

LAW REVIEW¹ 21033
May 2021
(Updated November, 2021)

DOL USERRA Regulations Need To Be Updated

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[About Sam Wright](#)

1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on 10/13/1994.³ USERRA is codified in title 38 of the United States Code at sections 4301 through 4335.⁴ USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940.

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 (VRRRA—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 VRRRA 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 VRRRA 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 Public Law 103-353, 108 Stat. 3150.

⁴ 38 U.S.C. 4301-35.

Section 4331 of USERRA gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to State and local governments and private employers.⁵ After considering the matter for 11 years, DOL published comprehensive and well-written regulations in the *Federal Register* in December 2005.⁶ The DOL USERRA regulations are codified in title 20 of the Code of Federal Regulations, Part 1002.⁷

Those regulations were excellent in 2005, but some provisions are now inaccurate because of statutory amendments in the last 15 years. In this article, I will outline the provisions of the DOL USERRA regulations that need to be amended.

Section 4303 of USERRA⁸ defines 16 terms used in this law. Those statutory definitions are quoted verbatim in section 1002.5 of the DOL USERRA regulations, as follows:

What definitions apply to USERRA?

(a) Attorney General means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under USERRA.

(b) Benefit, benefit of employment, or rights and benefits means any advantage, profit, privilege, gain, status, account, or interest (*other than wages or salary for work performed*) that accrues to the employee because of an employment contract, employment agreement, or employer policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, or employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or the location of employment.

(c) Employee means any person employed by an employer. The term also includes any person who is a citizen, national or permanent resident alien of the United States who is employed in a workplace in a foreign country by an employer that is an entity incorporated or organized in the United States, or that is controlled by an entity organized in the United States. "Employee" includes the former employees of an employer.

(d)

⁵ "The Secretary [of Labor] (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers." 38 U.S.C. 4331(a).

⁶ 70 FR 75292 (Dec. 19, 2005).

⁷ 20 C.F.R. Part 1002.

⁸ 38 U.S.C. 4303.

(1) Employer, except as provided in paragraphs (d)(2) and (3) of this section, means any person, institution, organization, or other entity that pays salary or wages for work performed, or that has control over employment opportunities, including --

(i) A person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities, except in the case that such entity has been delegated functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency;

(ii) The Federal Government;

(iii) A State;

(iv) Any successor in interest to a person, institution, organization, or other entity referred to in this definition; and,

(v) A person, institution, organization, or other entity that has denied initial employment in violation of 38 U.S.C. 4311, USERRA's anti-discrimination and anti-retaliation provisions.

(2) In the case of a National Guard technician employed under 32 U.S.C. 709, the term "employer" means the adjutant general of the State in which the technician is employed.

(3) An employee pension benefit plan as described in section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA)(29 U.S.C. 1002(2)) is considered an employer for an individual that it does not actually employ only with respect to the obligation to provide pension benefits.

(e) Health plan means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(f) National Disaster Medical System (NDMS) is an agency within the Federal Emergency Management Agency, Department of Homeland Security, established by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107-188. The NDMS provides medical-related assistance to respond to the needs of victims of public health emergencies. Participants in the NDMS are volunteers who serve as intermittent Federal employees when activated. For purposes of USERRA coverage only, these persons are treated as members of the uniformed services when they are activated to provide assistance in response to a public health emergency or to be present for a short period of time when there is a risk of a public health emergency, or when they are participating in authorized training. See 42 U.S.C. 300hh-11(e).

(g) Notice, when the employee is required to give advance notice of service, means any written or verbal notification of an obligation or intention to perform service in the

uniformed services provided to an employer by the employee who will perform such service, or by the uniformed service in which the service is to be performed.

(h) Qualified, with respect to an employment position, means having the ability to perform the essential tasks of the position.

(i) Reasonable efforts, in the case of actions required of an employer, means actions, including training provided by an employer that do not place an undue hardship on the employer.

(j) Secretary means the Secretary of Labor or any person designated by the Secretary of Labor to carry out an activity under USERRA and these regulations, unless a different office is expressly indicated in the regulation.

(k) Seniority means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.

(l) Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107-188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System (NDMS) or as a participant in an authorized training program is deemed "service in the uniformed services." 42 U.S.C. 300hh-11(e)(3).

(m) State means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof); however, for purposes of enforcement of rights under 38 U.S.C. 4323, a political subdivision of a State is a private employer.

(n) Undue hardship, in the case of actions taken by an employer, means an action requiring significant difficulty or expense, when considered in light of --

(1) The nature and cost of the action needed under USERRA and these regulations;

(2) The overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(3) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and,

(4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

(o) Uniformed services means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the NDMS when federally activated or attending authorized training in support of their Federal mission is deemed "service in the uniformed services," although such appointee is not a member of the "uniformed services" as defined by USERRA.⁹

Section 1002.5(b) should be amended to read as follows:

The term "benefit", "benefit of employment", or "rights and benefits" means *the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed)* that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.¹⁰

The first italicized clause above ("*the terms, conditions, or privileges of employment, including*") was added to USERRA by amendment in 2011.¹¹ The purpose of this 2011 amendment was to overrule an unfavorable decision of the United States Court of Appeals for the 5th Circuit.¹²

⁹ 20 C.F.R. 1002.5 (bold question in original). In this quotation of the regulation, I have marked in ***bold and italics*** the words that need to be amended.

¹⁰ This is a direct quote from the *current version* of 38 U.S.C. 4303(2), the definition of "benefit of employment."

¹¹ Public Law 112-56, 125 Stat. 729 (Nov. 21, 2011).

¹² *Carder v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011). The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. Please see Law Review 1189 (October 2011) for a detailed discussion of this issue.

The second italicized clause above (“*including wages or salary for work performed*”) was amended in 2010.¹³ This clause formerly read as follows: “(except for salary or wages for work performed).” The purpose of this 2010 amendment was to overrule an unfavorable decision of the United States Court of Appeals for the 8th Circuit.¹⁴

In section 1002.5(d), the following material needs to be added at the end of that subsection:

(i) Whether the term “successor in interest” applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:

(I) Substantial continuity of business operations.

(II) Use of the same or similar facilities.

(III) Continuity of work force.

(IV) Similarity of jobs and working conditions.

(V) Similarity of supervisory personnel.

(VI) Similarity of machinery, equipment, and production methods.

(VII) Similarity of products or services.¹⁵

This language was added to section 4303(4) by amendment in 2010.¹⁶ The purpose of the amendment was to overrule an unfavorable decision of the United States Court of Appeals for the 11th Circuit.¹⁷

Section 1002.5(l), the definition of “service in the uniformed services,” should be amended to read as follows:

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and

¹³ Public Law 111-275, 124 Stat. 2887 (Oct. 13, 2010).

¹⁴ *Gagnon v. Sprint Corp.*, 284 F.3d 839, 853 (8th Cir. 2002). The 8th Circuit is the federal appellate court that sits in St. Louis and hears appeals from district courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. Please see Law Review 18012 (January 2018) for a detailed discussion of this issue.

¹⁵ 38 U.S.C. 4303(4).

¹⁶ Public Law 111-275, 124 Stat. 2887 (Oct. 13, 2010).

¹⁷ *Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231 (11th Cir. 2005). The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia. See also *Brown v. Lincoln Property Co.*, 354 F. Supp. 3d 1276 (N.D. Fla. 2019). I discuss this issue in detail in Law Review 21013 (March 2021).

includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, *State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.), and State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170)*, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, *a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 USCS § 5165f]*, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.¹⁸

The definition of “uniformed services” in section 1002.5(o) should be amended to read as follows:

The term “uniformed services” means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, *System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 USCS § 5165f]*, and any other category of persons designated by the President in time of war or national emergency.¹⁹

Section 1002.6 of the DOL USERRA regulations reads as follows:

What types of service in the uniformed services are covered by USERRA?

USERRA's definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active

¹⁸ 38 U.S.C. 4303(13). The italicized reference to the National Urban Search and Rescue Response System was added by amendment in 2016. Public Law 114-326, 130 Stat. 1972-73 (Dec. 16, 2016). Raymond Shin and I discuss this amendment in detail in Law Review 17011 (February 2017). The italicized reference to State active duty was added by section 7004 of the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Public Law 116-315. Kathryn Piscitelli and I discuss this statutory amendment in Law Review 21002 (January 2021).

¹⁹ 38 U.S.C. 4303(16). The italicized reference to the National Urban Search and Rescue Response System was added by amendment in 2016. Public Law 114-326, 130 Stat. 1972-73 (Dec. 16, 2016). Raymond Shin and I discuss this amendment in detail in Law Review 17011 (February 2017).

components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.²⁰

As discussed above, this section needs to be amended, adding a reference to the 2016 amendment covering the National Urban Search and Rescue Response System.

Section 1002.57 of the DOL USERRA regulations reads as follows:

Is all service as a member of the National Guard considered “service in the uniformed services?”

The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.

(b) *National Guard service under authority of State law is not protected by USERRA.* However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or these regulations.²¹

The statement that: “National Guard service under authority of State law is not protected by USERRA.” Is no longer correct. As is explained above, section 7004 of the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020²² amended the definition of “service in the uniformed services” and State active duty performed by National Guard members is now protected by USERRA under most circumstances.

Section 1002.62 of the DOL USERRA regulations reads as follows:

Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a “uniformed service” for some purposes, it is not included in USERRA’s definition of this term. Service in the Civil Air Patrol and the Coast Guard

²⁰ 20 C.F.R. 1002.6 (bold question in original).

²¹ 20 C.F.R. 1002.57 (bold question in original, emphasis by italics supplied).

²² Public Law 116-315.

Auxiliary similarly is not considered “service in the uniformed services” for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.²³

The statement that service as a commissioned officer of the NOAA Corps does not give rise to reemployment rights under USERRA is no longer correct.²⁴ On 12/23/2020, President Trump signed the NOAA Commissioned Officer Corps Amendments Act of 2020.²⁵ That Act amended USERRA’s definition of “uniformed services” and the NOAA Corps is now included in the definition.

Section 1002.103 of the DOL USERRA regulations reads as follows:

Are there any types of service in the uniformed services that an employee can perform that do not count against USERRA's five-year service limit?

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)

(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and,

(ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

²³ 20 C.F.R. 1002.62 (bold question in original).

²⁴ Section 1002.62 remains correct concerning the Civil Air Patrol and the Coast Guard Auxiliary.

²⁵ Public Law 116-259.

- (ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);
 - (iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);
 - (iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);
 - (v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);
 - (vi) *10 U.S.C. 12304a²⁶ (involuntary active duty for major domestic disaster);*
 - (vii) *10 U.S.C. 12304b²⁷ (involuntary active duty for preplanned missions in support of combatant commands);*
 - (viii) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);
 - (ix) 14 U.S.C. 2127 (involuntary active duty by retired Coast Guard officer);
 - (x) 14 U.S.C. 2128 (voluntary active duty by retired Coast Guard officer);
 - (xi) 14 U.S.C. 2308 (involuntary active duty by retired Coast Guard enlisted member);
 - (xii) 14 U.S.C. 2309 (voluntary active duty by retired Coast Guard enlisted member);
 - (xiii) 14 U.S.C. 2314 (involuntary retention of Coast Guard enlisted member on active duty); and
 - (xiv) 14 U.S.C. 3713 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).
- (5) Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
- (6) Service performed in a uniformed service if the employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;
- (7) Service performed in a uniformed service if the employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,
- (8) Service performed as a member of the National Guard if the employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.
- (b) Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.²⁸

²⁶ Please note that section 12304a should not be confused with section 12304(a). Section 12304(a) is subsection (a) of section 12304. Section 12304a is a separate section after section 12304 and before section 12305.

²⁷ Please note that section 12304b should not be confused with section 12304(b). Section 12304(b) is subsection (ab) of section 12304. Section 12304b is a separate section after section 12304 and before section 12305.

²⁸ 20 C.F.R. 1002.103. The new language that I propose is shown in *italics*.

What I propose to change and why

Involuntary service for domestic emergencies does not count toward exhausting an individual's five-year limit.

On 12/31/2011, President Barack Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2012.²⁹ Section 515(a)(1) of NDAA 2012 added a new provision for involuntary call-up of Air Force Reserve, Army Reserve, Navy Reserve, and Marine Corps Reserve members. That provision reads as follows:

(a) Authority. When a Governor requests Federal assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ([42 U.S.C. 5122](#))), the Secretary of Defense may, *without the consent of the member affected*, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request.

(b) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or any other law.

(c) Termination of duty. Whenever any unit or member of the reserve components is ordered to active duty under this section, the service of all units or members so ordered to active duty may be terminated by order of the Secretary of Defense or law.³⁰

The National Guard (Air and Army) is a hybrid federal-state organization. In their state status, National Guard members are subject to call by the Governor for state active duty (called by the Governor, under state authority, paid with state funds, for state emergencies like natural or man-made disasters). Disaster mitigation and recovery is the principal mission of the National Guard in its state status.

In recent years, there have been several major hurricanes and the COVID-19 pandemic that have swamped the capacity of the National Guard, even with interstate cooperation. Active duty soldiers, sailors, airmen, and Marines have been deployed to respond to major natural disasters,³¹ and Congress acted in 2011 to provide authority to call up reservists for such missions.

²⁹ Public Law 112-81, 125 Stat. 1394. The citation means that this was the 81st new Public Law enacted during the 112th Congress (2011-12). You can find this Public Law in Volume 125 of *Statutes at Large*, starting on page 1394.

³⁰ 10 U.S.C. 12304a (emphasis supplied). Do not refer to this section as 12304(a)—that is subsection (a) of section 12304. Section 12304a is a separate section that comes after section 12304 and before section 12305.

³¹ Coast Guard personnel, active and reserve, have always responded to natural disasters of a maritime nature, and lifesaving is one of the principal missions of the Coast Guard.

One of the five conditions for reemployment is that the person's cumulative period or periods of uniformed service, with respect to the employer relationship for which he or she seeks reemployment, must not have exceeded five years. Under section 4312(c) of USERRA,³² there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit.

Under section 4312(c)(4)(A), *involuntary* service is exempted from the limit. That subsection lists the sections of title 10 and title 14 (Coast Guard) that provide for involuntary call-up, and duty under those sections is exempted from the computation of the individual's five-year limit.

When Congress enacted section 12304a in 2011, providing for the involuntary call-up of reservists for domestic emergencies, Congress should have simultaneously amended section 4312(c)(4)(A) by adding section 12304a to the list of title 10 sections duty under which does not count toward the five-year limit, but that was not done. That oversight was corrected four years later when Congress enacted NDAA 2016.³³ Because involuntary service under 10 U.S.C. 12304a is now exempted from the computation of an individual's five-year limit, I propose that DOL amend 20 C.F.R. 1002.103 to add a reference to this form of duty being exempted from the five-year limit.

Involuntary active duty for preplanned deployments also does not count toward exhausting the individual's five-year limit.

Section 562 of the National Defense Authorization Act for Fiscal Year 2016³⁴ also amended section 4312(c) of USERRA³⁵ by adding section 12304b of title 10 to the list of title 10 sections duty under which does not count toward exhausting an individual's five-year limit. Accordingly, I propose to add section 12304b to 20 C.F.R. 1002.103.

The title 14 section numbers have changed.

The Coast Guard is an armed force, like the Army, Navy, Marine Corps, and Air Force.³⁶ But the Coast Guard is part of the Department of Homeland Security (DHS), not the Department of Defense (DOD). Title 14 of the United States Code governs the Coast Guard. Section 4312(c) of USERRA³⁷ mentions six title 14 sections, and duty under those sections, by Coast Guard retirees and reservists, is exempted from the computation of the five-year limit. Title 14 has been renumbered, and the title 14 sections mentioned in 38 U.S.C., 4312(c) and 20 C.F.R. 1002.103

³² 38 U.S.C. 4312(c).

³³ Public Law 114-92, 129 Stat. 726. Please see Law Review 15108 (November 2015). The 2015 amendment to section 4312(c)(4)(A) also added section 12304b, another new 2011 section that provides for involuntary call-up of Reserve Component personnel.

³⁴ Public Law 114-92, 129 Stat. 726.

³⁵ 38 U.S.C. 4312(c).

³⁶ 10 U.S.C. 101(a)(4).

³⁷ 38 U.S.C. 4312(c).

have changed. Section 331 has become section 2127, section 332 has become section 2308, section 359 has become section 2314, section 360 has become 2309, and section 712 has become section 3713. I propose that DOL make those corrections in section 1002.103.

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, 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 Organization of America
1 Constitution Ave. NE
Washington, DC 20002

(Updated November, 2021)

Major General Jeffrey E. Phillips, USA (Ret.)

1 Constitution Avenue, NE

Washington, DC 20002

(202) 646-7701

jphillips@roa.org

Honorable Marty Walsh
Secretary of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Protecting the USERRA rights of Reserve Component service members

Dear Secretary Walsh:

Let us all remember that delegates to the Continental Congress *declared* our nation's independence 245 years ago, but military personnel of the nascent United States Army, Navy, and Marine Corps *secured* that independence over the next half-decade of hard fighting, defeating Great Britain, the major naval and military superpower of the late 18th Century. And over the next two and ½ centuries ten generations of American military personnel have ensured that "government of the people, by the people, and for the people shall not perish from the earth."

In a 2016 Memorial Day address at Arlington National Cemetery, General Joseph Dunford, USMC, the Chairman of the Joint Chiefs of Staff, said:

Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure of devotion. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that is the human cost.

Two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military. Without conscription, it is necessary for our country to establish incentives to encourage qualified young men and women to enlist and remain in our country's six armed forces, the Army, Navy, Marine Corps, Air Force, Coast Guard, and the nascent Space Force. An important incentive is the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4335.

Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans Reemployment Rights Act (VRRA), which was enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of nine million young men, including my late father, for World War II. The Federal reemployment statute guarantees that those who leave civilian jobs to serve our country in uniform shall not lose their civilian jobs or fall behind those of their age cohort who remain behind enjoying the protection of those who serve. *This law has always applied to voluntary as well as involuntary military service.*

Today, 48 years after the end of the draft, our country has the best-motivated, best-led, best equipped, and most effective military in the world, and perhaps in the history of the world. I hope that it will never be necessary to reinstate conscription. In the first decade of this century, Representative Charles Rangel of New York repeatedly introduced bills to reinstate the draft. *He never found a single co-sponsor.*

In the all-volunteer era, the effective enforcement of USERRA is essential to making it possible for our nation's six armed forces to recruit and retain the necessary quality and quantity of young men and women to defend our country and its vital interests. We invite your attention to our Law Review 14080 (July 2014). For your convenience, I am enclosing a copy of that article.

Our nation has 8 Reserve Components of the armed forces. In ascending order of size, they are the nascent Space Force Reserve, 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. One million men and women serve in these 8 Reserve Components, almost equal to the number of people serving full-time in the Active Component of the armed forces. Thus, the Reserve Components make up half of our nation's pool of trained and available military personnel.

More than one million Reserve Component personnel have been called to the colors since 9/11/2001. Through their efforts and sacrifices, along with the efforts and sacrifices of their Active Component comrades in arms, they have protected our nation from a repetition of the tragic events of that terrible Tuesday morning 20 years ago.

Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to State and local governments and private employers. In September 2004, DOL published proposed USERRA regulations in the *Federal Register* for notice and comment. After considering the comments received and making some adjustments, DOL published the final USERRA regulations in December 2005. Those regulations are codified at 20 C.F.R. Part 1002.

The DOL USERRA regulations were excellent in 2005, but over the last 16 years several statutory amendments have made major portions of the regulations inaccurate. I invite your attention to

Law Review 21033 (May 2021). For your convenience, I am enclosing a copy of that article. In that article, we explain in detail how the regulations are now inaccurate and what needs to be added and changed to make the regulations accurate and current. Please feel free to use this work in updating the DOL USERRA regulations, with or without attribution.

Please ensure that the rights and interests of our nation's service members and veterans do not get short shrift within the Department that you lead. Were it not for the sacrifices of military personnel, from the American Revolution to the Global War on Terrorism, none of us would enjoy the blessings of liberty.

Very respectfully,

Jeffrey Phillips
Major General (Retired), U.S. Army

Enclosures (as stated)