

# Law Review 13009

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## Differential Pay for Federal Employees Called to Active Duty for Contingency Service

By Captain Samuel F. Wright, JAGC, USN (Ret.)

### 2.0—Paid Leave for Government Employees Who Are Reserve Component Members

On March 11, 2009, President Obama signed into law the Omnibus Appropriations Act, 2009 (Public Law 111-8). Section 751 of that Act added a new section (section 5538) to title 5 of the United States Code (U.S.C.). This new section became effective on the first day of the first pay period beginning on or after March 11, 2009. For Executive Branch employees on the standard bi-weekly payroll cycle, the effective date is March 15, 2009.

The right to differential pay under section 5538 applies to essentially all federal employees, including Legislative Branch and Judicial Branch employees and employees of federal non-appropriated fund activities, like the Army & Air Force Exchange Service (AAFES).[\[1\]](#)

Section 745 of the Consolidated Appropriations Act, 2010 (Public Law 111-117 signed December 16, 2009) amended section 5538. As amended, the section reads as follows:

“(a) An employee who is absent from a position of employment with the Federal Government 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 section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee’s civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee’s civilian employment had not been interrupted)—

(1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee’s civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee’s employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)

(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) [This refers to intelligence agencies, including the Central Intelligence Agency, the Defense Intelligence Agency, the Federal Bureau of Investigation, etc.] shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms “employee”, “Federal Government”, and “uniformed services” have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term “employing agency”, as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

(3) the term “basic pay” includes any amount payable under section 5304.”

Title 5, United States Code, section 5538 (5 U.S.C. 5538).

The Office of Personnel Management (OPM) has issued definitive guidance about the application of section 5538 to federal agencies and federal employees. This 30-page document is available at:

<http://www.opm.gov/reservist/ReservistDifferentialPolicyGuidance.pdf>

The OPM guidance includes the following paragraph:

“A reservist differential under section 5538 is payable to a covered employee during a qualifying period during which the employee meets **both** of the following conditions:

1. The 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), as described in Part 1 of Appendix D, and is serving on such active duty; **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.”

**(Emphasis in original.)**

As I described in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

1. Must have left a civilian position of employment for the purpose of performing service in the uniformed services.
2. Must have given the employer prior oral or written notice.
3. Must not have exceeded the cumulative five-year limit, with respect to periods of uniformed service relating to the employer relationship for which the individual seeks reemployment.
4. Must have been released from the period of service without having received a disqualifying punitive (by court martial) or other than honorable discharge.
5. Must have made a timely application for reemployment, after release from the period of service.

As is explained in Law Review 201 (November 2005), there are nine exemptions from the five-year limit. The shorthand version is that *all* involuntary service and *some* voluntary service are exempted from the computation of the individual's limit.

Let us say that Joe Smith, a GS-15 at the Department of Interior (DOI), has been recalled to active duty as a third class petty officer (E-4) in the Coast Guard Reserve. Section 5538 entitles Joe to the substantial difference between his active duty military pay (including allowances and special pays like hazardous duty pay) and the federal civilian basic pay that he *would have received* from DOI if he were not on active duty. The 30-page OPM guidance explains in detail how the differential pay is to be computed and paid.

Section 5538 provides that Joe must be entitled to reemployment rights under USERRA to get the differential pay, but Law Review 1281 explains that Joe is not entitled to reemployment rights *until he meets all five of the eligibility conditions*. While Joe is on active duty, he is not entitled to reemployment, and we do not know for certain that Joe will be entitled to reemployment when he leaves active duty.

Several things might happen that would disqualify Joe from having the right to return to his GS-15 job at DOI. He could remain on active duty voluntarily, after the end of his involuntary call-up, and go over the five-year cumulative limit. He could do something really stupid ("let's wake up the prisoners and play the naked pyramid game again") and get a disqualifying bad discharge from the Coast Guard. He could win the Publisher's Clearinghouse Sweepstakes and retire. For whatever reason, he could fail to apply for reemployment at DOI after release from active duty. God forbid, he could die. Until Joe is released from active duty and then makes a timely application for reemployment at DOI, we do not know for certain that Joe will be entitled to reemployment.

As applied to the right to differential pay under section 5538, the "entitled to reemployment" criterion must be read as "Joe has not done anything that disqualifies him from having the right to reemployment." For example, if Joe has been on active duty for more than five years cumulatively, relating to his employment relationship with DOI, and if the nine exemptions under section 4312(c) of USERRA do not bring Joe back under the five-year limit, then Joe's right to differential pay from DOI, while on active duty in the Coast Guard, would come to an end.

I have recently heard from several federal employees who are on active duty for contingency operations and who appear to be clearly entitled to differential pay under section 5538, but who are not receiving that differential pay. Federal civilian personnel offices often profess ignorance about this section, although President Obama signed it into law almost four years ago and there is definitive OPM guidance about it available on the OPM website.

If you have applied for and believe that you are entitled to differential pay under section 5538, but you are not receiving it, let me hear from you. I am available by e-mail at [SWright@roa.org](mailto:SWright@roa.org) or by telephone at 800-809-9448, extension 730. I am available during regular business hours and until 2200 Eastern Time on Monday and Thursday evenings. The point of the evening availability is to enable RC personnel to call me from the privacy of their own homes, outside their civilian or military work hours.

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[1] Please see Law Review 0813 (April 2008). The article is titled “Despite its longtime contention, AAFES is not exempt from USERRA.” I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 831 articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.