

Yes, a Reservist Can Be Entitled to Veterans' Preference

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Q: I am a First Class Petty Officer (E-6) in the Navy, and I have been on active duty for almost ten years. I am currently serving in Florida, and I will be leaving active duty in a few months. I am looking for civilian employment, in anticipation of my upcoming release from active duty. I am also considering whether to affiliate with the Navy Reserve after I leave active duty. A friend provided me a copy of your Law Review 16086 (September 2016), and that article has very valuable information about the things that I should consider when deciding whether to affiliate with the Navy Reserve after I leave active duty.

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 (VRRRA—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 VRRRA 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 VRRRA 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.

Recently, I attended a “job fair” for military personnel who will be leaving active duty in the coming months. I met the assistant superintendent of a rural Florida school district. He told me that his school district has found that veterans generally make good teachers and that Florida law provides for veterans’ preference in hiring. He encouraged me to visit his office and to apply for a job starting in September 2018. I made an appointment to visit him a few days later. When I met with him in his office, I told him that I am seriously considering affiliating with the Navy Reserve immediately after I leave active duty, to continue my service on a part-time basis and to get some retirement benefit out of my decade of active duty. He told me that to qualify as a “veteran” for purposes of Florida’s veterans’ preference law I must sever all ties with the Navy. He told me that the school district has a strict policy not to hire any member of the Reserve or National Guard because calls to active duty are disruptive of the relationship between students and their teacher and are very inconvenient for the school district. Is the assistant superintendent correct about Florida’s veterans’ preference law? Does the federal reemployment statute forbid discrimination in hiring against Reserve Component personnel? Does the federal reemployment statute apply to local school districts?

Florida’s veterans’ preference law

A: First, the school district assistant superintendent is misstating the provisions of Florida’s veterans’ preference law. Please see www.floridavets.org/wp-content/uploads/2017/02/FAQs.pdf for an excellent summary of that law, prepared by the Florida Department of Veterans’ Affairs. The Florida law provides veterans’ preference for any person who has served on active duty during a “war” time (and we have been at war since 9/11/2001 for this purpose) and who has been discharged *or released from active duty*. You do not need to sever your ties with the Navy to qualify for veterans’ preference—you only need to leave active duty. Second, the Florida law provides for veterans’ preference for “a current member of any reserve component of the United States Armed Forces or the Florida National Guard.”

USERRA forbids discrimination in hiring

As I have explained in footnote 2 and in Law Review 15067 (August 2015) and many other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which dates from 1940. Section 4311 of USERRA makes it unlawful for employers (federal, state, local, or private sector) to discriminate against those who are serving or have served our country in uniform:

- **(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--
 - **(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.
- **(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.³
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Section 4311 forbids discrimination in hiring

Section 2021(b)(3) of the VRRRA forbade (starting in 1968) discrimination against Reserve and National Guard personnel with respect to retention in employment (firing) and promotions and benefits of employment. In 1986, Congress amended section 2021(b)(3) to outlaw discrimination *in initial hiring* as well as discrimination against those who were already employed. The enactment of USERRA in 1994 broadened and strengthened the prohibition on discrimination.

³ 38 U.S.C. 4311 (emphasis supplied).

The VRRRA and USERRA apply to state and local governments.

The VRRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress expanded the VRRRA to make it apply also to state and local governments.⁴ USERRA applies to state and local governments, as well as the Federal Government and private employers.

Relationship between USERRA and state law

USERRA is a floor and not a ceiling on the rights of those who are serving or have served our country in uniform. A state law or local ordinance can provide *greater or additional rights* but cannot take away rights conferred by USERRA. Section 4302 of USERRA provides:

- **(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.⁵

Under Article VI, Clause 2 of the United States Constitution (commonly called the “Supremacy Clause”), a federal statute like USERRA trumps conflicting state statutes and state constitutions.

A state veterans’ preference law is an example of a state law that gives those who are serving or have served *greater or additional rights*, above and beyond USERRA. Section 4311 of USERRA makes it unlawful for employers to *discriminate* against those who are serving or have served. Section 4311 does not require an employer to grant a preference to those who have served.

⁴ Vietnam Era Veterans Readjustment Assistance Act, Public Law 93-508, 88 Stat. 1593. I discuss this issue in detail in Law Review 17067 (June 2017).

⁵ 38 U.S.C. 4302.