

## Military Leave FAQ

What is a "butterbaugh claim?"

A Federal Appeals Court in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003); ruled that the Justice Department which was following OPM rules, improperly charged employees for military leave prior to 2000. Under 5 U.S.C. §6323(a)(1), federal employees who are reservists are allowed "15 days" of annual paid leave for reserve or National Guard training. (The Court used the terms reservist and reserve training to include National Guard members and their obligations.) The petitioners in this case are full-time employees of the Justice Department, Bureau of Prisons at the Federal Correctional Institution in Loretto, PA. Prior to 2000, the Justice Department, as had most other federal agencies, included days employees were not scheduled to work but would be at reserve training when calculating how much leave an employee used. For example, the court noted that "an employee (with a Monday-Friday workweek) attending reserve training from one Friday through the next would be charged for eight days of military leave, even though the employee was absent for only six workdays." The Court also noted that this policy was applied unevenly, in that non workdays at the beginning or the end of military leave were not counted, but non workdays that fell during the military leave were counted. Under the example above, an employee whose workweek ran Thursday to Monday had more leave counted against him than an employee whose workweek ran Monday to Friday. In 2000, Congress amended subsection 6323(a)(3) which sets forth the minimum charge for leave. Subsequently, the Office of Personnel Management "determined that, in light of the new subsection ... §6323(a)(1) could no longer be interpreted to charge non-workdays against federal employees' military leave." Petitioners filed claims with the Merit System Protection Board

claiming that, because of the calculations of military leave, they were forced to use vacation or unpaid leave in order to meet their reserve training obligations. They argued that the Justice Department's policy violated the 1994 Uniformed Services Employment and Reemployment Act "by denying them a benefit of employment based on their military service." Based on its interpretation of the statute, MSPB

ruled that the Justice Department had properly calculated the four employees' military leave and that petitioners were not denied a benefit of their employment. In its ruling, MSPB

concluded that Congress had intended to count calendar days against the 15 day allowance, not just workdays. In a ruling dated July 24, 2003, the U.S. Court of Appeals for the Federal Circuit overturned the MSPB's

decision. The Court ruled that agencies should have interpreted the statute to allow 15 workdays of leave for reserve training. The Court stated that "[as a general matter, employees are not accountable to their employers for time that are not required to work... [there is] no reason why federal employees need military leave for days on which they are not scheduled to work." MSPB

had argued that Congress knew or should have known how agencies were applying the requirements of the statutes and because Congress did not amend the statute, it must have

therefore approved of its application. The Court disagreed with this contention, stating "...congressional inaction is perhaps the weakest of all tools for ascertaining legislative intent, and courts are loath to presume congressional endorsement unless the issue plainly has been the subject of congressional attention."The Court reversed the MSPB's

decision and remanded the case for further proceedings. One Justice dissented in a separate ruling.How long will it before I get compensated?

Under normal conditions, you should be compensated within 4-6 months from the time we get your USERRA

appeal form. This is not a class action law suit. Each claim is filed on an individual basis. Returning necessary paperwork and responding to questions promptly will help in the processing of your claim.How will I get compensated?

This claim is processed on an individual basis and as such, compensation may differ. We can not estimate compensation until after the merits of your claim has been assessed.If you are still a Federal employee, you will be compensated in either military leave (if you are still in the military) or annual leave. In very rare circumstances, current federal employees may be compensated in the form of cash/check.If you are no longer a federal employee, you normally will be compensated in the form of a check.What if I am subjected to retaliation at work because of this?

Unlike when you file an administrative claim as OPM suggests you should do, if you allow us to file a USERRA

appeal on your behalf, you are protected by USERRA's anti-retaliation provisions. Under USERRA

you may not be denied employment, promotion, or any other benefits because you exercised your rights under USERRA

. In addition, under most circumstances your civilian chain of command is not notified by the lawyers defending the agency in order to prevent you from being subjected to retaliation (and the agency being subjected to another USERRA

appeal which would cost a lot more then a few days of annual leave).38 USC 4311(b) reads:An employer may not discriminate in employment against or take any adverse employment action against any person because such person:has taken an action to enforce a protection afforded any person under this chapter

has testified or otherwise made a statement in or in connection with any proceeding under this chapter

has assisted or otherwise participated in an investigation under this chapter

has exercised a right provided for in this chapter

The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.Why do I need Tully Rinckey now that the new DOD guidance memo came out?

Until recently, administrative claims would only recover time from no more then 6 years from the date employees filed their claims. For most, this meant they would only be compensated for one or two years.Thanks to recent victories by Tully Rinckey, PLLC case law with the Merit Systems Protection Board will allow USERRA

claims filed with the Board to go back to 1980. Further, there is no statute of limitations on

claims. As a result, DOD issued new guidance for employees filing claims and DFAS is to amend its claim process. Despite the new guidance, there may be advantages of using Tully Rinckey to file a claim: Filing a claim with DFAS you need to produce your time and attendance records from 1980 to 2001 and identify specific days that were incorrectly charged. By filing a USERRA

claim, we can engage in discovery and compel the agency to produce documents that would support your claim. Further, we have staff that will review and analyze your records saving you time and aggravation. If you allow us to file a USERRA

appeal on your behalf, you are protected by USERRA's

anti-retaliation provisions. We have an entire legal team that will look after your interests. We have been handling claims for thousands of employees and process claims in a timely manner. We are always available via email or telephone to address any complications or concerns if they arise. You are getting advocates for your cause without any cost to you! How far back will you try and get compensation for?

Claims can go back to 1980. However, for early years, records may be necessary to support your claim. What is the intake form and how do I get started?

The intake form is used so our attorneys and support staff can draft retainer agreements, USERRA

appeal forms, and open a case file with basic information about your claim. The intake form is the first step in filing a claim. Please fill out the forms as complete as possible to avoid delays in evaluating and processing your claim. We do not share any of this information with anyone outside our firm. To get started, simply download an Intake Form from this website or request that we mail you an Intake form. If you are unsure if you qualify for this claim, send an Intake Form and we will access. Return the complete form by any one of the following: intake@fedattorney.com

or Tully Rinckey PLLC USERRA Intake 441 New Karner Road Albany, NY 12205 How much is this going to cost?

Why does the retainer agreement say you will charge me \$300 per hour, I thought you were doing this for free? Let us begin by restating "No reservist will ever pay us a penny for our services related to the Federal Circuits decision in Butterbaugh" As a law firm licensed to practice under the rules of the Supreme Court of the State of New York we are required to inform our clients of the fees we charge and provide information about our services. In addition, in order to be compensated by the Merit Systems Protection Board we need to have a bono fide attorney client relationship with you. Under New York State rules, a bono fide attorney client relationship maybe shown by a signed retainer agreement setting forth the scope and cost of our relationship. With that said, under the provisions of USERRA

(see 38 USC 4324), the agency will pay our fees upon the successful completion of your appeal (FYI: What happens if you are unsuccessful? Pursuant to the retainer agreement you will owe nothing because we will swallow all the attorney fees). What happens after I send in the retainer agreement and appeal form?

Once we receive your signed retainer agreement and USERRA

appeal form we will file the appeal form with the appropriate regional office of the United States Merit Systems Protection Board

. Within three days of filing the appeal form, the regional office will assign an Administrative Law Judge to handle the appeal. The Administrative Law Judge will then issue an acknowledgment order setting some basic ground rules for the processing of your appeal. The acknowledgment order will be sent to you, the Agency and me. If you need to do

anything in response to the acknowledgment order, we will take care of it for you. After the acknowledgment order is issued, the Agency will serve upon you, the Board and me a designation of representative form. This will tell us whom the Agency point of contact is for all matters to your appeal. This will normally arrive in the mail 15-20 days after the acknowledgment order. Shortly after you receive the designation of representative form, we should receive the Agency tab file. The tab file will normally be received about twenty to twenty-five days after the acknowledgment order. The tab file is the Agency's response to your allegations. It is normally very lengthy. Once the tab file is received, we will enter into settlement negotiations with the Agency representative. If settlement talks are not successful, we will normally engage in discovery. Discovery is a way for the Agency and us to obtain additional information about the appeal. If we need to answer discovery demands, this will be the first time that we will need your assistance. We will contact you and tell you exactly what information you need to provide to us so that we can provide it to the Agency. Sometimes the judge may issue an "order to show cause" asking that we address certain issues. These types of orders usually require us to respond within a very short period of time (for example, just a few days). Normally we will need to contact you to obtain information. Because of the short time period we have to respond, if you are planning to be unavailable for any period of time, please let us know in advance so if an order comes in we can request an extension to respond. After discovery is complete, the Administrative Law Judge will issue a pre-hearing submission date and schedule a hearing. We will file all necessary paperwork associated with this order. Assuming no settlement is reached, we will have a hearing. After the hearing, the Administrative Law Judge will issue an initial decision. If either the Agency or we believe errors were made with the initial decision, the decision can be appealed to the full three-person Merit Systems Protection Board

in Washington, D.C. Normally the three-person board will issue a final decision within twelve months from the date of the initial decision. If the Agency or we believe errors were made with regards to the final decision, the agency or we may decide to appeal to the United States Federal Court of Appeals for the Federal Circuit. The Federal Circuit normally takes twelve to twenty-four months to decide on the matter. If during any stage of this litigation or even after the litigation is over you feel that you are being subjected to retaliation because you filed the USERRA

claim, please report this to us immediately. It is unlawful for anybody to retaliate against you for exercising your rights under USERRA

(see #4 above). What type of evidence do I need to prove that I qualify?

We will definitely need at least a sworn statement (which we will draft) and your reserve/national guard annual retirement points statement. In addition, if you have any military orders or civilian payroll records pre-2000 that establishes when you were charged leave on non work days, we will need them as well. Generally, we will not need these documents until we get the agency tab file and see what the agency is missing. What are settlement conferences?

This is when the Judge from the Merit Systems Protection Board

orders the Agency and us to talk about settlement. Normally, the Judge will try and broker an agreement to avoid the necessity of a hearing. Normally, these conferences are via the telephone and result in solid settlement offers from the agency to you. Will my case settle?

99% of our 'Butterbaugh' cases will settle. In rare circumstances the agency may want to have a hearing (normally it is when the claim is pre 1994 and both the agency and you can't produce evidence to show clearly that you were charged leave on non work days). Your case can not settle without your explicit consent and normally the settlement will be in writing and require your signature. What is a DWOP?

A dismissal without prejudice. This happens in some cases if the agency is unable to produce your time and attendance records quickly (Normally this is limited to cases involving DFAS who for some reason can't find employee records very easily). In addition, it happens when the agency has no evidence of a violation and you can't produce any evidence to show a violation. A DWOP allows us to withdraw the claim now and re-file it at some later date without any problems. I received all these documents from my agency, what should I do?

You don't need to do anything! We will handle everything for you. Those documents are either the agency tab file or response to our discovery demands. Under applicable regulations, you get these documents in addition to us. I work for the US postal service, can I file a claim?

Unfortunately our firm is no longer accepting US Postal Service military leave (Butterbaugh) claims. I am a national guard technician, can you help me?

Unfortunately our firm is no longer accepting National Guard military leave (Butterbaugh) claims. I work for the FBI, NSA, Defense Imagery, can I file a claim with the MSPB?

Probably not because the MSPB

can only hear matters involving a "Federal executive agency". Those agencies are defined in 38 USC 4303 as: "(5) The term "Federal executive agency" includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5, and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department." 5 USC 2302(a)(2)(C)(ii) from 1995 reads as follows: (ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the Central Imagery Office, 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." However, 38 USC 4315 and 38 USC 4325 allow you to seek compensation for lost benefits regardless of which agency you work for. You may be eligible to receive compensation. Contact your personnel or union department to find out the proper procedure. What about full-time civilian Air Force or VA employees?

Unfortunately we are not handling these types of Air Force or VA cases at this time. You may still be eligible for a claim. Contact your personnel or union department to find out the proper procedure. See DFAS instructions for filing a claim. If I already filed a claim, can I now go back further under new guidance?

This will depend on the circumstances of the prior claim. If you previously filed an administrative claim for 1999 and 2000, you should be able to file another claim with Tully Rinckey. Please indicate any prior military leave claim(s) and any compensation received on the USERRA Intake Claim

form. If you previously filed a USERRA

claim and received compensation, re-filing terms will be dictated by the signed settlement agreement with the agency. Resubmit a USERRA

Intake Claim form so our attorneys can determine if another claim is permitted. If I am retired from military or civilian service, can I file a claim?

Yes. Claims are for both current and former employees that have served in the Reserves and/or the National Guard. If you are retired, please indicate so on the USERRA

intake form. This is important for purposes of settlement negotiations and compensation. Also, if you worked at several agencies, please indicate that on the USERRA

intake form.

Contact us during normal business hours via Skype

. Click on the image above to schedule a time to speak with an attorney.