

National Guard Technicians Are Precluded from Receiving Paid Military Leave under Section 6323 of Title 5 When they Are on Active Guard & Reserve (AGR) Duty But not when they Are on other Forms of Active Duty

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1.1.1.7—USERRA applies to state and local governments

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1.8—Relationship between USERRA and other laws/policies

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Q: I am a Captain in the Air National Guard of a specific state—let’s call it North Caledonia. I am also a National Guard technician in and for that state. I am currently away from my technician job for a two-year active duty period at a major Air Force command outside the

¹ I invite the reader’s attention to 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.

² 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 (VRRRA—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 VRRRA 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 VRRRA 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. You can reach me by e-mail at SWright@roa.org.

United States. I am also a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related laws.

I believe that I am entitled to *paid* military leave under section 6323 of title 5 of the United States Code (5 U.S.C. 6323), and I have applied for that paid leave. The Adjutant General’s⁴ Personnel Officer and State Judge Advocate in North Caledonia have told me that National Guard technicians like me are not entitled to paid military leave under section 6323. What do you think?

Answer, bottom line up front:

The State Judge Advocate and Personnel Officer are wrong. You are entitled to paid military leave under section 6323 because you are on a form of active duty other than Active Guard & Reserve (AGR) duty.

Explanation:

Each Reserve Component is made up primarily of part-timers (traditional reservists and National Guard members) who are only paid for the days that they serve or train to serve, and that is why the Reserve Components are a great deal for the taxpayer. The cost of a part-timer is a small fraction of the cost of a full-time service member.

Each Reserve Component needs a cadre (perhaps 5-10%) of full-timers to perform functions like recruiting, maintenance of equipment, and preparing the training for the part-timers during their drill weekends and annual training periods. In the four Air Force and Army Reserve Components,⁵ most of these full-time support (FTS) functions are performed by “technicians.”

³ 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 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.

⁴ The Adjutant General is the head of the National Guard of a specific state.

⁵ Air National Guard, Air Force Reserve, Army National Guard, and Army Reserve.

A technician has a hybrid civilian-military status. A technician is a civilian employee of the Department of the Air Force or the Department of the Army and is treated for civilian personnel purposes like other federal civilian employees.⁶ The technician is required, as a condition of employment, to maintain his or her membership in one of the Guard or Reserve units that he or she supports. During drill periods and annual training periods, the technician participates in his or her military capacity. On regular work days, the technician is a civilian employee.

If you saw a technician on a Wednesday afternoon, you might have difficulty discerning that he or she is a technician and not a regular active duty service member. Technicians generally wear military uniforms and observe military courtesies (saluting, etc.) while working in their civilian technician capacities, but that does not make them service members.

In the Air National Guard and Army National Guard, technicians also have a hybrid federal-state status. For USERRA purposes, a National Guard technician is treated as a state employee.⁷ For other purposes, National Guard technicians are treated as federal employees and are entitled to the rights and privileges accorded to other federal civilian employees. This includes the right to *paid* military leave under section 6323 of title 5. That section reads as follows:

(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.

⁶ Most of the laws applicable to federal civilian employees are codified in title 5 of the United States Code.

⁷ USERRA provides: "In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed." 38 U.S.C. 4303(4)(B). The adjutant general is a state official. In most states, the adjutant general is appointed by the governor.

(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 5519.⁸

Each year, Congress enacts the “National Defense Authorization Act” (NDAA) for that fiscal year. On 12/23/2016, Congress passed, and President Obama signed into law the NDAA for Fiscal Year 2017.⁹ Section 513 of NDAA 2017 is titled “Inapplicability of certain laws to National Guard technicians *performing active Guard and Reserve duty*.”¹⁰ Section 513 of NDAA 2017 reads as follows:

Section 709(g) of title 32, United States Code, as amended by section 512(a)(2) [of NDAA 2017], is further amended—

(1) by inserting “(1) after “(g)”;

(2) By adding at the end the following new paragraph:

In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section [section 709 of title 32] *who is performing active Guard and Reserve duty* (as that term is defined in section 101(d)(6) of title 10).¹¹

As amended, section 709(g) of title 32 now reads as follows:

(1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(2) In addition to the sections referred to in paragraph (1), *section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).*¹²

The definitions section of title 10 of the Code defines the term “active Guard and Reserve duty” as follows:

⁸ 5 U.S.C. 6323 (emphasis supplied).

⁹ Public Law 114-328, 130 Stat. 2112, 2113. Fiscal Year 2017 began on 10/1/2016 and ended on 9/30/2017.

¹⁰ Emphasis supplied.

¹¹ Section 513 of NDAA 2017 (emphasis supplied).

¹² 32 U.S.C. 709(g) (emphasis supplied). The italicized words were added about a year ago.

(A) The term "active Guard and Reserve duty" means active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, *or full-time National Guard duty* performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more *for the purpose of organizing, administering, recruiting, instructing, or training the reserve components*.

(B) Such term does not include the following:

(i) Duty performed as a member of the Reserve Forces Policy Board provided for under section 10301 of this title.

(ii) Duty performed as a property and fiscal officer under section 708 of title 32.

(iii) Duty performed for the purpose of interdiction and counter-drug activities for which funds have been provided under section 112 of title 32.

(iv) Duty performed as a general or flag officer.

(v) Service as a State director of the Selective Service System under section 10(b)(2) of the Military Selective Service Act (50 U.S.C. 3809(b)(2)).¹³

The definition of "active Guard and Reserve duty" includes the term "full-time National Guard duty." That term is also defined in the title 10 definitions section, as follows:

The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia *under section 316, 502, 503, 504, or 505 of title 32* for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.¹⁴

Section 709(g)(2) of title 32 provides that a National Guard technician who is performing "active Guard and Reserve duty" including "full-time National Guard duty" is not eligible to receive benefits under section 6323(a)(1) of title 5 of the United States Code. *National Guard technicians who are performing other forms of military duty are still entitled to receive paid military leave under section 6323.*

Over a period of almost a millennium, courts in Great Britain and the United States and other common law countries have developed *rules of construction*—these are precepts the courts use when construing statutes, contracts, wills, and other legal documents. One of the most important rules is *expressio unius est exclusio alterius*. This legal maxim has been defined as follows: "Expression of one thing is the exclusion of another ... Mention of one thing implies

¹³ 10 U.S.C. 101(d)(6) (emphasis supplied).

¹⁴ 10 U.S.C. 101(d)(5) (emphasis supplied).

exclusion of another. ... When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.”¹⁵

Let us apply the *expressio unius* maxim to the interpretation of section 709(g)(2). A National Guard technician who is performing “active Guard and Reserve duty” is excluded from receiving paid military leave under section 6323 of title 5. The logical interpretation is that National Guard technicians who are performing other forms of military duty are not precluded from receiving paid military leave.

It seems clear that *you are not performing AGR duty*. You are performing active duty under section 12301(d) of title 10 of the United States Code. Accordingly, you are entitled to receive paid military leave under section 6323 of title 5.

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This article is one of 1800-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national defense needs.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

¹⁵ *Black’s Law Dictionary, Revised Fourth Edition*, page 692 (internal citations omitted).

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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