

## RESERVIST DIFFERENTIAL – SUMMARY DESCRIPTION

### Overview

Under 5 U.S.C. 5538, employing agencies must pay differential payments to eligible Federal civilian employees who are members of the Reserve or National Guard (hereafter referred to as “reservists”) called or ordered to active duty under certain specified provisions of law. Federal agencies must provide a payment—a “reservist differential”—equal to the amount by which an employee’s projected civilian “basic pay” for a covered pay period exceeds the employee’s actual military “pay and allowances” allocable to that pay period.

Section 5538 became effective on the first day of the first pay period beginning on or after March 11, 2009 (i.e., March 15, 2009, for executive branch employees on the standard biweekly payroll cycle).

### Coverage

Section 5538 applies to all employees and agencies within the Federal Government (executive, legislative, and judicial branches) unless the employee or agency is excluded from coverage by other provision of law.

### Qualifying Period

A reservist differential under section 5538 is payable to an employee during a “qualifying period” during which the employee meets **both** of the following conditions:

1. A covered employee is absent from a Federal civilian position in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 331, 332, 333, 688, 12301(a), 12302, 12304, 12305, or 12406, of title 10, United States Code, and is serving on such qualifying active duty; and
2. The employee is entitled to reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA - 38 U.S.C. chapter 43) for such active duty.

NOTE: Effective on the first pay period beginning on or after December 16, 2009, section 745 of Public Law 111-117 amended 5 U.S.C. 5538 to clarify that the reservist differential is not payable for periods following completion of active duty. For prior pay periods, OPM and DOD will offer further guidance in a subsequent issuance regarding agencies’ obligation, if any, to pay the reservist differential after the date on which active duty is completed.

The employee-reservist must provide his or her employing agency with a copy of his or her military orders. The employing agency will determine whether the employee-reservist meets the conditions described above.

### Pay and Leave Status

The receipt of a reservist differential does not affect an employee’s civilian pay and leave status. While absent from the civilian job, the employee is considered to be on leave without pay—unless the employee takes civilian paid leave or other paid time off. The employee may use paid time off (e.g., military leave, annual leave, credit hours, compensatory time off), as available to the employee, subject to the normal conditions governing use of the particular paid time off. A reservist may not receive the reservist differential for periods during which he or she uses paid time off, since the reservist is already receiving full civilian pay for such periods. (During civilian paid time off, the reservist receives full military pay and

full civilian pay, except that civilian pay is offset by military pay when an employee uses military leave under 5 U.S.C. 6323(b). During civilian leave without pay periods, the reservist receives full military pay and may receive a reservist differential, which represents the amount by which civilian basic pay exceeds military pay and allowances.) Thus, the reservist differential for a pay period will be adjusted to account for any hours of paid time off.

There are two types of military leave that may be used by civilian employees during qualifying military active duty:

1. Regular military leave under 5 U.S.C. 6323(a) – providing 15 days of leave each fiscal year with no military pay offset (i.e., full military and civilian pay); and
2. Additional military leave for contingency operations or law enforcement purposes under 5 U.S.C. 6323(b) – providing up to 22 days of leave each calendar year but with civilian pay offset by the amount of military pay allocated to those leave days, as required by 5 U.S.C. 5519.

In considering whether to use additional military leave under section 6323(b) or to receive a reservist differential, employees should take into account the following facts:

- When payments for military leave are offset by military pay, only civilian workdays are considered. Thus, an employee on military leave under section 6323(b) for a biweekly pay period can receive 10 days of paid leave (offset by military pay for those days) plus 4 days of military pay for the civilian nonworkdays (i.e., for most employees, weekend days). This means the total pay for the period can exceed the regular civilian pay for the period.
- Employees may not use regular military leave under section 6323(a) until they exhaust any additional military leave under section 6323(b) that is available to use. (See 49 Comp. Gen. 233 (1969).)
- The amount of the reservist differential depends solely on the amount of civilian basic pay, while the payment for military leave may reflect additional types of civilian pay.

### **Projected Civilian Basic Pay**

The employing agency must determine the projected gross amount of civilian “basic pay” that would otherwise have been payable to an employee for each pay period within a qualifying period if the employee’s civilian employment had not been interrupted by military active duty. Only “basic pay” as defined in OPM guidance is considered.

The employing agency must adjust an employee’s projected rate of basic pay as it would have been adjusted (with reasonable certainty) but for the interruption of military active duty. This would include general increases, locality pay increases, and within-grade increases (based on longevity and acceptable performance). It could also include certain career-ladder promotion increases and performance-based basic pay increases, if the reasonable certainty standard is met.

### **Military Pay and Allowances**

The employee-reservist must provide his or her employing agency with a copy of his monthly military leave and earnings statement for each affected month. Based on those statements, the employing agency must determine the actual paid gross amount of military pay and allowances allocable to each pay period in a qualifying period. A definition of “military pay and allowances” is included in OPM guidance. Military pay and allowances are payable on a monthly basis. For each affected month, a daily rate will be computed by dividing the monthly total by 30 days for full months or by the actual number of days for partial months. Military pay and allowances will be allocated to a civilian pay period (usually a 2-week period) based on the applicable daily rate for days within the pay period.

## **Computation of Differential**

For each civilian pay period, the employing agency must compare the projected civilian basic pay to the allocated military pay and allowances. If the allocated military pay and allowances are greater than or equal to the projected civilian basic pay, no reservist differential is payable for that pay period. If the projected civilian basic pay is greater than the allocated military pay and allowances, the difference represents the unadjusted reservist differential.

The reservist differential is not payable for periods during which the employee is receiving civilian basic pay for performing work or using civilian paid leave or other paid time off. Thus, the unadjusted reservist differential must be adjusted (reduced) to take into account any paid hours (paid work or paid time off). The agency must follow the adjustment methodology prescribed by OPM in its guidance.

## **Payment**

The reservist differential must be paid from the same appropriation or fund that would have been used to pay the employee's civilian salary but for the interruption to perform military active duty. Reservist differentials should be paid at the same frequency as regular civilian salary payments (e.g., generally on a biweekly basis for executive branch employees). Given the need to obtain information about an individual's military pay and allowances and other matters to accurately compute the reservist differential, a reservist differential is considered due and payable on a scheduled date that is no later than 8 weeks (4 biweekly pay periods) after the normal civilian salary payment date for a given pay period, except that this scheduled date may be pushed back beyond 8 weeks if the employee does not provide the agency with a copy of any needed military orders and military leave and earnings statement on a timely basis.

The reservist differential is not basic pay for any purpose. The reservist differential is considered to be pay for the purposes of various other laws governing Federal employee compensation (e.g., laws governing salary offset for debt collection, waiver of overpayments, garnishment, back pay). However, the reservist differential will not be counted as part of aggregate compensation in applying the aggregate pay limit in 5 U.S.C. 5307.

## **Taxability**

The Internal Revenue Service has given OPM the following guidance regarding the treatment of reservist differentials paid under 5 U.S.C. 5538 for Federal tax purposes:

- Reservist differentials are taxable income for Federal income tax purposes.
- Reservist differentials are treated as wages for Federal income tax withholding purposes, regardless of the length of the active duty. Reservist differentials would be reported as wages in box 1 of Form W-2 and in line 7 of Form 1040.
- Reservist differentials are not subject to FICA (Social Security and Medicare) taxes if those differential payments are paid for periods of active duty of more than 30 days.
- Reservist differentials are subject to FICA taxes if those differential payments are paid for periods of active duty of 30 days or less.

## References

- 5 U.S.C. 5538 [added by section 751 of the Omnibus Appropriations Act, 2009 (Public Law 111-8, March 11, 2009) and amended by section 745 of the Consolidated Appropriations Act, 2010 (Public Law 111-117, December 16, 2009)]
- *OPM Policy Guidance Regarding Reservist Differential under 5 U.S.C. 5538*, issued on December 8, 2009, via memorandum to agency Chief Human Capital Officers, and amended on January 8, 2010
- OPM regulations are under development.

## Additional Information

Additional information on reservist differentials may be found on OPM's Website at [www.opm.gov/reservist](http://www.opm.gov/reservist). Employee-reservists should contact their employing agency human resources office if they have any questions.