

LAW REVIEW¹ 20057

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You Have the *Right To Use Vacation Days or other Paid Time Off for Your Military Duty, without Regard to State Law, the Collective Bargaining Agreement, or the Employer's Policy*

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[About Sam Wright](#)

1.1.1.7—USERRA applies to state and local governments

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1.8—Relationship between USERRA and other laws/policies

2.0—Paid military leave for government employees who are Reserve Component members

Q: I am a second-class petty officer (E-5) in the Coast Guard Reserve and a member of the Reserve Organization of America (ROA).³ On the civilian side, I am a local police officer. I have

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 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 44 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 38 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

read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In Law Review 20040 (April 2020), you wrote that a reservist or National Guard member is entitled to time off from his or her civilian job not only for the actual time of the drill weekend (typically early Saturday morning until late Sunday afternoon) but also for the time required to travel from the service member’s residence to the place of military duty *and arrive in a reasonably rested, fit-for-duty condition*. Thus, the service member cannot be required to work all night at the civilian job and then travel to the drill location with no sleep. Under those conditions, the member would not be fit for duty for the Saturday drills.

As a police officer, I have a complicated work schedule that varies from week to week. Three or four times per year, I am scheduled to work for the department in a shift that starts at 10 pm Friday and ends at 6 am Saturday on my scheduled drill weekend. That means that I get no sleep Friday night before my Coast Guard Reserve drill starts at 7:30 am Saturday morning.

Three years ago, I raised this issue with the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR). An ESGR volunteer explained to the police chief that I am entitled to time off from my civilian job to travel to my drill and arrive in a fit-for-duty condition, and that means that I must be excused from the Friday night police department shift on my drill weekend. The police chief agreed to start letting me off from my Friday night shifts on drill weekends.

The problem is that I lose money when my drill weekend conflicts with my police department schedule, because the police department only grants me military leave *without pay*. To avoid losing money, I have been using vacation days to get around the Friday night shift on my drill weekend. Our long-time police chief let me do that, but he retired recently. The new police chief established a “new policy” that precludes me from using vacation days for days when I need to be away from work for my Coast Guard Reserve drills, including travel and rest time.

Does USERRA give me the *right* to use a vacation day in this way? Or is this just a matter of police department policy that can be changed at the police chief’s will?

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

A: Under section 4316(d) of USERRA, you have the *right* to use a vacation day in this way, during a period of uniformed service (including a drill weekend). Section 4316(d) provides:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services *shall be permitted*, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.⁴

Section 4316(d) means exactly what it says. When you request to use a vacation or annual leave day for your Coast Guard duty, your request *shall* (*must*) be granted by the police department.

Q: Under the collective bargaining agreement (CBA) between the union of which I am a member and the police department, I have the right to use annual leave that I have earned, but not necessarily to use an annual leave day at a time of my choosing. The police chief has the right to refuse to let me use an annual leave day on a day of my choice if several other police officers are already off work on that day.

The new police chief insists that he has the right, under the CBA, to refuse to grant me a day off on the Friday night before my drill weekend. What do you say about that?

A: When you ask for a day off to go fishing with your father and your son, the police chief has the right to refuse to grant you the day off, on a workload basis. But when you ask to use an annual leave day for your Coast Guard duties, the police department *must* grant your request. The federal law (USERRA) trumps the CBA.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress first enacted the reemployment statute in 1940. In its first case construing the 1940 statute, the Supreme Court held: “No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act.”⁵

Q: What is the relationship between USERRA and the CBA?

A: USERRA is a *floor and not a ceiling* on your employment rights as a reservist. 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

⁴ 38 U.S.C. 4316(d) (emphasis supplied).

⁵ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (emphasis supplied). The citation means that you can find this Supreme Court decision in Volume 328 of *United States Reports* and the decision starts on page 275. The specific language quoted can be found on page 285.

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

The CBA can give you *greater or additional rights, over and above USERRA, but the CBA cannot take away your USERRA rights.*

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

A: The same floor-not-ceiling relationship applies. State law can give you greater or additional rights but cannot take away your USERRA rights.

More than 40 states, including your state, have state laws that give state and local government employees a limited right to *paid* military leave for service in the National Guard or Reserve. I invite the reader's attention to the "state leave laws" section of the "Law Review Library" available at www.roa.org/lawcenter. You will find 54 articles about the 54 state and territorial laws on the right to paid time off for state, territorial, and local government employees who serve in the National Guard or Reserve.

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

⁶ 38 U.S.C. 4302.

those rights. We provide information to service members, without regard to whether they are members of ROA, 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
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