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Relationship between USERRA and State Law and Union Agreements

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Q: I am a Sergeant in the California Army National Guard and a member of the Reserve Organization of America (ROA).³ On the civilian side, I am a public-school teacher in

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 (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. 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 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

California. I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Together with my union, I have had detailed discussions with the personnel department of the school district concerning my right to be away from my teaching job for training and service in the Army National Guard. The discussions have focused on the California Education Code and the collective bargaining agreement (CBA) between my union and the school district. Nobody has brought up USERRA. What is the relationship between USERRA, state laws, and CBAs?

A: USERRA is a floor and not a ceiling on the rights of those who are serving or have served our country in uniform. The CBA and the state law can give you *greater or additional rights*, over and above USERRA, but state laws and CBAs cannot take away rights conferred by USERRA, nor can they impose additional prerequisites on the exercise of USERRA rights. USERRA’s second section 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.⁴

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the VRRA, the Supreme Court held: “No practice of employers *or agreement between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act.”⁵ Section 4302 of USERRA codifies this doctrine—that the agreement between the employer and the union can give the service member or veteran greater or additional rights but

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 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 38 U.S.C. 4302.

⁵ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (emphasis supplied).

cannot take away rights granted by Congress and cannot impose additional prerequisites upon the exercise of rights granted by Congress.

In our federal system of government, a federal statute like USERRA trumps a conflicting state statute or even a state constitution. The United States Constitution provides:

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.⁶

Q: The school district has told me that it will permit me to take two weeks off work for my National Guard annual training *only* if I agree to assist the substitute teacher in preparing lesson plans and agree to take her telephone calls during school hours to answer her questions. Can the school district put that condition upon my right to take military leave?

A: No. That amounts to an *additional prerequisite*, beyond the prerequisites that Congress established when it enacted USERRA. Section 4302(b) makes clear that an employer (federal, state, local, or private sector) cannot put additional prerequisites on the exercise of USERRA rights.

Moreover, you do not need the employer's *permission* to absent yourself from work to perform uniformed service—you are only required to give the employer *notice* that you will be leaving the job to perform service. The Department of Labor (DOL) USERRA regulation provides:

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.⁷

When you are away from your civilian job for military training or service, you should be devoting your full time and attention to your military duties, not to the requirements of your civilian employer back home.⁸

Q: The school district's lawyer has insisted that granting me more military leave than state law provides would violate state law. What do you say about that?

⁶ United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

⁷ 20 C.F.R. 1002.87 (bold question in original).

⁸ Please see Law Review 134.

A: As I have explained above, Article VI, Clause 2 of the United States Constitution provides that a federal law like USERRA trumps a conflicting state law. Because the federal law (USERRA) requires the school district to grant you unpaid military leave essentially without limit, it does not matter that the state law purports to limit military leave. The school district's lawyer should be sent back to law school and required to retake Constitutional Law 101.

Under USERRA, you have an essentially unlimited right to time off from your civilian job to perform service in the uniformed services.⁹ USERRA provides:

In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.¹⁰

USERRA's legislative history explains the intent and effect of section 4312(h) as follows:

Section 4312(i) [later renumbered as 4312(h)] is a codification and amplification of the Supreme Court's ruling in *King v. St. Vincent's Hospital*, 112 S. Ct. 570 (1991), which held there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under former section 2024(d) of title 38. This new section makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) [the five-year limit] and the servicemember has complied with the requirements under sections 4312(a) [prior notice to the employer] and (e) [timely application for reemployment].¹¹

California can limit the amount of *paid* military leave that you receive, because USERRA does not require an employer to pay an employee for time not worked because of military service, but California cannot limit your unpaid but job-protected military leave under USERRA.

Q: What does California law provide about *paid* military leave? I have searched the California Education Code and have not found a provision.

A: The pertinent section is not in the California Education Code—it is in the California Government Code. Here is the pertinent section:

⁹ Military leave under USERRA is unpaid but job-protected.

¹⁰ 38 U.S.C. 4312(h).

¹¹ House Committee Report, April 28, 1993, H.R. Rep. 103-65, Part 1, reprinted in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on pages 716-17 of the 2018 edition of the *Manual*.

An employee who is granted a short-term military leave of absence for active military duty, *but not for inactive duty*, including, but not limited to, scheduled reserve drill periods, and who for a period of not less than one year immediately prior to the effective date of active duty has had continuous state service as defined by rule that is not broken by a permanent separation, or who has had continuous state service immediately prior to the effective date of active duty not broken by a permanent separation and sufficient recognized military service that need not be contiguous to equal one year shall be entitled to *receive his or her salary or compensation for the first 30 calendar days of active duty served during the absence*.

An employee who is granted emergency military leave under Section 19773, shall receive his or her salary or compensation as a state employee while going to, engaging in, and returning from the duty. The employee shall not receive his or her salary or compensation for more than 30 days each time he or she is granted the emergency military leave.¹²

Section 19775.1 applies to the State of California and its political subdivisions, *including school districts*. If you have worked for the State of California or a political subdivision for at least a year, you are entitled to 30 days per year of *paid* military leave. You can use that paid leave for active duty or active duty for training, *but not for inactive duty training (drills)*.

When you have exhausted your entitlement to 30 days of paid military leave under state law, you then can use your essentially unlimited¹³ federal right to unpaid but job-protected military leave. The DOL USERRA regulation provides:

If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. *The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.*¹⁴

Q: Why does California law deny paid military leave for inactive duty training?

¹² California Government Code, section 19775.1 (emphasis supplied). I invite the reader's attention to the "state leave laws" section at www.roa.org/lawcenter. You will find, for each state, an article about the state laws that grant to state and local government employees the right to limited periods of paid military leave.

¹³ Your right to unpaid but job-protected military leave under USERRA is limited only by the five-year limit set forth in section 4312(c), 38 U.S.C. 4312(c). Most of the duty that you perform as a National Guard member does not count toward exhausting your five-year limit. Please see Law Review 16043 (May 2016).

¹⁴ 20 C.F.R. 1002.7(d) (emphasis supplied).

A: The rationale for that exclusion is obscure. Perhaps the idea was that inactive duty training (drill weekends) was traditionally conducted on Saturday and Sunday, and most public sector employees (police officers and firefighters excluded) do not work on weekends. Although you do not get paid military leave for inactive duty training under section 19775.1, you do get unpaid but job-protected military leave under USERRA. Inactive duty training is included in USERRA's definition of "service in the uniformed services."¹⁵ And inactive duty training can be held on any day of the week.

Q: **Mary Jones is a teacher with me, at the same public school. She also serves with me in the same Army National Guard unit. She only started her teaching career in August 2018, and she has not previously worked for the State of California or a political subdivision (county, city, etc.). Is she entitled to paid military leave?**

A: Mary is not entitled to paid military leave under section 19775.1 because she does not yet meet the requirement of having worked for at least one year. She is entitled to unpaid but job-protected military leave under USERRA.

Q: **As a member of the California Army National Guard, I routinely perform training duty (annual training, drill weekends, etc.) under title 32 of the United States Code. I am also subject to involuntary call-up to federal active duty under title 10, or I can volunteer. I am also subject to being called to *state active duty* by the Governor of California—called by the Governor, under state authority, paid with state funds, for state emergencies. In the summer of 2017 and again in the summer of 2018, I was called to state active duty to fight wildfires in both northern and southern California. How does USERRA apply to title 10 duty, title 32 duty, and state active duty?**

A: USERRA protects your civilian job (federal, state, local, or private sector) when you are away from that job for voluntary or involuntary active duty or training duty under title 10 or title 32 of the United States Code.¹⁶ USERRA does not apply to state active duty.

When you are away from your civilian job for state active duty, your right to reemployment in your civilian job is protected by California law.¹⁷

¹⁵ 38 U.S.C. 4303(13).

¹⁶ 38 U.S.C. 4303(13) and (16).

¹⁷ California Military and Veterans Code section 395.06. This provision applies to the State of California, its political subdivisions, and private employers in California. It applies to members of the California National Guard and to members of the National Guard of other states who hold civilian jobs in California. I invite the reader's attention to the "state leave laws" section at www.roa.org/lawcenter. You will find for each state an article about the state laws that protect the civilian jobs of National Guard members on state active duty.