

LAW REVIEW 18044¹

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National Guard Bureau PowerPoint for Training National Guard Technicians Has It Wrong on USERRA

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Our nation has seven Reserve Components (RC). 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 are hybrid federal-state organizations, while the other five components are purely federal.

The number of participating RC personnel is almost equal to the number of service members serving full-time in the Active Component (AC) of the armed forces, so RC personnel make up

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "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 1400 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 36 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.

almost half of our nation's military personnel. RC personnel are a great deal for the nation with respect to cost, because they are only paid for the days when they train or serve.

What are technicians?

In any RC, part-timers make up more than 90% of the personnel, but there is a need for a cadre of full-timers to perform functions like recruiting, maintenance of equipment and aircraft, and planning and preparing the training for the part-timers for the periods when they train. In the four Army and Air Force components, "technicians" perform most but not all this full-time support.³

Technicians have a hybrid civilian-military status. As a condition of employment, they are required to maintain their membership in one of the units that they support, and during "drill" periods and annual training tours they participate with their units in a military capacity, along with the traditional National Guard and Reserve members. On the great majority of work days, they are working in a civilian capacity, although they wear military uniforms and observe military courtesies (saluting, etc.) while at work. They receive federal salaries and benefits through the Department of the Air Force (for the ANG and USAFR) or the Department of the Army (for the ARNG and USAR). Like other federal civilian employees who are RC members, they receive paid military leave under section 6323 of title 5 of the United States Code.⁴ In the ARNG and ANG, technicians also have a hybrid state-federal status. For purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA), they are treated as state employees, and the Adjutant General of the state⁵ is their employer.⁶

Conditions upon the right to reemployment

As I have explained in Law Review 15116 (December 2015) and many other articles, a service member or veteran must meet five simple conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek

³ There are also traditional reservists and National Guard members who go on full-time active duty on Active Guard and Reserve (AGR) orders to perform full-time support functions.

⁴ 5 U.S.C. 6323.

⁵ The Adjutant General is a state official, appointed by the Governor, and is the head of the ARNG and ANG of the state.

⁶ 38 U.S.C. 4304(4)(B). This means that the USERRA rights of a technician in the ARNG or ANG must be enforced by a lawsuit against the state and the Adjutant General in United States District Court, not an action in the Merit Systems Protection Board (MSPB). Please see Law Review 15050 (June 2015).

reemployment. There are nine exemptions—kinds of service that do not count toward exhausting your five-year limit.

- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. Must have made a timely application for reemployment, after release from the period of service.⁷

A technician is a civilian employee. If a technician leaves his or her technician job for voluntary or involuntary uniformed service, he or she is entitled to reemployment in the technician job after release from the period of service, if he or she meets the five conditions.

Entitlements of the returning service member or veteran upon completion of the period of service

A person who meets these five conditions is entitled to prompt reemployment in the position that he or she *would have attained if continuously employed* in the civilian job during the entire time that he or she was away from work for uniformed service, or another position for which he or she is qualified that is of like seniority, status, and pay.⁸ Upon reemployment, the person is entitled to the seniority and pension credit that he or she would have attained if continuously employed.

Entitlements of the service member during the period of service

Most of USERRA's benefits accrue upon reemployment to the person who meets the five USERRA conditions, but under the "furlough or leave of absence" clause a person who has left a civilian job for service is entitled to certain *non-seniority benefits during the period of service*. That clause reads as follows:

(b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits *not determined by seniority* as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on *furlough or leave of absence* under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2) (A) Subject to subparagraph (B), a person who--

(i) is absent from a position of employment by reason of service in the uniformed services, and

⁷ 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). Shorter deadlines apply after shorter periods of service.

⁸ 38 U.S.C. 4313(a). The position that he or she would have attained is usually the position that he or she left, but it may be a better position, a worse position, or no position at all, depending on what would have happened. We must look to the civilian colleagues of the service member or veteran to determine what would have happened.

- (ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service, is not entitled to rights and benefits under paragraph (1)(B).**
- (B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).**
- (3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.**
- (4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.**
- (5) The entitlement of a person to coverage under a health plan is provided for under section 4317.**
- (6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.⁹**

How the National Guard Bureau got it wrong

In a PowerPoint used to train ANG and ARNG technicians about USERRA and other important laws, the National Guard Bureau has misunderstood and misconstrued section 4316(b)(1)(B)(2)(A) of USERRA.¹⁰ That PowerPoint states that a technician who has submitted a written resignation from technician employment to enter or reenter active duty is not entitled to *seniority benefits* if he or she is reemployed as a technician after release from the period of active military service. *This statement is wrong and the NGB should know better.*

Under section 4316(b)(2)(A)(ii),¹¹ a person who has knowingly provided written notice of intent not to return to the civilian position of employment at the end of his or her period of active military service is not entitled to “rights and benefits under paragraph 1(B).”¹² The benefits under paragraph 1(B) are “such other rights and benefits *not determined by seniority* as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on *furlough or leave of absence*.”¹³

For example, Specialist Joe Smith is an ARNG technician in the State of New Caledonia, and he is leaving his technician job for a year of active military service. For whatever reason, Smith gives a written notice that he intends not to return to his technician job at the end of his year of

⁹ 38 U.S.C. 4316(b) (emphasis supplied).

¹⁰ See <https://outlook.office.com/owa/projection.aspx>, page 52.

¹¹ 38 U.S.C. 4316(b)(2)(A)(ii).

¹² 38 U.S.C. 4316(b)(1)(B).

¹³ Id.

active duty. Under this written notice, Smith has arguably waived his right to *non-seniority* benefits *during* his year of active duty, under USERRA's "furlough or leave of absence" clause. He has not waived the right to reemployment, and he has not waived the right to *seniority* benefits upon his reemployment.¹⁴

As I have explained in detail in Law Review 18043 (the immediately preceding article in this series), a "resignation" submitted by a person leaving a civilian job (federal, state, local, or private sector) to perform uniformed service does not defeat the person's right to reemployment, provided he or she meets the five USERRA conditions.¹⁵

¹⁴ Moreover, under section 4316(b)(2)(B), 38 U.S.C. 4316(b)(2)(B), the employer has a heavy burden of proof to show that Smith *knowingly* waived his furlough or leave of absence clause rights and that he was specifically aware of the rights that he was waiving. It is difficult to imagine circumstances under which a person in Smith's situation would knowingly waive any USERRA rights.

¹⁵ A written or oral statement to the effect that "I resign because I am going on active duty in the Army" is a sufficient notice to the civilian employer under section 4312(a), 38 U.S.C. 4312(a). For practical reasons, I advise persons leaving civilian jobs for service to avoid using words like "resign" or "quit" when giving notice to their civilian employers.