

Differential Pay—Don't Abuse your Employer's Generosity

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Update on Sam Wright

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Q: I am a Major in the Army National Guard (ARNG) and a member of the Reserve Officers Association (ROA).³ I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁴

I have been called to active duty several times since the terrorist attacks of September 11, 2001. Each time, my employer has made up the difference in pay, in that my military pay on

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 “Law Review” 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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1200 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 have been dealing with USERRA (enacted in 1994) and the predecessor reemployment statute (enacted in 1940) for more than 33 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 work product of an interagency task force that studied the 1940 statute with a view toward improving it. President George H.W. Bush presented our work product to Congress, as his proposal, in February 1991. The version of USERRA that President Bill Clinton signed on 10/13/1994 was 85% the same as the Webman-Wright draft. I have also dealt with the reemployment statute (old and new) 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), and as an attorney in private practice, at Tully Rinckey PLLC. For six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an “of counsel” role. To arrange a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention my name (Captain Wright) when you call.

³ Yes, National Guard officers and noncommissioned officers (NCOs) are eligible for full membership in ROA.

⁴ USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-4335).

active duty has been less than my regular civilian pay, but the employer has not been entirely clear or consistent as to how this differential pay is to be computed. If only my military base pay is considered, there is a substantial disparity between my military pay and my civilian pay. If allowances like the Basic Allowance for Quarters and special pays like Hazardous Duty Pay are considered, the disparity is much smaller or maybe nonexistent. How should differential pay be computed?

A: That is probably within your employer's discretion. USERRA gives you the right to an *unpaid* but job-protected right to military leave, to perform "service in the uniformed services."

USERRA defines that term 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 [drills], 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, 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 32.⁵

USERRA defines the term "uniformed services" as follows:

The term "uniformed services" means the Armed Forces,⁶ the Army National Guard and Air National Guard *when engaged in active duty for training, inactive duty training, or full-time National Guard duty*, the commissioned corps of the Public Health Service,⁷ and any other category of persons designated by the President in time of war or national emergency.⁸

USERRA does not require your civilian employer to pay you for an hour, day, week, month, or year that you are away from work for uniformed service, nor does USERRA require your employer to make up the difference in pay if your military pay on active duty is less than your civilian pay. If your employer (particularly a private sector employer) is paying differential pay, this is probably a voluntary generous act by the employer, over and above the requirements of law. If your employer is supporting your National Guard service, over and above the requirements of law, you should contact the Department of Defense (DOD) organization called

⁵ 38 U.S.C. 4303(13) (emphasis supplied).

⁶ The term "armed forces" is defined in section 101(a)(4) of title 10, 10 U.S.C. 101(a)(4). The five armed forces are the Army, Navy, Marine Corps, Air Force, and Coast Guard.

⁷ The commissioned corps of the National Oceanic & Atmospheric Administration (NOAA) is a uniformed service as defined by 10 U.S.C. 101(a)(5) *but not for USERRA purposes*. Please see Law Review 15002 (January 2015).

⁸ 38 U.S.C. 4303(16) (emphasis supplied).

“Employer Support of the Guard and Reserve” (ESGR) and nominate your employer for an award.⁹

It has now been 43 years since Congress abolished the draft and established the All-Volunteer Military in 1973. It is likely that your employer’s Personnel Director has never served in the military, and she may have no idea just how complicated military pay can be. If you are putting in a claim for differential pay, it is essential that you make a full disclosure to the employer as to just how much you are paid by the Army while you are on active duty, including non-taxable allowances. Do not try to take advantage of your employer’s ignorance about the military pay system.

It is possible that while you are on active duty you may be promoted by the Army. Such a promotion will increase your pay from the Army and reduce or eliminate your differential payment. If you receive a military promotion or pay increase while you are on active duty, let your civilian employer know promptly.

If you work for a unionized company, and if you are part of the bargaining unit represented by the union, you may be entitled to differential pay under the collective bargaining agreement (CBA) between your union and the employer. In that situation, we must look to the terms of the CBA to determine how differential pay is computed.

Employees of a state or a political subdivision of a state (county, city, school district, etc.) may be entitled to differential pay by state law¹⁰ or local ordinance. In that situation, we must look to the terms of the state law or local ordinance to determine how differential pay is computed.

Under a federal law enacted in March 2009,¹¹ federal employees who are away from their civilian jobs for military service are entitled to differential pay. The total military compensation (not just military base pay) must be considered in determining the right to differential pay.

Q: The first time that I was called to active duty involuntarily, I was an enlisted ARNG member. The second time and the third time, I was a junior officer. Now that I am a Major (O-4), my military pay will likely be higher than my civilian pay, especially if the allowances and special pays are included in the comparison. If I am called to active duty again, and if my

⁹ You can call ESGR toll-free at (800) 336-4590. I also invite your attention to the ESGR website, www.esgr.mil.

¹⁰ Please see the “State Leave Laws” section at www.servicemembers-lawcenter.org. For each state, you will find an article summarizing the state laws on paid military leave and differential pay for state and local government employees who serve in the Reserve Components of the armed forces.

¹¹ 5 U.S.C. 5538. Please see Law Review 13009 (January 2013) for a detailed discussion of the right of federal employees to differential pay when they are called to the colors.

military pay next time is greater than my civilian pay, would it be lawful for the civilian employer to demand that I pay them the difference?

A: No. Under USERRA, you have the job-protected right to an unpaid military leave of absence. Under no circumstances is it lawful for the employer to demand that you make up the difference if your military pay exceeds your civilian pay.

Q: What is the relationship between USERRA and state laws, local ordinances, CBAs, and voluntary employer practices?

A: Under section 4302 of USERRA, this federal law is *a floor and not a ceiling* on your rights. The employer can always do more than USERRA provides. A state law, a local ordinance, or a CBA can give you greater or additional rights. None of these things can take away your USERRA rights. Here is the entire text of section 4302:

- (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 enjoyment of any such benefit.¹²

A state law or CBA that gives you the right to differential pay is not superseded by USERRA, because differential pay is over and above the requirements of USERRA. A state law or CBA that purports to limit USERRA rights is superseded. Under Article VI, Clause 2 of the United States Constitution (commonly called the “Supremacy Clause”), federal law trumps conflicting state law.

Q: The three times that I have been away from my civilian job for military service were all involuntary unit call-ups. If I volunteer for active duty, am I entitled to differential pay?

A: That depends. Since the employer is not required to pay differential pay at all, the employer can lawfully choose to pay differential pay to those who are called involuntarily but to deny differential pay to those who volunteer. But under USERRA you are entitled at least to unpaid military leave *even if you volunteer*.¹³

¹² 38 U.S.C. 4302 (emphasis supplied).

¹³ Please see Law Review 15075 (September 2015).

Q: As an ARNG member, I am subject to call by the Governor and have been called three times for state active duty, for a major fire, a major blizzard, and a riot. Does USERRA protect my civilian job when I am called to state active duty by the Governor?

A: No. USERRA protects your civilian job when you leave that job for voluntary or involuntary active duty under title 10 of the United States Code. USERRA also protects your civilian job when you are away from that job for active duty for training, inactive duty training, or “full-time National Guard duty” under 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 like hurricanes, tornadoes, fires, floods, riots, etc.

Your state (like every other state) has a state law that protects the civilian jobs of National Guard members on state active duty. Some of those laws are much better than others.¹⁴

Q: My employer established the differential pay policy on September 12, 2001, immediately after the terrorist attacks. This policy has been in effect for almost 15 years. Now, the company is talking about ending this policy. Does USERRA require that the company continue this generous policy?

A: No. The company has been doing more than the law requires for almost 15 years. Neither USERRA nor any other law requires the company to maintain this extra-statutory generosity.¹⁵

¹⁴ Please see the “State Leave Laws” section at www.servicemembers-lawcenter.org. You will find an article of the state active duty laws of each state, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

¹⁵ See *Crews v. City of Mount Vernon*, 567 F.3d 860 (7th Cir. 2009). This is a 2009 decision of the United States Court of Appeals for the Seventh Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The citation means that you can find this case in Volume 567 of *Federal Reporter Third Series*, and the case starts on page 860. I discuss *Crews* in detail in Law Review 1004 (January 2010).