

## LAW REVIEW<sup>1</sup> 21077

December 2021

### Paid Military Leave for Federal Employees

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1.1.1.8—USERRA applies to the Federal Government

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

2.0—Paid military leave for government employees

**Q: I am a Major in the Army Reserve and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the Reserve and National Guard.**

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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 2200 “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 two thousand 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 45 years, I have collaborated 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 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing business as” name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

**On the civilian side, I am a Foreign Service Officer (FSO), and I am currently assigned to the United States Embassy in Haiti. As you well know, living conditions in Haiti are Spartan and there is a real danger of violence from criminal gangs and terrorists. Accordingly, along with my FSO colleagues in Haiti, I receive a 25% “danger pay” bonus and a 25% “hardship differential.” That means that I am paid at 150% of the rate that I was paid in my last FSO assignment, at the Department of State headquarters in Washington, DC.**

**The Army Reserve has ordered me to a six-week annual training period in January-February 2022, and I have notified my civilian employer (the United States Department of State) that I will be away from work for the first six weeks of the new calendar year, for military duty. I have heard that I am entitled to 15 workdays of paid military leave per Federal fiscal year, and I have applied to use that paid military leave for this upcoming Army Reserve annual training period. While I am on this paid military leave period, will I receive only my Federal “base pay” amount, or will I receive the “Haiti rate” (50% more)?**

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

While you are on paid military leave under section 6323 of title 5 of the United States Code (U.S.C.), you are entitled to be paid at the rate of pay that you would have received in the Federal civilian job if you had remained in that job without interruption.<sup>4</sup>

#### **Explanation**

Your right to *paid* military leave is under section 6323 of title 5 of the United States Code. That section reads as follows:

**(a)**

**(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title [5 USCS § 2105] 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.**

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<sup>4</sup> See *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987). See also *Curry v. United States*, 66 Fed. Cl. 593 (United States Court of Federal Claims 2005). *Lanehart* is a 1987 decision of the United States Court of Appeals for the Federal Circuit, the specialized Federal appellate court that sits in our nation’s capital and has nationwide jurisdiction over certain kinds of cases, including appeals from Merit Systems Protection Board (MSPB) decisions. *Curry* is a decision of the United States Court of Federal Claims, a specialized Article I court that adjudicates certain kinds of monetary claims against the United States.

*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 [5 USCS § 3401(2)]), 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 [5 USCS § 5519], an employee as defined by section 2105 of this title [5 USCS § 2105] 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 [5 USCS § 2105] 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) [5 USCS § 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 [5 USCS § 5519].<sup>5</sup>

First, it should be emphasized that your upcoming military duty is under section 6323(a) of title 5<sup>6</sup> and not section 6323(b) or (c). Section 5519 of title 5 provides:

An amount (other than a travel, transportation, or per diem allowance) received by an employee or individual for military service as a member of the Reserve or National Guard for a period for which he is granted military leave *under section 6323(b) or (c)* shall be credited against the pay payable to the employee or individual with respect to his civilian position for that period.<sup>7</sup>

When you are on paid military leave under section 6323(a), as you will be for your upcoming period of Army Reserve annual training, you receive, for each day of paid military leave, the full amount of the Federal civilian compensation that you would have received but for your absence from work for military duty, without regard to whether your civilian compensation is greater than, less than, or equal to the military compensation that you receive for that day. When you are on paid military leave under section 6323(b) or (c), you receive only differential pay.<sup>8</sup> If your military pay, during military leave under section 6323(b) or (c), is equal to or greater than your civilian pay, you do not receive paid military leave for those days.

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<sup>5</sup> 5 U.S.C. § 6323 (emphasis supplied).

<sup>6</sup> 5 U.S.C. § 6323(a).

<sup>7</sup> 5 U.S.C. § 5519 (emphasis supplied).

<sup>8</sup> Under section 5538, 5 U.S.C. § 5538, a Federal civilian employee who is away from his or her Federal civilian job for "contingency" military duty is entitled to differential pay for the entire period of service, not just 22 days.

The kinds of military duty to which section 5519 applies are as follows:

- a. Military aid to enforce the law or to assist civil authorities.<sup>9</sup>
- b. Federal service under section 331, 332, 333, or 12406 of title 10 or other provision of law.<sup>10</sup>
- c. Full-time military service for the individual's State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States.<sup>11</sup>
- d. 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.<sup>12</sup>
- e. Service performed by a member of the District of Columbia Army National Guard or Air National Guard for a parade or encampment ordered or authorized under title 39 of the District of Columbia Code.<sup>13</sup>

**Q: I did not use any paid military leave in fiscal year 2021 (10/1/2020 through 9/30/2021). Thus, I figure that I have 30 days of paid military leave to use for my upcoming six-week annual training period in January-February 2022. Is that correct?**

**A: Yes.** Section 6323 provides, in pertinent part, as follows:

Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that is it 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.<sup>14</sup>

Because you did not use any paid military leave in Fiscal Year 2021, you carried over 15 days of paid military leave to Fiscal Year 2022 (which began on 10/1/2021), and you received 15 days of paid military leave at the start of Fiscal Year 2022. Thus, you have 30 days of paid military leave to use during your upcoming annual training period in January-February 2022.

**Q: What does “15 days of paid military leave” mean? Should the Department of State charge me for Saturdays, Sundays, and Federal legal holidays?**

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Please see Law Review 21076, the immediately preceding article in this “Law Review” series. The right to differential pay for the entire period of service renders largely moot the right to differential pay for 22 days.

<sup>9</sup> 5 U.S.C. § 6323(b)(2)(A).

<sup>10</sup> 5 U.S.C. § 6323(b)(2)(A)(i).

<sup>11</sup> 5 U.S.C. § 6323(b)(2)(A)(ii). This applies to members of the Army National Guard and Air National Guard exclusively, not to members of purely Federal Reserve Components like the Army Reserve.

<sup>12</sup> 5 U.S.C. § 6323(b)(2)(B).

<sup>13</sup> 5 U.S.C. § 6323(c).

<sup>14</sup> 5 U.S.C. § 6323(a)(1).

**A:** The Federal Circuit has held that a Federal employee who is a National Guard or Reserve member should not be charged for military leave for weekends and Federal holidays unless the employee would have been required to work on that weekend or holiday but for his or her absence from work for military duty.<sup>15</sup>

**Q: Are Foreign Service Officers (FSOs) like me entitled to paid military leave under section 6323?**

**A: Yes.** Section 6323 applies to “an employee as defined by section 2105 of this title” (title 5).<sup>16</sup> Section 2105 defines the term “employee” very broadly, and FSOs clearly qualify as “employees.”

**Q: If the Department of State does not pay me the correct amount for my paid military leave under section 6323 for my upcoming Army Reserve annual training period, how am I to enforce my rights?**

**A:** Your substantive right to paid military leave is under section 6323 of title 5, not under USERRA, but section 4311 of USERRA<sup>17</sup> makes it unlawful for an employer to deny a person a “benefit of employment” because of his or her service in the uniformed services, and the Federal Circuit has held that paid military leave under section 6323 is a “benefit of employment” for USERRA purposes.<sup>18</sup> Thus, you can enforce your right to paid military leave under section 4324 of USERRA, which provides:

(a)

(1) A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) [38 USCS § 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 [5 USCS § 1211].

(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

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<sup>15</sup> See *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). See also Law Review 151, by Mathew Tully, Esq., and Greg Rinckey, Esq., for a detailed discussion of the *Butterbaugh* case.

<sup>16</sup> 5 U.S.C. § 6323(a)(1).

<sup>17</sup> 38 U.S.C. § 4311.

<sup>18</sup> See *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003).

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 [38 USCS §§ 4321 et seq.] 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) [38 USCS § 4322(a)];

**(2)** has received a notification from the Secretary under section 4322(e) [38 USCS § 4322(e)];

**(3)** has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

**(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 [38 USCS §§ 4301 et seq.] 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 [38 USCS §§ 4301 et seq.] 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 [5 USCS § 7703].

**(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>19</sup>

#### **Please join or support ROA**

This article is one of 2300-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.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members 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.

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<sup>19</sup> 38 U.S.C. § 4324. Please see Law Review 19041 (April 2019) for a detailed discussion of the USERRA enforcement mechanism with respect to Federal executive agencies as employers.

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 or \$450 for a life membership. 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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