

## LAW REVIEW 18038<sup>1</sup>

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### You Must Use Your 22 Extra Days of Paid Military Leave During your Period of Contingency Active Duty

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[\(Update on Sam Wright\)](#)

- 1.1.1.8—USERRA applies to the Federal Government
- 1.3.1.3—Timely application for reemployment
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.3.2.3—Pension credit for military service time
- 1.8—Relationship between USERRA and other laws/policies
- 2.0—Paid leave for government employees who are Reserve Component members

**Q: I am a Master Sergeant in the Army Reserve. I recently joined the Reserve Officers Association (ROA)<sup>3</sup> because I am impressed by your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1600 “Law Review” 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), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, 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 1400 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 36 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, 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 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup> In 2013, ROA members amended the ROA Constitution to make noncommissioned officers eligible for full membership in the association, including voting and running for office.

are especially pertinent to those of us who serve our country in the Reserve Components of the armed forces.

I read with great interest your Law Review 18030 (March 2018), about the recent case styled *O'Farrell v. Department of Defense*, 882 F.3d 1080 (Fed. Cir. 2018) and about the right of the individual federal employee to an *additional* 22 days of *paid* military leave when he or she is called to active duty for a contingency operation. I have known about the basic entitlement to 15 days of paid military leave for many years, and I have used that entitlement each year for my annual training requirement in the Army Reserve. I did not know about the right to an additional 22 days of paid leave until I read your Law Review 18030 quite recently. I wish that I had known about this entitlement last year, when I was called to active duty for a contingency operation.

I am a GS-12 employee of a federal agency. I certainly cannot depend on my employer to inform me about my rights as a federal employee and military reservist. I am one of a handful of reservists employed by this agency, and the agency's personnel office woefully ill-informed about USERRA and other laws that apply to Reserve and National Guard personnel who work for the agency as civilian employees, and my direct supervisor and the agency's personnel office give me a hard time about the days that I am absent from work for Army Reserve service, although USERRA clearly protects my right to be absent from work for military training and service.

I also cannot depend on my Army Reserve unit to inform me about my rights as a reservist and federal employee. Nobody in the unit informed me of my right to an additional 22 days of paid military leave during my recent year of contingency active duty.

I was on active duty, with my unit, for exactly one year, from 4/1/2017 until 3/31/2018. For all but the first few days and the last few days, we were "down range" at a classified location in Southwest Asia (SWA). Our service clearly qualified as "contingency service" and I was clearly entitled to the additional 22 days of paid military leave under section 6323(b)(2)(B) of title 5 of the United States Code.

I was released from active duty, with a DD-214, on 3/31/2018, but I am in no hurry to return to work at my civilian job. Frankly, I am unhappy in the job, in part due to the harassment that I routinely receive because of my Army Reserve service. Since I returned home on 4/1/2018, I have been frantically searching USA Jobs<sup>4</sup> for a better federal civil service job. I will apply for reemployment at the federal agency I left in 2017 in late June, just before the

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<sup>4</sup> USA Jobs is a website operated by the United States Office of Personnel Management, advertising federal civil service opportunities and providing interested persons the opportunity to make on-line applications for those positions.

**expiration of the 90-day deadline for me to apply for reemployment after my 3/31/2018 release from active duty, but only if I don't find a better federal job by then.**

**On April 11, I applied to my federal agency employer for the 22 additional days of paid military leave. The agency's personnel director told me that if I had applied for this paid leave during my year of active duty my application would have been approved and I would have received 22 days of my federal GS-12 pay. She told me that I am not entitled to take the 22 days now because my active duty period ended 3/31/2018. Is the personnel director correct?**

**Answer, bottom line up front**

Yes, the personnel director is correct. A federal civilian employee who is away from his or her civilian job for contingency active duty is entitled to the 22 additional days of paid military leave "during and because of such [contingency] service."<sup>5</sup> Your contingency service ended 3/31/2018 and you are not entitled to the 22 additional days now.

**Explanation**

Here is the entire text of section 6323 (the section that provides paid military leave for federal employees) with the most pertinent words italicized:

Military leave; Reserves and National Guardsmen

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- (a)
  - (1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.
  - (2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.
  - (3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

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<sup>5</sup> 5 U.S.C. 6323(b)(2)(B).

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who--

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and

(2)(A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury--

- (i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or
- (ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or
- (B) *performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10; is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year.* Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d)

(1) A military reserve technician described in section 8401(30) is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.

(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.<sup>6</sup>

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<sup>6</sup> 5 U.S.C. 6323 (emphasis supplied).

Section 6323(b)(2)(B) explicitly requires that the federal employee apply for and use the 22 days of paid leave *during* the active duty period. You are not entitled to these paid leave days because you did not apply for them until after you had left the active duty period.

By the way, I strongly suggest that you apply for reemployment and return to work at the federal agency you left to go on active duty in April 2017, and only *then* should you use USA Jobs to apply for other federal civil service opportunities.<sup>7</sup> Under USERRA, you are entitled to be treated *as if you had been continuously employed* in the civilian job, for seniority and pension purposes, if you meet the five USERRA conditions. One of the conditions is that you must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

You need to return to work for the agency that employed you and get seniority and pension credit for the period of service and the period of federal civilian employment before the period of service. Then, when you move to another federal agency you can take this seniority and pension credit with you to the new federal agency.

When I was in practice a decade ago, I had a client who was away from his federal civilian job for a year of active duty. As the year was coming to an end, he applied for and accepted a new federal civilian job with another agency, instead of applying for reemployment at the agency that employed him before he left for military service. Years later, it turned out that he had not been properly credited for his military service time for federal civilian pension and seniority purposes. We resolved this problem, but not without substantial effort for which he -paid attorney fees.

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<sup>7</sup> Because your active duty period lasted longer than 180 days, you have 90 days (starting on the date of release) to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).