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National Guard Technicians Who Are away from Technician Jobs for Title 10 Active Duty Are Entitled to 15 Days per Year of Paid Military Leave under 5 U.S.C. 6323

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[Update on Sam Wright](#)

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

2.0—Paid military leave for governmental employees

Q: I am a Major in the Air National Guard (ANG) and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1800 “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 1600 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 43 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.

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

the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve our country in uniform.

I am an ANG technician, presently on a three-year military leave of absence and serving at a major overseas military command on active duty orders under section 12301(d) of title 10 of the United States Code.⁴ I have applied for and I believe that I am entitled to 15 workdays per year of *paid* military leave under section 6323 of title 5 of the United States Code.⁵ The Adjutant General (head of the National Guard) of my home state has denied my request for *paid* military leave. The State Judge Advocate and the personnel officer of my state's National Guard have told me that, because of a recent amendment by Congress, National Guard technicians on full-time military duty are no longer eligible for *paid* military leave under section 6323.

What do you think? Am I entitled to the 15 days of *paid* military leave during the three years that I am away from my technician job for this active duty period?

Answer, bottom line up front:

The State Judge Advocate and the personnel officer are wrong. You are entitled to 15 workdays per fiscal year of *paid* military leave while you are away from your technician job for active duty under title 10 of the United States Code. Yes, there was a change recently, and National Guard technicians who are away from their jobs to perform *Active Guard & Reserve (AGR)* duty are no longer eligible to receive *paid* military leave under section 6323. Technicians who are performing other kinds of military active duty remain eligible for *paid* military leave. Your title 10 duty overseas duty *does not qualify as AGR duty*.

The Reserve Components and Full-Time Support for them

Our nation has seven Reserve Components. In ascending order of number of personnel, they are the Coast Guard Reserve (USCGR), the Marine Corps Reserve (USMCR), the Navy Reserve (USNR), the Air Force Reserve (USAFR), the Air National Guard (ANG), the Army Reserve (USAR),

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 10 U.S.C. 12301(d).

⁵ 5 U.S.C. 6323.

and the Army National Guard (ARNG). The ARNG and ANG are hybrid state-federal organizations, while the other five Reserve Components are purely federal entities.

The National Guard traces its origin to 1636, when the Massachusetts Bay Colony established a militia to protect the colonists from the Pequot Indians. Before the Declaration of Independence, each colony had a militia of part-timers, and these became the backbone of the Continental Army that won our independence from Great Britain. During the first 125 years of our nation's independence, each state had a militia, and these militia forces supplemented the tiny federal standing Army in time of emergency.

At the end of the 19th Century, state militia forces from all states were federalized and mobilized for the Spanish-American War. The mobilization process did not go smoothly, and some state's forces were much better prepared than others. As the 19th Century turned to the 20th, Congress recognized that our country was becoming an emerging world power and that its need for effective military forces was increasing. In 1902, Congress enacted the Dick Act, which provided for federal funding, federal training, and federal standards for the state militia forces, and the State Militia became the National Guard. In 1947, when the Air Force became a separate service, the air assets in each state split off to form the ANG.

When you joined the ANG, you joined two overlapping but legally distinct organizations. You joined the Air National Guard *of your state*, which is part of the modern-day state militia. As such, you can be called to *state active duty* by the Governor for state service in state emergencies like floods, riots, etc.⁶ You are considered to be in your state status at all times, except when you volunteer for or are called to federal active duty under title 10 of the United States Code.

While in your state status, you perform inactive duty training (drills), active duty for training (annual training), and full-time National Guard duty, and USERRA protects your civilian job while you are on such duty.⁷ Of course, USERRA also protects your civilian job when you are on title 10 duty, voluntarily or involuntarily.

A Reserve Component is a great deal for our country, fiscally, because traditional Reservists and National Guard members are only paid for those days when they serve or train to serve. The cost of a traditional Reservist or Guard member is less than 20% of the cost of a full-time active duty service member.

⁶ ARNG members are more commonly called for state active duty, but ANG members are also subject to state call-ups. USERRA does not protect the civilian jobs of ARNG and ANG members on state active duty, but every state has a state law that protects these members from losing their civilian jobs when called to state active duty. In our "state leave laws" section at www.roa.org/lawcenter, you will find 54 articles (50 states, DC, Guam, Puerto Rico, and the Virgin Islands)

⁷ See 38 U.S.C. 4303(16).

Part-timers make up 90-95% of the numbers in each Reserve Component, but the Component needs a cadre of full-timers to perform functions like recruiting, maintenance of aircraft and vehicles, and preparation of the training for the part-timers on their drill weekends. These functions are called Full-Time Support (FTS).

In the four Army and Air Force Reserve Components (ARNG, USAR, ANG, and USAFR), a substantial part of the FTS need is met by *technicians*. A technician has a hybrid civilian-military status. During regular workdays, the technician is working as a civilian employee of the Army or the Air Force, but it would be difficult for an uninformed visitor to recognize that, because the technicians generally wear their military uniforms and observe military courtesies (saluting, etc.) while working in their civilian capacities.

As a condition of employment, the technician is required to maintain his or her membership in one of the Reserve or National Guard units that he or she supports. During drill weekends and annual training tours, the technician is present in his or her military capacity, just like the traditional Reservists and National Guard members. If the unit is mobilized, the technician will likely be called up as well.

In the USAR and USAFR, the technicians are purely federal employees, and like other federal employees they have rights and obligations under title 5 of the United States Code, which governs the relationship between the Federal Government and its civilian employees. In the ANG and ARNG, the technicians have a hybrid federal-state status. For purposes of USERRA, a National Guard technician is considered a state employee, and the Adjutant General (a state official) is the employer of the technician.⁸ For most other purposes, a National Guard technician is a federal employee, with the same rights as other federal employees under title 5 of the United States Code.

Most pertinently, National Guard technicians, like other federal employees, are entitled to 15 workdays per fiscal year of *paid* military leave under section 6323 of title 5, which provides:

Military leave; Reserves and National Guardsmen

- (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

⁸ 38 U.S.C. 4303(4)(B).

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 5519.⁹

Section 709(g) of title 32 of the United States Code now provides 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).*¹⁰

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

(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)).¹¹

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

⁹ 5 U.S.C. 6323 (emphasis supplied).

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

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

member is entitled to pay from the United States or for which the member has waived pay from the United States.¹²

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. That subsection provides as follows:

(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.¹³

A National Guard technician who is performing “active Guard and Reserve duty” (including “full-time National Guard duty”) does not receive the 15 days of paid military leave per year, under section 6323(a)(1) of title 5. A National Guard technician who is performing voluntary or involuntary duty under title 10 of the United States Code that does not involve organizing, training, etc. the Reserve Components¹⁴ is entitled to receive paid military leave under section 6323 of title 5.

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 rules 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 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

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

¹³ 5 U.S.C. 6323(a)(1).

¹⁴ Our nation has seven Reserve Components. In order of size they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard of the United States, the Army Reserve, and the Army National Guard of the United States. The Air National Guard and Army National Guard have a hybrid federal-state status, while the other five Reserve Components are purely federal entities.

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

Guard technicians who are performing other forms of military duty are not precluded from receiving paid military leave.

You are not on Active Guard and Reserve duty. You are on federal active duty under 10 U.S.C. 12301(d). You are entitled to 15 workdays per federal fiscal year of paid military leave under section 6323.

Q: When I complete my three-year active duty tour, will I have the right to reemployment in my technician position?

A: Yes, if you meet the five USERRA conditions for reemployment. As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you will have the right to reemployment in your technician position if you meet the five USERRA conditions.

- a. You must have left your job to perform service in the uniformed services.¹⁶
- b. You must have given the employer prior oral or written notice before leaving the job.¹⁷
- c. Your cumulative period or periods of uniformed service, relating to your employment relationship with the Adjutant General as your employer, must not have exceeded five years.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.¹⁸
- e. You must have made a timely application for reemployment after release from the period of service.¹⁹

I hope that this information is useful to you. Thank you for your service to our country in the Air Force and Air National Guard and thank you for joining ROA. Good luck.

Please join or support ROA

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

¹⁶ 38 U.S.C. 4312(a).

¹⁷ 38 U.S.C. 4312(a)(1). You are excused from the obligation to provide prior notice if giving such notice is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b).

¹⁸ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial as part of the sentence for a conviction of a serious crime) and other-than-honorable administrative discharges.

¹⁹ 38 U.S.C. 4312(e). After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

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.

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 a contribution to:

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