

## LAW REVIEW<sup>1</sup> 18110

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### USERRA's Escalator Can Descend as well as Ascend

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[Update on Sam Wright](#)

- 1.1.1.7—USERRA applies to state and local governments
- 1.1.1.8—USERRA applies to the Federal Government
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**Q: I am a Master Sergeant (E-7) in the Air National Guard (ANG) and a member of the Reserve Organization of America.<sup>3</sup> I have read with great interest many of your “Law Review” articles**

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<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).

<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 represents the interests of all Reserve Component members, from the most junior enlisted personnel

**about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I am an Air Reserve Technician (ART) for the ANG.**

**As a technician, I provide full-time support to the ANG of my state, doing aircraft maintenance and other activities. During regular work hours on weekdays, I wear my military uniform and observe military courtesies (saluting, etc.), but I am a civilian employee. As a condition of employment, I am required to maintain my membership and participation in one of the ANG units that we technicians support. In my military capacity, I participate in drill weekends and annual training along with the part-timers (traditional ANG members).**

**The Adjutant General (head of the National Guard) of my state has made a policy decision to deemphasize the technician program and put more reliance on National Guard members (Air and Army) going on full-time active duty or “full-time National Guard duty” in the Active Guard & Reserve (AGR) program. Many technician billets have been or are being disestablished, and the individuals in those billets are being offered the opportunity to go on full-time duty in the AGR program.**

**I am affected by this change in policy. My technician billet will be abolished soon, and I will be given the opportunity to go on “full-time National Guard duty” for three years. If I avail myself of that opportunity and serve honorably for three years in the AGR program, will I have the right to reemployment in the technician position that I am vacating?**

#### **Answer, bottom line up front**

If you meet the five eligibility conditions for reemployment under USERRA,<sup>4</sup> you are entitled to reemployment in the position of employment that you *would have attained if you had been*

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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.

<sup>4</sup> You must leave a civilian position of employment to perform service in the uniformed services as defined by USERRA, and full-time National Guard duty is included in USERRA’s definition of “service in the uniformed services” and “uniformed services.” 38 U.S.C. 4303(13) and (16). You must give the civilian employer prior oral or written notice that you are leaving to perform service. 38 U.S.C. 4312(a). You must serve honorably and be released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial as part of the sentence for a serious offense) and other-than-honorable administrative discharges. You must be released from the period of service without having exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service with respect to the employer relationship for which you seek reemployment. 38 U.S.C. 4312(c). There are nine exemptions—kinds of service that do not count in exhausting your five-year limit. Please see Law

*continuously employed in the civilian job* during the time that you were away from the job for uniformed service or another job (for which you are qualified) that is of like seniority, status, and pay.<sup>5</sup> In the scenario you describe, it is likely that the position that you would have attained if you had been continuously employed will be a worse position than the position you left or no position at all, because your civilian job (the technician position) *would have gone away anyway* even if you had not been away from the job for three years for full-time National Guard duty. The “escalator” can descend as well as ascend. USERRA does not protect you from a bad thing (like a reduction in force and resulting layoff) that clearly would have happened anyway.

Air Reserve Technicians (ARTs) of the Air Force Reserve (USAFR) and technicians in the Army Reserve (USAR) are treated differently from ARTs of the ANG or technicians of the ARNG. USAFR and USAR technicians are exempted from the “descending escalator syndrome” and are entitled to reinstatement in active positions of employment in this scenario.

### **Explanation**

#### **The role of technicians in providing full-time support**

As I have explained in footnote 3, our nation has seven reserve components,<sup>6</sup> and our nation is more dependent than ever before on the reserve components for essential national defense readiness. Relying upon the reserve components is cost-effective because the individual National Guard or Reserve service member is only paid for the days that he or she serves or trains to serve, while the Active Component service member is paid 365 days per year. The cost of a reserve component service member, for 39 training days per year, is only 15% of the cost of the Active Component service member on full-time active duty.

Each reserve component is made up predominantly (90% or more) of part-timers (traditional National Guard or Reserve members), but the component needs a cadre of full-timers to perform full-time support functions like recruiting, maintenance of aircraft and vehicles, and preparing for the training of the part-timers on their drill weekends and annual training tours. In the four Army and Air Force reserve components,<sup>7</sup> most of the full-time support role has traditionally been performed by technicians like you.<sup>8</sup> Putting reservists and National Guard members on full-time active duty is another way to provide full-time support.

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Review 16043 (May 2016). After release from the period of service, you must make a timely application for reemployment. 38 U.S.C. 4312(e). 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. Please see Law Review 15116 (December 2015) for a detailed discussion of the USERRA eligibility conditions.

<sup>5</sup> 38 U.S.C. 4313(a)(2)(A).

<sup>6</sup> The Air National Guard of the United States (ANGUS) and Army National Guard of the United States (ARNGUS) have a hybrid federal-state status, while the other five reserve components are purely federal entities.

<sup>7</sup> Army Reserve, Army National Guard, Air Force Reserve, and Air National Guard.

<sup>8</sup> The Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve do not have dual-status technicians.

## **USERRA's escalator principle**

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."<sup>9</sup> Section 4316(a) of USERRA<sup>10</sup> codifies the escalator principle in the current version of the reemployment statute.

It has always been the case that the escalator can descend as well as ascend. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

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### **Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**

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**Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.<sup>11</sup>

In the scenario you describe, technician billets are being abolished as technicians are deemphasized and AGR positions are emphasized. Let us say that Joe Smith leaves a technician position to serve on full-time active duty or full-time National Guard duty. While Joe is on active duty, the technician position that he left is abolished. If Joe had not been on active duty at the time, he would have lost his job anyway. In this situation, Joe is entitled, upon release from full-time service, to reinstatement in the position that he would have attained if he had been continuously employed. In this scenario, the position Joe would have attained is no position at all. This is an example of a descending escalator.

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<sup>9</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

<sup>10</sup> 38 U.S.C. 4316(a).

<sup>11</sup> 20 C.F.R. 1002.194 (bold question and bold "yes" in original).

**Air Force Reserve and Army Reserve technicians are treated differently.**

**Q: In Law Review 17028 (April 2017), you wrote that federal employees who leave their jobs for active military service are exempted from the application of the “descending escalator” and that in this situation the returning federal employee is entitled to reinstatement in an active job even if he or she would have been displaced by a reduction in force if he or she had remained in the civilian job. Why does that favorable result not apply to me?**

**A:** Section 4331(b) of USERRA<sup>12</sup> gives the Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to federal executive agencies as employers. The pertinent section of the OPM USERRA Regulation is as follows:

During uniformed service. An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered "for cause" under this subpart.) He or she is not a "competing employee" under § 351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay.<sup>13</sup>

Section 353.209(a) applies to employees of federal executive agencies as employers. This section does not apply to employees of state and local governments and private employers. The DOL USERRA Regulation applies to these non-federal employers, and the DOL USERRA Regulation does not contain a section like section 353.209(a).

For USERRA purposes, National Guard technicians are treated as employees of the state, and the Adjutant General of the state is considered to be their employer.<sup>14</sup> Thus, section 353.209(a) does not apply to National Guard technicians, and National Guard technicians are not exempted from the descending escalator.

The USAFR and USAR are purely federal entities. Technicians in the USAR and USAFR are employees of federal executive agencies, and section 353.209(a) exempts them from the consequences of a descending escalator.

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<sup>12</sup> 38 U.S.C. 4331(b).

<sup>13</sup> 5 C.F.R. 353.209(a).

<sup>14</sup> 38 U.S.C. 4303(4)(B).