

LAW REVIEW¹ 21060

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If you Leave your Civilian Job for Military Service and Return under USERRA, the Time you *Would Have Worked* in the Civilian Job Counts For Purposes of your Eligibility for Family Leave under the FMLA.

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[About Sam Wright](#)

1.1.3.1—USERRA applies to voluntary service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Commander in the Coast Guard Reserve³ (USCGR) and a life member of the Reserve Organization of America (ROA).⁴ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁵

I started a new civilian job on 1/1/2020, working for a huge company—let us call it Daddy Warbucks Industries or DWI. The USCGR called me to active duty⁶ for one year, from

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,200 “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), 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 90% of the articles published so far, but we are always looking for “other than Sam” articles by other lawyers who are ROA members or willing to join ROA.

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 and retired as a Captain (O-6) in 2007. I am a life member of ROA and have served on the national staff as the Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC during its six years in operation as a funded ROA program. I have continued some of the work of the SMLC as a volunteer and ROA member since I left the national staff in 2015.

³ The factual set-up for this article is hypothetical but realistic.

⁴ At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

⁵ Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

⁶ The answer would be the same if you had volunteered. USERRA applies equally to voluntary and involuntary service. See Law Review 30 (October 2001).

7/1/2020 through 6/30/2021. After I was released from active duty, I promptly applied for reemployment and returned to work at DWI on 8/1/2021. I have read and reread your Law Review 15116 (December 2015). I was careful to meet and to document that I meet each of the five conditions for reemployment under USERRA.⁷

My husband and I have been trying to adopt a child for years, and our efforts have finally succeeded. I applied to DWI for an unpaid but job-protected leave of absence under the Family Medical Leave Act (FMLA), to work out the details of the adoption and to have some quality time with our new child.⁸ The DWI personnel department told me that I am not eligible for FMLA leave because I have not worked for the company for at least one year and I have not worked for the company for at least 1,250 hours during the 12-month period before my proposed FMLA leave.

I think that the time that I was away from work for USCGR service should count in determining my compliance with the 12-month threshold and the 1,250-hour threshold. What do you think?

A: You are correct. You are entitled to credit for the 12 months of active duty in determining your compliance with the 12-month threshold, and you also must be credited with the hours that you *would have worked* for DWI in determining your compliance with the 1,250-hour threshold.

The Wage & Hour Division of the United States Department of Labor (DOL-WHD) is responsible for enforcing the FMLA. DOL-WHD has clearly addressed your question on its website, as follows:

Q. If I have to miss work due to National Guard or Reserve duty, will this affect my eligibility for FMLA leave?

A. No. The regulations make clear the protections for our men and women serving in the military by stating that a break in service due to an employee's fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1,250 hours of service.

⁷ As I have explained in detail in Law Review 15116 and many other articles, you must have left a civilian job (Federal, State, local, or private sector) to perform voluntary or involuntary service in the uniformed services, and you must have given the employer prior oral or written notice. You must not have exceeded the cumulative five-year limit on the duration of your period or periods of uniformed service, relating to your employer relationship with that employer. There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your 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 from the period of service, you must have made a timely application for reemployment. You clearly meet these five conditions.

⁸ Please see Law Review 21047 (August 2021) for detailed information about the FMLA.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), hours that an employee would have worked but for his or her military service are credited toward the employee's required 1,250 hours worked for FMLA eligibility. Similarly, the time in military service also must be counted in determining whether the employee has been employed for at least 12 months by the employer.

Example: Dean worked for his employer for six months in 2008, then was called to active duty status with the Reserves and deployed to Iraq. In 2009, Dean returned to his employer, requesting to be reinstated under the USERRA. Both the hours and the months that Dean would have worked but for his military status must be counted in determining his FMLA eligibility.⁹

Please join or support ROA.

This article is one of 2,200-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 October 1922 by a group of veterans of "The Great War" as World War I was then known. Captain Harry S. Truman was one of those veterans. 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 defense. 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 military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs in the Supreme Court and other courts, we educate service members, attorneys, judges, employers, and others about the legal rights of service members and 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 cost 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 eight¹⁰ uniformed services, you are eligible for full ROA membership, including the right to vote and run for office in the organization. Eligibility includes those who are serving or have served in the Active

⁹ See <https://www.dol.gov/agencies/whd/fmla/final-rule/faq> (bold question in original).

¹⁰ Congress recently established the United States Space Force as the eighth uniformed service.

Component, the Reserve, or the National Guard, and enlisted members as well as officers are eligible.

If you are eligible, please join on-line at www.roa.org or call ROA at 800-809-9448. The cost is only \$20 per year or \$450 for a life membership. If you are not eligible, please support us financially to help us continue this work. You can mail us a check as follows:

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