LAW REVIEW 17064[1]
June 2017

We Must Maintain Employer Support for Reserve Component Members

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

Update on Sam Wright

1.0—USERRA generally
1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.8—Relationship between USERRA and other laws/policies

I have seen, up close and personal, the transformation of our nation's Reserve Components[3] (RC) from a "strategic reserve" (available only for World War III, which thankfully never happened) to an "operational reserve" (routinely called upon to participate in intermediate military operations like Iraq and Afghanistan). This transformation began in August 1990, when Saddam Hussein's Iraq invaded and occupied Kuwait and threatened Saudi Arabia. President George H.W. Bush drew "a line in the sand" and promised to protect Saudi Arabia and to liberate Kuwait. As part of his forceful response to Hussein's naked aggression, he called up RC units—the first significant call-up of RC units since the end of the Korean War in July 1953.

---

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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.

[2] 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. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 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 proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 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 VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) 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, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

[3] There are seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve (USCGR), the Marine Corps Reserve (USMCR), the Navy Reserve (USNR), the Air Force Reserve (USAFR), the Air National Guard (ANG), the Army Reserve (USAR), and the Army National Guard (ARNG). The ARNG and ANG have a hybrid federal-state status, while the other five components are purely federal entities.

I began my Navy career in November 1973, during my first semester of law school, when I was commissioned an Ensign in the Navy Reserve, via the Judge Advocate General's Corps Student Program. I graduated from law school in 1976 and passed the Texas bar exam, and I reported to active duty in January 1977, as I had committed myself to do. Just 39 months later, I was released from active duty, at the end of my initial obligated active duty commitment, and I affiliated with the Navy Reserve. I returned to active duty for a six-month special project (having to do with Navy-Coast Guard cooperation) in 1982, but my Navy Reserve service in the 1980s was otherwise limited to the traditional "one weekend per month and two weeks of annual training" that was typical of the strategic reserve era.

After I left my second active duty period, in September 1982, I took a federal civilian attorney position at the Office of the Solicitor, United States Department of Labor (DOL). I worked in an office of 15 attorneys, called the Labor-Management Laws Division, at DOL headquarters in DC. The boss of our division had served as a junior officer in the Marine Corps during the Vietnam War, and the number 2 had briefly served as an enlisted member of the Navy Reserve. Among the other 13 attorneys, I was the only one who had ever served our nation in uniform.

As I have explained in footnote 2, I took a special interest in the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my father) for World War II. The VRRA was one of two laws that our division primarily focused upon.

In the fall of 1982, within a few weeks of my start of DOL employment, I spoke to my own Navy Reserve unit (in Richmond, Virginia) about the VRRA, and I soon began speaking to other Navy Reserve units and then units of other Reserve Components, about the VRRA. Even in the strategic reserve era, when RC service was generally limited to one weekend per month and two weeks of annual training, some civilian employers gave RC members a hard time about absences from work for RC training, although those absences were clearly protected by the VRRA.

In the Navy Reserve, I was promoted to Commander (O-5) on July 1, 1990. Just six days later, on the first weekend of July, Rear Admiral James J. Carey, the Commander of Navy Reservists in the Mid-Atlantic states, gave me the opportunity to accompany him on a trip from DC to Roanoke, Virginia, where Admiral Carey inspected the Naval Reserve Center and the reservists drilling that weekend.

I gave my speech about mobilization readiness and reemployment rights to about 100 reservists who were there for their drill weekend. As the reservists were gathering for my speech, an enlisted medical specialist in the grade of E-5 (HM2) made a nuisance of himself, saying: "I don't want to listen to this BS about mobilization readiness. The Navy Reserve has never been mobilized and never will be mobilized."

Within a month, Iraq invaded and occupied Kuwait. Within two months, that reservist and his entire unit had been mobilized. To this day, he thinks that I caused all of that to happen. We call it “power of attorney.”

The liberation of Kuwait, in Operation Desert Storm, occurred much more quickly, and with less loss of life, than many had predicted, and RC members, along with their Active Component (AC) counterparts, participated fully. Later in the 1990s, President Bill Clinton called up RC service members for operations in Haiti, former Yugoslavia, and other places. The transformation of the strategic reserve to the operational reserve was accelerated after September 11, 2001, the “date which will live in infamy” for our time. Almost one million RC members have been called to the colors since that date, and by their efforts, along with their AC counterparts, they have prevented a recurrence of the events of that terrible Tuesday morning almost 16 years ago.

The peak of military effort, especially by RC members, occurred in 2006-08. The pace of call-ups has slowed somewhat, but we will almost certainly not return to the “one weekend per month and two weeks annual training” days of the strategic reserve era (July 1953 to August 1990). Remember that “only the dead have seen the end of war.”

As the RC has transformed from a strategic reserve to an operational reserve, the burden to civilian employers has increased along with the burden on individual RC members and their families. As I have explained in footnote 2, in 1994 President Bill Clinton signed the Uniformed Services Employment and Reemployment Rights Act (USERRA), as a long-overdue rewrite of the 1940 VRRA. Under USERRA, even more clearly than under the VRRA, civilian employers (federal, state, local, and private sector) are required to grant unpaid but job protected military leaves of absence to employees who are RC members, for voluntary or involuntary military training and service. Moreover, USERRA forbids discrimination in initial employment, retention in employment, promotions, and benefits of employment because of membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.

USERRA is a necessary and relevant law, now more than ever, but we also need to be aware that the burden on employers has increased, and we need policies, procedures, and institutional arrangements that minimize that burden, without detracting from the readiness and effectiveness of RC units, and that recognize civilian employers for their support of RC members in the workforce. I have the following specific suggestions:

a. Limit the impact on the employer of the serial volunteer.
b. Provide the civilian employer as much notice as possible, and provide the employer documentation and other reassurance whenever possible. The employer needs to know that the employee claiming to be absent from work for military training and service really is performing training and service when he or she claims to be doing so.

c. Do not, under any circumstances short of a true emergency (not an exercise), call the individual RC member at his or her civilian job.

It is not sufficient to pound this advice into the heads of RC members—that approach has been tried without success. Each Reserve Component needs to establish policies, procedures, and institutional arrangements to make "employer support" work over the long haul. I will elaborate on my suggestions in this article.

Limit the impact on the employer of the serial volunteer.

Technical Sergeant (TSGT) Eager Beaver, ANG is a traditional ANG member, but over the last three years he has been away from his civilian job almost half of the scheduled work days, because of military training and service. In addition to his regularly scheduled drills and annual training periods, he has continually volunteered for "man days" and "special projects." Most of these voluntary military periods are with very little notice to Beaver's civilian employer, a local government.

I think that it is very important to maintain the principle that neither the civilian employer nor the court gets to decide how much military service is "too much." As I have explained in Law Review 17050 (May 2017), all TSGT Beaver's military-related absences from work are protected by USERRA. There is no "rule of reason" limiting the burden that can be put on an employer. The only limitation is the five-year cumulative limit on the duration of the periods of uniformed service that an individual can perform, with respect to the employer relationship for which he or she seeks reemployment, and that limit has nine exemptions (kinds of service that do not count toward exhausting the individual's limit). Most of TSGT Beaver's military periods do not count toward his five-year limit with the city.

We must encourage and not discourage volunteerism among RC members. We must not disparage TSGT Beaver as a "ramp rat" or "Guard bum." Since Congress abolished the draft almost two generations ago, our military has been entirely dependent upon volunteerism among those who serve and the young men and women who are qualified to serve and willing to consider enlisting.

We must not condemn TSGT Beaver for volunteering, but that is not to say that the Air Force should give him orders each time he volunteers. At some point, the right answer is to tell Beaver: "Thank you for volunteering, but this time we are going to find somebody else. I see from the record that you have already performed multiple 'special' tours and assignments, and your employer is complaining." We need to establish institutional arrangements that will enable the leadership of the Reserve Component to monitor serial volunteers, especially when employers complain, and to "red-flag" the files of these serial volunteers, thus limiting additional orders beyond the minimum that all component members are expected to perform. I will discuss my proposal for such institutional arrangements in the final section of this article.

Provide more notice to employers.

USERRA requires notice to the civilian employer, prior to a period of service,[4] except when giving such notice is precluded by military necessity or otherwise impossible or unreasonable.[5] No specific amount of notice is required, but certainly the practical advice is to give as much notice as possible. TSGT Beaver's civilian supervisor is much less likely to complain if he or she has 30 days of notice, rather than three days or three hours. If Beaver will be away from work, the employer needs to know that in advance to make alternative arrangements to cover Beaver's assignments.

DOD and the services have established rules about adequate notice to employers, but those rules have been "honored largely in the breach." We need to do a better job of keeping employers informed of the days and times when RC members will be performing military duty. Meeting this goal will require implementation of the institutional arrangements that I will discuss in the final section of this article.

The Reserve Component should notify employers directly.

Under USERRA, the notice to the civilian employer, before a period of military duty, can be provided by the individual employee or it can be provided by "an appropriate officer of the uniformed service in which such service is performed."[6] In several articles, I have urged the Reserve Components to utilize this provision and notify employers directly. We should encourage the individual RC member to give notice, but we should not depend on that. We need to establish a system whereby the Reserve Component itself gives written notice to the civilian employer. I will discuss this idea further in the final section of this article, on institutional arrangements.

Having the Component give the notice has several advantages. First, this method will ensure that adequate notice is provided. Second, a record can be maintained of the notice, and if the employer later denies having received notice that record can be introduced to prove the element of notice. Third, by giving such notice to the employer an appropriate officer of the Reserve Component can interpose himself or herself between the individual RC member and his or her angry employer. The individual member, especially a junior enlisted member, should not have to face the employer's wrath alone.

Provide documentation and other assurance to employers.

As I have explained in Law Review 16027 (April 2016) and Law Review 16127 (December 2016), the RC member *is not required to provide any documentation* when giving the employer notice

[4] 38 U.S.C. 4312(a)(1).
[5] 38 U.S.C. 4312(b).
[6] 38 U.S.C. 4312(a)(1).

of an impending period of service, and the requirement to provide documentation when applying for reemployment only applies after periods of service of 31 days or more. But employers expect to see such documentation and employers have an inflated concept of the kind of documentation that the individual Guard or Reserve member receives for short military tours, like drill weekends. What employers really want is reassurance that the individual is telling the truth when he or she claims to be away from work for military training or service, not for other reasons. There have been substantiated cases where such claims turned out to be untruthful. We need institutional arrangements enabling the Reserve Components to provide reassurance to civilian employers.

Don't call the RC member at his or her civilian job, except in a real emergency, not an exercise.

Major Mary Jones is an Individual Mobilization Augmentee (IMA). She performs inactive duty training periods on week days at a major military command, for many days per year, often with short notice to her civilian employer. All these military periods are protected by USERRA. On other days, when Mary is not performing military duty and when she is at her civilian job, officers at the military command that Mary supports call her at her civilian job, during work hours, to discuss work that she did during her most recent IMA period and to arrange for the next IMA period. *USERRA does not give Mary the right to do military duty while on the clock at her civilian job, even in nominal amounts.* The officers at the supported command must be aware of Mary's civilian job schedule and must call her outside her work hours—most likely during evenings or weekends. Yes, this will be inconvenient for them, but this is a price of doing business.

Private Alice Adams recently enlisted in the Army National Guard and was away from her civilian job for about six months for basic training.

While at basic training, she made a sexual harassment complaint against a drill instructor. Despite this problem, she successfully completed the basic training and is now back at her civilian job.

Captain I.B. Ignorant, an Army judge advocate, has been assigned to investigate Alice's sexual harassment complaint. On several occasions, he calls Alice at her civilian job in the weeks after her return from Army duty, and this causes immense problems for Alice with her civilian employer, culminating in her firing. Captain Ignorant needs to be instructed to call Mary at her home, outside her civilian work hours.

Petty Officer Joe Smith is a Navy Reservist. At least once per year, the full-timers at the Naval Operational Support Center (formerly known as the Navy Reserve Center) call all the members of Smith's reserve unit as part of a recall exercise. The full-timers make these calls during regular work hours because that is more convenient for them. Smith's civilian employer strenuously objects to these calls, although they only happen once or twice per year, because

Smith works on an assembly line. When a call like this comes in the employer must shut off the assembly line for several minutes, idling several other employees and interfering with production.

Captain Larry Lewis is the Commanding Officer of Smith's Navy Reserve unit. At his own civilian job, Lewis frequently receives calls from Smith and other unit members with various problems and questions. He also occasionally receives calls from the civilian employers of unit members, complaining about military training periods of unit members and asking Lewis, as the Commanding Officer, to cancel or reschedule those training periods. All these calls, which usually come during Lewis's work hours, seriously detract from Lewis' own job performance and magnify his problems with his civilian employer.

These are real situations of which I have been made aware in the last 35 years, in my efforts to assist RC members with their civilian job problems. We must establish and enforce a strict rule: *Do not call the individual RC member at his or her civilian job except in a real emergency.*

Institutional arrangements

Each Reserve Component needs to establish institutional arrangements that will enable the Component to control the serial volunteer phenomenon, especially when employers complain. The institutional arrangements also need to provide for the Reserve Component to notify civilian employers of military-related absences from work and to provide documentation and other reassurance to civilian employers. *We cannot rely on the unit commander to perform these functions, because the unit commander is a part-timer in most instances.* A full-timer at the national or regional headquarters of the Reserve Component or at the state headquarters of the National Guard needs to perform these functions. That full-timer needs the time, resources, and delegated authority to investigate these issues and to take timely corrective action.

With these reforms, we can make the increased reliance on the Reserve Components work over the long haul. I call upon the seven Reserve Component commanders and the 54 state and territorial Adjutant Generals to implement these suggestions as soon as possible.