

## LAW REVIEW<sup>1</sup> 21041

July 2021

### **It Is Unlawful To Copy your Military ID.**

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

[About Sam Wright](#)

1.3.2.10—Furlough or leave of absence clause

1.8—Relationship between USERRA and other laws/policies

**Q: I am a third-class petty officer (E-4) in the Coast Guard Reserve and a member of the Reserve Organization of America (ROA).<sup>3</sup> On the civilian side, I am a police officer for a large**

---

<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<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 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](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

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

**My police department supervisor continually gives me a hard time about my absences from work for Coast Guard Reserve training and service, although those absences are clearly protected by USERRA. The written policy of the police department requires me to take a whole series of steps to take military leave, paid or unpaid, from my civilian job. One of the steps is that each October I must provide the police department’s personnel department a photocopy of my current military ID card.**

**A colleague in my Coast Guard Reserve unit told me that it is illegal to make a photocopy of a military ID card. Is that correct?**

**A:** Yes, that is correct. Section 701 of title 18 of the United States Code provides:

Whoever manufactures, sells, or possesses any badge, identification card, or other insignia of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression of any such badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.<sup>4</sup>

**Q: What is the relationship between USERRA and State laws, local ordinances, collective bargaining agreements between employers and unions, and employer policies and practices?**

**A:** Under section 4302 of USERRA, this law is a floor and not a ceiling on the rights of service members and veterans with respect to their civilian employers. That section 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

---

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.

<sup>4</sup> 18 U.S.C. 701.

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.*<sup>5</sup>

A State law, local ordinance, collective bargaining agreement, or employer policy or practice can give you *greater or additional rights*, over and above USERRA, but these laws, ordinances, agreements, policies, or practices cannot deprive you of the rights that Congress granted you when it enacted USERRA, *nor can any of these things impose additional prerequisites upon your exercise of USERRA rights.*

To the extent that the written policy of the police department requires you to take a “whole series of steps” (including providing a photocopy of your military ID card) to exercise your USERRA rights, that police department policy is unlawful under USERRA.<sup>6</sup> It is unlawful for the police department to make you do anything, beyond the five simple USERRA conditions for reemployment,<sup>7</sup> to exercise your USERRA rights.

**Q: Does USERRA require my employer to grant me *paid* military leave for periods when I am away from work for military training or service?**

**A:** Under USERRA’s “furlough or leave of absence” clause,<sup>8</sup> an employer is required to pay employees for periods when they are away from work for military training or service if and to the extent the employer pays employees who are away from work for comparable periods for non-military reasons (like jury duty).<sup>9</sup> Under most circumstances, USERRA requires employers to grant *unpaid but job-protected leave*.

---

<sup>5</sup> 38 U.S.C. 4302 (emphasis supplied).

<sup>6</sup> See *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6<sup>th</sup> Cir. 2008), *cert. denied*, 556 U.S. 1165 (2009). See also *Petty v. Metropolitan Government of Nashville-Davidson County*, 687 F.3d 710 (6<sup>th</sup> Cir. 2012). I discuss these cases in detail in Law Review 12075 (August 2012).

<sup>7</sup> To have the right to reemployment under USERRA, you must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary “service in the uniformed services” as defined by USERRA, and you must have given the employer prior oral or written notice. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years. There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your limit. See Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. You must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, you must have made a timely application for reemployment with the pre-service employer. See Law Review 15116 (December 2015) for a detailed discussion of the five conditions.

<sup>8</sup> 38 U.S.C. 4316(b)(1).

<sup>9</sup> See *White v. United Air Lines, Inc.*, 987 F.3d 616 (7<sup>th</sup> Cir. 2021). I discuss this case in detail in Law Review 21014 (March 2021).

You are receiving paid military leave from the city because State law requires your State and political subdivisions to give State and local government employees a limited period of *paid* military leave.<sup>10</sup>

**Q: What is the relationship between my right to paid military leave under State law and my right to unpaid but job-protected military leave under USERRA?**

**A:** After you have exhausted your right to paid military leave under State law, you still have the right to unpaid but job-protected military leave under USERRA.<sup>11</sup> To the extent that your State law gives you a greater or additional right, like the right to *paid* military leave, that state law is not superseded by USERRA.<sup>12</sup>

**Q: Is it lawful for my State to put conditions upon the right to *paid* military leave, under State law, that are over and above the five USERRA conditions?**

**A:** Your State can put conditions upon the “over and above USERRA” rights but not on the USERRA rights. It would be unlawful for your employer to require you to violate Federal law to get paid military leave under State law. For example, providing the employer a photocopy of your military ID card violates section 701 of title 18 of the United States Code.

**Q: My police department supervisor, the Chief of Police, and the department’s personnel director seem to be confused and ill-informed about USERRA. What can I do to set them straight?**

**A:** First, refer them to our “Law Review Library” at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). There are more than 2,200 “Law Review” articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. There is also a detailed Subject Index, to facilitate finding articles about specific topics.

Second, call the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR) at 800-336-4590. I recognize that the Coast Guard is part of the Department of Homeland Security (DHS), not DOD, but ESGR supports members of the Coast Guard Reserve just as it supports members of the other Reserve Components.

**Please join or support ROA**

---

<sup>10</sup> Please see the “State leave laws” section at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find 54 articles (50 States, the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands) about the State and territorial laws that provide for paid military leave for state and local government employees who also serve in the National Guard or Reserve. I updated those articles this year.

<sup>11</sup> See 20 C.F.R. 1002.7(d).

<sup>12</sup> See 38 U.S.C. 4302(a).

This article is one of 2200-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, including “friend of the court” briefs filed in the Supreme Court and other courts, we have sought to educate service members, military spouses, attorneys, judges, employers, ESGR volunteers, and others about the legal rights of service members 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](http://www.roa.org). 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