



## REFERENCE GUIDE

### USERRA REQUIREMENTS AND NSPS PERFORMANCE-BASED PAYOUTS

#### Purpose

This reference provides guidance for offices that have employees returning from military service to their DoD civilian positions, their performance-based pay entitlements under NSPS and the Uniformed Services Employment and Reemployment Rights Act (USERRA), at 38 USC § 4301-4334.

#### Background

USERRA requires that the employee will not be disadvantaged because he or she chose to perform in the uniformed service. As such, under USERRA, employees have the right to be reemployed or returned to their civilian job (in some cases a comparable job) if they leave that job to perform service in the uniformed service, which includes compensation and benefits he or she would have attained if the employee had not been absent due to military service. The intent of the law is to provide protection for those employees who are voluntarily or involuntarily called to duty.

#### Discussion

As mentioned above, the employee's USERRA rights encompass the right to be employed in the same job or in a job that is similar in status, pay and benefits when the employee is returned to duty. Upon returning to work, the employee is entitled to the rate of pay, that with reasonable certainty, the employee would have attained had he or she remained employed in civilian service.

To address this special set of circumstances, the NSPS implementing issuance contained in the Civilian Personnel Manual, DoD 1400.25-M, SC1940.AP1 (appendix 1) contains guidance on administering performance assessments and pay adjustments for employees returning from military service, along with other 'specially situated employees'.

The appendix provides guidance for those employees who are absent from civilian service to perform in the uniformed services. This section applies to employees who:

- completed the minimum period of performance during the appraisal period;





- did not complete a minimum period of performance within the appraisal period, and has a previous NSPS rating; or
- did not complete a minimum period of performance within the appraisal period, and has no previous NSPS rating.

For employees who completed the minimum period of performance during the appraisal period, the rating of record will be based on the performance and contributions made by the employee while in his or her civilian capacity under an approved NSPS performance plan. The employee shall receive a final rating of record and pay adjustment determination consisting of the appropriate increase, based on the rating received, in base salary and/or bonus.

For employees who did not complete a minimum period of performance within the appraisal period, performance pay adjustments shall be based on either the employee's last NSPS rating of record or the modal rating received by other employees covered by the same pay pool and pay band for the most recently completed appraisal period, whichever is most advantageous to the employee.

For employees who did not complete a minimum period of performance within the appraisal period and had no previous NSPS rating, the modal rating received by other employees covered by the same pay pool and pay band for the most recently completed appraisal period shall serve as the basis for performance pay decisions. If there is more than one modal rating, the highest one shall be used.

In any of the situations mentioned above, under NSPS, the enabling regulation at 5 CFR § 9901.342(e)(2), precludes prorating performance payouts based on absences due to military service. The employee is entitled to the rate of pay, that with reasonable certainty, the employee would have attained had he or she remained employed in civilian service.

### Conclusion

Proper administration of performance payouts reflecting absences due to military service for employees who return after performing honorable service in the uniformed services is essential and required for the rate of pay that they would have attained if they had never left those jobs for military service in accordance with their rights under USERRA.

Additionally, consistent with the requirements of the NSPS enabling regulations, practitioners should remember that prorating performance payouts because of absences due to military service is prohibited.





References

5 CFR § 9901.342(e)(2)

DoD 1400.25-M, SC1940, Performance Management