

## LAW REVIEW 15056<sup>1</sup>

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### What Is “Service in the Uniformed Services” for USERRA Purposes?

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1.1.1.8—USERRA applies to Federal Government

1.3.1.2—Character and duration of service

2.0—Paid leave for government employees who are Reserve Component members

**Q: I am a Colonel in the Air Force Reserve and a life member of the Reserve Officers Association (ROA). For years, I have read and utilized your excellent “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I graduated from the United States Air Force Academy (USAFA) in 1990 and served on active duty for nine years. After I left active duty, I affiliated with the Air Force Reserve.**

**I live in Colorado Springs and I work for a federal agency, not in the Department of Defense. I am very involved with the USAFA activities involving recruiting, public relations, and training for cadets. A specific Colonel on the USAFA staff calls me frequently, often on short notice, and asks me to come to the campus for various activities and events. When I go, I always wear my Air Force uniform.**

**Does USERRA give me the right to time off from my federal civilian job (at least unpaid) for these USAFA activities?**

**A:** Under USERRA,<sup>3</sup> you have a job-protected right to unpaid military leave for “service in the uniformed services” as defined by USERRA. If and to the extent that these activities at the USAFA do not qualify as uniformed service, you do not have the right to time off (even without pay) from your civilian job (federal, state, local, or private sector) for these activities. The fact that you wore your uniform while engaging in the activity does not, in and of itself, mean that the activity qualifies as

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<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,300 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

<sup>2</sup> Captain Wright was the Director of ROA’s Service Members Law Center (SMLC) for six years (June 2009 to May 2015), as a full-time employee of ROA. He is now continuing the SMLC on a reduced basis, as a volunteer for and member of ROA. He is available to answer calls and e-mails on Wednesday and Thursday evenings. The telephone number is (800) 809-9448, ext. 730. His e-mail is [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup> As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, act sections 4301 through 4335 (38 U.S.C. 4301-4335).

uniformed service for USERRA purposes. USERRA's definition of "service in the uniformed services" is broad but not unlimited.

As I have explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job *for the purpose of performing service in the uniformed services*, as defined by USERRA.
- b. You must have given the employer prior oral or written notice. You do not need the employer's permission, and the employer does not get a veto, but you must have given prior notice, unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, has not exceeded five years. As is explained in detail in Law Review 201, there are nine exemptions—kinds of service that do not count toward exhausting your five-year limit.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, you have been timely in reporting back to work or applying for reemployment.

You must meet all five of these conditions to have the right to reemployment. Accordingly, for purposes of this article I will concentrate solely on the first condition.

Section 4303 of USERRA defines 16 terms used in this law. Section 4303(13) defines "service in the uniformed services" as follows:

(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service *under competent authority* and includes active duty, active duty for training, initial active duty for training, *inactive duty training*, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.<sup>4</sup>

These work periods at the USAFA could qualify as "inactive duty training" and thus as "service in the uniformed services" for USERRA purposes if you receive some compensation (at least a reserve retirement point) for the activity and you performed the activity *under competent authority*. A telephone call from a Colonel on the USAFA staff is probably insufficient to amount to *competent authority* for this purpose.

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<sup>4</sup> 38 U.S.C. 4303(13) (emphasis supplied).

**Q: As a federal civilian employee, I receive 15 work days of *paid* military leave per fiscal year. Is it permissible for me to use one of the 15 days for this sort of informal USAFA activity?**

**A:** No. Section 6323 of title 5 of the United States Code gives you (as a federal civilian employee) the right to 15 work days of paid military leave. That section reads as follows:

§ 6323. Military leave; Reserves and National Guardsmen

(a)

(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for *active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard*. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.

(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who--

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and

(2) (A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury--

(i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or

(ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or

(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance

or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year. Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d) (1) A military reserve technician described in section 8401(30) is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.

(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.<sup>5</sup>

I invite your attention to the language that I have italicized in section 6323(a)(1), above. Your informal USAFA activities are not among the kinds of activities (active duty, active duty for training, etc.) for which a federal employee is permitted to use paid military leave.

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<sup>5</sup> 5 U.S.C. 6323 (emphasis supplied).