

LAW REVIEW¹ 20058

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Paid Military Leave for Federal Civilian Employees

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[About Sam Wright](#)

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Q: I am a Staff Sergeant (E-5) in the Air Force Reserve (USAFR) and a member of the Reserve Organization of America (ROA).³ I have read with interest several of your “Law Review”

¹ I invite the reader's attention to 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.

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 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.

³ 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 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

articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related laws.

I graduated from high school in 2005 and enlisted in the Air Force. I served on active duty for six years. When I left active duty in 2011, I affiliated with the USAFR. I was hired by the United States Department of Veterans Affairs (VA) in September 2018, a few days before the beginning of Fiscal Year 2019.⁴ When I went to work for the VA in 2018, that was the first time I had ever worked for the Federal Government as a civilian employee. I understand that federal civilian employees who also serve in the National Guard or Reserve receive 15 days per fiscal year of *paid* military leave and can carry over up to 15 days of this paid military leave from one fiscal year to the next.

During Fiscal Year 2019, I performed 12 monthly drill weekends for the USAFR and qualified for a “good year” for reserve retirement purposes. I did not need to use any of my paid military leave during Fiscal Year 2019 because I did not perform an annual training tour during that period and my USAFR drills were limited to Saturday and Sunday and were held in the same metropolitan area where I live and work.

The way I figure it, I earned 15 days of paid military leave on 10/1/2018, the first day of Fiscal Year 2019. Since I did not use that 15 days in Fiscal Year 2019, I carried over that 15-day entitlement to Fiscal Year 2020, the current fiscal year. I earned an additional 15 days of paid military leave on 10/1/2019, the first day of Fiscal Year 2020. Thus, I have 30 days of paid military leave in the bank, I figure.

I have orders for a 29-day period of Air Force duty coming up soon. I spoke to the personnel director at the VA facility where I work. He told me that I have only 15 days of paid military leave in the bank right now. He said that I did not earn 15 days of paid military leave on 10/1/2018 (the start of Fiscal Year 2019) because he did not even know that I was a reservist at the time.

Who is right, me or the personnel director?

Answer, bottom line up front

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.

⁴ The federal fiscal year runs from October 1 to September 30. Fiscal Year 2019 started on 10/1/2018.

You are right and the personnel director is wrong.

Explanation

Under section 6323 of title 5 of the United States Code, you are entitled to 15 days per fiscal year of *paid* military leave. Here is the text of that section:

(a)

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

You are "an employee as defined by section 2105 of this title" (Title 5)⁶ and have been since you were hired in September 2018. Thus, you earned 15 days of paid military leave on 10/1/2018,

⁵ 5 U.S.C. 6323 (emphasis supplied).

⁶ The great majority of federal civilian employees are "Title 5 employees." At the VA, some personnel are called "Title 38 employees." Please see Law Review 13097 (July 2013). Title 38 employees do not receive paid military leave under section 6323, but they are protected by USERRA. I have determined that you are a title 5 employee.

the first day of Fiscal Year 2019. Under section 6323(a)(1),⁷ you are entitled to carry over up to 15 days of paid military leave from one fiscal year to the next. Because you did not use any of the paid military leave in Fiscal Year 2019, you carried over 15 days to Fiscal Year 2020. You earned a new 15-day entitlement on 10/1/2019, the first day of Fiscal Year 2020. Thus, you currently have 30 days of paid military leave in the bank.

I suggest that you provide the personnel director a copy of this article and ask him to reconsider. If that does not work, call me again and we can discuss the enforcement mechanism with respect to federal executive agencies as employers.

Q: How does section 6323 relate to USERRA?

A: Under section 4302 of USERRA,⁸ USERRA is a floor and not a ceiling on the rights of veterans and Reserve Component personnel. USERRA does not supersede another federal law that gives you greater or additional rights. Section 6323 is such a law. USERRA gives you the right to *unpaid but job-protected military leave*. You are not generally entitled to paid military leave under USERRA.⁹ Because section 6323 gives you greater or additional rights, it is not preempted by USERRA.

Q: My good friend Joe Smith is a member of the same USAFR unit. He works for the state government. Does section 6323 apply to him?

A: No, but more than 40 states have similar (not identical) laws giving state and local government employees the right to limited periods of *paid military leave*. Please see the “state leave laws” section at www.roa.org/lawcenter. You will find 54 articles (50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) about these state and territorial laws.

Q: What does “15 days” really mean? If I am on military duty on a Saturday, a Sunday, or a federal legal holiday, does that count as one of my 15 days of paid military leave?

A: No. You should be charged for a day of paid military leave only for a day when you *otherwise would have worked in the federal civilian job*. You should not be charged for a Saturday, Sunday, or legal holiday unless your federal civilian job normally requires that you work on those days.¹⁰

⁷ 5 U.S.C. 6323(a)(1).

⁸ 38 U.S.C. 4302.

⁹ Under USERRA’s “furlough or leave of absence clause” the service member who is away from work for uniformed service is entitled to be paid if and to the extent that other employees who are away from work for non-military leave periods of comparable duration are paid. Please see Law Review 20052 (May 2020).

¹⁰ See *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). Please see Law Review 151, by Mathew B. Tully, Esq. and Greg Rinckey, Esq. for a detailed discussion of the *Butterbaugh* case.

Q: What, exactly, do I receive under section 6323(a)?

A: For each day when you are on paid military leave under section 6323(a), you receive your full federal civilian pay, without regard to whether it is greater than, less than, or equal to your military pay for that day.

If you are called to perform “contingency service,” you are entitled to an additional 22 days of paid military leave under section 6323(b), but with a big difference. During the additional 22 days, you receive only *differential pay*. If your military pay, while you are on active duty, is equal to or greater than your regular civilian pay, you receive no additional pay under section 6323(b) during the additional 22 days.¹¹

Q: I have heard that federal civilian employees who leave their civilian jobs for “contingency” military duty are entitled to differential pay for the entire period of service, not just 22 days. Is that true?

A: Yes, under section 5538 of title 5.¹² I discuss that provision in detail in Law Review 20051 (May 2020).

Q: After I have exhausted my right to 15 days of paid leave under section 6323 of title 5, what happens if I need to do more military service or training?

A: After you have exhausted your paid military leave under section 6323, you still have the right to *unpaid but job-protected* military leave under USERRA. The pertinent section of the Department of Labor (DOL) USERRA Regulation provides as follows:

If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.¹³

Q: As a federal civilian employee, I earn six hours of annual leave per pay period. I seldom use annual leave, so I have a significant amount of it in the bank. Am I entitled to use annual

¹¹ Please see Law Review 20051 (May 2020).

¹² 5 U.S.C. 5538.

¹³ 20 C.F.R. 1002.7(d).

leave so that I can keep receiving my federal civilian paycheck while I am away from work for military service?

A: Yes. Section 4316(d) of USERRA provides:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.¹⁴

Q: My supervisor told me that he has the right to deny my request to take annual leave for a period of time for which other employees in the group have already been granted annual leave. How does that apply when I request to use annual leave for uniformed service?

A: When you request to use annual leave for military service, your request *shall be granted*. Section 4316(d) provides that an employee *shall be permitted* to use annual leave or vacation for military service. In a statute, “shall” means “must.” When you ask to use annual leave for your military service time, the supervisor is required to grant your request.

Please join or support ROA

This article is one of 2000-plus “Law Review” articles available at 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

¹⁴ 38 U.S.C. 4316(d).

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 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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