

New York Law Includes a Provision for your Situation

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

[About Sam Wright](#)

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Q: I am a Second-Class Petty Officer (E-5) in the Navy Reserve and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹¹ 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 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

I was born in 1990 and graduated from high school in 2008. I enlisted in the Navy and served on active duty for six years, until 2014. After I left active duty, I affiliated with the Navy Reserve. I was recalled to active duty, with my unit, on 10/1/2020, for a one-year period. I expect to leave active duty on 9/30/2021.

While I was on active duty the first time, I had training in firefighting, and I got interested in firefighting as a career. In 2019, I began the lengthy process of seeking employment as a firefighter in my city. There is a two-step process in my city. The first step is a written exam. The second step is a Physical Aptitude Test (PAT). Only candidates who score well on the written test are invited to take the PAT.

I scored a 97 on the written test in September 2020 and was invited to take the PAT on October 18-19, but I was called to active duty on October 1 and was unable to take the PAT as scheduled. I notified the fire department that I would be unable to take the PAT as scheduled because I had been called to active duty and would be deployed thousands of miles away on the dates the PAT was scheduled to be administered.

A Navy Reserve judge advocate (lawyer) told me that there is a provision in USERRA for exactly this situation. Is that correct?

A: Yes, there is such a provision, but no it is not in USERRA. The provision is in a state law enacted in Albany. The provision is as follows:

7-b. Status of applicants called for military duty before taking all parts of an examination. Any person who has passed one or more of several parts of an examination for a position for which competitive examinations are required, and who has been prevented from taking or completing the remaining part or parts of the examination for such position by reason of his service in military duty shall be afforded an opportunity to take a comparable examination as to such remaining part or parts, provided he makes request therefor during the period of ninety days following termination of his military duty. If he passes such examination his name shall be placed upon a special eligible list provided that his name would have been reached for certification between the date when he entered

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.

upon such military duty and the date that he was officially notified that he had passed such examination. Such special eligible list shall remain in existence for a period of two years from the date that the name of such person is placed thereon. Such special eligible list shall be certified before certification shall be made from a subsequent eligible list whether open competitive, promotion or preferred for the same position or from the original eligible list for such position. Any such person thus appointed shall, for the purpose of computing seniority credit and training and experience credit for promotion and seniority in the event of suspension or demotion, be deemed to have been appointed on the earliest date upon which any eligible was appointed who was lower on such original eligible list or lower in relative order of rating thereon than such person would have been had his name been entered thereon.⁴

Q: What do I need to do to exercise my rights under section 243(7-b) of the New York Military Law?

A: Within 90 days after you leave active duty, you need to notify the city that you are off active duty and that you want to reschedule the PAT. If you take the PAT, pass, and then become a firefighter, you are entitled to a retroactive adjustment of your seniority date, to the date that you likely would have become a firefighter but for having been called to the colors in 2020.

Q: From reading your “Law Review” articles, I am aware that the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS) and the United States Department of Justice (DOJ) assist service members and veterans in enforcing their USERRA rights. Will DOL-VETS and DOJ assist me in enforcing my rights under section 243(7-b)?

A: No. Under section 4323 of USERRA,⁵ DOL-VETS and DOJ have an important role in enforcing USERRA. These agencies have no authority to enforce State laws like section 243(7-b). You may need to retain your own attorney to enforce your rights under this State law.

Q: What is the relationship between USERRA and State laws like section 243(7-b)?

A: Under section 4302 of USERRA, this federal law is *a floor and not a ceiling* on the employment and reemployment rights of service members and veterans. That section provides:

(a) Nothing in this chapter [USERRA] 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.

⁴ New York Military Law, section 243(7-b).

⁵ 38 U.S.C. 4323.

(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

Section 243(7-b) provides service members and veterans greater or additional rights, over and above USERRA; therefore, this section is not superseded by USERRA. But rights under section 243(7-b) are not USERRA rights. To enforce your rights under section 243(7-b), you will need to utilize the State law's enforcement mechanism, not USERRA's enforcement mechanism.

Q: Does USERRA have a provision that is like section 243(7-b)?

A: No. Section 4311 of USERRA makes it unlawful for an employer (federal, state, local, or private sector) to discriminate against those who are serving or have served our country in uniform, but nothing in USERRA requires an employer to make accommodations for a job applicant who has completed part but not all the application process before leaving for military service.

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This article is one of 2200-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, 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, 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

⁶ 38 U.S.C. 4302.

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 eight 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.

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
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