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Differential Pay for Federal Civilian Employees Who Are Called to the Colors

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- 1.1.1.8—USERRA applies to the Federal Government
- 1.8—Relationship between USERRA and other laws/policies
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Q: I am a Third-Class Petty Officer (E-4) in the Coast Guard Reserve and a member of the Reserve Officers Association.³ On the civilian side, I am a GS-14 for a federal agency. I am expecting to be called to active duty soon. If I were on active duty, my E-4 pay would be substantially less than the GS-14 pay that I am currently receiving, even if allowances and special pays of military personnel are included. I have heard that under a 2009 law a person in this situation is entitled to differential pay, so that he or she does not lose income by being called to active duty. Is that correct? How does that provision work?

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. 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 In 2013, ROA members amended the ROA Constitution and made petty officers and noncommissioned officers eligible for full membership, including voting and running for office.

A: Yes. Section 5538 of title 5 of the United States Code provides for differential pay. That section reads as follows:

- (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 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 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 5304.⁴

Section 5538(a) provides that a federal employee who is away from his or her federal civilian job "pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10"⁵ shall be eligible for differential pay. Here is the text of section 101(a)(13):

(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, chapter 15 of this title, *section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.*⁶

Under these provisions, you will be entitled to differential pay from your employing agency if you are called to active duty in the Coast Guard Reserve for a contingency operation.

Q: How does this provision apply to the Coast Guard Reserve?

A: The definition of "contingency operation" in section 101(a)(13) of title 10 includes operations that result in the call-up of personnel under "section 712 of title 14." That section reads as follows:

⁴ 5 U.S.C. 5538 (emphasis supplied).

⁵ Please see the italicized language above. The italics are mine.

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

Active duty for emergency augmentation of regular forces

(a) Notwithstanding another law, and for the emergency augmentation of the Regular Coast Guard forces during a, or to aid in prevention of an imminent, serious natural or manmade disaster, accident, catastrophe, act of terrorism (as defined in section 2 of the Homeland Security Act of 2002 ([6 U.S.C. 101](#))), or transportation security incident as defined in section 70101 of title 46, the Secretary may, without the consent of the member affected, order to active duty of not more than 120 days in any 2-year period an organized training unit of the Coast Guard Ready Reserve, a member thereof, or a member not assigned to a unit organized to serve as a unit.

(b) Under the circumstances of the domestic emergency involved, a reasonable time shall be allowed between the date when a Reserve member ordered to active duty under this section is alerted for that duty and the date when the member is required to enter upon that duty. Unless the Secretary determines that the nature of the domestic emergency does not allow it, this period shall be at least two days.

(c) Active duty served under this section--

(1) satisfies on a day-for-day basis all or a part of the annual active duty for training requirement of section 10147 of title 10;

(2) does not satisfy any part of the active duty obligation of a member whose statutory Reserve obligation is not already terminated; and

(3) entitles a member while engaged therein, or while engaged in authorized travel to or from that duty, to all rights and benefits, including pay and allowances and time creditable for pay and retirement purposes, to which the member would be entitled while performing other active duty.

(d) Reserve members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or under any other law.

(e) For purposes of calculating the duration of active duty allowed pursuant to subsection (a), each period of active duty shall begin on the first day that a member reports to active duty, including for purposes of training.⁷

As a Coast Guard reservist, you are subject to be called to active duty for a domestic emergency, under title 14 of the United States Code, or for a national defense emergency, under title 10. In either case, you can qualify for federal differential pay under 5 U.S.C. 5538.

⁷ 14 U.S.C. 712.

Q: My older sister is also a Coast Guard reservist and a federal civilian employee. She was called up for the Deepwater Horizon emergency in 2011, but she did not receive differential pay. What gives?

A: Section 681 of the National Defense Authorization Act (NDAA) for Fiscal Year 2013⁸ amended section 101(a)(13) of title 10 (the definition of “contingency operation”) by adding the reference to call-ups under section 712 of title 14. President Barack Obama signed that law on 1/2/2013. The amendment was not retroactive, so it did not apply to the call-up of Coast Guard reservists for the Deepwater Horizon disaster in 2011, but it does apply going forward after 1/2/2013.⁹

Q: My friend Joe Smith is a Senior Airman (E-4) in the Air Force Reserve and a GS-14 for the same federal agency where I work. Joe plans to volunteer to go on active duty in support of a contingency operation. If he volunteers, can he receive differential pay?

A: That is a very controversial issue that has not been definitively settled. I have taken the position that the answer is YES. Please see Law Review 17082 (August 2017) and Law Review 14028 (March 2014). I also invite your attention to Law Review 13160 (December 2013), by Jennifer Zucker, Scott Felder, Adrienne Johnson, and Greg Marchand, four distinguished lawyers.

Q: How does the right to differential pay under section 5538 relate to the right to 15 days of paid military leave, and an additional 22 days for contingency operations, under section 6323, as you discussed in Law Review 18101?

A: One law does not cancel out the other. I suggest that when you are activated you first use your 15 days of basic paid military leave, if you have not already used up that entitlement, and then use your 22 additional days. That way, you will receive both your regular civilian pay and your military pay, until you have exhausted your supply of paid military leave under section 6323. Then, you should start drawing the differential pay.

Q: I have a supply of annual leave that I have earned while working and have not used. I want to use that annual leave while on active duty to extend the period for which I will receive double pay. Do I have the right to do that?

A: Yes, under section 4316(d) of USERRA.¹⁰ It is your choice, not the employer’s choice. It is unlawful for the employer to make you use your annual leave in this way.¹¹ You will probably not accrue additional annual leave in your civilian job while you are on active duty. If you use up all your annual leave while you are on active duty, you will need to work for several months to

⁸ Public Law 112-239, 126 Stat. 1632. The citation means that this was the 239th new Public Law enacted during the 112th Congress, and you can find the law in Volume 126 of *Statutes at Large*, starting on page 1632.

⁹ I discuss this issue in detail in Law Review 13008 (January 2013).

¹⁰ 38 U.S.C. 4316(d).

¹¹ *Id.*

build up a balance of annual leave, before you can take more time off with pay from your federal civilian job.

Q: I also have a supply of sick leave in my civilian job. Do I have the right to use that federal civilian sick leave while I am on active duty?

A: No.¹²

¹² 20 C.F.R. 1002.153(a). This is a provision in the Department of Labor USERRA Regulations.