

## **Extra 22 Days of Paid Military Leave for RC Members on Active Duty in Support of Contingency Operations**

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**Q: I am a Major in the Army 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 who serve our country in uniform.**

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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).

**On the civilian side, I am a federal civilian employee. I am aware of the provision in title 5 of the United States Code that gives federal employees who are Reserve Component (RC) members 15 days of *paid* military leave per fiscal year, and I have used that provision several times for my annual training in the Army Reserve.**

**I have heard that a federal employee who serves on active duty in support of a contingency operation is entitled to an additional 22 days of paid leave on top of the 15. Is that correct? How does this provision work?**

**A:** Section 6323 of title 5 of the United States Code provides 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

**(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>3</sup>

The basic entitlement to 15 days per federal fiscal year of *paid* military leave dates from 8/10/1956.<sup>4</sup> The provision in section 6323(b)(2)(B), providing for an additional 22 days of paid military leave for a federal employee who “performs full-time service as a result of an order or call to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10” dates from 11/24/2003.<sup>5</sup>

Section 101(a)(13) of title 10 reads as follows:

The term "contingency operation" means a military operation that--

**(A)** is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

**(B)** results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406

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<sup>3</sup> 5 U.S.C. 6323 (emphasis supplied).

<sup>4</sup> Section 13, Public Law 85-861, 70A Stat. 632.

<sup>5</sup> Section 1113(a) of Public Law 108-136, 117 Stat. 1392.

of this title, chapter 15 of this title, section 712 of title 14, *or any other provision of law during a war or during a national emergency declared by the President or Congress.*<sup>6</sup>

Section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>7</sup> makes it unlawful for an employer (federal, state, local, or private sector) to deny a person a “benefit of employment” (or initial employment, reemployment, retention in employment, or a promotion) on the basis of the person’s membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service. The term “benefit of employment” is broadly defined by section 4303(2) of USERRA.<sup>8</sup>

The Federal Circuit has held that paid military leave under section 6323 of title 5 is a “benefit of employment” for USERRA purposes.<sup>9</sup> This means that if the federal employee’s claim is that he or she has been wrongfully denied paid military leave, the USERRA enforcement mechanism is the proper way to adjudicate such a claim. USERRA’s provision for enforcement with respect to federal executive agencies, as employers, is set forth in section 4324, as follows:

#### Enforcement of rights with respect to Federal executive agencies

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**(a)**

**(1)** A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

**(2)**

**(A)** If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

**(B)** Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall--

- **(i)** make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and
- **(ii)** notify such person in writing of such decision.

**(b)** A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

- (1)** has chosen not to apply to the Secretary for assistance under section 4322(a);
- (2)** has received a notification from the Secretary under section 4322(e);

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<sup>6</sup> 10 U.S.C. 101(a)(13) (emphasis supplied).

<sup>7</sup> 38 U.S.C. 4311.

<sup>8</sup> 38 U.S.C. 4303(2). Please see Law Review 18012 (January 2018) for a detailed discussion of this definition.

<sup>9</sup> *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003).

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)

(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.<sup>10</sup>

**Q: Does my active duty have to be in *direct* support of the contingency operation for me to qualify for the additional 22 days of paid military leave under section 6323?**

**A:** No. Earlier this year, the United States Court of Appeals for the Federal Circuit held that federal civilian employees who go on active duty in the Reserve or National Guard to provide *indirect* support of a contingency operation qualify for the additional 22 days of paid military leave.<sup>11</sup>

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<sup>10</sup> 38 U.S.C. 4324.

<sup>11</sup> See *O'Farrell v. Department of Defense*, 882 F.3d 1080 (Fed. Cir. 2018). I discuss this case in detail in Law Review 18030 (March 2018).