

LAW REVIEW¹ 20041

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If you Are Being Called to Active Duty, Don't Forget about USERRA

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[About Sam Wright](#)

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President Trump has authorized Secretary of Defense Mark Esper to call National Guard and Reserve personnel to active duty to address the COVID-19 emergency. Please see the linked article below.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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 1800 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.

If you are involuntarily recalled to active duty from a part-time status in the National Guard or Reserve, or if you volunteer, you will have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), *if you meet five simple conditions*. It is important that you meet these conditions and *document that you meet them*. You need to keep your civilian job behind you as an unburned bridge. Even if you think that it is unlikely that you will want to return to that job after you complete your upcoming period of service, you should make it a point to meet the conditions, just in case you change your mind.

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.³
- b. You must have given the employer prior oral or written notice. I suggest that you give the notice in writing, by certified mail or the e-mail equivalent. You should be prepared to *prove* that you gave prior notice, in case the employer tries to deny it.
- c. Your cumulative period or periods of uniformed service, relating to your employment relationship with that employer, must not have exceeded five years. Under section 4312(c) of USERRA,⁴ there are nine exemptions from the five-year limit. If you are called to active duty involuntarily, the period of involuntary service will not count toward your five-year limit. If you volunteer, the period of service may be exempt, depending on the circumstances. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military. If you receive a punitive discharge (by court martial) or an administrative discharge called "OTH" (other than honorable), you will not have the right to reemployment.⁵
- e. After release from the period of service, you must be *timely* in reporting back to work or applying for reemployment. If your period of service lasts for fewer than 31 days, you must report for work at your regular place of employment at the start of the first full regularly scheduled work period after you are released from the period of service and after the time reasonably required for *safe transportation* from the place of service to your residence, plus eight hours for rest.⁶ If the period of service lasted for more than 30 days but less than 180 days, you must *apply for reemployment* with your pre-service

³ For purposes of USERRA, the uniformed services are the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service. 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic & Atmospheric Administration is a uniformed service for other purposes, but not for purposes of USERRA. Please see Law Review 15002 (January 2015).

⁴ 38 U.S.C. 4312(c).

⁵ 38 U.S.C. 4304.

⁶ 38 U.S.C. 4312(e)(1)(A)(i).

employer within 14 days after your release from the period of service.⁷ If the period of service lasted for 181 days or more, you have 90 days to apply for reemployment.⁸ If at the time you are released from active duty you are *hospitalized or convalescing* from an injury or illness sustained during the active duty period, the deadline for you to report back to work or apply for reemployment is extended during the time that you are hospitalized or convalescing, and the period of hospitalization or convalescence can last up to two years.⁹

If you meet the five conditions, you are entitled to *prompt* reinstatement to your job, generally within two weeks after you apply for reemployment.¹⁰ You are also entitled to return to the job that you *would have attained if you had been continuously employed*, perhaps a better job than the one you left.¹¹ You should return to work with the seniority that you had at the time you left plus the additional seniority that you would have attained if you had been continuously employed.¹² You are also entitled to be treated, upon reemployment, as if you had been continuously employed in the civilian job for purposes of your civilian pension entitlements.¹³

Even if you have been furloughed or laid off by your civilian employer, you should give prior notice and report back or apply for reemployment within the deadline after you are released from the period of service. If you have been furloughed or laid off, you are still considered to be an employee of that employer, for as long as there is some possibility that you will be called back to work when business conditions improve, but you still must meet the five USERRA conditions, including prior notice and a timely application for reemployment.

If you leave a furlough or layoff status to go on active duty, voluntarily or involuntarily, and if you meet the other USERRA conditions, you will be entitled to reemployment *in an active job* if other furloughed or laid off employees were called back to work during your period of uniformed service. Otherwise, you will at least be entitled to reinstatement on the furlough or layoff list. It is worthwhile to give the employer prior notice, to protect your rights.

Please go to www.roa.org/lawcenter. You will find more than 1400 “Law Review” articles about USERRA and more than 600 articles about the Servicemembers Civil Relief Act, 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

⁷ 38 U.S.C. 4312(e)(1)(C).

⁸ 38 U.S.C. 4312(e)(1)(D).

⁹ 38 U.S.C. 4312(e)(2)(A).

¹⁰ 20 C.F.R. 1002.181.

¹¹ 38 U.S.C. 4313(a)(2)(A).

¹² 38 U.S.C. 4316(a).

¹³ 38 U.S.C. 4318.

country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics.

In the Department of Defense, there is an organization called “Employer Support of the Guard and Reserve” (ESGR), and that organization’s mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. ESGR has volunteer ombudsmen all over the country, and they can help you by explaining USERRA to your employer and imploring the employer to comply. If you need assistance, or if you have questions about your rights as an employee or your obligations as an employer, you can call ESGR at **800-336-4590** or visit the ESGR website at <https://esgr.mil>.

I also invite your attention to the website of the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), www.dol.gov/vets. DOL-VETS is responsible for enforcing USERRA against federal, state, local, and private sector employers.¹⁴

https://americantruthtoday.com/politics/2020/03/28/trump-authorized-defense-secretary-mark-esper-to-order-national-guard-and-reservists-to-active-duty/?utm_source=sprklst&utm_campaign=americantruth-trump-03_28-mid

Please join or support ROA

This article is one of 2000-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.

¹⁴ 38 U.S.C. 4322.

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:

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