

## LAW REVIEW<sup>1</sup> 19005

January 2019

### Accrual of Annual Leave as a Federal Civilian Employee— Credit for Prior Active Duty

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

[Update on Sam Wright](#)

#### 3.0—Reserve retirement and civilian employment

**Q: I am a recently retired Lieutenant Colonel of the Army Reserve (USAR) and a life member of the Reserve Organization of America.<sup>3</sup> I have read with great interest several of your “Law**

---

<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> At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component

Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to persons who serve or have served in the Reserve or National Guard.

I was born in May 1968. I graduated from high school in May 1986 and from college in May 1990. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC) program. When I graduated college, I was simultaneously commissioned a Second Lieutenant in the Army. I spent the next four years on active duty. When I was released from active duty in May 1994, I affiliated with the Army Reserve (USAR). In May 2018, I reached my mandatory retirement date (28 years of commissioned service), and I became a "gray area retiree."<sup>4</sup>

As you described in Law Review 16090 (September 2016), I served two years of "contingency" active duty after 1/28/2008, when Congress amended the reserve retirement law.

Accordingly, I am entitled to start drawing my USAR retired pay two years early, on my 58<sup>th</sup> birthday instead of my 60<sup>th</sup> birthday. But that is still more than seven years away. I will turn 51 in May of this year (2019).

I recently started a new federal civilian job. I have never been a civilian employee of the Federal Government until just recently. I understand that new federal employees receive credit for military active duty that they have performed earlier in their lives, in determining the rate at which they earn annual leave as federal civilian employees. I think that I am entitled to credit for my seven years of active duty and that I should therefore earn six hours of annual leave (rather than four) per two-week pay period. The personnel department of the federal agency where I work insists that I am not eligible for credit for my active duty because I am a military retiree. What do you think?

#### **Answer, bottom line up front**

You are entitled to six hours of annual leave per pay period because you are not a "retired member of a uniformed service" until you start drawing your retired pay in May 2026.

#### **Explanation**

The pertinent subsection of the United States Code is as follows:

---

personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

<sup>4</sup> The colloquial term "gray area retiree" refers to a person who has met all the requirements for receipt of reserve retirement except the age requirement. The statutory term for this status is "inactive status list."

**(a)** An employee is entitled to annual leave with pay which accrues as follows--

**(1)** one-half day [four hours] for each full biweekly pay period for an employee with less than 3 years of service;

**(2)** three-fourths day [six hours] for each full biweekly pay period, except that the accrual for the last full biweekly pay period in the year is one and one-fourth days, for an employee with 3 but less than 15 years of service; and

**(3)** one day [eight hours] for each full biweekly pay period for an employee with 15 or more years of service.

In determining years of service, an employee is entitled to credit for all service of a type that would be creditable under section 8332, regardless of whether or not the employee is covered by subchapter III of chapter 83, and for all service which is creditable by virtue of subsection (e). However, *an employee who is a retired member of a uniformed service as defined by section 3501 of this title* is entitled to credit for active military service only if--

**(A)** his retirement was based on disability--

**(i)** resulting from injury or disease received in line of duty as a direct result of armed conflict; or

**(ii)** caused by an instrumentality of war and incurred in line of duty during a period of war as defined by sections 101 and 301 of title 38;

**(B)** that service was performed in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

**(C)** on November 30, 1964, he was employed in a position to which this subchapter applies and thereafter he continued to be so employed without a break in service of more than 30 days.

The determination of years of service may be made on the basis of an affidavit of the employee. Leave provided by this subchapter accrues to an employee who is not paid on the basis of biweekly pay periods on the same basis as it would accrue if the employee were paid on the basis of biweekly pay periods.<sup>5</sup>

Section 3501 of title 5 defines the term "retired member of a uniformed service" as follows: "[A] 'retired member of a uniformed service' means a member or former member of a uniformed service who *is entitled*, under statute, to retired, retirement, or retainer pay on account of his service as such a member."<sup>6</sup>

---

<sup>5</sup> 5 U.S.C. 6303(a) (emphasis supplied).

<sup>6</sup> 5 U.S.C. 3501(a)(2) (emphasis supplied).

Clearly, you are not a “retired member of a uniformed service” until May 2026, when you turn 58 and start drawing your USAR retired pay. When you start drawing your reserve retired pay, you will lose the credit for leave accrual purposes for your active duty years, but by that time you will have more than three years of federal civilian service and you will be entitled to earn six hours of annual leave per pay period on that basis.