

# Law Review 13033

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## Right to Federal Employee Differential Pay Continues if Retained on Active Duty due to Combat Wound

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

2.0—Paid leave for government employees who are Reserve Component members

**Q: I am a federal employee and also a member of the Army National Guard. In the fall of 2009 I was called to active duty for one year and deployed to Afghanistan, where I was wounded in action. I expected to be released from active duty in the fall of 2010, but because of my wounds, several surgeries, and rehabilitation I was retained on active duty well past the expiration of my original orders. I am still on active duty and expect to be released soon. I have kept my federal agency employer informed of my active duty extensions and on the progress of my recovery.**

**I have read with great interest your Law Review 13009<sup>[1]</sup> about differential pay for federal employees who have been called to active duty for contingency service. I am an E-4 in the Army, and my military pay is substantially less than my regular federal civilian pay. I have applied repeatedly, by letter and by e-mail, to my agency for this differential pay. The agency's personnel office keeps replying that "we don't know what you are talking about." Am I eligible for the differential pay for the year (fall 2009 to fall 2010) when I was called to active duty involuntarily? What about the additional time since the fall of 2010 when I have been retained on active duty for medical treatment and rehabilitation necessitated by my combat wound?**

**A:** As I explained in Law Review 13009, I think that it is unconscionable that federal agencies are still dragging their feet in paying this differential pay. In Law Review 13009, I wrote: "I have recently heard from several federal employees who are on active duty for contingency operations and who appear to be clearly entitled to differential pay under section 5538 [of title 5 of the United States Code], but who are not receiving that differential pay. Federal civilian personnel offices often profess ignorance about this section, although President Obama signed it into law almost four years ago [March 2009] and there is definitive OPM [Office of Personnel Management] guidance about it available on the OPM website."

I think that you are clearly eligible for the differential pay both for the initial year of involuntary active duty and for the additional time thereafter when you have been retained on active duty because of the combat wound. I hope that your agency's personnel office will get off the dime and do the right thing. I wish that I had a magic wand to make them do their duty.

The OPM guidance provides as follows: "Federal employees called/ordered to active duty under one of the following authorities may be eligible for Reservist Differential (RD), if they also have USERRA [Uniformed Services Employment and Reemployment Rights Act] rights: 10 U.S.C. 331, 10 U.S.C. 332, 10 U.S.C. 333, 10 U.S.C. 688, 10 U.S.C. 12301(a)\*, 10 U.S.C. 12302, 10 U.S.C. 12304, 10 U.S.C. 12305, 10 U.S.C. 12306.

\*Only (a) is qualifying [within section 12301]. However, an employee called under one of these nine authorities whose authority changes to 10 U.S.C. 12301(h) due to a **combat injury [emphasis in original]** continues to be eligible for RD.

If you were injured (wounded, we call it in the military) in combat, you should have received a Purple Heart, and that medal should certainly constitute sufficient evidence that your wound was received in action.

Here is a copy of section 12301 of title 10:

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty for the duration of the war or emergency and for six months thereafter. However a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available.

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State (or, in the case of the District of Columbia National Guard, the commanding general of the District of Columbia National Guard).

(c) So far as practicable, during any expansion of the active armed forces that requires that units and members of the reserve components be ordered to active duty as provided in subsection (a), members of units organized and trained to serve as units who are ordered to that duty without their consent shall be so ordered with their units. However, members of those units may be reassigned after being so ordered to active duty.

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.

(e) The period of time allowed between the date when a Reserve ordered to active duty as provided in subsection (a) is alerted for that duty and the date when the Reserve is required to enter upon that duty shall be determined by the Secretary concerned based upon military requirements at that time.

(f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

(g)

(1) A member of a reserve component may be ordered to active duty without his consent if the Secretary concerned determines that the member is in a captive status. A member ordered to active duty under this section may not be retained on active duty, without his consent, for more than 30 days after his captive status is terminated.

(2) The Secretary of Defense shall prescribe regulations to carry out this section. Such regulations shall apply uniformly among the armed forces under the jurisdiction of the Secretary. A determination for the purposes of this subsection that a member is in a captive status shall be made pursuant to such regulations.

(3) In this section, the term "captive status" means the status of a member of the armed forces who is in a missing status (as defined in section 551(2) of title 37) which occurs as the result of a hostile action and is related to the member's military status.

(h)

(1) When authorized by the Secretary of Defense, the Secretary of a military department may, with the consent of the member, order a member of a reserve component to active duty —

(A) to receive authorized medical care;

(B) to be medically evaluated for disability or other purposes; or

(C) to complete a required Department of Defense health care study, which may include an associated medical evaluation of the member.

(2) A member ordered to active duty under this subsection may, with the member's consent, be retained on active duty, if the Secretary concerned considers it appropriate, for medical treatment for a condition associated with the study or evaluation, if that treatment of the member is otherwise authorized by law.

(3) A member of the Army National Guard of the United States or the Air National Guard of the United States may be ordered to active duty under this subsection only with the consent of the Governor or other appropriate authority of the State concerned

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[1] We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 855 articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.