

## LAW REVIEW<sup>1</sup> 21024

April 2021

### **Federal Employee Called to the Colors as RC Member Is Entitled to Continued Civilian Health Insurance Coverage for Free**

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[About Sam Wright](#)

- 1.1.1.8—USERRA applies to the Federal Government
- 1.1.3.1—USERRA applies to voluntary service
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**Q: I am a life member of the Reserve Organization of America (ROA)<sup>3</sup> and a Colonel in the Army Reserve (USAR). On the civilian side, I am a GS-13 employee of a federal agency. I have**

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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 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 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.

<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 44 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 38 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

read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I was particularly interested in reading Law Review 20060 (June 2020). In that article you explained in detail the service member’s right to continue civilian health insurance, through the member’s civilian job, while away from the job for voluntary or involuntary service in the uniformed services. You discussed in detail section 4317 of USERRA and the Consolidated Omnibus Budget Reconciliation Act (COBRA) and the relationship between those two laws.

In Law Review 20060, you wrote: “Except in the most unusual circumstances, the employee would be foolish to elect continued health insurance through the civilian job while away from the job for an extended period of active duty.” I have heard that if I leave my federal civilian job for active duty in support of a “contingency” operation I am entitled to continue my civilian health insurance coverage through the Federal Employees Health Benefit Plan (FEHBP) at no charge—that the federal agency employer will pay both the employee share and the employer share of the health insurance coverage while I am on “contingency” active duty. Is that correct?

A: Yes. Thank you for bringing this matter to my attention. Section 8905a(b)(3) of title 5 of the United States Code provides:

This section applies to-- ...

(3) any employee who—

- (A) is enrolled in a health benefits plan under this chapter [FEHBP];
- (B) is a member of a reserve component of the armed forces;
- (C) is called or ordered to active duty in support of a contingency operation (as defined in section 101(a)(13) of title 10);
- (D) is placed on leave without pay or separated from service to perform active duty; and
- (E) serves on active duty for a period of more than 30 consecutive days.<sup>4</sup>

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

<sup>4</sup> 5 U.S.C. 8905a(b)(3).

Section 8906(e)(3) of title 5 provides:

- (A)** An employing agency may pay both the employee and Government contributions, and any additional administrative expenses otherwise chargeable to the employee, with respect to health care coverage for an employee described in subparagraph (B) and the family of such employee.
- (B)** An employee referred to in subparagraph (A) is an employee who—
  - (i)** is enrolled in a health benefits plan under this chapter;
  - (ii)** is a member of a reserve component of the armed forces;
  - (iii)** is called or ordered to active duty in support of a contingency operation (as defined in section 101(a)(13) of title 10);
  - (iv)** is placed on leave without pay or separated from service to perform active duty; and
  - (v)** serves on active duty for a period of more than 30 consecutive days.
- (C)** Notwithstanding the one-year limitation on coverage described in paragraph (1)(A), payment may be made under this paragraph for a period not to exceed 24 months.<sup>5</sup>

Under section 8905a(b)(3) and section 8906(e)(3), you are entitled to continued FEHBP health insurance coverage while you are on a “contingency” active duty period, for up to 24 months. Your employer (the federal agency) will pay both the employer share and the employee share of the premium during that period.

**Q: What is “contingency” active duty?**

**A:** One of the five conditions for receiving the no-cost FEHBP health insurance coverage while away from the federal civilian job for active duty is that the employee “is called or ordered to active duty in support of a contingency operation (as defined in section 101(a)(13) of title 10).”<sup>6</sup> That title 10 section reads as follows:

- (13)** 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 of this title,

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<sup>5</sup> 5 U.S.C. 8906(e)(3).

<sup>6</sup> 5 U.S.C. 8906(e)(3)(B)(iii).

chapter 13 of this title, section 712 of title 14 [14 USCS § 3713], or any other provision of law during a war or during a national emergency declared by the President or Congress.<sup>7</sup>

Your right to no-cost continuation of your FEHBP health insurance coverage for yourself and your family, under 5 U.S.C. 8906(e)(3), is essentially identical to your right to differential pay under 5 U.S.C. 5538. 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, 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 [USERRA] 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.

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<sup>7</sup> 10 U.S.C. 101(a)(13) (emphasis supplied).

**(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 [USERRA]; and

**(3)** the term “basic pay” includes any amount payable under section 5304.<sup>8</sup>

**Q: If I volunteer to go on active duty for a contingency operation, am I entitled to differential pay under section 5538 and no-cost health insurance continuation under section 8906(e)(3)?**

**A:** Probably so, but the matter is not entirely free from doubt. I invite your attention to *Marquiz v. Department of Defense*.<sup>9</sup>

Section 12301(d) of title 10 (the section cited by Marquiz’ orders) is not one of the title 10 sections enumerated in section 101(a)(13)(B), and duty under section 12301(d) is voluntary. The question is whether he qualified for differential pay under the final “catch-all” clause of section 101(a)(13)(B)—“or any other provision of law during a war or national emergency declared by the President or Congress.”<sup>10</sup>

In Law Review 14028 (March 2014), I expressed the opinion that a person in Marquiz’ situation is entitled to the differential pay under the “catch-all” clause at the end of section 101(a)(13)(B). I

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<sup>8</sup> 5 U.S.C. 5538 (emphasis supplied).

<sup>9</sup> *Joshua Marquiz v. Department of Defense*, Merit Systems Protection Board Administrative Judge Decision, Docket Number SF-4324-15-0099-I-1, March 12, 2015, *affirmed by an equally divided Board*, July 12, 2016. I discuss this case in detail in Law Review 17082 (August 2017).

<sup>10</sup> President George W. Bush declared a national emergency shortly after the terrorist attacks of September 11, 2001. Presidential Proclamation No. 7463, 66 Fed. Reg. 48,199 (September 14, 2001). That national emergency declaration remains in effect.

also invite your attention to Law Review 13160 (December 2013). In that article, four distinguished attorneys (Jennifer Zucker, Scott Felder, Adrienne Johnson, and Greg Marchand) express that same opinion definitively and eloquently.

Joshua Marquiz was a Technical Sergeant in the Air Force Reserve and (on the civilian side) an information technology specialist for the Department of Defense (DOD). He was on active duty for about six months, from October 2014 until April 2015, to attend classes on intelligence operations. He applied for differential pay under section 5538.

Although Marquiz' pay on active duty was less than his federal civilian pay, DOD (as his civilian employer) denied his claim for differential pay, contending that he was ineligible because he had volunteered for this active duty period and because his orders cited section 12301(d) of title 10, and that section is not one of the title 10 sections specifically enumerated in section 101(a)(13)(B) of title 10.<sup>11</sup> Marquiz filed an appeal with the Merit Systems Protection Board (MSPB), contesting the denial of his claim for differential pay.

The MSPB is a quasi-judicial federal executive agency, and it was created by the Civil Service Reform Act of 1978 (CSRA).<sup>12</sup> That statute split the former Civil Service Commission (CSC) into three separate federal agencies.

The Office of Personnel Management (OPM) inherited most of the CSC's assets (including the headquarters building at 1900 E Street Northwest in the District of Columbia) and staff and the important functions as the agency that establishes personnel policies for the Executive Branch of the Federal Government. The MSPB inherited the adjudicatory functions of the former CSC. The Office of Special Counsel (OSC) inherited the investigative and prosecutorial functions.<sup>13</sup>

The MSPB has three members—a Chairman, a Vice Chairman, and a Member. The Chairman and Vice Chairman must be of the same political party as the President, and the Member must be of the other major political party. Each of the three members is appointed by the President and must be confirmed by the Senate, for a term of seven years. There are times when one or more of the three seats are vacant, because a confirmed member has departed and has not yet been replaced by a new member who has received a presidential appointment and a Senate confirmation. To decide a case, the MSPB needs at least two members, and they must agree on the result.<sup>14</sup>

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<sup>11</sup> 10 U.S.C. 101(a)(13)(B).

<sup>12</sup> Public Law 95-454, 92 Stat. 1111 (October 13, 1978). The citation means that the CSRA was the 454<sup>th</sup> new public law enacted during the 95<sup>th</sup> Congress (1977-78), and you can find this law in Volume 92 of *Statutes at Large*, starting on page 1111.

<sup>13</sup> OSC was originally part of the MSPB. In 1984, it was split off and became a separate federal agency.

<sup>14</sup> The MSPB has been without a quorum (at least two members) since January 2017), and it has been without any members since March 2019. MSPB members must be nominated by the President and confirmed by the Senate. The Senate has failed to act on Presidential nominations for this Board. Please see Law Review 19098 (October 2019).

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted the Veterans' Reemployment Rights Act (VRRA) in 1940, as part of the Selective Training and Service Act (STSA).<sup>15</sup> The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA),<sup>16</sup> Congress expanded the VRRA to make it apply to state and local governments, as employers.

In 1994, Congress enacted USERRA.<sup>17</sup> USERRA was a long-overdue update of and improvement upon the VRRA. Although the VRRA has applied to the Federal Government since 1940, it lacked an enforcement mechanism for enforcing this law against federal agencies as employers. One of the big improvements brought about by the enactment of USERRA in 1994 was to provide for such an enforcement mechanism. Section 4324 of USERRA provides:

- (a)
  - (1) A person who receives from the Secretary [of Labor] 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);
  - (3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

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<sup>15</sup> Public Law 76-783, 54 Stat. 885. The STSA is the law that led to the drafting of more than ten million young men, including my late father, for World War II.

<sup>16</sup> Public Law 93-508, 88 Stat. 1593.

<sup>17</sup> Public Law 103-353, 108 Stat. 3149.

- (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>18</sup>

MSPB cases (including MSPB USERRA cases) start before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. Either party

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<sup>18</sup> 38 U.S.C. 4324. Denial of a statutory benefit for veterans and Reserve Component service members who are federal civilian employees is a denial of a “benefit of employment” as defined by USERRA and, thus, the MSPB is the appropriate forum to resolve disputes of this kind. *See Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). Mathew Tully, Esquire and Greg Rinckey, Esquire discuss *Butterbaugh* in detail in Law Review 151.

(the individual or the federal agency) can appeal the AJ's decision to the MSPB itself. If neither party files a timely appeal, the AJ's decision becomes the decision of the MSPB.

The *Marquiz* case was assigned to Benjamin Gutman, the Chief AJ of the MSPB. This was a "pure question of law" case, meaning that the facts were not in dispute and the dispute was about the meaning of the law as applied to the agreed upon facts. Accordingly, Judge Gutman held an oral argument rather than a hearing. In a scholarly decision, Judge Gutman agreed with *Marquiz*' argument that under the "catch-all" clause at the end of section 101(a)(13)(B) a Reserve Component service member on voluntary active duty under section 12301(d) of title 10 was entitled to differential pay under section 5538.

DOD, the employer, appealed Judge Gutman's decision to the MSPB. At the time (summer of 2016), the MSPB was down to just two members, Chairman Susan Tsui Grundman and Member Mark A. Robbins.<sup>19</sup> Because Chairman Grundman and Member Robbins could not agree on the disposition of DOD's appeal, Judge Gutman's decision became the decision of the MSPB, and *Marquiz* received his differential pay.

Under these circumstances, Judge Gutman's decision is not entitled to precedential effect. I believe that his decision will be followed, based on the strength of his legal reasoning and the legal authorities that he cited in his opinion. Nonetheless, it is not fair to say that the MSPB has endorsed the Gutman position that a federal employee on section 12301(d) orders is entitled to differential pay. This is still very much an open question.

The test for eligibility for no-cost continuation of FEHBP health insurance coverage, under section 8906(a)(3) is identical to the test for differential pay under section 5538. I believe that the same result will apply.

**Q: My Army pay, when I am on active duty as a Colonel, is greater than my regular civilian compensation as a GS-13. Am I entitled to the no-cost continuation of my FEHBP health insurance coverage while I am away from my civilian job for contingency active duty?**

**A:** Yes. Section 8906(e)(3) is separate from section 5538. You are not entitled to differential pay under section 5538 because there is no differential to make up. You are entitled to no-cost continuation of your health insurance coverage under section 8906(e)(3).

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<sup>19</sup> As I have explained in Law Review 17040 (April 2017), Chairman Grundman left the MSPB in early 2017, shortly after the inauguration of President Trump. The MSPB was then down to one member (Robbins) and could not act on appeals. Member Robbins left in March 2019, when his seven-year term and his one-year overtime period expired, and the MSPB has had no members since March 2019. The MSPB AJs are continuing their adjudication of cases, but when either party appeals the AJ's decision to the MSPB itself the case goes into limbo until the MSPB has at least two members. See Law Review 19098 (October 2019).

## **Please join or support ROA**

This article is one of 2000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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.

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](http://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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