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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 351 and 630

RIN 3206-AH64

#### Reduction in Force and Mandatory Exceptions

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rulemaking.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim regulations that implement recent legislation giving employees the right to use annual leave to establish initial retirement eligibility for employees in reduction in force and other restructuring situations. These regulations also implement related provisions concerning the availability of annual leave to qualify for continuance of health benefits in the same situation.

**DATES:** These regulations are effective March 10, 1997. Comments must be received on or before May 9, 1997.

**ADDRESSES:** Send or deliver written comments to: Mary Lou Lindholm, Associate Director for Employment Service, Room 6F08, Officer of Personnel Management, Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:** (part 351) Thomas A. Glennon or Edward P. McHugh, (202) 606-0960, FAX (202) 606-2329; (part 630) Jo Ann Perrini, (202) 606-2858, FAX (202) 606-0824.

**SUPPLEMENTARY INFORMATION:** Section 634 of the Treasury, Postal Service, and General Government Appropriations Act, 1997, as contained in section 101(f) of the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208, approved September 30, 1996), provides that an employee who is being involuntarily separated from an agency due to reduction in force or transfer of

function may elect to use annual leave and remain on the agency's rolls after the effective date the employee would otherwise have been separated in order to establish initial eligibility for immediate retirement, including discontinued service or voluntary early retirement. The same option is also available to acquire eligibility to continue health benefits into retirement. These provisions are codified in new 5 U.S.C. 6302(g).

Since January 1993, OPM has provided similar benefits by regulation. Presently, an agency may elect to retain on annual leave an employee who has received a specific reduction in force notice so that the employee may establish initial eligibility for retirement, and/or for continuance of health benefits into retirement (58 FR 5563, January 22, 1993, as amended at 60 FR 2678, January 11, 1995). For an employee to achieve initial eligibility in a reduction in force situation, agencies use a "Permissive Temporary Exception" under authority of section 5 CFR 351.608(d) to retain an employee past the effective date that the employee would have been separated.

The new 5 U.S.C. 6302(g) required two major changes to OPM's regulatory provisions: (1) an employee who is being involuntarily separated now has a right to use his or her annual leave to achieve initial eligibility for retirement and/or continued health benefits coverage; and (2) this right extends to transfer of function relocation situations.

To implement 5 U.S.C. 6302(g), section 5 CFR 351.606, Mandatory exceptions, is revised by adding a new paragraph (b).

Section 5 CFR 351.606(b)(1) provides that an employee who is being involuntarily separated from an agency because of reduction in force under authority of 5 CFR part 351 may elect to use annual leave past the date that the employee would otherwise have been separated for the purpose of establishing initial eligibility under sections 5 U.S.C. 8336, 8412, or 8414 for immediate retirement, including discontinued service or voluntary early retirement.

Section 5 CFR 351.606(b)(1) also provides the same election option so that an employee who is being involuntarily separated from an agency because of reduction in force may use

annual leave for the purpose of acquiring initial eligibility under 5 U.S.C. 8905 to continue health benefits into retirement.

Section 5 CFR 351.606(b)(2) provides that an employee who is being involuntarily separated as an adverse action because of the employee's decision to decline relocation (including transfer of function) may use annual leave to remain on the agency's rolls after the effective date of the relocation to establish initial eligibility for immediate retirement under 5 U.S.C. 8336, 8412, or 8414 (including discontinued service or voluntary early retirement), and/or to establish initial eligibility under 5 U.S.C. 8905 to continue health benefits coverage into retirement.

Section 5 CFR 351.606(b)(3) provides that the entitlements under 5 U.S.C. 6302(g) apply to employees covered by chapter 63 of title 5, United States Code.

Section 5 CFR 351.606(b)(4) provides that an agency may not retain any employee under the provisions of 5 U.S.C. 6302(g) past the date that the employee first becomes eligible for immediate retirement, and/or for continuation of health benefits into retirement.

Section 5 CFR 351.606(b)(5) provides that, except as permitted by 5 CFR 351.608(d), an agency may not approve an employee's use of any other type of leave after the employee has been retained under a temporary exception.

Section 5 CFR 351.606(b)(6) clarifies that the annual leave that may be used for the purpose of remaining on an agency's rolls to establish eligibility for immediate retirement and/or establish initial eligibility to continue health benefits coverage into retirement is described in 5 CFR 630.212.

Section 630.212 states that all accumulated, accrued, and restored annual leave to an employee's credit prior to the effective date of a reduction in force or relocation and annual leave earned by an employee while in a paid leave status after the effective date of the reduction in force or relocation may be used for these purposes. However, annual leave that is advanced to an employee under 5 U.S.C. 6302(d) may not be used for these purposes. In addition, an employing agency may permit an approved leave recipient to use for these purposes any or all annual leave donated under 5 CFR part 630,

subpart I, or made available under 5 CFR part 630, subpart J, as of the effective of the reduction in force or relocation.

In conforming changes, section 5 CFR 351.606(a) is revised with a reference label, and former section 5 CFR 351.606(b) is found in a new section 5 CFR 351.606(c), also with a reference label.

In another conforming change, section 5 CFR 351.608 is revised as a result of the entitlements provided under 5 U.S.C. 6302(g). Also, a new section 5 CFR 351.608(e) provides that an employee who is not covered by chapter 63 of title 5, United States Code, but who is being involuntarily separated from an agency because of reduction in force under part 5 CFR 351, may, at the agency's discretion, elect to use annual leave past the date that the employee would otherwise have been separated for the purpose of establishing initial eligibility under sections 5 U.S.C. 8336, 8412, or 8414 (or other authority) for immediate retirement, including discontinued service or voluntary early retirement, and/or establishing eligibility under 5 U.S.C. 8905 (or other authority) to continue health benefits coverage into retirement.

An additional conforming change revises section 351.506(b) to provide, consistent with prior policy, that the retention standing of each employee retained in a competitive level as an exception under section 351.606(b), as well as sections 351.607 or section 351.608, is determined as of the date the employee would have been released had the exception not been used. The retention standing of each employee retained under any of these three exceptions remains fixed until completion of the reduction in force action which resulted in the mandatory or permissive temporary retention.

**Waiver of Notice of Proposed Rulemaking and Delay in Effective Date**

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking because it would be contrary to the public interest to delay access to benefits. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists to make this amendment effective in less than 30 days. The delay in the effective date is being waived because these regulations provide a benefit authorized by statute rather than eliminating or modifying existing benefits. This amendment gives full effect to the benefits extended by the amended provisions of the statute at the earliest practicable date.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects Federal employees.

**Executive Order 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

**List of Subjects in Parts 351 and 630**

Administrative practice and procedure, Government employees.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is amending parts 351 and 630 of title 5, Code of Federal Regulations, as follows:

**PART 351—REDUCTION IN FORCE**

1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 1302, 3502, 3503; sec. 351.801 also issued under E.O. 12828, 58 FR 2965.

2. In § 351.506, paragraph (b) is revised to read as follows:

**§ 351.506 Effective date of retention standing.**

\* \* \* \* \*

(b) The retention standing of each employee retained in a competitive level as an exception under § 351.606(b), § 351.607, or § 351.608, is determined as of the date the employee would have been released had the exception not been used. The retention standing of each employee retained under any of these provisions remains fixed until completion of the reduction in force action which resulted in the temporary retention.

\* \* \* \* \*

3. § 351.606 is revised to read as follows:

**§ 351.606 Mandatory exceptions.**

(a) *Armed Forces restoration rights.* When a agency applies § 351.601 or § 351.605, it shall give retention priorities over other employees in the same subgroup to each group I or II employee entitled under 38 U.S.C. 2021 or 2024 to retention for, as applicable, 6 months or 1 year after restoration, as provided in part 353 of this chapter.

(b) *Use of annual leave to reach initial eligibility for retirement or continuance of health benefits.* (1) An agency shall make a temporary exception under this section to retain an employee who is being involuntarily separated under this

part, and who elects to use annual leave to remain on the agency's rolls after the effective date the employee would otherwise have been separated by reduction in force, in order to establish initial eligibility for immediate retirement under 5 U.S.C. 8336, 8412, or 8414, and/or to establish initial eligibility under 5 U.S.C. 8905 to continue health benefits coverage into retirement.

(2) An agency shall make a temporary exception under this section to retain an employee who is being involuntarily separated under authority of part 752 of this chapter because of the employee's decision to decline relocation (including transfer of function), and who elects to use annual leave to remain on the agency's rolls after the effective date the employee would otherwise have been separated by adverse action, in order to establish initial eligibility for immediate retirement under 5 U.S.C. 8336, 8412, or 8414, and/or to establish initial eligibility under 5 U.S.C. 8905 to continue health benefits coverage into retirement.

(3) An employee retained under paragraph (b) by this section must be covered by chapter 63 of title 5, United States Code.

(4) An employee may not retain an employee under paragraph (b) of this section past the date that the employee first becomes eligible for immediate retirement, or for continuation of health benefits into retirement, except that an employee may be retained long enough to satisfy both retirement and health benefits requirements.

(5) Except as permitted by 5 CFR 351.608(d), an agency may not approve an employee's use of any other type of leave after the employee has been retained under a temporary exception authorized by paragraph (b) of this section.

(6) Annual leave for purposes of paragraph (b) of this section is described in § 630.212 of this chapter.

(c) *Documentation.* Each agency shall record on the retention register, for inspection by each employee, the reasons for any deviation from the order of release required by § 351.601 or § 351.605.

4. Section 351.608 is revised to read as follows:

**§ 351.608 Permissive temporary exceptions.**

(a) *General.* (1) In accordance with this section, an agency may make a temporary exception to the order of release in § 351.601, and to the action provisions of § 351.603, when needed to retain an employee after the effective date of a reduction in force. Except as

otherwise provided in paragraphs (c) and (e) of this section, an agency may not make a temporary exception for more than 90 days.

(2) After the effective date of a reduction in force action, an agency may not amend or cancel the reduction in force notice of an employee retained under a temporary exception so as to avoid completion of the reduction in force action. This does not preclude the employee from receiving or accepting a job offer in the same competitive area in accordance with a Reemployment Priority List established under part 330, subpart B, of this chapter, or under a Career Transition Assistance Plan established under part 330, subpart E, of this chapter, or equivalent programs.

(b) *Undue interruption.* An agency may make a temporary exception for not more than 90 days when needed to continue an activity without undue interruption.

(c) *Government obligation.* An agency may make a temporary exception to satisfy a Government obligation to the retained employee without regard to the 90-day limit set forth under paragraph (a)(1) of this section.

(d) *Sick leave.* An agency may make a temporary exception to retain on sick leave a lower standing employee covered by chapter 63 of title 5, United States Code (or other applicable leave system for Federal employees), who is on approved sick leave on the effective date of the reduction in force, for a period not to exceed the date the employee's sick leave is exhausted. Use of sick leave for this purpose must be in accordance with the requirements in part 630, subpart D, of this chapter (or other applicable leave system for Federal employees). Except as authorized by § 351.606(b), an agency may not approve an employee's use of any other type of leave after the employee has been retained under this paragraph (d).

(e)(1) An agency may make a temporary exception to retain on accrued annual leave a lower standing employee who:

(i) Is being involuntarily separated under this part;

(ii) Is covered by a Federal leave system under authority other than chapter 63 of title 5, United States Code; and,

(iii) Will attain first eligibility for an immediate retirement benefit under 5 U.S.C. 8336, 8412, or 8414 (or other authority), and/or establish eligibility under 5 U.S.C. 8905 (or other authority) to carry health benefits coverage into retirement during the period represented by the amount of the employee's accrued annual leave.

(2) An agency may not approve an employee's use of any other type of leave after the employee has been retained under this paragraph (e).

(3) This exception may not exceed the date the employee first becomes eligible for immediate retirement or for continuation of health benefits into retirement, except that an employee may be retained long enough to satisfy both retirement and health benefits requirements.

(4) Accrued annual leave includes all accumulated, accrued, and restored annual leave, as applicable, in addition to annual leave earned and available to the employee after the effective date of the reduction in force. When approving a temporary exception under this provision, an agency may not advance annual leave or consider any annual leave that might be credited to an employee's account after the effective date of the reduction in force other than annual leave earned while in an annual leave status.

(f) *Other exceptions.* An agency may make a temporary exception under this section to extend an employee's separation date beyond the effective date of the reduction in force when the temporary retention of a lower standing employee does not adversely affect the right of any higher standing employee who is released ahead of the lower standing employee. The agency may establish a maximum number of days, up to 90 days, for which an exception may be approved.

(g) *Notice to employees.* When an agency approves an exception for more than 30 days, it must:

(1) Notify in writing each higher standing employee in the same competitive level reached for release of the reasons for the exception and the date the lower standing employee's retention will end; and

(2) List opposite the employee's name on the retention register the reasons for the exception and the date the employee's retention will end.

## PART 630—ABSENCE AND LEAVE

5. The authority citation for part 630 continues to read as follows:

Authority: 5 U.S.C. 6311; § 630.301 also issued under Pub. L. 103-356, 108 Stat. 3410; § 630.303 also issued under 5 U.S.C. 6133(a); §§ 630.306 and 630.308 also issued under 5 U.S.C. 6304(d)(3), Pub. L. 102-484, 106 Stat. 2722, and Pub. L. 103-337, 108 Stat. 2663; subpart D also issued under Pub. L. 103-329, 108 Stat. 2423; § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100-566, 102

Stat. 2834, and Pub. L. 103-103, 107 Stat. 1022, subpart J also issued under 5 U.S.C. 6362, Pub. L. 100-566, and Pub. L. 103-103; subpart K also issued under Pub. L. 102-25, 105 Stat. 92; and subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103-3, 107 Stat. 23.

6. In part 630, § 630.212 is added to read as follows:

### § 630.212 Use of annual leave to establish initial eligibility for retirement or continuation of health benefits.

(a) An employee may elect to use annual leave and remain on the agency's rolls in order to establish initial eligibility for immediate retirement under 5 U.S.C. 8336, 8412, or 8414, and/or to establish initial eligibility under 5 U.S.C. 8905 to continue health benefits coverage into retirement, as provided in:

(1) Section 351.606(b)(1) for an employee who would otherwise have been separated by reduction in force procedures under part 351 of this chapter; or

(2) Section 351.606(b)(2) of this chapter for an employee who would otherwise have been separated by adverse action procedures under authority of part 752 of this chapter because of the employee's decision to decline relocation (including transfer of function).

(b)(1) Annual leave that may be used for the purposes described in paragraph (a) of this section includes all accumulated, accrued, and restored annual leave to the employee's credit prior to the effective date of the reduction in force or relocation (including transfer of function) and annual leave earned by an employee while in a paid leave status after the effective date of the reduction in force or relocation (including transfer of function).

(2) Annual leave that is advanced to an employee under 5 U.S.C. 6302(d), including any advance annual leave that may be credited to an employee's leave account after the effective date of the reduction in force or relocation (including transfer of function), may not be used for purpose of this section.

(3) For purposes of this section, the employing agency may approve the use of any or all annual leave donated to an employee under part 630, subpart I, of this chapter (Voluntary Leave Transfer Program), or made available to the employee under part 630, subpart J, of this chapter (Voluntary Leave Bank Program), as of the effective date of the reduction in force or relocation.

[FR Doc. 97-5835 Filed 3-7-97; 8:45 am]

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