

## LAW REVIEW 16119<sup>1</sup>

November 2016

### Differential Pay for Federal Employees Who Were Recalled to Active Duty To Respond to the Deepwater Horizon Disaster

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

2.0—Paid leave for government employees who are Reserve Component members

**Q: I am a Chief Petty Officer in the Coast Guard Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the Reserve Components (RC) of the armed forces, including the Coast Guard Reserve.**

**Just recently, in Law Review 16117, you wrote that federal civilian employees who leave their jobs for active duty under certain enumerated sections of the United States Code are entitled to differential pay if their active duty pay is less than their federal civilian pay. Section 712 of title 14<sup>3</sup> is one of the enumerated sections that you mentioned in your article.**

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<sup>1</sup> I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

<sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC (TR), and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (May 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> Title 14 of the United States Code pertains to the Coast Guard. Section 712 provides for the involuntary call-up of Coast Guard Reservists when such a call-up is necessary because of an emergency brought on by a natural disaster, a manmade accident (like Deepwater Horizon), or an act of terrorism.

**On April 20, 2010, the Deepwater Horizon offshore oil platform exploded in the Gulf of Mexico, setting off a massive oil spill that continued for weeks before it was finally shut off. I was one of many Coast Guard Reservists involuntarily called to active duty to respond to the environmental disaster.**

**I was a federal civilian employee at the time, and I still am. I lost money when I was called to active duty because my active duty Coast Guard pay was substantially less than my regular federal civilian pay. Am I entitled to differential pay for the period that I was on active duty in 2010?**

**A:** No.

As I explained in Law Review 13008 (December 2013), on January 2, 2013 President Obama signed the National Defense Authorization Act (NDAA) for Fiscal Year 2013. That new law amended section 101(a)(13)(B) of title 10 by adding section 712 of title 14 to the list of sections of the United States Code that are covered by the right to differential pay for federal civilian employees who leave their civilian jobs for military active duty. Congress backdated this change, but only to December 31, 2011.

Because you started and completed your active duty period before December 31, 2011, you are not entitled to differential pay. The next time that you are called to active duty under section 712 of title 14, you will be entitled to differential pay. This statement assumes, of course, that you will still be a federal civilian employee at that time and that your federal civilian compensation still exceeds your Coast Guard active duty compensation.