

How Much Notice Must I Give my Employer?

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

[Update on Sam Wright](#)

1.3.1.1—Left job for service and gave prior notice

Q: I am a Gunnery Sergeant in the Marine Corps Reserve and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I am a teacher, working for a public- school district.

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. 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 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.

I have applied for a two-year voluntary recall to active duty, to start on 10/1/2019 (the first day of Fiscal Year 2020). It is likely that I will be selected for this opportunity, but that is not certain. I did not tell the employer that I had applied, and I have kept the fact of my application a “close hold” secret. I fear that if the employer learns of my application, I will not be offered a position for the 2019-20 school year. Also, I want to work for the first month of the 2019-20 year, before I report for deployment, because missing out on that month of pay would cause me financial hardship.

How much notice am I required to give my employer? How do you suggest that I handle this situation?

A: As a condition on the right to reemployment, USERRA requires that “the person [who is to perform uniformed service] (or an appropriate officer of the uniformed service in which such service is to be performed)⁴ has given advance written or verbal notice of such service to the person’s employer.”⁵ The law does not say how much notice the service member must provide, only saying that it must be advance (given before leaving the job for service).

For many years, in my speeches and articles about reemployment rights, I have suggested that the service member should give his or her civilian employer as much advance notice as possible, but don’t get your employer spun up about a mere *possibility*.⁶ Don’t tell the employer that you have applied for a return to active duty or that it is possible that you may be called to active duty. Wait until both the fact of return to active duty and the report date are reasonably certain, and then give both oral and written notice.

Under section 4312(f) of USERRA,⁷ you are required, upon the employer’s request, to provide certain documentation to the employer *when you apply for reemployment, after release from the period of service*. You are not required to provide documentation (like a copy of your military orders) when you give the employer advance notice of an upcoming period of service. However, if you have documentation, I strongly suggest that you provide a copy to the employer. I suggest that you go out of your way to remain on good terms with the employer even if you think that it is unlikely that you will want to return to that employer after release from the upcoming period of service.⁸

⁴ I have long suggested that each reserve component should undertake to notify civilian employers when members of the component are going on active duty voluntarily or involuntarily. Please see Law Review 14009 (January 2014). My suggestion has not been implemented by any reserve component. Accordingly, I strongly suggest that you not depend upon your component to give the notice for you. Give the notice yourself, in writing, and retain a copy of the notice for yourself. If possible, give the notice by certified mail and retain the Postal Service evidence that the notice was transmitted and received.

⁵ 38 U.S.C. 4312(a)(1).

⁶ Please see Law Review 13083 (June 2013).

⁷ 38 U.S.C. 4312(f).

⁸ Please see Law Review 16005 (January 2016).