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Helping the Army Reserve Work Out Problems with the Civilian Employers of Army Reserve Soldiers

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

1.1.3.1—USERRA applies to voluntary service
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Several times per week, I receive the very informative "Smart Brief" by e-mail from the Reserve Officers Association (ROA). If you are a member of ROA, you should be receiving "Smart Brief" two or three times per week and "Reserve Voice" twice per month. If you are not receiving these informative e-mails, call ROA at 800-809-9448 to get on the distribution list. You can get

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1 I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 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.

these publications without being a member of ROA, but if you are eligible[3] we sure would like to have you as a member.

The Chief of Army Reserve Speaks

The "Smart Brief" dated October 9, 2017 included a very interesting *Defense News* article about speakers at the annual Association of the United States Army (AUSA) convention, conducted recently. Here is the link to the article:
https://www.defensenews.com/news/your-army/2017/10/08/3-star-army-reserve-focuses-on-readiness-while-balancing-civilian-lives/

The article reported that Lieutenant General Charles Luckey, the Chief of Army Reserve, spoke to the convention and said:

> Readiness is job one, so making sure that we have units of action that are trained and equipped and able to on fairly short notice meet the war fighter's requirements at any number of theaters of operation [is essential]. I also have to make sure I'm giving employers a very, very high level of confidence that they are doing the right thing by sharing their employees with us as soldiers. One of our challenges is to make sure that we are ready enough to be relevant, but no so ready that our soldiers can't keep meaningful, satisfying civilian employment.
> **The civilian employer does not own the employee, and it should not be necessary to persuade the employer to "share" the employee.**

First, let me say that I strenuously object to General Luckey's apparent implication that the civilian employer "owns" the employee and must be persuaded to "share" that person with the Army. Slavery went out 152 years ago when the 13th Amendment was ratified in 1865.

Second, let me say that I reject the implication that the employer has an option to forbid the individual employee's request to be away from his or her job for training and service in a Reserve Component of the armed forces. Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), an employee has the explicit and unqualified right to an unpaid but job-protected right to military leave.

> **USERRA gives the employee the right to a leave of absence from the civilian job for military service.**

It should be emphasized that USERRA was not a new law in 1994—it was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part

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[3] Anyone who is or has been a commissioned, warrant, noncommissioned, or petty officer of any United States uniformed service is eligible for full membership in ROA.

of the Selective Training and Service Act.[4] The federal reemployment statute is more than 77 years old and is part of the fabric of our society. Employers claim to be unaware of this law, but of course ignorance of the law is no excuse. I think that employers are aware of the law—they plead ignorance as part of an effort to shuck their obligations.

As I have explained in Law Review 15116 (December 2015) and many other articles, USERRA gives any employee (federal, state, local, or private sector) the right to an unpaid but job-protected leave of absence from his or her civilian job for voluntary or involuntary military training or service. To have the right to reemployment under USERRA, a person must meet five simple conditions:

a. Left a civilian job (federal, state, local, or private sector) to perform uniformed service.
b. Gave the employer prior oral or written notice.
c. Has not exceeded the cumulative five-year notice on the duration of the period or periods of uniformed service, with respect to the employer relationship for which the person seeks reemployment. As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting the five-year limit.
d. Was released from the period of service without having received a disqualifying bad discharge from the military.
e. Made a timely application for reemployment after release from the period of service.

A person who meets these conditions is entitled to prompt reinstatement in the position of employment that he or she would have attained if continuously employed in the civilian job or in another position (for which he or she is qualified) that is of like seniority, status, and pay.[5] Upon reemployment, the person is entitled to the seniority and pension credit that he or she would have attained if continuously employed.[6]

Under USERRA, the right to a military leave of absence is essentially unlimited.

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[4] The Selective Training and Service Act was the law that led to the drafting of more than ten million young men, including my late father, for World War II. As originally enacted in 1940, the VRRA only applied to draftees, but it was amended by the Service Extension Act of 1941 to apply also to voluntary enlistees. Almost from the very beginning, the reemployment statute has applied equally to voluntary and involuntary service.

[5] 38 U.S.C. 4313(a)(2)(A). The position that the person would have attained if continuously employed may be a better position than the position the person left for service. The fact that the job has been filled is not a defense to the employer's obligation to reemploy. In some cases, reemploying the returning service member necessarily means displacing another employee. Please see Law Review 17077 (August 2017).

[6] 38 U.S.C. 4316(a), 4318. Please see Law Reviews 17095 and 17096 (October 2017).

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[7] 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. The VRRA made confusing and cumbersome distinctions among categories of military training or service. Different subsections of the law, and different rules, applied to each category. USERRA eliminated these distinctions. Under USERRA, the rules depend upon the duration of the period of service, not the category.

Under the VRRA, there was a four-year cumulative limit on the duration of the periods of *active duty* that a person could be away from a job and still have the right to reemployment. The VRRA had no limit on the duration of a specific period of *active duty for training* or on the cumulative amount of time that a person could be away from a job for active duty for training.

After Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973, the services started asking some Reserve Component service members to perform active duty for training periods that were substantially longer than the traditional two-week period for such training. There was a 20-year argument in the courts as to whether there was a "rule of reason" limiting the duration of active duty for training periods. Finally, in 1991, the Supreme Court put an end to that argument by holding, explicitly and unanimously, that there was no such implied limit.[8]

When Congress enacted USERRA in 1994, it included a provision that explicitly ratified the 1991 Supreme Court decision and precluded the application of any "rule of reason" under USERRA:

> In any determination of a person's entitlement to protection under this chapter [USERRA], the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements in subsection (a)(1) and the notification requirements established in subsection (e) are met.[9]

USERRA's legislative history explains the purpose and effect of section 4312(h) as follows:

> Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital.* This new subsection makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and

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7 Public Law 103-353, 108 Stat. 3162.

8 *See King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).

9 38 U.S.C. 4312(h).

that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements of sections 4312(a) and (e).

The Committee believes, however, that instances of blatant abuser of military orders should be brought to the attention of appropriate military authorities (*see Hilliard v. New Jersey Army National Guard,* 527 F. Supp. 405, 411-412 (D.N.J. 1981)[10]), and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.[11]

USERRA forbids discrimination.

Those who drafted and enacted USERRA recognized that an employer could make a mockery of the right to a military leave of absence by firing employees who are RC members or by discriminating in the hiring process. Accordingly, section 4311 of USERRA forbids discrimination in hiring, retention of employment (firing), promotions, and benefits of employment, as follows:

- **(a)** A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
- **(b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) 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.
- **(c)** An employer shall be considered to have engaged in actions prohibited--

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[10] I discuss the *Hilliard* case in detail in Law Review 15025 (March 2015).

[11] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on page 674 of the 2016 edition of the *Manual.*

- **(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
- **(2)** under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is *a motivating factor in the employer's action*, unless the employer can *prove* that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.[12]

- **(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

USERRA's burden on the civilian employer is neither unreasonable nor unconstitutional.

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20th Century) and the Army Reserve, Navy Reserve, and Marine Corps Reserve (created early in the 20th Century) and by drafting young men into military service.[13] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[14]

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). No one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these three laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's

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[12] 38 U.S.C. 4311 (emphasis supplied).

[13] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

[14] *Arver v. United States,* 245 U.S. 366 (1918). The citation means that you can find this decision in Volume 245 of *United States Reports,* starting on page 366.

population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we recently passed the 16th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, AC and RC, have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 16 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 44 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor. Our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that we never need to return to the draft. Maintaining the

AVM requires that we provide incentives and minimize disincentives to serve among the young men and women who are qualified for military service.

I have written:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
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> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).
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> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is a compelling government interest in the enforcement of USERRA.[15]

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by

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[15] Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.

employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren. You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

Needed actions

a. Redouble efforts to educate RC members and their civilian employers about USERRA

As I have explained in footnote 2, I have made the VRRA and USERRA the focus of my military career and my legal career. For more than 35 years, I have advised and represented RC service members concerning their rights with respect to their civilian employers, and I have written hundreds of articles and have spoken to RC audiences hundreds of times about reemployment rights. For six years (June 2009 through May 2015), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. During that period, I received and responded to 35,000 e-mail and telephone contacts from service members, military family members, attorneys, employers, Employer Support of the Guard and Reserve (ESGR) volunteers, DOL investigators, congressional staffers, reporters, and others. Approximately half of the inquiries were about USERRA, and the other half were about other military-legal topics. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC.

My salaried ROA employment ended 5/31/2015, but I have continued this work as a volunteer and ROA member. In 2016, we added 127 new "Law Review" articles to our website. I was the author of 122 of them and co-author of another three. I continue to receive and respond to e-mail inquiries, but as you can imagine it is just not feasible for me to maintain the pace that I achieved as a full-time employee.

I hope that it will be possible to reconstitute the SMLC, and I hope to recruit a cadre of RC judge advocates who are a generation behind me. We need to carry this message and this effort into the next generation.

b. Accommodate the needs of employers, where possible.

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.

c. Limit the impact on the employer of the serial volunteer.

Sergeant (SGT) Eager Beaver, USAR is a traditional reservist, 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 above, all SGT 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 SGT 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 SGT Beaver as a "ramp rat" or "Reserve 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 SGT Beaver for volunteering, but that is not to say that the Army 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.

d. Provide more notice to employers.

USERRA requires notice to the civilian employer, prior to a period of service,[16] except when giving such notice is precluded by military necessity or otherwise impossible or unreasonable.[17] No specific amount of notice is required, but certainly the practical advice is to give as much notice as possible. SGT 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.

e. 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."[18] 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.

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

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16 38 U.S.C. 4312(a)(1).

17 38 U.S.C. 4312(b).

18 38 U.S.C. 4312(a)(1).

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.

f. 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 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.

g. 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 Reserve 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 Naval 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.*

I hope that these suggestions will be helpful to General Luckey and the other leaders of the Army Reserve and the other six Reserve Components.