688
5. 10 USC 12301(a)
6. 10 USC 12302
7. 10 USC 12304
8. 10 USC 12305
9. 10 USC 12406

3. **Q: What if my activation orders do not specify the call or order to active duty authority code?**

A: You will need to go back to your reserve unit and ask for amended orders that clearly state the call or order to active duty. This will be the only way your civilian servicing HRO will be able to determine whether you are eligible for a reservist differential.

4. **Q: If I am eligible for this payment will I receive a differential payment each pay period I am deployed?**

A: No. You will only receive a differential payment for pay periods in which the actual military pay and allowances you received (as defined in Appendix D of the OPM

guidance) is less than the projected civilian pay you would have received for that same period if not for the call or order to active duty.

5. **Q: Will my civilian LES have a remark so I will know if I have received a differential payment?**

A: For now, the civilian LES will display "RSV/STF DIFF" in the Current Earnings block.

6. **Q. Will the use of paid civilian leave impact my differential payment?**

A. Yes. You will not receive a differential payment for any period in which you use paid civilian leave of any kind (military leave, annual leave, etc.). When you use paid civilian leave, you are considered to be in a civilian pay status.

7. **Q. Do I have to use all of my paid civilian leave before I can start receiving a differential payment?**

A. No. You are eligible for a reservist differential beginning the first day of active duty as long as all other eligibility requirements are met. You can choose to use your paid civilian leave as you deem necessary.

8. **Q. What documentation must I provide to my supervisor and/or human resources office (HRO)?**

A. You must provide a copy of your military orders. It is not necessary to submit a copy of your military Leave and Earnings Statement (LES) each month to your HRO as DFAS will be providing military pay data, however you should retain a copy of your military LES(s) each month as you may be asked to submit a copy during the reconciliation process for verification purposes. You should also be retaining copies of your civilian LES(s) for the same period of time in the event of a reconciliation.

9. **Q. Is there a minimum deployment period required before I am eligible to receive a reservist differential?**

A. No. You are eligible for a reservist differential beginning the first day of active duty as long as all other eligibility requirements are met.

10. **Q: Which parts of my military pay and civilian pay are being compared to make a reservist differential determination?**

A: Civilian basic pay, for the purposes of this provision, is defined as the gross amount of the base rate of pay set by law or administrative action without additional pay

of any kind except additional payments as defined in Appendix C of the OPM guidance. Computation of a reservist differential comparison requires projecting the civilian basic pay that would otherwise have been payable if not for the call or order to active duty. Appendix D of the OPM guidance provides a definition of military pay and allowances for the purposes of this provision, as well as provides a table of all pays and allowances that should be included in the computation.

11. **Q: Will I receive a differential payment during the intervening period, allowable under USERRA law, following the completion of my active duty before returning to my civilian job after returning from active duty?**

A: No. The Consolidated Appropriations Act of 2010 (Public Law 111-117, December 16, 2009) clarified that reservist differential is not payable for periods following completion of active duty. For pay periods prior to December 16, 2009, OPM and DoD will have to provide further guidance on the obligation, if any, to pay reservist differential after the date of active duty is completed. To date, no additional guidance on this has been issued; therefore no payment can be made.

12. **Q. If I believe the differential amount I am receiving is incorrect, who should I contact?**

A. Please contact your servicing civilian HRO.

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