

# LAW REVIEW 131 - Update

**Update: March 2009**

## **Criminal Prohibition on Salary Supplement for Reserve or Guard Personnel**

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In Law Review 131 (July 2004), Colonel John S. Odom, Jr. and I wrote about the question of the lawfulness of employer generosity to National Guard and Reserve personnel who leave well-paying civilian jobs for voluntary or involuntary active duty. The National Committee for Employer Support of the Guard and Reserve (ESGR), a Department of Defense (DoD) organization founded in 1972, encourages civilian employers to pay differential pay in this situation and gives awards (up to and including the prestigious "Freedom Award") to employers who go above and beyond the requirements of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in supporting employees who have been called to the colors.

More than a million National Guard and Reserve personnel have been called to active duty since the terrorist attacks of September 11, 2001. (This figure includes some double counting of Guard and Reserve personnel called more than once.) About one-third of these recalled Reserve Component (RC) members have suffered a substantial loss of pay when mobilized, in that their military pay on active duty is substantially less than their regular civilian compensation. USERRA does not require employers to pay differential pay, but such payments are certainly to be encouraged.

In Law Review 131, Colonel Odom and I addressed the contention that it may be unlawful for an employer to pay differential pay and unlawful for the recalled RC member to accept it, under 18 U.S.C. 209(a). We cited case law and suggested that such payments are not unlawful. We also wrote, "Having said that, we favor a statutory amendment to the law, making it abundantly clear that it is not unlawful for an employer to voluntarily supplement the pay of any employee or former employee who has entered upon active duty, voluntarily or involuntarily, and that it is not unlawful for the employee or former employee to accept any such payment from the employer or former employer."

Through the good efforts of Lieutenant Colonel Susan Lukas, then ROA's Legislative Director, Congress addressed this issue a few months later. Public Law 108-375 added a new subsection (h) to 18 U.S.C. 209. That new subsection makes it very clear that making and accepting such payments is not unlawful.

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