

LAW REVIEW¹ 19001
January 2019

How Much Military Leave Am I Entitled to under USERRA?

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[Update on Sam Wright](#)

- 1.1.1.7—USERRA applies to state and local governments
- 1.2—USERRA forbids discrimination
- 1.3.1.2—Character and duration of service
- 1.3.2.7—Adequate rest before and after service
- 1.3.2.10—Vacations, holidays and days of
- 1.7—USERRA regulations
- 1.8—Relationship between USERRA and other laws/policies
- 2.0—Paid leave for government employees

Q: I am a Specialist (E-4) in the Army Reserve (USAR) and a member of the Reserve Organization of America.³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to 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.

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. 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 (VRRRA—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 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.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and 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

On the civilian side, I work for an intermediate sized city in Alabama, as a clerk in the tax office. Because my USAR unit is scheduled for mobilization and deployment late in 2019, we are required to train far beyond the traditional pattern of one weekend per month and two weeks of “summer camp.” My civilian supervisor (the city’s tax director) has given me a hard time about the work days I have missed because of my USAR obligations, and he has told me many times: “You must make a choice. You can work here, or you can play soldier, but you cannot do both.”

Recently, I asked for four days off, including Thursday and Friday as well as Monday and Tuesday. My USAR “drill weekend” extends from early Friday morning until Monday evening, and the training is conducted at an Army base that is 400 miles from my home and civilian job. I need to take Thursday off to travel to the training location and arrive in time to get a reasonable night of sleep Thursday night, to be fit for duty when the training starts early Friday morning. After the training ends late Monday afternoon or early Monday evening, I am exhausted and cannot safely drive home Monday night. I drive home on Tuesday and report back to work at 8 am Wednesday morning.

My civilian supervisor told me that under Alabama law I am only entitled to 21 days of military leave, and that I have already exhausted that limit. Is he correct? What is the limit on my right to military leave? What happens if the Army orders me to serve more days than my civilian employer will tolerate?

A: First, under Alabama law you are entitled to 168 hours (21 work days) of *paid* military leave.⁴ After you have exhausted your paid military leave under Alabama law, you have the right to *job protected but unpaid military leave* under the federal law, USERRA. Your right to unpaid military leave is almost unlimited.⁵

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.

⁴ Alabama Code section 31-2-13(a). I invite the reader’s attention to the “state laws” section at our website, www.roa.org/lawcenter. You will find an article for each state about the state laws that provide for limited periods of paid military leave.

⁵ Unpaid military leave is limited only by the five-year limit set forth in section 4312(c) of USERRA, 38 U.S.C. 4312(c), and most of the USAR duty that you perform is exempt from the five-year limit. Your inactive duty training periods do not count toward exhausting your five-year limit, even when those periods are not limited to Saturdays and Sundays. Similarly, your annual training periods are exempt, even when they are not limited to once per year or to two weeks in the summer. All involuntary service (like your upcoming unit mobilization) is exempt from the five-year limit, and

You have the right to reemployment in a civilian job after a period of absence from the job for military training or service, whether for five hours or five years, provided you meet the five simple USERRA conditions:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services, as defined by USERRA. USERRA's definition of uniformed service includes active duty, active duty for training, initial active duty training, inactive duty training, funeral honors duty, etc.⁶
- b. You must have given the employer prior oral or written *notice*.⁷ You do not need the employer's permission, and the employer does not get a veto on your right to absent yourself from your job for uniformed service.⁸
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that you have performed with respect to the employer relationship for which you seek reemployment.⁹
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.¹⁰
- e. After release from the period of service, you must be timely in reporting back to work or applying for reemployment.¹¹

If you meet these five simple conditions, and it will be easy for you to meet them once you understand them, you have the right to prompt reinstatement in the civilian job you left for service and you are entitled to be treated (for seniority and pension purposes after your return to work) as if you had been continuously employed in the civilian job during the entire time that you were away from work for service.¹²

USERRA protects your right to be absent from your civilian job for military service not only for the days when you are performing service but also the days when you are traveling to and returning

voluntary service can be exempted under certain circumstances. Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit and the exemptions from the limit.

⁶ 38 U.S.C. 4303(13).

⁷ 38 U.S.C. 4312(a).

⁸ 20 C.F.R. 1002.87. See also Law Review 15030 (March 2015).

⁹ 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

¹⁰ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious criminal misconduct) and other-than-honorable administrative discharges. Ordinarily, you will not be discharged at the end of a period of military duty or training. You will simply leave active duty and revert to the status of a traditional reservist.

¹¹ After a period of training or service lasting fewer than 31 continuous days, you must report back to work 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 you arrive at your residence. 38 U.S.C. 4312(e)(1)(A). After a period of service lasting 31 to 180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service lasting 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

¹² 38 U.S.C. 4313(a), 4316(a), 4318.

from your military duty. USERRA also protects your right to reasonable rest time, on the front end and the back end, so that you will be fit for duty while performing the duty and when you are back at the civilian job.

First, let us discuss the front end. As I understand your situation, your “drill weekend” last for four full days, from early Friday morning to late Monday afternoon. If you were to work all day on Thursday and then drive all night for the 400 miles to the military training site, you would be exhausted at the start of the training early Friday morning. You would get little out of the training, and you would be a danger to yourself and others.

Section 4331 of USERRA¹³ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, DOL published draft USERRA regulations in the *Federal Register*, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* in December 2005. The regulations are now codified in title 20 of the Code of Federal Regulations (C.F.R.). The pertinent subsection is as follows:

Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

- (a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.¹⁴

This provision means that you can absent yourself from your civilian job (unpaid but job protected) on Thursday, so that you can drive the 400 miles to the drill site and have a reasonable night of sleep Thursday night and be fit for duty when the drill weekend starts Friday morning.

Now, let’s talk about the back end. After a period of service lasting fewer than 31 continuous days, you are required to report for work at the start of the first regularly scheduled work period on the

¹³ 38 U.S.C. 4331.

¹⁴ 20 C.F.R. 102.74(a) (bold question in original).

first calendar day after the completion of the period of service, the time reasonably required for *safe* transportation home, plus eight hours for rest after arriving home.¹⁵ It would not be safe for you to try to drive home Monday night after having performed strenuous military duty all day. You can drive home Tuesday, and the 400-mile drive will likely take all day. You can have eight hours of rest Tuesday night and return to work fit for duty on Wednesday morning.

Trying to drive, to perform military duty, or to work at one's civilian job with little or no rest is dangerous to the individual Reserve Component service member and to others.¹⁶

Q: Last winter, when I completed my drill weekend late one Monday afternoon, an ice storm was just starting. The highways were closed Tuesday and Wednesday. I was finally able to drive home Thursday, and I reported back to work early Friday morning. What does USERRA provide for a situation like this?

A: If reporting back to work within the deadline set forth above is “impossible or unreasonable through no fault of the” service member, he or she must report back to work “as soon as possible” thereafter.¹⁷

Q: I earn two weeks (ten work days) of vacation per year in my civilian job and seldom use vacation. More than once, I have lost vacation days to my employer's “use it or lose it” rule. Does USERRA give me the right to use vacation days for my military duty?

A: The pertinent section of USERRA is as follows: “

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.¹⁸

If you want to use your vacation days for military service to get both civilian and military pay for the same day, USERRA gives you the right to do that. It is unlawful for the employer to make you use your vacation days that way. Under USERRA, you have the right to unpaid-but-job-protected military leave as a matter of federal law, state law and employer policy to the contrary notwithstanding.

¹⁵ 38 U.S.C. 4312(e)(1)(A).

¹⁶ See *Gordon v. Wawa Food Markets*, 388 F.3d 78 (3d Cir. 2004). I discuss that case in detail in Law Review 156 (January 2005).

¹⁷ 38 U.S.C. 4312(e)(1)(A)(ii).

¹⁸ 38 U.S.C. 4316(d).

Q: My supervisor told me that I have the right to two weeks of vacation per year but must request his permission to use my vacation at any specific time, and that he will not permit me to use my vacation to magnify my “play soldier days.” Is my supervisor correct?

A: No, your supervisor is wrong. USERRA is a federal statute, and it overrides the general rule that an employee needs the employer’s permission to take a vacation day on a specific day.

Q: What is the relationship between USERRA and state law?

A: Under section 4302 of USERRA, this federal law is a floor and not a ceiling on your rights as a member of a Reserve Component of the armed forces. Section 4302 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.¹⁹

Also pertinent is the “Supremacy Clause” of the United States Constitution:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.²⁰

Like many state and local officials in your part of the country, your supervisor needs to be reminded that a bloody dispute about the supremacy of federal law over state law was resolved more than 150 years ago, and General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

¹⁹ 38 U.S.C. 4302.

²⁰ United States Constitution, Article VI, clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.