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## New Washington Law Protects Students who Are Members of the National Guard or Reserve

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### 1.1.2.4—Students

### 1.8—Relationship between USERRA and other laws/policies

The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to a person who leaves a *position of employment* with an employer (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services (active duty, active duty for training, inactive duty training, initial active duty training, funeral honors duty, or time required to be away from one's civilian employment for the purpose of an examination to determine fitness to perform any such duty). USERRA does not apply to the relationship between a student and an educational institution because the institution is not the student's *employer*.

In 2008, Congress enacted a law that provides USERRA-like protections to post-secondary students whose educational programs are interrupted by voluntary or involuntary service in the uniformed services. We invite the reader's attention to Law Review 13070 (the immediately preceding article in this series) and Law Review 1052 (published in 2010)<sup>3</sup> for a detailed description of this new federal law.

The 2008 federal law provides reasonably good protection for the student whose educational program is interrupted by voluntary or involuntary military service. The student gets a refund of tuition and fees paid for the interrupted semester and gets grade protection—the professor is forbidden to assign a failing grade for the interrupted course. Upon release from the period of service, the student is entitled to reinstatement, without having to go through the

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<sup>1</sup> Colonel Wurzburg is retired from the Air National Guard and is a member of ROA. He is also retired from his practice of law which included serving as a deputy prosecutor, public defender, and law school professor. For many years, he has been active in Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization that seeks to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve.

<sup>2</sup> Captain Wright is the Director of the Service Members Law Center at ROA.

<sup>3</sup> These two articles were written by Commander Wayne L. Johnson, JAGC, USN (Ret.). Please go to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 793 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

admissions process again, and for the first year back in school the student pays the tuition rate that was in effect before the military-related interruption. The student is entitled to pick up at the point where he or she left off before the interrupted semester.

The federal law does not help the college student who is trying to complete the current semester despite short interruptions for inactive duty training or annual training in the National Guard or Reserve. Most or at least many professors are willing to make accommodations for these circumstances, but no federal law requires them to do so. The student will never complete his or her educational program if each semester is interrupted by these military training obligations.

This 2008 federal law is a floor and not a ceiling on the rights of the college student who is also a member of the National Guard or Reserve. A state law can provide the student *greater or additional rights* but cannot take away the rights conferred by federal law.

On May 16, 2013, Washington Governor Jay Inslee signed an important new state law that goes into effect on July 28, 2013, adding the following language to existing state law:

“A member of the Washington national guard or any other military or guard component who is a student at an institution of higher education and who is ordered for a period of thirty days or less to either active or inactive state or federal service and as a result of that service **or follow-up medical treatment for an injury incurred during that service** misses any class, test, examination, laboratory, or class day upon which a written or oral assignment is due, or other event upon which a course grade or evaluation is based, is entitled to make up the class, test, examination laboratory, presentation or event without prejudice to the final course grade or evaluation. The makeup must be scheduled after the member’s return from service and after a reasonable time for the student to prepare for the test, examination, laboratory, presentation or event.

Class sessions a student misses due to the performance of state or federal active or inactive military service must be counted as excused absences and may not be used in any way to adversely impact the student’s grade or standing in class.

If the faculty member teaching the course determines that the student has completed sufficient work and has demonstrated sufficient progress toward meeting course requirements to justify the grade without making up the class, test, examination, laboratory, class day, presentation, or other event, the grade may be awarded without the makeup, but the missed class, test, examination, laboratory, class day, presentation or other event must not be used in any way to adversely impact the student’s grade or standing in the class.”

The new law is S.B. 5343-2013-2014. It amends section 28B.10.270 of the *Revised Code of Washington*. The bold-faced emphasis has been supplied. You can find this new law at:

<http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/Senate%20Passed%20Legislature/5343.PL.pdf>.

This new Washington State law is most welcome because it fills in gaps left open by the federal law. It applies to short periods of military training or service (like drill weekends and annual training tours) that are not covered by the federal law. It applies to *state active duty* performed by a member of the Washington Army or Air National Guard who is called to serve by the Governor of Washington to remediate the effects of a tornado or flood or fire.<sup>4</sup>

This new Washington law also provides valuable rights that go well beyond the rights that USERRA provides in the employment context, concerning *absences necessitated by follow-up medical treatment* for a condition incurred or aggravated during active military service. Let us take two very realistic scenarios.

Mary Jones served on active duty in the Army from 2007 to 2011, including a year in Afghanistan. She suffered post-traumatic stress and traumatic brain injury in two separate combat incidents. The bad effects did not become apparent until after she left active duty in 2011. She has applied to the United States Department of Veterans Affairs (VA), and the VA has recognized her condition as service-connected. Several times per year, she is scheduled for medical appointments at the VA facility in Seattle.

Joe Smith is a member of the Marine Corps Reserve, and he was called to active duty and deployed to Afghanistan, where he suffered serious leg injuries in the explosion of an improvised explosive device. He was given the opportunity to remain on active duty until he is fully recovered from his injuries, but he chose to leave active duty so that he can resume his undergraduate education at the University of Washington in Seattle. He received a Notice of Eligibility (NOE) from the Marine Corps, and several times per year he reports to the military hospital at Joint Base Lewis-McChord in Tacoma for medical appointments related to his leg injuries.

VA and military medical treatment facilities do not have evening or weekend appointments available. Jones and Smith need to miss classes several times per year for these medical appointments, and this new Washington law applies in this situation. This state law protection for students goes beyond the protection that USERRA provides for employees. USERRA's definition of "service in the uniformed services" includes time needed to be away from a civilian job for a military medical *examination* but not for military medical *treatment*. Bills have been introduced in Congress to expand USERRA to cover this scenario, but those bills have not been enacted.<sup>5</sup>

This new Washington law applies to state universities (University of Washington, Washington State University, etc.) and community colleges and also to private universities (Gonzaga, etc.) that are located in the State of Washington.

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<sup>4</sup> It appears that this new law will also protect a member of the National Guard of a nearby state (like Oregon or Idaho) who is attending college in Washington and who is called to state active duty by the Governor of that state. Please see Law Review 45.

<sup>5</sup> Please see Law Review 1234 (April 2012).

**ROA departments—please work on state issues.**

Here at ROA headquarters, we have our hands full with the United States Congress and Executive Branch. We do not have the staff or resources to monitor (much less to affect) what is going on in 50 state capitals. Most of the laws that directly affect the uniformed services are federal laws, but there are certainly important issues addressed in the state legislatures that affect the rights and interests of those who serve our country in uniform. I invite the reader's attention to Law Review 16 (September 2000), titled "Department Involvement in State Issues."

We need ROA's state departments and local chapters to contact state legislators and urge them to keep in mind the interests of those who serve our country in uniform, whether Active, National Guard, or Reserve. If you have time to get involved in this effort, please call Captain Wright at 800-809-9448, extension 730, or e-mail him at [SWright@roa.org](mailto:SWright@roa.org).

It has now been 40 years since Congress abolished the draft in 1973. With each passing year, a greater and greater percentage of state legislators (as well as members of the United States Senate and House of Representatives) have never served in the uniformed services. We need to educate these folks about the issues that affect those who serve in uniform.

**UPDATE March 2019**

Please see Law Review 19027 (March 2019) for new information on this topic.