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Reservist Differential

Federal workers' pay should be protected when they put on the uniform to defend America. But it is not for some members of the Guard and Reserves.

We are now taking a large step toward making workers whole through 'reservist differential' payments. Under a new law, OPM has published instructions for agencies on how to properly pay eligible Federal civilian employees who are serving in the Reserves or National Guard. This new law will protect them and their families by making up the difference between their active duty military pay and their civilian basic pay whenever their civilian basic pay is higher.

- John Berry Director, OPM

I. Overview

This document provides guidance to agencies on implementing a new law providing 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.

This new law is codified in 5 U.S.C. 5538, which was added by section 751 of the Omnibus Appropriations Act, 2009 (Public Law 111-8, March 11, 2009). 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). Pending issuance of regulations, agencies should follow this guidance in applying section 5538, including retroactive application to the period between March 15 and the issuance date of this guidance.

Under section 5538, Federal agencies must provide a payment—hereafter referred to as 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. 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. (This requirement is accomplished by a special adjustment, as described in section VII.B.)

The guidance in this document addresses coverage, definitions, computation methods, procedures, interactions with other laws, and other relevant subjects.

II. Coverage

1. Covered Agencies

Section 5538 and this guidance apply to all agencies within the Federal Government unless the agency is excluded from coverage by other provision of law. The term "Federal Government" includes any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States. For this purpose, the term "executive agency" includes (1) any Executive agency as defined in 5 U.S.C. 105 [excluding an intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii)], (2) the United States Postal Service, (3) the Postal Regulatory Commission, and (4) any nonappropriated fund instrumentality.

Employees of a covered agency or subcomponent thereof may be excluded from coverage in certain circumstances. (See discussion of Federal Aviation Administration (FAA) and Transportation Security Administration (TSA) employees in section II.B.)

While intelligence agencies referred to in 5 U.S.C. 2302(a)(2)(C)(ii) are excluded from the definition of "Federal Government" based on section 5538(f)(1) and 38 U.S.C. 4303(5)-(6), those agencies are included as an "employing agency" under section 5538(c). (In section 5538, see subsection (f)(2) and the use of the term "employing agency" in subsection (c)(1).) Therefore, those intelligence agencies are covered by the payment provisions in section 5538(c) (and related regulations) but not by the provisions in subsections (a) and (b) of section 5538. Section 5538(e)(1) requires the head of each such intelligence agency to prescribe, in consultation with OPM, procedures to ensure that the rights under section 5538 apply to that agency's employees.

2. Covered Employee

Section 5538 and this guidance apply to all employees of a covered agency who meet applicable eligibility conditions, excluding the following categories of employees:

1. Employees of FAA (who are not covered by section 5538 based on 49 U.S.C. 40122(g));
2. Employees of TSA (who are not covered by section 5538 based on 49 U.S.C. 114(n));
3. Any other category of employee that is excluded from coverage under section 5538 by operation of law; and
4. Any category of individuals for whom there is a statutory provision expressly stating that the individual is not considered an employee of the Federal Government for any purpose (or is considered an employee of the Federal Government for limited purposes, not including section 5538).

As provided by 5 U.S.C. 5538(e)(2), the FAA Administrator must, in consultation with OPM, prescribe procedures to ensure that the rights under 5 U.S.C. 5538 apply to FAA employees. For other excluded employees, the employing agency may choose to implement a similar or parallel reservist differential program under any applicable authorities.

A covered employee is a person employed by an employer. (See 5 U.S.C. 5538(f)(1) and 38 U.S.C. 4303(3)-(4).) An individual is considered to be an "employee" of an agency if there is an employer-employee relationship, consistent with principles followed for purposes of employer taxes, Fair Labor Standards Act overtime pay, or acquisition regulations (see 48 CFR 37.104). An individual can be considered an "employee" even if he or she does not have an appointment in the civil service or otherwise meet the requirements in 5 U.S.C. 2105. An independent contractor who does not have an employer-employee relationship is not considered an employee.

An individual who separates from Federal service would lose any eligibility for the reservist differential effective on the date of separation, since no civilian basic pay would otherwise be payable to a separated employee. (See 5 U.S.C. 5538(a)(1).)

III. Qualifying Periods

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 a provision of law referred to in 10 U.S.C. 101(a)(13)(B), as described in Part 1 of Appendix D, and is serving on such 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, except that this determination must be made without regard to the provisions of 38 U.S.C. 4312(d) (dealing with exceptional circumstances when an employer is not required to reemploy an individual covered by USERRA).

NOTE: OPM and DOD will offer further guidance in a subsequent issuance regarding agencies' obligation, if any, to continue to pay the reservist differential after the date on which active duty is completed. We expect to issue that guidance within 60 days.

If an employee is placed in military nonpay status for conduct-related reasons (e.g., AWOL, confinement, or desertion) during qualifying active duty, the days on which the employee has such status are not considered to be qualifying days for the purpose of computing the reservist differential. For the purpose of applying section 5538, the employee is not considered to be performing or serving on active duty during such periods of military nonpay status. Those nonqualifying days will not be used in computing the reservist differential for any affected pay period. The computation of military pay and allowances and projected civilian basic pay will be based solely on qualifying days. (See sections V and VI for additional details.) This ensures that the affected employee experiences the intended loss of pay, avoiding an absurd result that would clearly be contrary to the intent of Congress. If an individual is separated from military service for misconduct or other reasons that terminate USERRA reemployment rights, entitlement to the reservist differential would also terminate at the time of such separation.

Under section 5538(b)(1)(B), an employee may not receive a reservist differential for a period for which the employee receives basic pay for either the performance of work or the use of any kind of paid leave or other paid time off. Thus, if an employee receives civilian basic pay for the entire tour of duty for a biweekly pay period that falls entirely within a qualifying period, no reservist differential may be received for that biweekly pay period. If an entire biweekly pay period falls within a qualifying period and an employee receives civilian basic pay for a portion of the pay period (through paid work or paid time off), this statutory requirement will be met through the methodology used in computing the amount of the reservist differential. (See adjustment for paid hours under section VII.B.) Paid time off includes military leave, annual leave, sick leave, other applicable

paid leave, excused absence, holiday time off, time off as an award, compensatory time off, credit hours, or any other paid time off to the employee's credit. The employee must meet the normal requirements associated with use of any particular type of paid time off.

A qualifying period may begin or end in the middle of an employee's civilian biweekly pay period. Since the days before or after the qualifying period are not qualifying, those days will not be used in determining the reservist differential for the pay period. The computation of military pay and allowances and projected civilian basic pay for a pay period will be based solely on days within the qualifying period. Thus, in computing projected civilian basic pay, it will be necessary to determine what days and hours the employee would have worked during the qualifying portion of the pay period. (See sections V, VI, and VII.B for additional details.)

NOTE: While executive branch employees generally have biweekly pay periods, certain Federal employees may have a monthly pay period. This guidance is generally written based on the presumption that a biweekly pay period applies. Generally, the guidance applies equally to a pay period of a different length (e.g., monthly).

IV. Civilian Pay and Leave Status

The receipt of a reservist differential does not affect an employee's civilian pay and leave status. OPM views the reservist differential as a payment not related to the performance of civilian duty. Furthermore, the reservist differential does not involve assigning an amount of pay to specific individual hours, but is computed based on a comparison of pay for a whole pay period. Accordingly, even though an employee may be receiving a reservist differential, OPM still considers the employee to be in a leave without pay (LWOP) status unless he or she substitutes paid leave or other paid time off for specific hours. In other words, other provisions and entitlements that are linked to an employee's pay and leave status are not affected by the reservist differential. For example, as applicable, an employee receiving a reservist differential-

- Would be considered to be in LWOP-US status (signifying coverage under USERRA as documented by Nature of Action Code 473);
- Would be covered by the special life insurance provisions in 5 U.S.C. 8706(d) related to LWOP status;
- Would be considered to be placed in LWOP status for purpose of triggering the extended 2-year health benefits continuation period under 5 U.S.C. 8906(e)(3); and
- Would be subject to the same requirements that currently govern entitlement to holiday time off (with the reservist differential having no effect). (See additional information on holidays later in this section.)

The language in section 5538 clearly indicates that employees are not in a civilian pay status when in receipt of the reservist differential. Section 5538(c)(2) provides that an employing agency must pay the reservist differential from the same appropriation or fund that would be used to pay the employee "if such employee were in a pay status."

The reservist differential is not civilian basic pay for any purpose (e.g., retirement, life insurance, severance pay). It is simply a supplemental payment that is computed using a mathematical comparison of projected civilian basic pay and military pay and allowances. Section 5538(a) speaks of the basic pay that "would otherwise have been payable" but for the interruption of employee's civilian employment. In other words, unlike military leave, the reservist differential does not cause the employee to be placed in a paid leave status, but is providing a special type of payment during periods of unpaid leave.

During a qualifying period, an employee may use various types of paid time off, subject to the normal conditions and requirements. However, as discussed in section III, an employee may not receive a reservist differential for any period for which he or she receives any kind of paid time off. The employee will be considered to be in a civilian pay status during periods of paid time off.

An employee may continue to use military leave, as applicable.

- 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
- 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) – this leave must be exhausted before using regular military leave (see 49 Comp. Gen. 233 (1969)).

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.
- 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.

An employee may continue to choose to use annual leave or other applicable paid leave or other paid time off, as appropriate, during a period of active duty. In the case of periods to which additional military leave under section 6323(b) (22 days) is applicable, only annual leave and compensatory time off may be substituted for that military leave.

An employee is entitled to pay for a holiday (as a separate payment under the normal holiday pay provisions) only if the employee is in civilian pay status on the workday before or after the holiday. As noted above, the reservist differential does not place the employee in civilian pay status. If the employee is entitled to pay for a holiday, the reservist differential would not be payable for that holiday, since pay for a holiday is a form of paid time off. Regardless of whether or not the employee is entitled to actual pay for a holiday under the normal holiday pay provisions, the regular basic pay for the holiday would be included as part of projected civilian basic pay that is compared to military pay and allowances in computing any reservist differential. (See sections V and VII. Note that if the employee is entitled to a paid holiday under the normal holiday pay provisions, an adjustment would be made under section VII.B to prevent receipt of the reservist differential for the holiday hours.)

The policy on excused absence for employees returning home from active duty (see OPM Compensation Policy Memoranda (CPM) 2008-12 and 2008-21) after each deployment in support of an Overseas Contingency Operation continues until that policy is modified or rescinded. The reservist differential would not be payable for periods of excused

absence, since it is a form of paid time off. Again, this will be accomplished through the adjustment described in section VII.B.

V. Projected Civilian Basic Pay

Computation of the reservist differential requires projecting the 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. The definition of "civilian basic pay" used in this guidance document is found in Appendix C.

1. *Civilian Tour of Duty*

The first step in projecting an employee's civilian basic pay is to identify (1) the employee's civilian biweekly tour of duty established for leave usage purposes and (2) the pay computations that apply in computing basic pay for that tour of duty.

For most full-time employees, the biweekly tour of duty established for leave usage purposes consists of 80 hours. For such an employee, the typical pay computation rules require multiplying 80 hours times the employee's hourly rate of basic pay (including locality pay or other pay that is creditable basic pay in applying section 5538, as shown in Appendix C). This computation is not affected by the use of flexible or compressed work schedules, since full-time employees on those schedules also have an 80-hour basic work requirement.

For a part-time employee, use the part-time biweekly tour of duty established for leave usage purposes.

For an employee with an uncommon tour of duty under 5 CFR 630.210, use the hours in the uncommon tour (e.g., 144 hours for certain firefighters that work six 24-hour shifts). Special pay computation rules generally apply to employees on uncommon tours of duty; however, any payments that are not considered civilian basic pay (as defined in Appendix C) must be disregarded in this computation.

For an employee with an established work schedule for which the number of hours varies across biweekly pay periods because of a rotating cycle, an agency may (1) adjust the projected civilian basic pay each pay period consistent with the established cycle or (2) use the average number of hours in the employee's civilian biweekly tour over a full cycle to compute an average civilian basic pay.

For an employee with a full-time or part-time seasonal work schedule, identify the established work season and the hours in the biweekly tour of duty established for leave usage purposes during that season. The reservist differential will be payable only during periods corresponding with the established work season when basic pay would have otherwise been payable.

For an employee with an intermittent work schedule, there is no established tour of duty for leave usage purposes. Therefore, the agency must identify the average

biweekly non-overtime hours over an appropriate period of time (e.g., 6-month period or lesser period if the employee has been in the position with the intermittent work schedule for less than 6 months). For employees with a seasonal intermittent schedule, base the average on periods within the established work season.

For other types of employees who are not covered by a leave system (e.g., certain Presidential appointees), there is no established tour of duty for leave usage purposes. Instead, the agency must determine an appropriate tour of duty that will be used for the purpose of applying the reservist differential provision—e.g., for employees with no fixed schedule who are receiving a full-time salary, the agency may deem the tour of duty to be 8 hours per workday with five workdays, Monday through Friday.)

NOTE: While executive branch employees generally have biweekly pay periods, certain Federal employees may have a monthly pay period. In these cases, the agency will need only to establish a method of determining the basic pay attributable to days within the qualifying period—to deal with situations in which the qualifying period begins or ends in the middle of a calendar month.

2. *Basic Pay Adjustments*

Section 5538 requires employing agencies to compute the civilian basic pay (as defined by OPM—see Appendix C) that would otherwise have been payable to an employee for each affected pay period but for the interruption of civilian service because of a call or order to active duty. This means that an agency must adjust an employee's rate of basic pay as it would have been adjusted but for the interruption of military active duty. This adjustment is only for purposes of making the comparison of projected civilian basic pay and military pay and allowances used in computing the reservist differential. These adjustments do not affect an employee's actual basic pay entitlement.

In determining the pay adjustments that would have occurred but for the interruption of military active duty, agencies should follow policies consistent with those used to determine an employee's rate of basic pay upon reemployment under USERRA, as codified in 38 U.S.C. chapter 43. (See also 5 CFR part 353, subparts A and B.) Under USERRA, employees are credited with any pay adjustment that, with "reasonable certainty," would have been made but for service in the uniformed services. (While USERRA requires setting an employee's prospective rate of pay upon reemployment following military service, section 5538 requires determining an employee's entitlement to a differential payment that is made on an ongoing, real-time basis during military active duty. Thus, agencies and payroll providers will need to develop procedures to provide a current projection of civilian basic pay each pay period for the purpose of computing the reservist differential under section 5538.)

The following pay adjustments should be applied in computing an employee's projected current rate of civilian basic pay:

- General (annual) pay adjustments in basic pay (including locality pay and special rate adjustments);
- Within-grade increases (generally based on longevity and acceptable performance);
- Career ladder promotion increases (if promotion would have occurred with reasonable certainty);
- Performance-based basic pay adjustments (to the extent the amount of the adjustment would have been attained with reasonable certainty); and
- Other basic pay adjustments that would have been received with reasonable certainty.

A projected adjustment takes effect at the time the adjustment otherwise would have been made but for interruption of military active duty. This means that, even if an employee is actually in leave without pay (LWOP) status, the employee must be treated as if he or she is in pay status when applying pay adjustment rules (because the employee would have been in pay status but for the interruption of military active duty). Thus, for example, LWOP periods occurring within a qualifying period would not reduce creditable service in applying the rules governing General Schedule within-grade increases.

3. *Biweekly Total Civilian Basic Pay*

Using the rates of basic pay projected for a given biweekly pay period (after making adjustments as described in section V.B), compute the total amount of projected civilian basic pay for that pay period. Consider only pay periods that contain days within the qualifying period. Do not include projected civilian basic pay for (1) days that fall outside the qualifying period (i.e., days before the beginning of the qualifying period in the first affected pay period and days after the beginning of the qualifying period in the last affected pay period) or (2) days on which the employee is in military nonpay status for conduct-related reasons (e.g., AWOL, confinement, or desertion).

Base the computation on the established biweekly tour of duty as described in section V.A. At this stage, ignore any hours in the tour of duty for which the employee receives civilian pay (paid civilian work or paid time off). (Appropriate adjustments will be made for paid hours under the computation methodology described in section VII.) However, if the entire civilian tour of duty is covered by paid hours, then no computation of civilian basic pay is necessary for that period, since no reservist differential will be payable in that case.

If an agency later determines that the computed amount of basic pay was incorrect, it must correct the basic pay assigned to the given pay period and correct the reservist differential for that pay period. The agency may adjust a

future reservist differential payment to address any overpayment or underpayment. If reservist differential payments associated with a period of active duty have stopped, the agency should handle any outstanding overpayment or underpayment in accordance with normal procedures. For an overpayment, follow the normal debt collection procedures. (See section VII.C.)

VI. Actual Military Pay and Allowances

Computation of the reservist differential requires determining the actual paid gross amount of military pay and allowances allocable to each pay period in a qualifying period. The definition of "military pay and allowances" used in this guidance document is found in part 2 of Appendix D. The table below shows the steps that must be followed to determine the amount of military pay and allowances allocable to a given biweekly pay period.

Table VI-1 Allocation of Military Pay and Allowances to a Civilian Pay Period	
Step 1	<p>Identify affected months. Identify the calendar months that contain part of a qualifying period.</p>
Step 2	<p>Determine monthly amount of military pay and allowances. Determine the total monthly pay and allowances (as defined in part 2 of Appendix D) for each affected calendar month. Include gross pay and allowances before any forfeitures, reductions, deductions, or collections (e.g., excess leave). The reservist is responsible for providing his or her civilian employing agency with a copy of the employee's military leave and earnings statement for each month within the qualifying period. The civilian employing agency will determine the monthly amount based on the employee's military leave and earnings statements. (See Appendix D.)</p>
Step 3	<p>Compute military daily rate. For each affected calendar month, determine a daily rate of military pay and allowances by dividing the monthly total from Step 2 by the appropriate number of days, as explained in this step. For months in which the entire month falls within the qualifying period of active duty, divide the monthly total from Step 2 by 30 days. If the qualifying period of active duty begins or ends in the middle of the month, divide the monthly total from Step 2 by the actual number of days of qualifying active duty in that month. If a month contains days on which the employee is in military nonpay status for conduct-related reasons, subtract those days from the applicable number of days (i.e., 30 days for full months and total actual days of active duty for partial months) and divide the monthly total from Step 2 by that adjusted number of days. Round to the nearest cent.</p>
Step 4	<p>Allocate military pay and allowances to civilian biweekly pay period. For each civilian biweekly pay period within a qualifying period, allocate military pay and allowances to that biweekly period. This is done by identifying the number of calendar days within a biweekly pay period that fall within a given calendar month, and multiplying</p>

that number of days times the daily rate for that month. If a biweekly pay period covers parts of two calendar months, you will have two separate computations; if so, add the results of the two separate computations. The result is the allocated military pay and allowances for the biweekly pay period. (For example, if the military daily rate for April is \$200 and military daily rate for May is \$210, and if the given civilian biweekly pay period consists of 5 days in April and 9 days in May, then the total military pay and allowances allocated to that pay period would be $(5 \times \$200) + (9 \times \$210) = \$2,890.$)

Do not include military pay and allowances for days that fall outside the qualifying period in the first and last affected pay periods. In such pay periods, the total number of calendar days used in this step will be less than 14. For example, if the number of nonqualifying days in the first affected biweekly pay period is 5, then the agency would allocate military pay and allowances to the 9 qualifying days. As explained in section V.C, no projected civilian basic pay is credited for the nonqualifying days. Thus, those days have no effect on the reservist differential.

NOTE 1: No military pay and allowances are credited for days on which the employee is in military nonpay status for conduct-related reasons (e.g., AWOL, confinement, desertion). As explained in section V.C, no projected civilian basic pay is credited for those days. Thus, those days have no effect on the reservist differential.

NOTE 2: For any employee with a **monthly** civilian pay period, there is no need to compute a daily rate of military pay and allowances when the month is completely contained within a qualifying period. In such cases, simply allocate the entire monthly amount of military pay and allowances to the monthly civilian pay period. However, if the qualifying period begins or ends within the month, or if the employee has days of military nonpay status within the month, the agency must determine the amount of military pay and allowances attributable to qualifying days. Thus, in those cases, a daily rate of military pay and allowances is needed.

If an agency later receives information that the computed monthly amount of military pay and allowances was incorrect, it must use the corrected daily rate and determine the correct amount of the reservist differential for any affected pay period. The agency may adjust a future reservist differential payment to address any overpayment or underpayment. If reservist differential payments associated with a period of active duty have stopped, the agency should handle the overpayment or underpayment in accordance with normal procedures. For an overpayment, follow the normal debt collection procedures. (See section VII.C.)

VII. Computation and Payment of Reservist Differential

1. Comparison of Civilian and Military Compensation

For each civilian biweekly pay period, compare the projected civilian basic pay (as derived under section V) to the allocated military pay and allowances (as derived under section VI). If the allocated military pay and allowances are greater than or equal to the projected civilian basic pay for any biweekly pay period, no reservist differential is payable for that pay period. If the projected civilian basic pay is greater than the allocated military pay and allowances for any biweekly pay period, the difference represents the *unadjusted* reservist differential. Before paying a reservist differential, an agency must reduce the unadjusted reservist differential to take into account any paid hours (paid work or paid time off), as described in section VII.B.

If the employee has received the full amount of basic pay payable for the entire civilian biweekly pay period (e.g., all hours covered by paid time off), no reservist differential is payable during that pay period. For such a pay period, a comparison of civilian and military compensation is not necessary.

2. Adjustment for Paid Hours

Under section 5538(b)(1)(B), the reservist differential may not be paid for periods for which the employee receives basic pay, including paid hours resulting from working or using any kind of paid time off. This section describes the adjustment that must be made to implement this statutory requirement.

Paid time off includes military leave, annual leave, sick leave, other applicable paid leave, excused absence, holiday time off, time off as an award, compensatory time off, credit hours, or any other paid time off to the employee's credit.

The table below shows the steps that must be taken to make the required adjustment:

Table VII-1 Adjustment for Paid Hours	
Step 1	Identify total hours in civilian biweekly tour. Identify the number of hours in an employee's established civilian biweekly tour of duty used for leave usage purposes (or estimated average non-overtime hours for intermittent employees without such a tour). (For most full-time employees, this will be 80 hours. Part-time employees will have less hours and employees with an uncommon tour will have more hours. See section V.A for additional guidance—e.g., guidance on employees with variable,

	<p>seasonal, or intermittent schedules.)</p> <p>If a civilian biweekly pay period includes nonqualifying days, exclude hours on those days in computing the total hours. Nonqualifying days include (1) days before or after the qualifying period (in the first or last affected pay period) and (2) days in which the employee is in military nonpay status for conduct-related reasons. For example, if an employee's active duty began in the middle of a civilian biweekly pay period and 4 work days of the pay period had already elapsed (8-hour days from Monday through Thursday), the agency would exclude those 32 hours, leaving a total of 48 hours as the total hours in the civilian biweekly tour (assuming a 80-hour biweekly tour of duty).</p>
Step 2	<p>Identify paid hours.</p> <p>For each civilian biweekly pay period, identify the number of paid hours (i.e., civilian paid work hours or paid time off), if any, on qualifying days. (Exclude paid hours on nonqualifying days.)</p>
Step 3	<p>Express paid hours as a percentage.</p> <p>For each civilian biweekly pay period, compute a percentage by dividing the paid hours derived under Step 2 by the total biweekly hours derived under Step 1. (For example, if the employee has an 80-hour biweekly tour and used 16 hours of paid time off with no other paid hours, the percentage would be $16 \div 80 = 20\%$.)</p>
Step 4	<p>Compute percentage for LWOP hours.</p> <p>For each civilian biweekly pay period, compute the percentage of leave without pay hours within the biweekly tour by subtracting the percentage derived under Step 3 from 100 percent. (For example, if the Step 3 percentage is 20 percent, $100\% - 20\% = 80\%$.)</p>
Step 5	<p>Adjust the reservist differential.</p> <p>For each civilian biweekly pay period, multiply the unadjusted reservist differential derived under section VII.A by the percentage derived under Step 4. The result is the payable amount of the reservist differential for that pay period. (For example, if the unadjusted reservist differential is \$500 and the LWOP percentage is 80%, then the adjusted (payable) reservist differential would be \$400 ($80\% \times \\500).)</p>

3. *Payment*

For each affected civilian biweekly pay period, the employee is entitled to payment of the reservist differential as computed and adjusted under sections VII.A and VII.B. 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. Consistent with 5 U.S.C. 5538(c)(3), 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 as provided in the NOTE 1 below. Thus, an agency may establish a reservist differential payment schedule with a built-in time lag as long as that time lag does not exceed 8 weeks. The allowing of a time lag in establishing the scheduled pay date for reservist differential payments is based on 5 U.S.C. 5538(c)(3), which allows for a judgment regarding what is practicable. (This scheduled date has significance in determining any back pay interest as explained later in this section.)

NOTE 1: If an employee does not submit necessary information (e.g., copy of military orders or military leave and earnings statement containing amount of military pay and allowances) at least 4 weeks prior to the scheduled date, the agency may push back the scheduled payment date consistent with the delay resulting from the employee's inaction and the agency's normal payroll processing dates. In these cases, the scheduled payment date may be more than 8 weeks after the normal salary payment. This delayed scheduled payment date is considered to be the date the reservist differential is due and payable for all purposes, including the purpose of determining any back pay interest liability.

If an agency has identified errors in computing the reservist differential for past pay periods, it may adjust a current reservist differential payment to correct the error, as long as that differential is for a pay period within the same qualifying period (i.e., pay periods associated with a specific call or order to active duty). The error may be an overpayment (i.e., debt owed to the agency) or an underpayment (i.e., debt owed to the employee).

- An overpayment may be recouped from a later reservist differential payment for the same qualifying period by reducing that later payment. In this situation, the overpayment is considered an advance payment, which eliminates any employee debt and allows the later payment to be adjusted to account for the advance payment. If an overpayment debt is not recoverable from reservist differential payments for the same qualifying period, collection of that debt is subject to normal debt collection

procedures (e.g., salary offset under 5 U.S.C. 5514 and 5 CFR part 550, subpart K).

- The agency should resolve any underpayment by adjusting (increasing) later reservist differential payments for the same qualifying period. If the qualifying period has ended, the agency should make a supplemental payment to the employee as soon as possible. Back pay interest will accrue from the scheduled date of the affected payment if the agency does not make the back payment within 30 days of that date. (Failure to pay the reservist differential on the scheduled date is considered an unjustified or unwarranted personnel action, except as provided in NOTE 2 below.) As explained in the first paragraph of this section, the scheduled date of payment may be no more than 8 weeks after the normal salary payment date for a given pay period.

NOTE 2: For pay periods beginning before the issuance date of this policy guidance, a late payment (i.e., a payment made more than 8 weeks after the normal salary payment date for a given pay period) will not be considered to be due to an unjustified or unwarranted personnel action by the employing agency, and no Back Pay Act interest will accrue for such late payments. Agencies necessarily waited for OPM policy guidance. Delays in implementation of section 5538 during the development of OPM policy guidance are not unjustified or unwarranted personnel actions. The scheduled payment date for the first pay period beginning on or after the issuance date of this policy guidance should be treated as the scheduled payment date for earlier pay periods—unless that scheduled date is delayed as described in NOTE 1 of this section C.

4. Treatment for Tax Purposes

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 and regardless of whether the payment is for a period of active duty or for a period following 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.

5. Treatment for Purposes of Various Pay-Related Laws

The table below describes how reservist differentials will be treated in applying other laws that deal with employee pay.

Table VII-2 Application of Pay-Related Laws to Reservist Differentials		
Salary offset for collection of debt owed the U.S. Government	5 U.S.C. 5514; 5 CFR part 550, subpart K	A reservist differential is considered to be "pay" that is subject to salary offset.
Administrative offset	31 U.S.C. 3716; 31 CFR parts 900-904	A reservist differential is a Federal payment that would be subject to administrative offset for collection of debts owed the Federal Government.
Garnishment for alimony & child support	42 U.S.C. 659; 5 CFR part 581	A reservist differential is a Federal payment that would be subject to garnishment for alimony, child support, or commercial debt. (Under 42 U.S.C. 659(a), the law applies to "moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States." See also 5 CFR 581.103-104.)
Garnishment for commercial debt	5 U.S.C. 5520a; 5 CFR part 582	A reservist differential is considered to be "pay" for personal services that is subject to garnishment for commercial debt. (See 5 CFR 582.102(5).)
Settlement of accounts for deceased employees	5 U.S.C. 5581-5583	A reservist differential is considered to be part of the "pay and allowances" that may be due on account of the services of a deceased employee for the Government of the United States (5 U.S.C. 5581(2)).
Waiver of overpayment debt	5 U.S.C. 5584	A reservist differential is considered to be part of an employee's "pay and allowances" that may generate an erroneous overpayment, collection of

		which may be waived under 5 U.S.C. 5584.
Back pay	5 U.S.C. 5596	A reservist differential is considered to be part of an employee's "pay, allowances, or differentials" that are covered by the back pay law. (See 5 U.S.C. 5596(b)(1)(A)(i) and also the definition of "pay, allowances, and differentials" in 5 CFR 550.803.)
Aggregate limitation on pay	5 U.S.C. 5307	A reservist differential is excluded in applying the aggregate limitation on pay. Reservist differentials are not considered to be a type of "other similar cash payment."

Appendices

- Appendix A – Statutory Provision (5 U.S.C. 5538)
- Appendix B – Definitions
- Appendix C – Civilian Basic Pay
- Appendix D – Military Duty and Compensation
- Appendix E – Example

Appendix A - Statutory Provision (5 U.S.C. 5538)

Text of 5 U.S.C. 5538 (as added by section 751 of Public Law 111-8):

§ 5538. Nonreduction in pay while serving in the uniformed services or National Guard

(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)(1) 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)—

(A) during which such employee is entitled to reemployment 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

(B) 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.

(2) For purposes of this section, the period during which an employee is entitled to reemployment rights under chapter 43 of title 38—

(A) shall be determined disregarding the provisions of section 4312(d) of title 38; and

(B) shall include any period of time specified in section 4312(e) of title 38 within which an employee may report or apply for employment or reemployment following completion of service on active duty to which called or ordered as described in subsection (a).

(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.

Text of Law Enacting Section 5538:

Section 751 of Omnibus Appropriations Act, 2009

(Public Law 111-8, March 11, 2009)

SEC. 751. NONREDUCTION IN PAY WHILE FEDERAL EMPLOYEE IS PERFORMING ACTIVE SERVICE IN THE UNIFORMED SERVICES OR NATIONAL GUARD.

(a) IN GENERAL.—Subchapter IV of chapter 55 of title 5, United States Code, is amended by adding at the end the following:

[Text of Section 5538]

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 55 of title 5, United States Code, is amended by inserting after the item relating to section 5537 the following:

"5538. Nonreduction in pay while serving in the uniformed services or National Guard."

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to pay periods (as described in section 5538(b) of title 5, United States Code, as amended by this section) beginning on or after the date of enactment of this Act.

Appendix B - Definitions

Active duty means full-time duty in the active service of a uniformed service, including full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the

military department concerned. Such term does not include full-time National Guard Duty under title 32 of the U.S. Code. (See 10 U.S.C. 101(d)(1) and (d)(5)). (See definition of "qualifying active duty" for active duty covered by section 5538.)

Additional military leave means military leave authorized under 5 U.S.C. 6323(b) (providing up to 22 days of leave in a calendar year for contingency operations or law enforcement) or 5 U.S.C. 6323(c) (providing leave for members of the District of Columbia National Guard for parade or encampment). Payments for this additional military leave are subject to offset under 5 U.S.C. 5519.

Armed Forces mean the Army, Navy, Air Force, Marine Corps, and the Coast Guard, including the reserve components of those forces.

Civilian basic pay means the gross amount of basic pay as defined in Appendix C, before applying any deductions.

Covered agency means an agency of the Federal Government, excluding any agency that is not covered by section 5538 by operation of law. An intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii) is a covered agency only for the purpose of applying section 5538(c) and related regulations and guidance. (See section II.A in the main body of this guidance for additional information.)

Employee or ***covered employee*** means a civilian employed by a covered agency, excluding employees that are excluded by law from coverage under section 5538. For example, employees of the Federal Aviation Administration and the Transportation Security Administration (TSA) are not covered, since those employees are excluded from all personnel provisions in title 5 except those listed in 49 U.S.C. 40122(g)(2). (See 49 U.S.C. 114(n) and 40122(g).) (See also section II.B in the main body of this guidance.) Employees of an intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii) are included only for the purpose of applying section 5538(c) and related regulations and guidance. An individual who separates from Federal civilian service ceases to be a covered employee.

Employing agency, for the purpose of assigning payment obligations and responsibilities under 5 U.S.C. 5538(c), means the agency or entity of the Federal Government that employs the civilian employee, including an intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii). (Note: While an intelligence agency is covered by agency procedures instead of OPM regulations with respect to subsections (a) and (b) of 5 U.S.C. 5538, subsection (c) of that section and any related OPM regulations do apply to such an intelligence agency.)

Federal executive agency, for the purpose of defining *Federal Government*, means (1) any Executive agency as defined in 5 U.S.C. 105 (other than an intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii)), (2) the United States Postal Service, (3) the Postal Regulatory Commission, and (4) any nonappropriated fund instrumentality of the United States.

Federal Government means any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States.

Intelligence agencies means the agencies listed in 5 U.S.C. 2302(a)(2)(C)(ii)—namely, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities;

Military pay and allowances means the gross amount of pay and allowances as defined in Appendix D, before applying any deductions, forfeitures, collections, or other reductions.

Military leave means military leave provided under 5 U.S.C. 6323, including regular military leave under section 6323(a) and additional military leave under section 6323(b).

National Guard means the Air National Guard and the Army National Guard. When functioning as a reserve component of the military, the terms "Air National Guard of the United States" and "Army National Guard of the United States" are used.

Nonqualifying day means a day within a covered civilian pay period (1) which falls outside a qualifying period (i.e., days before active duty commences in the first covered pay period or days after the end of the qualifying period in the last covered pay period) or (2) on which the employee is in military nonpay status for conduct-related reasons (e.g., absence without leave (AWOL), confinement, or desertion).

Other paid leave, as used in 5 U.S.C. 5538(b)(1)(B), means all forms of paid leave or other paid time off in addition to military leave and annual leave, including, as applicable, sick leave, other applicable paid leave, excused absence, holiday time off, time off as an award, compensatory time off, credit hours, or any other paid time off to the employee's credit.

Qualifying active duty means active duty by a covered employee pursuant to a call or order, as described in section 5538(a). (See Part 1 of Appendix D.) (Note: Under section 5538(a), active duty that qualifies for coverage under section 5538 is active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B)—i.e., the following specific provisions in title 10 of the United States Code: sections 688, 12301(a), 12302, 12304, 12305, and 12406 and chapter 15 (which includes sections 331, 332, and 333). Thus, qualifying active duty does not include voluntary active duty under 10 U.S.C. 12301(d) or annual training duty under 10 U.S.C. 10147 or 12301(b).)

Qualifying day means a day within a qualifying period that is used in computing a reservist differential—i.e., any day in a covered civilian pay period that is not a nonqualifying day.

Qualifying period means a period of qualifying active duty that provides coverage under 5 U.S.C. 5538 and potential entitlement to a reservist differential depending on the comparison of civilian basic pay and military pay and allowances for each pay period within the qualifying period. A period of qualifying active duty provides coverage under section 5538 only if the employee has USERRA reemployment rights based on that active duty. (See 5 U.S.C. 5538(b), section III of the guidance, and Part 1 of Appendix D.)

NOTE: OPM and DOD will offer further guidance in a subsequent issuance regarding agencies' obligation, if any, to continue to pay the reservist differential after the date on which active duty is completed. We expect to issue that guidance within 60 days.

Paid hours means hours in the employee's civilian biweekly tour of duty used for leave purposes for which the employee receives pay as a result of performing work or using paid time off.

Paid time off means, as applicable, military leave, annual leave, sick leave, other applicable paid leave, excused absence, holiday time off, time off as an award, compensatory time off, credit hours, or any other paid time off to the employee's credit.

Payable, as used in 5 U.S.C. 5538(a)(2)(A), means the gross amount of military pay and allowances that would be paid for the days within a civilian pay period before considering any reductions, forfeitures, collections (e.g., excess leave), or any other deductions.

Regular military leave means military leave authorized under 5 U.S.C. 6323(a) (providing 15 days per fiscal year without any offset for military pay).

Reserve means the following components of the uniformed services:

- (1) the Army Reserve;
- (2) the Navy Reserve;
- (3) the Marine Corps Reserve;
- (4) the Air Force Reserve;
- (5) the Coast Guard Reserve; or
- (6) the Reserve Corps of the Public Health Service.

Reserve component means —

- (1) the Army National Guard of the United States;
- (2) the Army Reserve;
- (3) the Navy Reserve;
- (4) the Marine Corps Reserve;
- (5) the Air National Guard of the United States;
- (6) the Air Force Reserve;

- (7) the Coast Guard Reserve; or
- (8) the Reserve Corps of the Public Health Service.

Reservist means a member of reserve component—i.e., a member of the Reserve, the Air National Guard of the United States, or the Army National Guard of the United States.

Reservist differential means a payment provided to a reservist under 5 U.S.C. 5538.

Section 5538 means section 5538 of title 5, United States Code.

Uniformed services means the Armed Forces (consisting of Army, Navy, Air Force, Marine Corps, and Coast Guard); the Army National Guard and the 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; and any other category of persons designated by the President in time of war or national emergency. (Note: While full-time National Guard duty is considered service in the uniformed services, the active duty that is qualifying under 5 U.S.C. 5538 does not include full-time National Guard duty. Members of the National Guard are covered by section 5538 only when they perform qualifying active duty. See section 5538(a), which refers to "active duty in the uniformed services.")

USERRA means the Uniformed Services Employment and Reemployment Act as codified in 38 U.S.C. chapter 43. (See also Department of Labor regulations at 20 CFR part 1002 and OPM regulations at 5 CFR part 353, subparts A and B.)

Appendix C - Civilian Basic Pay

Computation of the reservist differential requires projecting the civilian basic pay that would otherwise have been payable to an employee if the employee's civilian employment had not been interrupted by military active duty.

Section 5538 does not provide a definition of "basic pay" other than to state that the term includes locality pay under 5 U.S.C. 5304. (See section 5338(f)(3).) OPM will provide a definition in its implementing regulations. In the meantime, the following definition of "civilian basic pay" should be used based on current laws, regulations, or official policies of a pay system administrator:

Civilian basic pay, for the purpose of applying 5 U.S.C. 5538, means the gross amount of the base rate of pay set by law or administrative action without additional pay of any kind, except that the following types of additional payments (i.e., basic pay supplements) will be considered basic pay beginning on the effective date of section 5538:

- Locality pay under 5 U.S.C. 5304, as required by 5 U.S.C. 5538(f) and permitted by 5 U.S.C. 5304(c)(2);

- Special rate supplements under 5 U.S.C. 5305, which are required by 5 CFR 530.308(a) to be treated the same as locality pay under 5 U.S.C. 5304 (see also 5 U.S.C. 5305(j));
- Local market supplements payable under the National Security Personnel System, which must be treated the same as locality pay under 5 U.S.C. 5304, as required by 5 CFR 9901.331(d)(10);
- Market pay for VA doctors and dentists under 38 U.S.C. 7431, which is treated as basic pay for retirement and other benefits under 38 U.S.C. 7431(f);
- Market pay consistent with 38 U.S.C. 7431 for doctors and dentists in other agencies provided under a delegated authority granted by OPM under 5 U.S.C. 5371;
- Other locality payments or special rate supplements that are equivalent to locality pay under 5 U.S.C. 5304 or special rate supplements under 5 U.S.C. 5305 and that the pay system administrator considers basic pay (by regulation or official policy) for the same general purposes as those title 5 payments, including retirement purposes.

All other additional payments beyond the base rate are not part of an employee's basic pay for the purpose of computing the reservist differential under section 5538 unless provided by OPM in future regulations.

OPM recognizes that there are additional payments that are considered to be basic pay for certain purposes, including law enforcement availability pay under 5 U.S.C. 5545a, availability pay for TSA air marshals, administratively uncontrollable overtime pay under 5 U.S.C. 5545(c)(2) received by law enforcement officers, standby duty pay under 5 U.S.C. 5545(c)(1), straight-time portion of firefighter overtime pay received by firefighters covered by 5 U.S.C. 5545b, and physicians' comparability allowances under 5 U.S.C. 5948. However, these payments are considered basic pay for a particular purpose only if expressly provided in law or regulation. Unlike the payments that are considered basic pay upon the enactment of section 5538, there is no existing legal basis for automatically treating these payments as basic pay under section 5538. These payments are not equivalent to locality pay or special rate supplements, which represent supplemental compensation for hours in an employee's basic workweek treated as basic pay for purposes of premium pay and benefits. In some cases, applicable law and/or regulation expressly bars treatment of a given payment as basic pay absent an express provision of law or regulation. For example—

- with respect to law enforcement availability pay, see 5 U.S.C. 5545a(h)(2) and 5 CFR 550.186(b);
- with respect to standby duty pay and administratively uncontrollable overtime pay, see 5 CFR 550.163(d);
- with respect to the straight-time portion of firefighter overtime pay received by firefighters covered by 5 U.S.C. 5545b, see 5 U.S.C. 5545b(b)(2) and (c)(2) and 5 CFR 550.1305(a); and
- with respect to physicians' comparability allowances under 5 U.S.C. 5948, see 5 U.S.C. 5948(h)(1).

For employees receiving a retained rate under 5 U.S.C. 5363, the additional pay payable above the range maximum received because of a retained rate is not considered basic pay, except as expressly provided in law or regulation. (See 5 U.S.C. 5363(d) and 5 CFR 536.307(a), especially paragraph (a)(10).) The maximum rate of basic pay of the applicable range is considered to be a retained rate employee's rate of basic pay in all other situations. (See 5 CFR 536.307(b).) Thus, the range maximum would be treated as a retained rate employee's rate of basic pay in computing the reservist differential.

Appendix D - Military Duty and Compensation

Part 1 - Qualifying Military Duty

One condition that employees must meet to receive reservist differentials under 5 U.S.C. 5538 is that they must be 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 "a" provision of law "referred to" in 10 U.S.C. 101(a)(13)(B). Section 101(a)(13)(B) refers to (i.e., cites by number) the following specific provisions in title 10 of the United States Code: sections 688, 12301(a), 12302, 12304, 12305, or 12406 and chapter 15 (which includes sections 331, 332, and 333). The cited provisions are authorities for certain military contingency operations for which a reservist (i.e., member of a Reserve or the National Guard) may be called or ordered to active duty. (Note: The term "contingency operation" means a military operation that 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.)

Active duty referred to in section 101(a)(13)(B) includes active duty under:

1. An order issued by a Secretary of one of the military services to a retired member of the service or the service's Reserve under **10 U.S.C. 688**;
2. An order issued by a Secretary of a military service or a designee in time of war or national emergency declared by Congress, or when otherwise authorized by law, to units and reservists not assigned to units, under **10 U.S.C. 12301(a)**;
3. An order issued by a Secretary of a military service or a designee in times of national emergency declared by the President, or when otherwise authorized by law to units and reservists not assigned to units in the Ready Reserve, under **10 U.S.C. 12302**;
4. An order issued by the Secretary of Defense or the Secretary for Homeland Security for the Coast Guard, under the authority of the President, when the President determines that it is necessary to augment the active forces for any operational mission or that it is necessary to provide assistance in responding to an emergency involving a use or threatened use of a weapon of mass destruction, or a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property, to units, reservists not attached to units, and members of the Individual Ready Reserve, under **10 U.S.C. 12304**;

5. An order already issued under 10 U.S.C. 12301(a), 12302, or 12304, covering a period of time when an individual reservist would have been separated or retired, but for the suspension by the President for the individual reservist of a law relating to promotion, retirement, or separation, because the President has determined he or she is essential to the national security of the United States under the authority of **10 U.S.C. 12305**;
6. An order from the President, issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia, calling into Federal service members and units of the National Guard of any State to repel an invasion or danger of invasion of the United States, its Commonwealths, or its territories, to suppress rebellion or the danger of rebellion against the authority of the United States, or to execute the laws of the United States, under **10 U.S.C. 12406**;
7. An order from the President calling the militia of any State into Federal service to put down an insurrection in any State, under **10 U.S.C. 331** (a section within chapter 15);
8. An order from the President calling into Federal service such of the militia of any State, or using such of the armed forces, when he considers it necessary to enforce Federal law or to suppress rebellion because of unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, under **10 U.S.C. 332** (a section within chapter 15);
9. An order from the President to the armed forces, including the National Guard in Federal service, to restore public order and enforce the laws of the United States in situations of natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, or to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, under **10 U.S.C. 333** (a section within chapter 15);

If there are questions about whether the orders are specific enough or whether they cite the correct authority, the reservist or the civilian employing agency may contact the headquarters that issued the orders (listed at top of orders) for clarification.

Part 2 - Military Pay and Allowances

Computation of the reservist differential requires allocating military pay and allowances received by an employee to each affected civilian biweekly pay period. Section 5538 does not provide a definition of "military pay and allowances." OPM will provide a definition in its implementing regulations. In the meantime, agencies should use the definition of "military pay and allowances" provided in this part. OPM has consulted with DOD in preparing this guidance.

In determining what payments are included in military pay and allowances, OPM and DOD considered existing policies defining military pay and allowances for the purpose of (1) applying the military pay offset under 5 U.S.C. 5519 applied to payments of

additional military leave under 5 U.S.C. 6323(b) and (c) and (2) implementing the DOD Reserve Income Replacement Program (RIRP) authorized under 37 U.S.C. 910.

The military pay offset under section 5519 is administered by employing agencies. DOD official policy guidance for section 5519 defines "military pay" as including military basic pay, basic allowance for housing (BAH), basic allowance for subsistence (BAS), and all other monthly military pay and allowances, **excluding** travel, transportation, and per diem allowances (as expressly required by section 5519) and one-time annual payments such as clothing allowances or reenlistment bonuses.

In administering the Reserve Income Replacement Program under 37 U.S.C. 910, DOD must use "total monthly military compensation," which was defined to include "regular military compensation" plus any amount of special pay or incentive and any allowance not already included in regular military compensation that is paid on a monthly basis. (See 37 U.S.C. 910(d)(2).) Under 37 U.S.C. 101(25), "regular military compensation" is defined to include basic pay, BAH, BAS, and the Federal income tax advantage that accrues from those two allowances because they are not subject to Federal income tax. DOD official policy provides additional information. (See DoD Financial Management Regulation (DoDFMR), Volume 7A, Chapter 55.) For example, total monthly military compensation includes Foreign Language Proficiency annual bonuses that may be paid in monthly installments. It also includes cost of living allowances. However, bonuses paid in a lump sum or in anniversary installments, such as enlistment, reenlistment, and affiliation bonuses are not included. Also, per diem allowances (including meals and incidental expenses) are not included.

In defining military compensation under both 5 U.S.C. 5519 and 37 U.S.C. 910, the administering agencies focused on "monthly" military compensation. Since military pay and allowances under section 5538 must be allocated to civilian pay periods, we have determined that we should consider only military payments that may be paid on a monthly basis. Payments are considered to be paid on a monthly basis if the payment is of a type that can be paid monthly, even if the actual payments may be delayed and paid retroactively for multiple months. We are not including payments that are normally paid only in a lump sum (e.g., single event or annually).

Consistent with the policies governing 5 U.S.C. 5519 and 37 U.S.C. 910, we are not including various reimbursement-type allowances such as allowances for travel, transportation, or per diem.

In contrast to 37 U.S.C. 910, section 5538 does not provide an express legal authority to include the imputed value of the Federal income tax advantage associated with tax-free allowances. Accordingly, OPM has determined that the value of any tax advantage should **not** be considered in determining military pay and allowances under section 5538.

As part of our analysis, we took note that the term "pay" is defined in 37 U.S.C. 101(21) as including basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay.

The following table identifies military payments that should be included in "military pay and allowances" in computing the reservist differential under section 5538:

Statutory Authority (37 U.S.C.)	Short Name	Military Pay and Allowances
Sec. 204	BASE PAY	Basic Pay
Sec. 301	HDIP	Hazardous Duty Incentive Pay
Sec. 301a	ACIP	Aviation Career Incentive Pay
Sec. 301c	SDIP	Submarine Duty Incentive Pay
Sec. 302	VSP/ASP/BCP	Special Pay for Medical Officers (Variable, Additional & Board Certified)
Sec. 302a	BCP	Special Pay for Optometrists
Sec. 302b	VSP/ASP/BCP	Special Pay for Dental Officers (Variable, Additional & Board Certified)
Sec. 302c	PSYCHOLOGIST DIPL PAY	Special Pay for Psychologists and Nonphysician Health Care Providers
Sec. 302e	NURSES' MEDICAL BNS	Nurse Anesthetists
Sec. 302f	<NONE>	Reserve Recalled or Retained Health Care Officers
Sec. 302g	<NONE>	Selected Reserve Health Care Professionals in Critically Short Wartime Specialties
Sec. 302i	<NONE>	Special Pay for Pharmacy Officers
Sec. 303	VETERINARIAN SPECIAL PAY	Special Pay for Veterinarians
Sec. 304	DVDY	Diving Duty Special Pay

Sec. 305	HDP	Hardship Duty Pay
Sec. 305a	CSP	Career Sea Pay
Sec. 305b	SPEC DUTY ASSIGN	Special Pay for Service as Member of Weapons of Mass Destruction Civil Support Team
Sec. 306	<NONE>	Special Pay for Officers Holding Positions of Unusual Responsibility and of Critical Nature
Sec. 307a	AIP	Assignment Incentive Pay
Sec. 308d	<NONE>	Designated Unit Pay for Enlisted Members
Sec. 310	HFP/IDP	Hostile Fire/Imminent Danger Pay
Sec. 314	NONE	Qualified Members Extending Duty at Designated Locations Overseas (see Note 1)
Sec. 319	SWO	Surface Warfare Officer Continuation Pay
Sec. 320	CEFIP	Career Enlisted Flyers Incentive Pay
Sec. 321	JACP	Judge Advocate Continuation Pay
Sec. 402	BAS	Basic Allowance for Subsistence
Sec. 402a	FSSA	Family Subsistence Supplemental Allowance
Sec. 403	BAH	Basic Allowance for Housing
Sec. 427	FSH	Family Separation Allowance
<p>Notes:</p> <p>1. A payment under section 314 (Qualified Members Extending Duty at Designated Locations Overseas) may be paid in monthly installments or as a lump-sum bonus. If it is paid as a lump-sum</p>		

bonus, then the payment will not be included in military pay and allowances for the purpose of calculating the reservist differential.

2. In accordance with NDAA 2008, Military Compensation is consolidating special and incentive pays under these authorities: 334 (Aviation Pays), 335 (Medical), 351 (Hazardous Duty), 352 (Assignment/Special Duty Pay), and 353 (Skill Incentive Pay). As these authorities are implemented, DoD will notify OPM of any impact on the reservist differential program.
3. For members serving in Combat Zone Tax Exclusion (CZTE) areas, the Incidental Expense (IE) of \$3.50 per day is not included since it is intended as a reimbursement.

Appendix E - Example

In this example, the employee—

- is serving in a civilian position in a covered agency (see section II.A);
- is a covered employee (see section II.B);
- is called or ordered to perform active duty in the uniformed services under a provision of law referred in 10 U.S.C. 101(a)(13)(B) (see part 1 of Appendix D);
- is entitled to reemployment rights under USERRA for such active duty (see section III);
- is in the General Schedule pay system at GS-13, step 5, and stationed in Washington, DC (2009 annual locality rate of \$98,518 and hourly locality rate of \$47.21);
- at the end of the pay period prior to the pay period in which active duty commences, has completed 98 weeks of the required 104-week waiting period to advance to step 6;
- is not in a career ladder (i.e., no career ladder promotion will occur during the qualifying period); and
- has a full-time work schedule of 80 hours per biweekly pay period.

	Actions to Take	Example
Step 1	<p><i>Identify qualifying period.</i> Identify the date when active duty begins and the first affected pay period. When known, determine when qualifying period ends and identify the last affected pay period. (See section III.)</p>	<p>Active duty begins: April 19, 2009 1st affected pay period: April 12-25, 2009 2nd affected pay period: April 26-May 9, 2009 3rd affected pay period: May 10-23, 2009 4th affected pay period: May 24-June 6, 2009 etc.</p>

		Last (14th) affected pay period: Oct. 11-24, 2009 Active duty ends: October 15, 2009
Step 2	Identify employee's civilian tour of duty. Identify the employee's civilian biweekly tour of duty established for leave usage purposes. (See section V.A.)	Full-time biweekly tour of duty of 80 hours. Monday-Friday, 8 hours per day.
Step 3	Identify initial rate of civilian basic pay. Use the rate of civilian basic pay in effect at the beginning of the qualifying period, based on the official worksite of the civilian position at that time.	GS-13, step 5, in Washington, DC \$98,518 annual locality rate \$47.21 hourly locality rate ($\$98,518 \div 2,087$ hours)
Step 4	Determine the projected amount of civilian basic pay. For each affected civilian biweekly pay period, determine the projected rate of civilian basic pay. Assume the employee has the same official worksite as in effect at the beginning of the qualifying period. Apply any basic pay adjustments that would have occurred with reasonable certainty. Determine the amount of projected civilian basic pay for each affected pay period based on the projected rate and the employee's tour of duty. Exclude pay for (1) hours before or after the qualifying period in the first and last pay periods and (2) any hours during a period of military nonpay status. Include projected basic pay for all other hours in the tour of duty, including any paid time off or other paid hours. (Note: An adjustment for paid hours will be made in Step 7.) (See section V.)	1st pay period: $\$47.21 \times 40$ hours = \$1,888.40 (Apr. 20-24) 2nd pay period: $\$47.21 \times 80$ hours = \$3,776.80 3rd pay period: $\$47.21 \times 80$ hours = \$3,776.80 4th pay period: Increase to GS-13, step 6. $\$101,416 \div 2087 = \48.59 $\$48.59 \times 80$ hours = \$3,887.20 etc. 14th pay period: $\$48.59 \times 32$ hours = \$1,554.88 (Oct. 12-15)
Step 5	Determine allocable military pay and allowances. For each affected civilian biweekly pay period, determine the amount of military pay and allowances allocable to the pay period. (See section VI.)	See Steps 5A through 5D below.
5A	Identify affected months. Identify the calendar months that contain part of a qualifying period.	April, May, June, July, August, September, October
5B	Determine monthly amount. Determine the total monthly military pay and allowances (as defined in part 2 of Appendix D) for each affected calendar month based on the employee's Military Leave and Earning Statement (provided by the employee). (Note: While the	April \$3,240 (April 19-30 = 12 days) May \$7,500 June \$7,600 July \$8,500 August \$8,300 September \$7,900 October \$4,100 (Oct. 1-15 = 15 days)

	amounts shown in the Example vary month to month so that we can show different mathematical scenarios, we expect that a reservist's actual monthly amounts will generally be fairly stable.)	
5C	Compute daily rate. For each affected calendar month, an agency must determine a daily rate of military pay and allowances by dividing the monthly total from step 5B by 30 days. Round to the nearest cent.	April $\$3,240 \div 12 = \270.00 May $\$7,500 \div 30 = \250.00 June $\$7,600 \div 30 = \253.33 July $\$8,500 \div 30 = \283.33 August $\$8,300 \div 30 = \276.67 September $\$7,900 \div 30 = \263.33 October $\$4,100 \div 15 = \273.33
5D	Allocate military pay and allowances to biweekly pay period. For each civilian biweekly pay period within a qualifying period, an agency must allocate military pay and allowances to that period. This is done by identifying the number of calendar days within a biweekly pay period that fall within a given calendar month, and multiplying that number of days times the daily rate for that month. If a biweekly pay period covers parts of two calendar months, you will have two separate computations; if so, add the results of the two separate computations. The result is the allocated military pay and allowances for the biweekly pay period. (Note: Include days when employee had paid civilian hours within the qualifying period. An adjustment for these days is made in Step 7.)	1st pay period (April 12-25) 7 days x $\$270.00 = \$1,890.00$ (April 19-25) 2nd pay period (April 26-30 + May 1-9) 5 days x $\$270.00 = \$1,350.00$ 9 days x $\$250.00 = \$2,250.00$ 14 days total = $\$3,600.00$ 3rd pay period (May 10-23) 14 days x $\$250.00 = \$3,500.00$ 4th pay period (May 24-31 + June 1-6) 8 days x $\$250.00 = \$2,000.00$ 6 days x $\$253.33 = \$1,519.98$ 14 days total = $\$3,519.98$ etc. 14th pay period (Oct. 11-24) 5 days x $\$273.33 = \$1,366.65$ (Oct. 11-15)
Step 6	Compare military and civilian compensation. For each affected pay period, subtract allocated military pay and allowances derived under Step 5D from the projected civilian basic pay derived under Step 4. If projected civilian basic pay is the higher amount, the result is the unadjusted reservist differential. If the allocated military pay and allowances is the higher amount, no differential is payable, and there is no need to apply Step 7 for that pay period. (See section VII.A.)	1st pay period: $\$1,888.40 - \$1,890.00 = -\$1.60$ no differential payable 2nd pay period: $\$3,776.80 - \$3,600.00 = \$176.80$ 3rd pay period: $\$3,776.80 - \$3,500.00 = \$276.80$ 4th pay period: $\$3,887.20 - \$3,519.98 = \$367.22$ etc. 14th pay period: $\$1,554.88 - \$1,366.65 = \$188.23$
Step 7	Make adjustment for paid hours and derive the reservist differential. (See section VII.B.)	See steps 7A through 7E below.

<p>7A</p>	<p>Identify total hours in biweekly tour. For each affected pay period, identify the number of hours in an employee's established civilian biweekly tour of duty used for leave usage purposes. Exclude any hours before or after the qualifying period in the first and last pay periods.</p>	<p>1st pay period: 40 hours in the qualifying period (April 19-25 includes five 8-hour daily tours) 2nd pay period: 80 hours 3rd pay period: 80 hours 4th pay period: 80 hours etc. 14th pay period: 32 hours in the qualifying period (October 11-15 includes four 8-hour daily tours)</p>
<p>7B</p>	<p>Identify paid hours. For each affected pay period, determine the number of paid hours (i.e., civilian paid work hours or paid time off, including paid leave), if any, within the qualifying period. Exclude any hours before or after the qualifying period in the first and last pay periods. Note: The paid time off may include military leave, annual leave, other paid leave, excused absence, compensatory time off, or other paid time off credited to the employee, as applicable.</p>	<p>1st pay period: 40 paid time off hours (e.g., military leave or annual leave) during qualifying portion, (April 19-25) = 40 paid hours 2nd pay period: 80 paid hours 3rd pay period: 36 paid hours 4th pay period: 0 paid hours (no paid holiday May 25) etc. 14th pay period: 0 paid hours during qualifying portion (October 11-15) (no paid holiday Oct. 12)</p>
<p>7C</p>	<p>Express paid hours as a percentage. For each affected pay period, compute a percentage by dividing the paid hours derived under step 7B by the total biweekly hours derived under step 7A.</p>	<p>1st pay period: $40 \div 40 = 100\%$ 2nd pay period: $80 \div 80 = 100\%$ 3rd pay period: $36 \div 80 = 45\%$ 4th pay period: $0 \div 80 = 0\%$ etc. 14th pay period: $0 \div 32 = 0\%$</p>
<p>7D</p>	<p>Compute percentage for LWOP hours. For each affected pay period, compute the percentage of leave without pay hours within the biweekly tour by subtracting the percentage derived under step 7C from 100 percent.</p>	<p>1st pay period: $100\% - 100\% = 0\%$ 2nd pay period: $100\% - 100\% = 0\%$ 3rd pay period: $100\% - 45\% = 55\%$ 4th pay period: $100\% - 0\% = 100\%$ etc. 14th pay period: $100\% - 0\% = 100\%$</p>
<p>7E</p>	<p>Apply adjustment to determine the reservist differential. For each affected pay period, multiply the unadjusted reservist differential derived under step 6 by the percentage derived under step 7D. The result is the payable amount of the reservist differential for the given pay period.</p>	<p>1st pay period: no differential payable 2nd pay period: $\\$176.80 \times 0\% = \\0 (no differential) 3rd pay period: $\\$276.80 \times 55\% = \\152.24 4th pay period: $\\$367.22 \times 100\% = \\367.22 etc. 14th pay period: $\\$188.23 \times 100\% = \\188.23</p>

