

LAW REVIEW¹ 20051

May 2020

Paid Military Leave and Differential Pay for Federal Civilian Employees Who Are Members of the National Guard or Reserve

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[About Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

2.0—Paid leave for government employees who are RC members

Q: I am a Sergeant First Class (SFC) in the California Army National Guard and a member of the Reserve Organization of America.³ On the civilian side, I work for the Transportation

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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

Security Administration (TSA) in the United States Department of Homeland Security (DHS). I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws.

This is confusing. Please explain for me my rights under USERRA, other federal laws, the collective bargaining agreement between my union and TSA, and state laws, concerning my right to be away from my civilian job for voluntary or involuntary service in the uniformed services, including National Guard training.

A: USERRA gives you the right to *unpaid but job-protected* military leave from your civilian job for voluntary or involuntary “service in the uniformed services.” That phrase is broadly defined in section 4303(13) of USERRA, as follows:

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.⁴

USERRA is *a floor and not a ceiling* on the rights of the service member. He or she can have *greater or additional rights* under another federal law, a state law or local ordinance, a collective bargaining agreement between the person’s union and the employer, or another agreement, contract, or employer practice. Section 4302 of USERRA provides:

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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁴ 38 U.S.C. 4303(13).

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.⁵

Another federal law can give you *greater or additional rights*. Under section 6323 of title 5 of the United States Code, federal civilian employees who are National Guard or Reserve members have a limited right to *paid* military leave. That section provides:

(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—

⁵ 38 U.S.C. 4302.

(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 5519.⁶

Under section 6323(a)(1), you are entitled (as a federal employee who is a member of the National Guard or Reserve) to 15 *workdays* of *paid* military leave.⁷ During these 15 days, you receive your full federal salary for each day, without regard to whether your military pay is more than, less than, or equal to your regular federal civilian pay.⁸

Under section 6323(b), you are entitled to an *additional 22 days* of paid military leave if you perform state active duty as a National Guard member⁹ or if you perform “full-time military service as a result of an order or call to active duty in support of a contingency operation as defined in section 101(a)(3) of title 10.”¹⁰ When you are using the basic 15 days of paid military leave under section 6323(a), you receive your full federal salary for each day without regard to whether it is greater than, less than, or equal to your military pay for that day, but when you are using your additional 22 days of paid military leave under section 6323(b) you receive only *differential pay*, if there is a difference to make up.¹¹ If your military pay while on active duty is equal to or greater than your regular federal civilian pay, there is no difference to make up and you receive no additional pay during the 22 extra days.

Q: I have heard that federal employees who are away from their civilian jobs for “contingency” military duty in the National Guard or Reserve are entitled to differential pay for the entire active duty period. Is that correct?

A: Yes, under section 5538 of title 5. That section provides:

(a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive,

⁶ 5 U.S.C. 6323 (emphasis supplied).

⁷ You should not be charged with a day of *paid* military leave for a Saturday, Sunday, or federal legal holiday *unless you were scheduled to work on that day in your federal civilian job*. See *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). Please see Law Review 151, by Mathew B. Tully and Greg Rinckey. As a TSA employee, you are probably required to work on weekends and holidays at least occasionally—someone must operate the TSA security system on weekends and holidays. If you were scheduled to work at your civilian job on a day that you were away from work for military duty, you should be charged one of your 15 days for that day. Otherwise, you should not be charged.

⁸ Please see Law Review 19073 (August 2019).

⁹ 5 U.S.C. 6323(b)(2)(A)(ii).

¹⁰ 5 U.S.C. 6323(b)(2)(B).

¹¹ Please see Law Review 19073 (August 2019).

for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

(1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)

(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms “employee”, “Federal Government”, and “uniformed services” have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term “employing agency”, as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

(3) the term “basic pay” includes any amount payable under section 5304.¹²

Section 5538 was enacted several years after section 6323. The right to differential pay for the entire period of contingency service renders largely irrelevant the right to differential pay for 22 days.

Q: As a member of the California Army National Guard, I need to be away from my civilian job for voluntary or involuntary training or duty under title 10 or title 32 of the United States Code, and I am also subject to being called to *state active duty* by the Governor of California to fight fires or quell riots. Does USERRA protect my TSA job when I am away from that job for this sort of National Guard duty?

A: As I explained in Law Review 20037 (April 2020), USERRA applies to National Guard members when they are on voluntary or involuntary training or duty under title 10 or *title 32* of the United States Code. USERRA does not apply to *state active duty*—called by the Governor, under state authority, paid with state funds, for state emergencies. All states and territories have laws that protect the civilian jobs of National Guard members on state active duty, but some of those laws are better than others.¹³

Q: California has a law that protects the civilian jobs of National Guard members who are on state active duty. Does that state law apply to me as a federal civilian employee?

A: No. States lack the constitutional authority to tax or regulate the activities of federal agencies.¹⁴ A state law cannot apply to the relationship between a federal employee and the federal agency that is his or her employer.

¹² 5 U.S.C. 5538. Section 5538 was added to the United States Code by section 751 of the Omnibus Appropriations Act, Public Law 111-8. President Obama signed that bill into law on 3/11/2009. The right to differential pay applies to federal civilian pay periods that start on or after 3/15/2009. Please see Law Review 14028 (March 2014).

¹³ Please see the “state leave laws” section at www.roa.org/lawcenter. You will find 54 articles (50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands) about these laws.

¹⁴ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Q: If I am called to state active duty by the Governor of California, is my civilian job protected?

A: Under section 6323(b)(2)(A)(ii) of title 5,¹⁵ you have the right to 22 days of military leave for state active duty. If your state active duty pay is less than your regular federal civilian pay, you are entitled to differential pay for that period. If your state active duty pay for that period is equal to or greater than your regular federal civilian pay, you do not receive differential pay, but you still have the right to the time off.

The Governor of California and the California National Guard need to understand that your situation is different, because you are a federal civilian employee. The State of California must not call you to state active duty beyond your 22-day entitlement and cause you to lose your federal civilian job.

Q: My TSA supervisor told me that TSA is exempt from USERRA. Is that correct?

A: That was correct at one time, but that problem was resolved in 2012. Please see Law Review 12086 (August 2012).

Please join or support ROA

This article is one of 2000-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 defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

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, 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.

¹⁵ 5 U.S.C. 6323(b)(2)(A)(ii).

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 us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002