

## LAW REVIEW<sup>1</sup> 18108

November 2018

### **AFTP<sub>s</sub> in the Army as well as the Air Force and for Enlisted Crew Members as well as Pilot Officers**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

[Update on Sam Wright](#)

- 1.1.1.8—USERRA applies to the Federal Government
- 1.1.3.1—USERRA applies to voluntary service
- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.3.1.3—Timely application for reemployment
- 1.3.2.11—Vacations, holidays, and days off
- 1.4—USERRA enforcement
- 1.7—USERRA regulations
- 1.8—Relationship between USERRA and other laws/policies
- 2.0—Paid military leave for governmental employees

---

<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1700 "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 1500 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 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 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](mailto:SWright@roa.org).

**Q: I am a Staff Sergeant in the Army National Guard (ARNG) and a member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I am particularly interested in your Law Review 17050 (May 2017). In that article, you wrote that pilots in the Air National Guard (ANG) and the Air Force Reserve (USAFR) are entitled to time off from their civilian jobs (unpaid but job-protected) to perform Additional Flight Training Periods (AFTP) because those periods constitute “service in the uniformed services” as defined by USERRA. I want to point out that AFTP are not limited to the ANG and the USAFR. Members of aviation (usually helicopter) units of the ARNG and the Army Reserve (USAR) are also required to perform AFTP to maintain their proficiency.**

**AFTP are also not limited to pilots but also apply to enlisted air crew members like me. In the ARNG, I am a Crew Chief in large Army helicopters, and I am required to perform AFTP to maintain my proficiency. I am also an instructor, and I perform AFTP to train new Crew Chiefs. I believe that USERRA protects my right to absent myself from my civilian job to perform AFTP. Do you agree?**

**On the civilian side, I am a civilian employee of the Department of the Army (DA), but I am not a dual status technician. My civilian DA supervisor constantly harasses me about work days that I miss to perform ARNG duty, especially AFTP. I gave him a list of dates over the next three months when I will need to be away from my civilian job to perform AFTP. He told me that AFTP are not protected by USERRA because they are voluntary and because the Army does not require me to perform AFTP on a specific day, like drill weekends.**

**It is true that I have some discretion on the scheduling of AFTP, but I need to get them completed during the fiscal year, and I need to coordinate with the other personnel involved and with the limited availability of aircraft and other equipment, and sometimes scheduled AFTP must be postponed because of mechanical issues or weather problems.**

**I asked my direct civilian supervisor for military leave for seven AFTP days scheduled during the next three months, and he denied my request. I gave him a copy of your Law Review**

---

<sup>3</sup> At its September 2018 annual convention, the Reserve Officers Association adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization is open to and represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

**17050 and told him that AFTPAs do qualify as service in the uniformed services and that I am entitled under USERRA to military leave for days when I will perform AFTPAs. He said that the article was just “some GD lawyer’s opinion” and he refused to read it or to reconsider his denial of my military leave request. Help!**

**A:** First, I entirely agree with you that the right to time off from a civilian job to perform AFTPAs and other forms of uniformed service applies to enlisted air crew members, not just to pilots, and to ARNG and USAR personnel, as well as ANG and USAFR personnel.

Second, the supervisor’s statement that AFTPAs are not protected by USERRA because they are voluntary is clearly wrong, because USERRA applies to voluntary as well as involuntary service. Section 4303 of USERRA<sup>4</sup> defines 16 terms used in this law. The term “service in the uniformed services” is defined as: “the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority.”<sup>5</sup>

Third, you do not need the employer’s or supervisor’s permission to absent yourself from your civilian job to perform uniformed service (including AFTPAs), and the employer or supervisor does not get a veto. If you are away from your civilian job for a day, a week, a month, a year, or longer, you have the right to reemployment (including being treated as continuously employed for seniority and pension purposes) if you meet the five USERRA conditions.<sup>6</sup>

Section 4331 of USERRA<sup>7</sup> gives the Department of Labor (DOL) the authority to promulgate regulations concerning the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* in September 2004, for notice and comment. After considering the comments received and making a few adjustments,

---

<sup>4</sup> 38 U.S.C. 4303.

<sup>5</sup> 38 U.S.C. 4303(13) (emphasis supplied). Of course, in a larger sense all military service is voluntary. No one has been drafted by the United States Government since 1973.

<sup>6</sup> As I have explained in Law Review 15116 (December 2015) and many other articles, you (or any returning service member or veteran) must have left a civilian job (federal, state, local, or private sector) to perform uniformed service as defined by USERRA (and AFTPAs are within the definition) and you must have given the employer prior oral or written *notice*. 38 U.S.C. 4312(a)(1). You must have been released from the period of service without having exceeded the cumulative five-year limit on the duration of periods of service related to the employer relationship for which you seek reemployment. 38 U.S.C. 4312(c). As I have explained in Law Review 16043 (May 2016) and many other articles, there are nine exemptions to the five-year limit. That means that nine enumerated kinds of service do not count toward exhausting your five-year limit with respect to a specific employer. AFTPAs and other kinds of inactive duty training do not count toward exhausting your five-year limit. 38 U.S.C. 4312(c)(3). You must have been released from the period of service without having received a disqualifying bad discharge from the military, such as a punitive discharge (by court martial) or an other-than-honorable administrative discharge. 38 U.S.C. 4304. After release from a period of service lasting fewer than 31 days, you must report for work at the civilian job at the start of the first regularly scheduled work period on the first calendar day after release from the period of service, the time reasonably required for safe transportation from the place of service to your residence, and the expiration of eight hours (for rest) after your arrival at your residence. 38 U.S.C. 4312(e)(1)(A). Longer deadlines to apply for reemployment apply after longer periods of service.

<sup>7</sup> 38 U.S.C. 4331.

DOL published the final regulations in the *Federal Register* in December 2005. The regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The pertinent section is as follows:

**Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?**

---

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.<sup>8</sup>

Technically, the DOL USERRA regulations do not apply to federal agencies as employers, but USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter [USERRA]."<sup>9</sup> Accordingly, a rule that applies to state and local governments and private employers must also apply to federal agencies as employers. You don't need the supervisor's permission to be absent from work to perform AFTP or other forms of uniformed service. You have already given the employer prior notice. If the employer denies you proper reemployment when you are released from the period of service and report back to work in a timely manner, the employer is violating USERRA, and at that point you can utilize the USERRA enforcement mechanism.<sup>10</sup>

**Q: I am most uncomfortable absenting myself from work to perform AFTP, in the face of my supervisor's repeated threats to fire me or deny me reinstatement on the next work day after the AFTP day. Is there a way to force my supervisor or the personnel office to grant me a day of unpaid military leave for the AFTP day?**

**A:** Unfortunately, no. You do not have a ripe controversy with your employer until you meet the five USERRA conditions and the employer unlawfully refuses to reemploy you. I suggest that you contact the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR) and ask that organization to assign a volunteer ombudsman to contact your supervisor and your supervisor's supervisor to persuade them to be more supportive of your ARNG service. ESGR's telephone number is 800-336-4590.

**Q: I think that it is ironic, to say the least, that my civilian employer is the Army, and the Army (as a civilian employer) seeks to flout USERRA. The Army (along with the other services) is the principal beneficiary of USERRA. How do we get the gas station owner to comply with USERRA with respect to his or her employees when the Army, as a civilian employer, does not respect and obey this law?**

---

<sup>8</sup> 20 C.F.R. 1002.87 (bold question in original).

<sup>9</sup> 38 U.S.C. 4301(b).

<sup>10</sup> Please see Law Review 07055 (October 2007) for a description of USERRA's enforcement mechanism with respect to federal executive agencies as employers.

**A:** I entirely agree, and I have made exactly that point in Law Review 18014 (January 2018), Law Review 16055 (June 2016), and Law Review 16036 (April 2016).

**Q: As a federal civilian employee who is a Reserve Component (RC) member, I am entitled to 15 days of *paid* military leave. Am I entitled to use a day of *paid* military leave to perform an AFTP?**

**A:** Yes, you are entitled to 15 days of *paid* military leave per federal fiscal year, and you should receive the 15 days on October 1 (the first day of the fiscal year). You can carry over up to 15 days of paid military leave from one fiscal year to the next. Thus, you can have a positive balance of up to 30 days of paid military leave.<sup>11</sup> If you have a positive balance of at least one day of *paid* military leave, you can use that day to perform an AFTP on that day.

In exhausting your entitlement to *paid* military leave under section 6323 of title 5, you should only be charged for federal workdays that you missed because you were performing military duty or training on that day. You should not be charged for a Saturday, Sunday, or federal legal holiday unless you ordinarily work weekends and holidays in your federal civilian job.<sup>12</sup>

**Q: I seldom take leave (other than military leave) in my civilian job, and I have a positive balance of 160 hours (20 days) of annual leave. Am I entitled to use eight hours of annual leave to perform a day of AFTP?**

**A:** Yes.<sup>13</sup>

**Q: I almost never miss a day of work because of illness, and I have a huge balance of sick leave. Am I entitled to use eight hours of sick leave for a day of AFTP?**

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

---

<sup>11</sup> 5 U.S.C. 6323.

<sup>12</sup> See *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). Please see Law Review 151, by Mathew B. Tully, Esq., and Greg Rinckey, Esq., concerning the *Butterbaugh* case.

<sup>13</sup> See 38 U.S.C. 4316(d). Using your annual leave in this way is your choice, not the employer's choice. It is unlawful for the employer to make you use your annual leave in this way. If you don't want to use your annual leave, or if you have exhausted your balance of annual leave, you have the right under USERRA to take a day off for military duty (including AFTPs) without pay but with job protection.

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