

## **The Right to 15 Days of Paid Military Leave Applies to Federal Employees, Not Employees of Federal Contractors**

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Update on Sam Wright

1.1.3.3—USERRA applies to National Guard service

1.3.2.1—Vacations, holidays, and days off

1.8—Relationship between USERRA and other laws/policies

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

**Q: I am a Sergeant in the Illinois Army National Guard. I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I live and work in the Chicago area. For my civilian job, I am an Information Technology (IT) professional at a federal facility, but I am not a federal employee in the traditional sense. I work for an IT company—let’s call it Computers R Us (CRU). I work exclusively at the federal facility, and I take orders from federal employees. A federal employee fills out my**

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<sup>1</sup> I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 “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. I am the author of more than 1300 of the articles.

<sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have dealt with the federal reemployment statute for 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress as his proposal in February 1991, as a proposed rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in 1940. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA). The 1994 version of USERRA was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an “of counsel” role. To arrange a consultation with me or any Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at 518-640-3538. Please mention Captain Wright when you call.

performance evaluation twice per year. The federal agency pays CRU a fee to cover my salary plus overhead and profit for CRU. CRU pays me twice per month, by direct deposit into my checking account. In all other respects, I am a federal employee at a federal facility. At the facility, there are 1500 federal employees plus myself and three other CRU employees and about 20 employees of other contractors.

My good friend Joe Smith is also a member of the Illinois Army National Guard—he is a member of the unit that I joined recently. Joe works with me at this federal facility, but the difference is that he is a federal employee in the traditional sense—he is a GS-11. Joe gets *paid military leave* for his inactive duty training (drill) periods and his annual training in the Illinois Army National Guard. Am I also entitled to *paid military leave*?

A: As a federal employee who is a Reserve Component (RC)<sup>3</sup> member, Joe Smith is entitled to 15 work days<sup>4</sup> of paid military leave under section 6323 of title 5 of the United States Code. That section provides in pertinent part as follows:

Subject to paragraph 2 of this subsection [pertaining to part-time federal employees, who receive fewer than 15 days of paid military leave], *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.<sup>5</sup>

Joe Smith is an employee as defined in section 2105 of title 5 of the United States Code, so he is entitled to the 15 days of paid military leave per fiscal year. You are not an employee as defined in section 2105—the definition does not include employees of private employers, even when the private employers are federal contractors. You certainly are not an employee of the

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<sup>3</sup> Our nation has seven Reserve Components: the Army National Guard (ARNG), the Army Reserve (USAR), the Air National Guard (ANG), the Air Force Reserve (USAFR), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), and the Coast Guard Reserve (USCGR). The ARNG and ANG are hybrid federal-state organizations, partly federal and partly state. The other five Reserve Components are purely federal entities.

<sup>4</sup> A federal employee should not be charged one of the 15 days of paid military leave for a Saturday, Sunday, or federal legal holiday when the employee is performing military duty but the employee would not otherwise be working at the civilian job. See *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003).

<sup>5</sup> 5 U.S.C. 6323(a)(1) (emphasis supplied).

government of the District of Columbia. You are not entitled to the 15 days of paid military leave under section 6323.

**Q: What about the Uniformed Services Employment and Reemployment Rights Act (USERRA)? Am I entitled to paid military leave under USERRA? What about unpaid military leave?**

**A:** Under USERRA, you are entitled to *unpaid but job-protected* leave from your civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.<sup>6</sup> As I have described in detail in Law Review 15116 (December 2015) and other articles, you are entitled to prompt reemployment in a civilian job after a short or long period of uniformed service if you meet five simple conditions:

- a. You must have left the 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 on your right to absent yourself from the job to perform uniformed service.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. As described in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit—that is, there are nine 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.<sup>7</sup>
- e. After release from the period of service, you must have been timely in reporting back to work or applying for reemployment.<sup>8</sup>

If you meet these five conditions, you are entitled to prompt reinstatement in the civilian job.<sup>9</sup> You are entitled to reinstatement in the position that you would have attained if you had been

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<sup>6</sup> The term “service in the uniformed services” is defined in section 4303(13) of USERRA, 38 U.S.C. 4303(13). The definition includes active duty, active duty for training, inactive duty training, initial active duty training, funeral honors duty, and time required to be away from a civilian job for purposes of an examination to determine fitness to perform any such duty.

<sup>7</sup> Under section 4304 of USERRA, 38 U.S.C. 4304, you are not entitled to reemployment if you received a dishonorable or bad conduct discharge or an other-than-honorable administrative discharge or if you were dismissed or dropped from the rolls of your uniformed service.

<sup>8</sup> After a period of service of fewer than 31 days, you are required to report to the employer “not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the person’s residence.” 38 U.S.C. 4312(e)(1)(A)(i). After a period of service of 31-180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

continuously employed.<sup>10</sup> Upon reemployment, you must be treated, for seniority and pension purposes in the civilian job, as if you had been continuously employed in the job during the entire time that you were away from work for service.<sup>11</sup>

**Q: It is reassuring to know that my civilian job is protected during a period of National Guard training or service, but I was really hoping to get *paid* military leave. Am I entitled to paid military leave under Illinois state law?**

**A:** No. Illinois Statutes, Chapter 5, section 325/1 grants limited periods of paid military leave to employees of the State of Illinois, units of local government, and public institutions of higher learning (like the University of Illinois).<sup>12</sup>

**Q: I need money more than I need time off from work. In my job at CRU, I earn 30 days of paid vacation per year. Do I have the right to use up to 30 days of vacation for my National Guard annual training?**

**A:** Yes. USERRA provides:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be *permitted, upon request of that person*, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. *No employer may require any such person to use vacation, annual or similar leave during such period of service.*<sup>13</sup>

For example, let us assume that you have a positive balance of vacation time when you begin a 12-day annual training tour in the National Guard. You have the right, but not the obligation, to

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<sup>9</sup> After a short period of service, like a weekend of inactive duty training, you are entitled to immediate reinstatement when you report back to work. After a period of service of 31 days or more, you are entitled to reinstatement within 14 days after you apply for reemployment. 20 C.F.R. 1002.181. The citation refers to title 20 of the Code of Federal Regulations, section 1002.181. This is part of the Department of Labor USERRA Regulations.

<sup>10</sup> 38 U.S.C. 4313(a)(1)(A). If your period of service was 91 days or more, the employer has the option to reemploy you in another position, for which you are qualified, that is of like seniority, status, and pay. 38 U.S.C. 4313(a)(2)(A). The position that you would have attained if you had been continuously employed is usually but not always the position you left. If with reasonable certainty you would have moved into a better position if you had remained continuously employed, you are entitled to that better position upon reemployment. On the other hand, if you would have moved to a worse position, or if you would have lost your job altogether, you are not exempted from such an unfavorable development that would have happened anyway. We must look to what happened to your colleagues at work, while you were away from work for service, to determine what would have happened to you. 20 C.F.R. 1002.191-199.

<sup>11</sup> 38 U.S.C. 4316(a), 4318.

<sup>12</sup> Please see the “State Leave Laws” section of our website, [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). We have an article for each state (listed alphabetically) about the state laws that grant paid military leave to state and local government employees. Those laws do not apply to private sector employees, like you.

<sup>13</sup> 38 U.S.C. 4316(d) (emphasis supplied).

use part or all of your vacation balance in order to continue receiving your civilian pay while on your National Guard training. It is unlawful for the employer to make you use your vacation in this way. If you choose not to use your vacation, or if you have exhausted your vacation for the year, you still have the right to unpaid military leave under USERRA.

**Q: I also receive sick leave from my civilian employer. Do I have the right to use accrued sick leave for my military training period?**

**A: No.**<sup>14</sup>

**Q: As a member of the Army National Guard, I perform periodic training duty under title 32 of the United States Code, and I am also subject to involuntary call-up (or I can volunteer) for active duty under title 10 of the United States Code. Does USERRA protect my civilian job when I am away from the job for voluntary or involuntary training or service under either title 10 or title 32?**

**A: Yes.**<sup>15</sup>

**Q: As a member of the Illinois Army National Guard, I am also subject to being called by the Governor of Illinois for state active duty—for state service in state emergencies like riots, floods, fires, etc. Does USERRA protect my civilian job when I am away from that job for state active duty?**

**A:** USERRA does not apply to state active duty. Like every other state, Illinois has a law that protects the civilian jobs of Army National Guard and Air National Guard soldiers and airmen when they are on state active duty.<sup>16</sup> The pertinent Illinois provision is Title 330, Illinois Consolidated Statutes, section 60/3.

**Q: As I have stated, my good friend Joe Smith is a federal employee (GS-11) and is a member of my Illinois Army National Guard unit. If our unit is called to state active duty by the Governor of Illinois, does Title 330, Illinois Consolidated Statutes, section 60/3 protect Joe's federal civilian job?**

**A:** No. A state statute cannot constitutionally be applied to the relationship between a federal agency and federal employees.<sup>17</sup> If Joe Smith is called to state active duty to enforce the law or

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<sup>14</sup> 20 C.F.R. 1002.153.

<sup>15</sup> See 38 U.S.C. 4303(13) and (16).

<sup>16</sup> Please see the "State Leave Laws" section at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find a definitive article for each state about these states laws for National Guard members on state active duty.

<sup>17</sup> See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

to provide assistance to civil authorities in the protection or saving of life or property or the prevention of injury, he is entitled to an additional 22 days of paid military leave (on top of the 15 days discussed at the start of this article).<sup>18</sup>

**Q: What is the relationship between USERRA and other laws, policies, contracts, etc.?**

**A:** Under section 4302 of USERRA,<sup>19</sup> USERRA is *a floor and not a ceiling* on your rights. Under section 4302(a), USERRA does not supersede or override another federal or state law, local ordinance, collective bargaining agreement or other agreement or contract, or other matter that gives you *greater or additional rights, over and above USERRA*. Under section 4302(b), USERRA supersedes and overrides a state law, a local ordinance, a collective bargaining agreement or other agreement or contract, or other matter that purports to limit or eliminate your USERRA rights or that imposes an additional prerequisite upon your exercise of USERRA rights.

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<sup>18</sup> 5 U.S.C. 6323(b)(2)(A)(ii).

<sup>19</sup> 38 U.S.C. 4302.