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

PERSONNEL AND READINESS

JUN - 5 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEF, NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTOR, STRATEGIC CAPABILITIES OFFICE
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Repeal of National Emergency Exception to Appointment of Retired Military Members of the Armed Forces to Department of Defense Positions within 180 Days of Retirement

The National Defense Authorization Act for Fiscal Year 2017, enacted December 23, 2016, amended section 3326(b) of title 5, U.S. Code (U.S.C.), by deleting the national emergency waiver exception for the appointment of retired members of the armed forces to civil service positions in or under the DoD, within 180 days of retirement.

Proposed appointments must comply with section 3326 of title 5, U.S.C., as implemented by Department of Defense Instruction (DoDI) 1402.01, "Employment of Retired Members of the Armed Forces." The DoDI delegates authority, and prescribes policy and procedures for employing retired members of the Armed Forces. DoDI 1402.01 will be updated to remove the national emergency waiver exception contained in paragraph 4.6.2.

Firm offers of employment made on or before December 22, 2016, to retired military members who were within 180 days after retirement, are not impacted by this statutory change and can be processed without a waiver required by section 3326(b)(1) of title 5, U.S.C.

Cases in which firm offers of employment were made after December 22, 2016, and cases for which waivers were not approved in advance of the firm offer, may have been made in violation of section 3326 of title 5, U.S.C. DoD Components are encouraged to identify potential violations and consult with their servicing civilian human resources office to determine the appropriate remedy. I request that the Military Departments' Assistant Secretaries for Manpower and Reserve Affairs provide my point of contact with a report on such cases arising within their respective Departments within 30 days of the effective date of this memorandum. The report must include information regarding the position, appointment, and any corrective action taken, or proposed to be taken, in each case.

A reference guide containing information about the impact of the repeal is attached. Should you have any questions, my point of contact is Ms. Julie Blanks, Acting Deputy Assistant Secretary of Defense for Civilian Personnel Policy, whom you may reach at (703) 614-9487 or by email at julie.a.blanks.civ@mail.mil.

AM Kurta

A. M. Kurta
Performing the Duties of the Under Secretary of
Defense for Personnel and Readiness

Attachment:
As stated

Repeal of National Security Exception to Appointment of Retired Military Members of the Armed Forces within 180 Days of Retirement

References

National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, Section 1111
Title 5, U.S. Code, Section 3326(b)
DoD Instruction 1402.01, *Employment of Retired Members of the Armed Forces,* September 9, 2007

Introduction

On December 23, 2016, President Obama signed into law the NDAA for FY 2017. Section 1111 amended section 3326 (b) of title 5, U.S.C. and eliminated the Department's flexibility that allowed a retired member of the Armed Forces to be appointed to a position in the civil service (including non-appropriated funds instrumentality) during the 180 days immediately after retirement (without a waiver) if a state of national emergency existed.

Modification

The language modification in section 3326(b) of title 5, U.S.C., does not represent a new requirement. When the state of national emergency was declared on September, 14, 2001, it became a business practice to appoint retired military members within 180 days of retirement, without the need to seek a waiver. The elimination of the language in the law reverts procedures to those in effect prior to September 14, 2001.

Positions Impacted

The change in the law impacts all appropriated and non-appropriated civilian positions in the competitive and excepted service.

Effective Date

Effective December 23, 2016, the only instances when a retired military member may be appointed in the Department to a civil service position within 180 days of retirement is when:

a. The appointment is approved by the official to whom authority has been delegated and statutory criteria have been met; or
b. The minimum rate of basic pay for the position has been increased under special pay authority in section 5305 of title 5, U.S.C.

For additional questions please contact DCPAS Human Resources Operational Programs and Advisory Services, Staffing Policy Advisory Office at (703) 882-5196 or send an email to dodhra.mc-alex.dcpas-hrops.list.staffing-and-civ-transition@mail.mil.

Q1. What did section 1111 of the NDAA for FY 2017 change?

A1. Section 1111 eliminated the DoD's flexibility provided by paragraph (b)(3) of section 3326 of title 5, U.S.C., that allowed a retired member of the Armed Forces to be appointed to a position in the civil service (including non-appropriated fund instrumentality positions) during the period 180 days immediately after the member's retirement (without a waiver) if a state of national emergency existed.

Q2. When is the new law effective?

A2. The law went into effect on December 23, 2016, when the President signed into law the NDAA for FY 2017 (P.L.114-840). Note: this is not a new "policy and procedure," but a statutory requirement effective December 23, 2016.

Q3. What positions are impacted by this law change?

A3. All appropriated fund civilian positions in the competitive and excepted service, as well as non-appropriated fund positions, Senior Executive Service, Senior-Level, and Scientific and Professional positions (including permanent, temporary, term, part-time, flexible, and intermittent positions).

Q4. Does the change in the law mean our agency can no longer hire retired military members within 180 days following their retirement?

A4. No. With the enactment of the NDAA for FY 2017 striking the state of national emergency waiver exception from section 3326, the only instances when a retired military member may be appointed in the Department to a civil service position within 180 days of the member's retirement is when the appropriate authority has granted a waiver.

Q5. When should a 180-day rule waiver be submitted?

A5. A waiver should be submitted when the best qualified candidate tentatively selected for the position is a retired member of the Armed Forces and the projected appointment date is within 180 days of the member's retirement.

Q6. Must a waiver be approved before appointing a member of the Armed Forces who retired within 180 days?

A6. Yes. A waiver request must be approved <u>before</u> a selectee can be given a firm offer. Waivers must be approved by the official to whom authority has been granted. Once the waiver has been approved, the individual may be given a firm offer for, and thus appointed to, the civilian position.

Q7. What information is required in the 180-day rule waiver package?

A7. The law requires that all requests for waivers must contain information that: 1) full consideration was given to eligible career employees in accordance with the DoD Component's placement and promotion procedures; 2) that the vacancy was publicized to give interested candidates the opportunity to apply; 3) qualification requirements for the position have not been written in a manner designed to advantage the retired member; and 4) the position has not been held open pending the retirement of the member.

There must be sufficient evidence to support that recruitment was conducted to seek highly qualified candidates and information regarding how the retired member's knowledge, skills, and abilities is superior to other available candidates. Enclosure 2 of DoDI 1402.01 provides documentation required to submit waiver packages.

Q8. Is the approval authority delegated to the Heads of the DoD Components?

A8. Yes. DoD policy guidance (DoDI 1402.01) delegates the authority to the Heads of the DoD Components with independent appointing authority. Heads of DoD Components may further delegate this authority to officials in Major Commands, Defense Agencies and Defense Field Activity levels with independent appointing authority.

Q9. Is there a folder identified in the electronic Official Personnel Folder (eOPF) where components can file approval packages or place the staffing case files?

A9. Components have the capability to upload approved waiver letters/memoranda in the recruitment folder (one of the temporary folders) available in an employee's eOPF. However, each Component must work with OPM's Enterprise Human Resources Integration office to ensure the Component's Master Form List is properly updated to reflect these forms prior to the Component uploading these documents to eOPF using USA Staffing's Onboarding process.

Q10. Does this change mean retired military members cannot apply to a vacancy announcement until after 180 days from the date of their retirement?

A10. No. Retired member of the Armed Forces have a right to seek and be considered for Federal civilian employment. The change to section 3356 of title 5, U.S.C., does not impact this right; rather, it imposes a requirement for approval of the member's appointment during the 180 days following the member's retirement.

Q11. What impact does section 1111 of the NDAA for FY 2017 have with the Veterans Opportunity to Work (VOW) Act of 2011?

A11. The VOW Act of 2011 requires Federal agencies to treat certain active duty service members as veterans and preference eligibles when they apply for positions in the competitive service and excepted service. The provision in section 1111 of the NDAA for FY 2017 does not restrict the consideration of active duty service members covered under the

VOW Act. Applications for positions will continue to be processed and considered in accordance with the VOW Act, section 3326 of title 5.

Q12. An active duty service member applies for consideration under the VOW Act. The submitted certification shows the service member will be retiring, but will go on terminal leave prior to retiring. The hiring manager selects the active service member. Can the soon-to-retire active service member be appointed without a waiver while on terminal leave?

A12. No. A service member who is on terminal leave pending his/her retirement may apply and accept a Federal civilian service position. However, the waiver specified in section 3326 of title 5, U.S.C., must be approved prior to appointment.

Q13. Is the 180-day rule applicable to retired Guard or Reserve members?

A13. Yes, the provision applies to active duty, Guard, and Reserve retirees.

Q14. Section 3326(b) of title 5, U.S.C., states no waiver is required if "the minimum rate of basic pay for the position has been increased under section 5305 of this title." Are Defense Civilian Intelligence Personnel System (DCIPS) positions exempt from 180-day waiver requirement based on section 5305?

A14. No. The DCIPS pay system is not established under section 5305 of title 5, U.S.C.

Q15. Where can I find additional information on this policy?

A15. DoDI 1402.01 provides details on policy requirements and the associated waiver process. This DoDI is currently being updated to reflect the change in the law.