

## LAW REVIEW<sup>1</sup> 19103

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### Sorry, but I Don't Have a Magic Wand

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

[About Sam Wright](#)

#### 1.4—USERRA enforcement

**Q: I am a Sergeant in the California Army National Guard and a member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest several of your “Law Review”**

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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 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

**articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have also read your articles about California in your “state leave laws” section—about my rights under California law over and above USERRA.**

**I am a high school teacher, and I work for an intermediate sized school district in California. Frankly, your articles have been very informative but not helpful. I have printed copies of several of your articles and provided them to the personnel director of our school district, but she has refused to read them. I contacted the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and that organization dispatched a volunteer ombudsman (a retired National Guard Colonel) to explain USERRA to the personnel director, but she refused to meet with him. Help!**

**A:** Sorry, but I do not have a magic wand to wave and make employers comply with the law. To enforce your rights, I suggest you start by making a formal written USERRA complaint against the school district with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency is required to investigate your complaint.<sup>4</sup> DOL-VETS has subpoena authority.<sup>5</sup> DOL-VETS is expected to complete its investigation within 90 days after receiving your complaint.<sup>6</sup>

After completing its investigation, DOL-VETS is required to notify you of the results of its investigation.<sup>7</sup> If DOL-VETS has not resolved the complaint, you can request (in effect insist) that DOL-VETS refer your case file to the United States Department of Justice (DOJ).<sup>8</sup> If DOJ is satisfied that you are entitled to the benefits you seek, it can undertake to represent you and file suit, in your name, against the school district in the appropriate United States District Court.<sup>9</sup>

Within 60 days after receiving the referral from DOL-VETS, DOJ must decide whether it will represent you and notify you of its decision.<sup>10</sup> If DOJ declines your request for representation, you can file suit in your own name with your own lawyer.<sup>11</sup>

When DOL-VETS notifies you of the results of its investigation, you can decide not to request referral of your case file to DOJ. In that case, you can file suit in your own name with your own lawyer.<sup>12</sup> You can also bypass DOL-VETS altogether and file suit without first filing a complaint

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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> 38 U.S.C. 4322(d).

<sup>5</sup> 38 U.S.C. 4326.

<sup>6</sup> 38 U.S.C. 4322(f).

<sup>7</sup> 38 U.S.C. 4322(e).

<sup>8</sup> 38 U.S.C. 4323(a)(1).

<sup>9</sup> *Id.*

<sup>10</sup> 38 U.S.C. 4323(a)(2).

<sup>11</sup> 38 U.S.C. 4323(a)(3)(C).

<sup>12</sup> 38 U.S.C. 4323(a)(3)(B).

with that agency.<sup>13</sup> If you proceed with private counsel and prevail, the court can order the employer to pay your attorney fees.<sup>14</sup>

You can also represent yourself in filing and prosecuting the case. I do not recommend that course of action. Abraham Lincoln said: “A man who represents himself has a fool for a client.” And the law is so much more complicated today than it was during Lincoln’s lifetime.

Good luck and thank you for your service to our country in the Army National Guard and for your membership in ROA.

### **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 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.

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<sup>13</sup> 38 U.S.C. 4323(a)(3)(A).

<sup>14</sup> 38 U.S.C. 4323(h)(2).

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:

Reserve Officers Association  
1 Constitution Ave. NE  
Washington, DC 20002