

## LAW REVIEW<sup>1</sup> 18097

October 2018

### Am I Eligible for the Extra 22 Days of Paid Military Leave as a Federal Civilian Employee?

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.3.1.2—Character and duration of service

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

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

**Q: I am a Sergeant Major (E-9) in the Army Reserve and a member of the Reserve Officers Association (ROA).<sup>3</sup> I have read with great interest several 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 or National Guard.**

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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 1700 “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 1500 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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (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 and made noncommissioned officers and petty officers eligible for full membership in the association.

**On the civilian side, I have been a federal civilian employee since 2002. I joined the Transportation Security Administration (TSA) as a screener when it was founded in 2002, shortly after the terrorist attacks of 9/11/2001. TSA was originally part of the Department of Transportation. It was transferred to the new Department of Homeland Security in March 2003. I was employed by TSA until 2013, when I moved to another federal agency.**

**My TSA employment was interrupted by periods of military service. I was on active duty for 16 months in 2003-04, and most of that time I was in Iraq with “boots on the ground.” I was away from my TSA job for another 48 months (not all continuous) of active duty in 2006-12. I spent part of that time in Iraq and Afghanistan, but most of the time I served at Army bases in the United States training other soldiers for these and other contingency operations.**

**At the end of each period of uniformed service, I made a timely application for reemployment at TSA, and I was reemployed. Although my cumulative period of uniformed service during my TSA employment exceeded five years, I did not exceed USERRA’s five-year limit because several of my periods were exempt from the computation of the limit.<sup>4</sup>**

**I have read with great interest your Law Review 18030 (March 2018), about the case styled *O’Farrell v. Department of Defense*, 882 F.3d 1080 (Fed. Cir. 2018). I think that my situation is very similar to Colonel O’Farrell’s situation, and that if he was deemed eligible for the 22 extra days of paid military leave under section 6323 of title 5 of the United States Code I should also be eligible. I applied for that benefit more than a decade ago, each time I returned to work at TSA after military service periods, but the TSA personnel office insisted that I was not eligible. Is it too late for me to renew that claim now?**

**Answer, bottom line up front**

Because you were employed by TSA at the relevant times, and because USERRA could not be enforced against TSA until late 2013, there is doubt as to whether you can enforce your right to the 22 additional days of paid military leave for contingency operations under section 6323. If you had been employed by any other federal executive agency your right to this benefit would be clear.

**Explanation**

**What difference does it make that I worked for TSA?**

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<sup>4</sup> Please see Law Review 16043 (May 2016).

Section 111(d) of the Aviation Security Act gave TSA the authority to appoint screeners “notwithstanding any other provision of law.”<sup>5</sup> The Merit Systems Protection Board (MSPB) and the United States Court of Appeals for the Federal Circuit held that this “notwithstanding” clause meant that TSA screeners and persons seeking such positions had no enforceable USERRA rights.<sup>6</sup> The “notwithstanding” clause resulted in a serious loophole in effective USERRA enforcement. Congress finally closed that loophole when it enacted Public Law 112-171.<sup>7</sup> That law went into effect 270 days after enactment (8/13/2013). Because your claim for the extra 22 days of paid military leave under section 6323 of title 5 accrued prior to 8/13/2013, I fear that the MSPB and the Federal Circuit will hold that you cannot enforce your right to that benefit.

### **Substantive right to the additional 22 days of paid military leave**

Section 6323 of title 5 reads as follows:

#### **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.
- (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

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<sup>5</sup> 49 U.S.C. 44935 note.

<sup>6</sup> *Conyers v. Merit Systems Protection Board*, 388 F.3d 1380 (Fed. Cir. 2004). I discuss this issue in detail in Law Review 06037 (November 2006).

<sup>7</sup> 126 Stat. 1306, signed into law 8/16/2012.

**(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--

- Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or
- 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>8</sup>

The italicized language was added in 2003.<sup>9</sup> Thus, you were entitled to the additional 22 days of paid military leave for your contingency active duty, except for the initial months of your active duty in 2003, before 11/24/2003. If you had worked for any federal executive agency other than TSA, your right to this benefit would be clear.

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<sup>8</sup> 5 U.S.C. 6323 (emphasis supplied).

<sup>9</sup> Public Law 108-136, 117 Stat. 1635, Division A, Title XI, Subtitle B, section 1113(a) (enacted November 24, 2003).