

## LAW REVIEW<sup>1</sup> 19095

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### Your Civilian Employer Cannot Make You Quit the Army Reserve, but the Army Reserve May Screen you out Because you Are a Key Employee.

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

[About Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.8—Relationship between USERRA and other laws/policies

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

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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 1900 “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 1700 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 43 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 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

I was particularly interested in Law Review 18052 (June 2018) and Law Review 10044 (August 2010). In both articles you wrote that it is unlawful for a federal agency, as the civilian employer, to force a Reserve or National Guard service member to quit the Reserve Component or to go to an inactive status.<sup>4</sup> I have been a federal civilian employee for five years. Recently, I left a job at the Department of the Interior to take a civilian job for the Department of the Army, and I was promoted from GS-11 to GS-12. My second-level supervisor in my civilian job is an active duty Colonel. He reported to the Army Reserve that I hold a “key employee” position and that I should be transferred to a “standby” status in the Army Reserve. The Army Reserve saluted and complied.

Now, I cannot be mobilized, I cannot volunteer for active duty, and I cannot even perform weekend drills or annual training. The only way that I can earn Army Reserve retirement points is by doing correspondence. I am concerned that I won’t be able to earn a “good year” toward the 20 good years I need to earn for a Reserve Component retirement benefit. If I had known that this would be the result, I would not have applied for the Department of the Army position. It would have been better to remain at the Department of the Interior as a GS-11 than to take a GS-12 job at the Army and lose my right to participate in the Army Reserve.

**What is the difference between forcing me to quit the Army Reserve and persuading the Army Reserve to screen me out?**

**A:** I acknowledge that from your point of view there is very little difference between the two outcomes, but legally there is a big difference. USERRA governs your relationship with your civilian employer. USERRA does not govern the relationship between you and the uniformed service of which you are a member. If the Department of the Army, as your civilian employer, were to force you out of the Army Reserve, that would be a violation of USERRA. But if the Army Reserve screens you out of active participation, USERRA is not implicated.

The principal mission of the Army, the other services, and the Department of Defense (DOD) is to prepare for, deter, and prevail over challenges to our vital national interests. The Army and DOD need to anticipate and prepare for the full spectrum of necessary military operations, from normal peacetime operations to total war, along the lines of World War II. Military

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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 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> In both articles, you cited a 2009 decision of the Merit Systems Protection Board (MSPB), *Baker v. Department of Homeland Security*, 2009 MSPB 83.

operations require many things, but the long pole in the tent will likely be personnel. As our nation transitions from peacetime operations to a war footing, there will be a greatly increased need for *trained personnel* among civilian employees, active duty service members, Reserve and National Guard service members and military retirees called to the colors, and maybe even draftees.<sup>5</sup>

In planning for war, the Army and the other services need to plan for filling personnel needs—coming up with feasible plans to recruit or otherwise obtain and train the necessary quantity and quality of personnel who can accomplish all the necessary tasks and fill all the necessary billets. We are not talking just about cannon fodder but about men and women who can accomplish tasks that require years of training and experience.

In making these plans, the Army needs to avoid double-counting. If the Army is counting on you in your Army Reserve capacity to fill one need and counting on you in your civilian Department of the Army capacity to fill a different need, that double counting is delusional and dangerous. You won't be able to fill both needs.

For this reason, the Army needs to identify Army Reserve and Army National Guard soldiers who hold civilian jobs for the Army, another service, DOD, or another federal department or agency which will be key to national defense in a wartime scenario. I have come to appreciate, better than I did previously, the necessity for the “key employee” program.

Title 10 of the United States Code requires continuous screening of the seven Reserve Components<sup>6</sup> to ensure that those who are paid to be ready and available will, to the maximum extent feasible, be available for service in emergencies. Here is the pertinent subsection of title 10:

- (a)** Under regulations to be prescribed by the President, the Secretary concerned shall provide a system of continuous screening of units and members of the Ready Reserve to ensure the following:
  - (1)** That there will be no significant attrition of those members or units during a mobilization.
  - (2)** That there is a proper balance of military skills.

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<sup>5</sup> Congress abolished the draft and established the All-Volunteer Military almost half a century ago, but young men turning 18 are still required to register with the Selective Service System. Congress would have to enact legislation to reinstate the draft, but draft registration is intended to expedite the process in the unlikely but not impossible event that a return to the draft might be necessitated by a total war scenario. Those who would be drafted would have no military training or experience and might have low morale and poor motivation.

<sup>6</sup> The seven Reserve Components are, in order of size, 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.

**(3)** *That except for those with military skills for which there is an overriding requirement, members having critical civilian skills are not retained in numbers beyond the need for those skills.*

**(4)** That with due regard to national security and military requirements, recognition will be given to participation in combat.

**(5)** That members whose mobilization in an emergency would result in an extreme personal or community hardship are not retained in the Ready Reserve.<sup>7</sup>

Here are links to the relevant DOD and Army regulations:

- <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/120007p.pdf>
- [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/ARN8113\\_AR600-8-111\\_FINAL.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN8113_AR600-8-111_FINAL.pdf)

**Q: Where does this leave me?**

**A:** I suggest that you go back to USAJOBS as soon as possible and look for positions that are not “key employee” positions, and preferably that are outside DOD. If you want to have an Army Reserve career and a simultaneous federal civilian career, you need to find a civilian job that is not a “key employee” position.

**Please join or support ROA**

This article is one of 1900-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are

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<sup>7</sup> 10 U.S.C. 10149(a) (emphasis supplied).

members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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