

LAW REVIEW¹ 20030

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Right to Paid and Unpaid Military Leave for State and Local Government Employees in Massachusetts

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[About Sam Wright](#)

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Q: I am a Technical Sergeant (E-6) in the Massachusetts Air National Guard (ANG) and a member of the Reserve Organization of America (ROA).³ On the civilian side, I work for a town

¹ I invite the reader's attention to 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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1700 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 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.

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

government in Massachusetts. I have heard that the Uniformed Services Employment and Reemployment Rights Act (USERRA) requires my employer (the town government) to give me up to 40 days per fiscal year of *paid* military leave—paying me my full civilian salary for the days that I am away from work for uniformed service, up to 40 days per year, on top of my military compensation for those days. I have also heard that I get differential pay for days (beyond 40 per year) if my military pay is less than my regular civilian pay. Is that true?

A: No, that is not true. USERRA gives you the right to *unpaid but job-protected military leave* to perform “service in the uniformed services” as defined by USERRA. USERRA does not require an employer (federal, state, local, or private sector) to pay you for an hour, day, week, month, or year that you are away from work for service.

In more than 40 states, including Massachusetts, state law provides for *paid* military leave for state government employees who serve part-time in the National Guard or Reserve. In our “state leave laws” section you will find an article for each state about the state laws that provide for paid military leave for state and local government employees.

Some of these state laws also apply to employees of political subdivisions of the state (counties, cities, towns, school districts, etc.), but the Massachusetts law only applies to the state government. The state law in your state applies to counties, towns, and other local governments only if the county commissioners, the city council, or the inhabitants of the town at a town meeting have voted to “accept” the state law.⁴ Here is the text of the pertinent section of Massachusetts law:

- (a) An employee of the commonwealth [Massachusetts] in the service of the armed forces of the commonwealth or a reserve component of the armed forces of the United States shall be entitled to receive pay without loss of ordinary remuneration as a public employee during service in the uniformed services, annual training under section 60 or drills and parades under section 61, not exceeding 40 days in any federal fiscal year, and shall not lose any seniority or any accrued vacation leave, sick leave, personal leave, compensation time or earned overtime. For the purposes of this section, “uniformed services” shall have the same meaning as defined in section 13. For the purposes of this subsection, “day” shall mean any 24-hour period regardless of calendar day.**

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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁴ Annotated Laws of Massachusetts, Chapter 33, section 59(e).

(b) An employee of the commonwealth in the service of the armed forces of the commonwealth under sections 38, 40 or 41 shall be entitled to receive pay without loss of ordinary remuneration as a public employee and shall not lose any seniority or any accrued vacation leave, sick leave, personal leave, compensation time or earned overtime during the first 30 consecutive days of any mission. Thereafter, any such ordinary remuneration shall be reduced by any amount received either from the United States or the commonwealth as base pay for military service performed during the same pay period, and there shall be no loss of any seniority or any accrued vacation leave, sick leave, personal leave, compensation time or earned overtime. National guard duty performed under Title 32 of the United States Code shall not be deemed service in the armed forces of the commonwealth under sections 38, 40 or 41 for the purposes of this section.

(c) An employee of the commonwealth in the armed forces of the commonwealth performing duty under Titles 10 or 32 of the United States Code shall be paid the regular base salary as a public employee for each pay period of such military leave of absence, reduced by any amount received either from the United States or the commonwealth as base pay for military service performed during the same pay period, and shall not lose any seniority or any accrued vacation leave, sick leave, personal leave, compensation time or earned overtime.

(d) An employee of the commonwealth in a reserve component of the armed forces of the United States who is ordered to service for more than 30 consecutive days shall be paid the regular base salary as a public employee for each pay period of such military leave of absence, reduced by any amount received either from the United States or the commonwealth as base pay for military service performed during the same pay period. No such employee shall lose any seniority or accrued vacation leave, sick leave, personal leave, compensation time or earned overtime.

(e) *An employee of a county, city or town which, by vote of its county commissioners, city council or inhabitants at a town meeting, has accepted this section or similar provisions of earlier laws, shall be entitled to the benefits and protections of this section or the benefits of the accepted earlier law.*

(f) For the purposes of this section, “base pay for military service” shall not include any housing, incentive, bonus, skills pay, allowance or other stipend or benefit paid to the employee for the employee’s military service.⁵

If your town has “accepted” Chapter 33, section 59, you are entitled to the same paid military leave that employees of the Commonwealth of Massachusetts enjoy, as set forth in that section. If your town has not adopted this state law, you are not entitled to any paid military leave. Of course, you are still entitled to *unpaid but job-protected military leave under USERRA*.

⁵ Annotated Laws of Massachusetts, Chapter 33, section 59 (emphasis supplied).

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

A: USERRA is a floor and not a ceiling on your rights. USERRA does not supersede or override a state law that gives you *greater or additional rights*, like the right to a limited period of *paid* military leave. USERRA supersedes state laws that purport to limit or override USERRA rights. Section 4302 of USERRA 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.⁶

Q: As a member of the Massachusetts National Guard, I must be away from my job frequently for duty and training under title 10 and title 32 of the United States Code. I am also subject to being called by the Governor of Massachusetts to *state active duty*—called by the Governor, under state authority, paid with state funds, for state emergencies like floods, riots, etc. If I must leave my civilian job for state active duty, is my right to reinstatement in the civilian job protected by USERRA? Or by state law in Massachusetts?

A: USERRA (the federal law) protects your right to reinstatement in your civilian job when you are away from the job for voluntary or involuntary duty or training under title 10 or title 32 of the United States Code. USERRA does not apply to state active duty.

In this situation, Massachusetts law protects your right to return to your civilian job. Here is the pertinent section:

Members of the armed forces of the commonwealth, including the state defense force or similar organization composed as permitted by law, the state staff or the armed forces of another state or territory who are employed within the commonwealth and ordered to active duty under this chapter, the appropriate authority of another state or territory, or Title 32 of the United States Code shall be entitled to all rights, protections, privileges and immunities afforded under the Uniformed Services Employment and Reemployment Rights Act, codified at 38 U.S.C. 4301 et seq.⁷

This section applies to the Commonwealth of Massachusetts, towns and other political subdivisions of the Commonwealth (including those that have not adopted Chapter 33, section 59), and private employers in Massachusetts.

⁶ 38 U.S.C. 4302.

⁷ Annotated Laws of Massachusetts, Chapter 33, section 13(b).

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This article is one of 1900-plus “Law Review” articles available at 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.

If you are eligible for ROA membership, please join. You can join on-line at 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
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