

A Guide to
Employment and Reemployment Rights
for
National Guard Technicians



People First, Mission Always

Published by the National Guard Bureau, Office of Technician Personnel

Forward...

Supervisors and managers play critical roles in the implementation of the human resources program for the National Guard. For example, supervisors and managers are responsible for initiating necessary personnel actions and utilizing the workforce in the most efficient manner to accomplish the DoD mission.

The NGB-J1-TN Division is pleased to publish the ***Guide to Employment and Reemployment Rights for National Guard Technicians*** to all managers and supervisors of the States, Territories and the District of Columbia to assist you in accomplishing this mission.

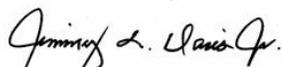
About the Guide

This Guide is designed to be a “ready reference” that provides supervisors and managers with advice and basic guidance on issues relating to human resources management. Although the contents are not regulatory in nature, the guidance has been drafted based on Federal statutes and regulations, as well as DoD and National Guard Bureau policy. Chapter 43 of Title 38 U.S.C. must be consulted on all matters related to the employment and reemployment rights for National Guard Technicians serving in the uniformed service. It is also recommended that you consult 20 CFR Part 1002, Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules.

How to use this Guide

The contents of the Guide were developed in a logical sequence to assist supervisors and managers in making decisions regarding employment and reemployment of National Guard Technicians who voluntarily or involuntarily elect to serve in the uniformed services. This interactive product provides easy access to applicable Laws and regulation related to military technicians serving in the uniformed services. Each highlighted link in the document will take you to the specific reference related to the section in the guide. This will give you the legal and regulatory reference to the specific topic. NGB’s goal is to ensure that our supervisors and managers are well informed. I hope that you will find the information regarding the NGB-J1-TN Division, which is included in the introduction and overview, useful. After all, we are full partners in the efficient administration and management of our most valuable resource...our employees!

The accomplishment of our mission and vision is realized when we understand and support each other’s needs and the vast diversity of our workforce. To this end, the ***Guide to Employment and Reemployment Rights for National Guard Technicians*** will assist you significantly.



JIMMY L. DAVIS, Jr.

Colonel, USAF

Chief, Office of Technician Personnel

**A Guide to
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1. **Purpose:** This guide is provided to assist National Guard supervisors and managers in making employment and reemployment decisions regarding National Guard Technicians serving in the uniform services. This guide is for informational purposes only, and its contents are not to be considered a substitute for the language of the actual statute.

2. **Responsibilities:**

a. The Adjutant General (TAG): Ensures overall implementation and adherence of Title 38 USC Chapter 43, Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994 and 20 CFR Part 1002, Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules within the state. Reemployment rights extend to technicians who have been absent from a position of employment because of “service in the uniformed services.” Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service.

b. Human Resources Office (HRO): Is the office through which each state TAG discharges their delegation for administration of the Technician Program.

(1) Within the HRO, the responsibility for advising managers, supervisors, and technicians who enter military duty regarding the provisions of USERRA is delegated to the Employee Relations Specialist (ERS). The ERS ensures technicians who enter uniform service receive the necessary information about their entitlements, obligations, benefits, grievances, and appeal rights. The ERS should obtain written certification the technician concerned understands his/her rights, benefits, and obligation.

(2) Military Duty and Reemployment Rights: The ERS is responsible for notifying and counseling technicians concerning their selection of status during their tour of military duty. The ERS will maintain records of all completed military service that counts toward the 5-year cumulative limit.

c. Technicians: Prior to entry onto military duty, technicians should provide advance notification to their supervisor. Preferably, the notice should be in writing; however, the technician may provide oral notice. The military commander or other appropriate official may also provide this notice. If providing notice is unreasonable or impossible or if military necessity prevents it, no prior notice is required ([5 CFR 353.204](#)). Technicians may use annual leave, compensatory time, military leave, or leave without pay upon request, to perform service in the uniformed services.

1. **State Merit Promotion Plan:** The State Merit Promotion and Placement Plan must provide mechanisms for employees who are absent because of uniformed service to be considered for a promotion or any other incident or advantage of employment they may have been entitled to had employees not been absent. (TPR 300 335)

2. Technician Absences While Performing Service in a Uniformed Service:

Technicians who enter either Title 10 or Title 32 military duty after 11 December 1994 are carried on leave without pay (LWOP-US). The technician may elect to use other accrued leave such as military, annual or compensatory leave prior to being placed on LWOP-US. When the technician *freely and knowingly provides written notice of intent not to return to a position of employment with the National Guard unit assigned*, the technician will be separated and placed in Separation-US status. Whether the technician is in LWOP-US or Separation-US, he or she is entitled to reemployment. A separation under the LWOP-US provision only affects the benefits based upon seniority. [38 USC 4316, CFR 353.106(a), and 20 CFR 1002.149 – 1002.152]

3. Reemployment Rights ([38 USC 4312 & 20 CFR 1002.32; 1002.34 – 1002.74; 1002.85 – 1002.88; 1002.99 – 1002.104; 1002.115 – 1002.123; 1002.134 – 1002.138](#)):

a. Reemployment rights following either Title 10 or Title 32 military service are limited to 5 cumulative years with the same employer for reemployment actions initiated after 11 December 1994. The National Guard in each state is considered “the employer.” All Title 32, as well as Title 10, military service counts toward the 5-year limit unless specifically exempted under 38 USC 4312 ([see paragraph 7 & 20 CFR 1002.103](#)).

b. Title 32 military duty performed on 11 December 1994 or earlier is exempt from the 5-year limit. Beginning on 12 December 1994, all Title 32 military duty counts toward the 5-year limit, unless performed for training under 32 USC 503; or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining.

c. Technicians are required to notify The Adjutant General or his/her designated representative of their intentions to return to work upon completion of military service. Notification will be provided as follows:

(1) For periods of service in the uniformed services for less than 31 days, by reporting to the employer not later than the beginning of the full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of 8-hours after a period allowing for the safe transportation of the person from the place of service to the person’s residence or;

(2) For more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service; or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(3) For more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

(4) Technicians who fail to meet these time limits are subject to disciplinary action in accordance with (IAW) TPR 715, Voluntary and Non-Disciplinary Actions. Technicians will be reemployed (promptly) not more than 30 days after notifying the HRO. ([5 CFR 353.207 & 20 CFR 1002.180](#))

(5) Technicians who indicate no intention of returning are considered to have abandoned his or her position and should be separated effective one day following the last day of LWOP-US. The Nature of Action Code for termination is 357 and the Legal Authority Code is C7M (Regulation 715.202 Abandonment). The second Legal Authority Code is V8K (32 USC 709). [TPR 715, 1-4(a)]

(6) Technicians who submit, in writing, their resignation at the time of entering uniform service will be separated on the date requested by the technician. When the technician requests resignation upon completion of five years of uniform service, the separation will be one day after the last day on LWOP-US. The Nature of Action Code will be 317, resignation, and the legal authority code will be RPM (Regulation 715.202 resignation). The second Legal Authority Code is V8K (32 USC 709).

d. Technicians whose intention cannot be determined should be removed for abandonment of position. Follow procedures outlined in TPR 715, 1- 4(a) [[CFR 353-207\(e\)](#)], [[38 USC 4312\(3\) & 20 CFR 1002.117](#)]

4. Documentation upon Return:

a. A technician absent for 31 days or more:

(1) Must apply for reemployment in a timely manner,

(2) Must provide documentation validating separation from service was under honorable conditions, and ([38 USC 4304 & 20 CFR 1002.121](#))

(3) May not have exceeded the 5-year service limitation.

b. Unavailable documentation will not prevent prompt reemployment of the technician. If, after reemploying the technician, documentation becomes available that shows one or more of the reemployment requirements were not met, The Adjutant General may terminate the technician. ([38 USC 4312 & 20 CFR 1002.122](#))

7. Exemption of Military Service from the 5-Year Limit: IAW 38 USC 4312 and 20 CFR 1002.103, the following types of service are exempt from the 5-year limit for reemployment:

a. [32 USC 502\(a\)](#): National Guard regularly scheduled inactive duty training (e.g., weekend drills) and annual training, or to fulfill additional training requirements

determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining. Some types of professional development training referred to above that are exempt include Air War College, Air Command and Staff College, Noncommissioned Officer (NCO) Academy, Army War College, Command and General Staff College, Basic NCO Course, and Advanced NCO Course.

b. [32 USC 503](#): National Guard active duty for encampments, maneuvers, or other exercises for field or coastal defense.

c. [10 USC 10148](#): Ordered to active duty up to 45 days because of unsatisfactory participation.

d. [10 USC 1209](#): Involuntary active duty in wartime, or retention on active duty while in captive status.

e. [10 USC 12302](#); [12304](#); [12305](#): Involuntary active duty for national emergency up to 24 months; involuntary active duty for operational mission up to 270 days; involuntary retention of critical persons on active duty during a period of crisis or other specific conditions.

f. [10 USC 688](#): Involuntary active duty by retirees.

g. [10 USC Chapter 15](#): National Guard call into Federal service to suppress insurrection, domestic violence, etc.

h. [10 USC 12406](#): National Guard call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces.

i. Any active duty in support of a war, national emergency, critical mission, or requirement is also exempt. All active duty orders must cite the specific statutory reference covering the exemption. ([DODI 1205.12](#))

j. Active duty under section 12301(d) of Title 10 on or after September 14, 2001 in direct or indirect support of missions and operations associated with the National Emergency by reason of certain terrorist attacks, declared by Presidential Proclamation 7463, dated September 14, 2001. (Dept. of A.F. Memorandum dated 19 Sep 2005)

8. Loss of Reemployment Rights: If a technician exceeds the 5-year cumulative limit for uniformed service [38 USC 4312](#), he/she will be terminated from National Guard employment IAW TPR 715. The effective date for termination is the date the 5-year cumulative limit ends, which would be considered the last day in an authorized leave status. States may choose to reemploy a former technician, through a competitive vacancy announcement, upon completion of service in excess of the 5-year limit; however, states may not extend other reemployment or restoration rights provided under USERRA.

9. Denial of Reemployment Rights with the State National Guard:

a. Section [4314\(d\)](#) of 38 USC and 20 CFR 1002.139 allows The Adjutant General of each state to refuse to reemploy a technician if reemployment is impossible or unreasonable. Technicians with reemployment rights who fail to meet the military requirements of continued employment listed in paragraph 9a(1)(a) below, or are denied reemployment for reasons listed in the paragraphs 9a(3) or (4) below, may be entitled to an offer of employment in an alternative position as stated in paragraph 9b. Some examples of circumstances that may lead to denial of reemployment with the National Guard are:

(1) The loss of military membership or inability to obtain military membership, e.g., National Guard or active duty retirement while on military duty.

(a) Compatibility: Inability to obtain the required military grade or assignment.

(b) Inability to obtain the required security clearance, through no fault of their own.

(c) Physical Standards. Member has lost military membership due to not meeting military physical standards through no fault of their own.

(2) Expiration of a temporary appointment during period of military absence.

(3) Conversion of a former position to Active Guard Reserve and the lack of any other suitable position in the state for which the individual may be trained or qualified.

(4) Abolishment of the organization or function and no other suitable position in the state for which the individual may be trained and qualified.

b. Instances of denial of reemployment are expected to be rare. [[38 USC 4314\(d\) & 5 CFR 353.110](#)] If The Adjutant General of a state determines it is impossible or unreasonable to reemploy a dual status technician, who is otherwise eligible for reemployment under USERRA, such person shall, upon application to the Director, OPM, be ensured an offer of employment in an alternative position in a Federal executive agency with like seniority, status, and pay the person is qualified to perform. Below are the procedures to follow:

(1) When such cases occur, the HRO should forward a copy of the individual's resume or job application form, together with reasons why employment was denied to NGB-J1-TN for coordination.

(2) NGB-J1-TN will forward all necessary information to the nearest Office of Personnel Management (OPM) office for placement assistance. OPM will place the individual in an equivalent position in another agency within the same or another geographic location. If the technician declines an offer of equivalent employment, he or

she has no further restoration rights. Individuals who are denied reemployment for reasons within their control, e.g., physical fitness, will not be offered OPM placement assistance.

10. Reemployment Position: The responsibility for reemploying National Guard technicians rests with the state from which the technician was last employed. Technicians will promptly be reemployed in a position of employment in the following order of priority: ([38 USC 4313 and 20 CFR 1002.192 – 1002.199](#))

a. Reemployment positions for service of 90 days or less:

(1) The position the person would have attained if continuously employed (the [“escalator” position](#)) provided the person is qualified to perform the duties, or

(2) The position of employment in which the person was employed on the date of the commencement of service in the uniformed services, only if the person is not qualified to perform the duties in paragraph 11a(1) of this section after reasonable efforts by management.

b. Reemployment of persons after service of 91 days or more:

(1) The “escalator” position or a position of like seniority, status, and pay, the duties of which the person is qualified to perform; or,

(2) The position of employment that the person was employed on the date, at the beginning of service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform. Management may place a person under this paragraph only when they are not qualified to perform the duties of a position referred to in the former paragraph after reasonable efforts by the employer to qualify the person.

(3) If not qualified, or cannot become qualified with reasonable efforts by the employer, for any of the above, then in any other position of lesser status and pay, which such person is qualified to perform, with full seniority.

c. If two or more technicians are entitled to reemployment in the same position, the one who left the position first has the priority right to restoration in that position. The other technician(s) would be placed according to the order of priority described in paragraph [10a and b](#) above.

d. If the technician’s position is abolished while absent for uniformed service, the state must reemploy the employee in another position of like status and pay. If such a position does not exist, the employee would be placed according to paragraph [12](#).

e. Upon reemployment, a technician under a temporary appointment completes the unexpired portion of their original appointment. If the not-to-exceed date has passed, there is no restoration right.

f. If the individual is employed in an indefinite status the individual, unless released for cause, will be: (1) reemployed for one year when the period of service before reemployment was for more than 180 days, or (2) reemployed for 180 days when the period of service is for more than 30 days and less than 181 days. [[38 USC 4316\(c\)\(1\)\(2\)](#) and [20 CFR 1002.247](#)] Lack of funds, lack of work or the unavailability of a position for a returning indefinite technician is considered to be “for cause” and the individual may be separated with a 30-day advance notice. (TPR 316 4-10 b.) and [[38 USC 4313 \(b\)\(1\)](#)]

g. Upon reemployment, an employee is generally entitled to be treated as though they had never left, i.e., an employee has seniority and other rights and benefits they would have attained had they remained continuously employed. Employee receives:

- (1) Rights and benefits based on seniority
- (2) Within grade increases
- (3) Career tenure
- (4) Completion of probation
- (5) Leave rate accrual
- (6) Severance pay

11. Back-filling Positions Vacated by Technicians on Military Duty: This guide places no restrictions on hiring employees to replace those on active duty. However,

- a. Permanent employees hired to replace technicians who enter or are called to active duty will certify they understand they may be required to vacate their position when the former incumbent exercises reemployment rights.
- b. Management has the option and may be required to reassign or separate employees to reemploy eligible technicians as required by law.
- c. If the position is filled on a permanent basis, it may be necessary to remove the incumbent through reassignment or through reduction in force placement action in order to reemploy a technician with reemployment rights under USERRA.
- d. If a temporary technician fills the position, they may be displaced or separated upon reemployment of the incumbent technician with restoration rights under USERRA.
- e. If a temporary technician fills the position and he or she is called to perform military duty, upon return from military duty, they have the right to complete any unexpired portion of their appointment.

f. When a technician is employed on a time limited appointment with a not-to-exceed date to backfill a position vacated by a deployed technician, and the temporary employee is subsequently deployed, the temporary employee would be reemployed to complete any unexpired portion of his/her temporary appointment upon his/her return. Should the appointment expire during the temporary employee's absence, the employment is considered to have ended, and he/she has no rights to reemployment. [[5 CFR 353.103\(a\)](#), [38 USC 4312 \(d\)\(1\)\(C\)](#), & [20 CFR 1002.41](#)]

g. If the individual is employed in an indefinite status, the individual, unless released for cause, will be: (1) reemployed for one year when the period of service before reemployment was for more than 180 days, or (2) reemployed for 180 days when the period of service is for more than 30 days and less than 181 days. [[38 USC 4316\(c\)\(1\)\(2\)](#) & [20 CFR 1002.247](#)] Lack of funds, lack of work or the unavailability of a position for the returning infinite technician is considered to be "for cause" and the individual may be separated with a 30-day advance notice. (TPR 316 4-10 b) and [[38 USC 4313 \(b\)\(1\)](#)]

12. Retention Rights during Workforce Realignment:

a. Uniformed Services Employment and Reemployment Rights Act of 1994 requires retention of reemployed individuals, following military service for the periods specified below:

(1) If the length of uniformed service was for more than 180 days, retention period is for 1 year.

(2) If the length of uniformed service was for more than 30 days but less than 181 days, the retention period is 180 days.

(3) An employee may not be demoted or separated (other than for military separation) while performing duty with the uniformed service except for cause; workforce realignment is not considered "for cause."

13. Appeal Rights:

a. Pursuant to [38 USC 4323 and 20 CFR 1002.303 – 1002.305](#), National Guard technicians may file complaints with the appropriate district court if they believe they have been denied or refused employment or reemployment rights or benefits accorded them under USERRA (i.e., Chapter 43 of Title 38 USC). Technicians do not have the right to appeal to the Merit Systems Protection Board a denial of reemployment rights by the state Adjutant General. ([5 CFR 353.211](#))

b. The Department of Labor has regulatory/oversight responsibility only. They are required to accept and investigate complaints from individuals who believe the employer (TAG) has failed or refused to comply with provisions of USERRA.

14. Protection from Discrimination and Retaliation Reprisals: The employer (TAG) is forbidden to discriminate against any employee or prospective employee, with regard to hiring, retention, and promotion, or any benefit of employment because of past, present, or future application for membership in a uniformed service.

Glossary:

Abbreviations

CFR
Code of Federal Regulations

HRO
Human Resources Office(r)

OPM
Office of Personnel Management

PL
Public Law

TAG
The Adjutant General

TPR
Technician Personnel Regulation

USC
United States Code

USERRA
Uniformed Services Employment and Reemployment Rights Act

Terms:

Compatibility: The condition in which a dual status technician's military assignment is substantially equivalent to the duties described in the full-time technician position description.

Critical mission: An operational mission that requires the skills or resources available in a Reserve component or components.

Dual-Status Technician: A federal civil service employee who has an excepted appointment as a full-time employee of the Air or Army National Guard.

Employer: The Adjutant General of the State in which the technician is employed.

Escalator Position: This is established by the principle that the returning Service member is entitled to the position of civilian employment he or she would have attained had he or she remained continuously employed by that civilian employer.

Primary Occupant: The first individual who left the position in question for service in the uniformed service.

PL 99-586: A bill to amend Title 5, USC, to provide that certain individuals be accorded competitive status for purposes of transferring to the competitive service. Declares that an individual who has served as a National Guard technician for at least 3 years acquires competitive status for transfer to the competitive service if such individual: (1) is involuntarily separated from service as a technician other than for cause on charges of misconduct or delinquency; and (2) passes a noncompetitive examination and transfers to the competitive service within 1 year after separation as a technician.

PL 103-353: To amend Title 38, USC, to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services, and for other purposes.

State: Each of the 48 contiguous states, Hawaii, Alaska, The District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

Supervisor: The individual who directly supervises the full-time technicians.

Technician: Excepted and competitive service technicians defined in 32 USC 709(d).

Uniformed Service: The Armed Forces, the Army National Guard and the Air National Guard member is engaged in active duty training, annual training or full-time National Guard duty. For purposes of these instructions, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform such duty.

References:

[Title 38, USC Chapter 43, Employment and Reemployment Rights of Members of the Uniformed Services](#)

[20 CFR Part 1002, Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules](#)

[Department of Defense Instruction \(DoDI\) 1205.12](#)

[Title 5, Code of Federal Regulations \(CFR\), Section 353](#)

[Title 32, USC, Chapter 709, Technician: Employment, Use, Status](#)

[A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act \(DOL\)](#)