

LAW REVIEW¹ 22027

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Arizona Enacts New Legislation for Post-Secondary Students who Actively Participate in the National Guard or Reserve

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

1.1.2.4—Students

1.8—Relationship between USERRA and other laws/policies

Very recently (3/23/2022), the Arizona Legislature enacted and the Governor signed Senate Bill No. 1406, adding a new section to the Arizona Revised Statutes. The complete text of this section is shown near the end of this article.

As Commander Wayne L. Johnson, JAGC, USN (Ret.) explained in Law Review 21038 (July 2021), and as I explained in Law Reviews 21048 and 21049 (August 2021), the Federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to the

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 <mailto:swright@roa.org>.

relationship between a student and an educational institution, because the institution is not the student's *employer*. However, in 2008 Congress enacted a new law that gives USERRA-like protections to post-secondary students.³

The federal law (section 1091c) offers some protection to the student who needs to withdraw from the educational institution to perform uniformed service and return months or years later after completing the period of service. The federal law is most unsatisfactory for the student who needs to miss a few days of class to participate in annual training of a Reserve or National Guard unit and still receive credit for that semester.

Section 1091c is *a floor and not a ceiling* on the reinstatement rights of students who serve in the Reserve Components. The federal law does not supersede or override a state law that provides *greater or additional rights*. I am most pleased that Arizona has now enacted such a law, and the entire text of this new law can be found below.

This new Arizona law is not limited to public universities (like the University of Arizona) and community colleges. This new Arizona law also applies to private universities in the State of Arizona. This new law went into effect 3/23/2022.

- A MEMBER OF THE NATIONAL GUARD OF THIS STATE OR ANY OTHER STATE OR OF THE UNITED STATES ARMED FORCES RESERVES WHO IS A STUDENT AT AN INSTITUTION OF HIGHER EDUCATION IN THIS STATE AND WHO IS ORDERED TO EITHER STATE OR FEDERAL RESERVE COMPONENT DUTY OR A PERSON WHO IS THE SPOUSE OF A MEMBER OF THE NATIONAL GUARD OF THIS STATE OR ANY OTHER STATE OR THE UNITED STATES ARMED FORCES RESERVES, WHO IS A STUDENT AT AN INSTITUTION OF HIGHER EDUCATION IN THIS STATE AND WHOSE SPOUSE IS ORDERED TO EITHER STATE OR FEDERAL RESERVE COMPONENT DUTY, WHETHER THE MEMBER OR SPOUSE IS ATTENDING CLASS IN PERSON OR ONLINE AND WHETHER THE MEMBER IS STATIONED IN OR OUTSIDE OF THIS STATE, MAY DO ANY OF THE FOLLOWING:
 - 1. WITHDRAW FROM ONE OR MORE COURSES FOR WHICH TUITION AND FEES HAVE BEEN PAID. THE TUITION AND FEES MUST BE CREDITED TO THE STUDENT'S ACCOUNT AT THE INSTITUTION. ANY REFUNDS ARE SUBJECT TO THE REQUIREMENTS OF THE STATE OR FEDERAL FINANCIAL AID PROGRAMS OF ORIGIN. THE STUDENT MAY NOT RECEIVE CREDIT FOR THE COURSES AND MAY NOT RECEIVE A FAILING GRADE, AN INCOMPLETE OR ANOTHER NEGATIVE ANNOTATION ON THE STUDENT'S RECORD AND THE STUDENT'S

³ See 20 U.S.C. § 1091c.

GRADE POINT AVERAGE MAY NOT BE ALTERED OR AFFECTED IN ANY MANNER BECAUSE OF THE STUDENT'S WITHDRAWAL UNDER THIS SUBSECTION.

- 2. DEPENDING ON WHEN THE MEMBER IS ORDERED TO EITHER STATE OR FEDERAL RESERVE COMPONENT DUTY AND DEPENDING ON THE INDIVIDUAL STUDENT'S NEEDS, RECEIVE A GRADE OF INCOMPLETE AND BE ALLOWED TO COMPLETE THE COURSE IF THE COURSE IS BEING OFFERED AT THE TIME TO OTHER STUDENTS ON RELEASE FROM RESERVE COMPONENT DUTY UNDER THE INSTITUTION'S STANDARD PRACTICE FOR COMPLETION OF INCOMPLETES.
- 3. IN ACCORDANCE WITH ANY ACADEMIC UNIT OR INSTITUTION OF HIGHER EDUCATION REQUIREMENTS OR IN COMPLIANCE WITH ACCREDITATION OR CERTIFICATION STANDARDS, WHEN APPLICABLE, CONTINUE AND COMPLETE THE COURSE FOR FULL CREDIT. CLASS SESSIONS THE STUDENT MISSES DUE TO STATE OR FEDERAL RESERVE COMPONENT DUTY MUST BE COUNTED AS EXCUSED ABSENCES AND MAY NOT BE USED IN ANY WAY TO ADVERSELY IMPACT THE STUDENT'S GRADE OR STANDING IN THE CLASS. ANY STUDENT WHO SELECTS THIS OPTION IS NOT AUTOMATICALLY EXCUSED FROM COMPLETING ASSIGNMENTS DUE DURING THE PERIOD THE STUDENT OR STUDENT'S SPOUSE IS PERFORMING STATE OR FEDERAL RESERVE COMPONENT DUTY. A LETTER GRADE OR A GRADE OF PASS MAY BE AWARDED ONLY IF THE FACULTY MEMBER TEACHING THE COURSE DETERMINES THAT THE STUDENT HAS COMPLETED A SUFFICIENT AMOUNT OF WORK AND HAS DEMONSTRATED SUFFICIENT PROGRESS TOWARD MEETING COURSE REQUIREMENTS TO JUSTIFY THE GRADE.
- 4. RECEIVE A REFUND FOR ANY AMOUNT PAID FOR ROOM, BOARD AND FEES ATTRIBUTABLE TO THE TIME PERIOD DURING WHICH THE STUDENT OR STUDENT'S SPOUSE SERVED IN STATE OR FEDERAL RESERVE COMPONENT DUTY AND DID NOT USE THE FACILITIES OR SERVICES FOR WHICH THE AMOUNTS WERE PAID. ANY REFUND FOR ROOM, BOARD AND FEES IS SUBJECT TO THE REQUIREMENTS OF THE STATE OR FEDERAL FINANCIAL AID PROGRAMS OF ORIGIN.
- 5. WITHDRAW AND BE READMITTED AND ENROLLED AS A STUDENT AT THE INSTITUTION, WITHOUT PENALTY OR REDETERMINATION OF ADMISSION ELIGIBILITY, WITHIN ONE YEAR AFTER THE RELEASE OF

THE STUDENT OR STUDENT'S SPOUSE FROM STATE OR FEDERAL
RESERVE COMPONENT DUTY.

- B.
A MEMBER OF THE NATIONAL GUARD OF THIS STATE OR ANY OTHER STATE OR OF THE UNITED STATES ARMED FORCES RESERVES WHO IS A STUDENT AT AN INSTITUTION OF HIGHER EDUCATION IN THIS STATE, WHO IS ORDERED TO EITHER STATE OR FEDERAL RESERVE COMPONENT DUTY AND AS A RESULT OF THAT SERVICE OR FOLLOW-UP MEDICAL TREATMENT FOR AN INJURY INCURRED DURING THAT SERVICE, MISSES ANY TEST, EXAMINATION, LABORATORY, PRESENTATION OR CLASS DAY ON WHICH A WRITTEN OR ORAL ASSIGNMENT IS DUE OR OTHER EVENT ON WHICH A COURSE GRADE OR EVALUATION IS BASED MAY MAKE UP THE TEST, EXAMINATION, LABORATORY, PRESENTATION, CLASS OR EVENT WITHOUT PREJUDICE TO THE FINAL COURSE GRADE OR EVALUATION. THE MAKEUP ACTIVITY MUST BE SCHEDULED AFTER THE STUDENT'S RETURN FROM RESERVE COMPONENT DUTY AND AFTER A REASONABLE AMOUNT OF TIME FOR THE STUDENT TO PREPARE FOR THE TEST, EXAMINATION, LABORATORY, PRESENTATION, CLASS OR EVENT.
- C.
FOR CLASS SESSIONS A STUDENT DESCRIBED IN SUBSECTION A OF THIS SECTION MISSES DUE TO STATE OR FEDERAL RESERVE COMPONENT DUTY, THE INSTITUTION OF HIGHER EDUCATION SHALL EXCUSE THE STUDENT'S ABSENCES AND NOT USE THESE EXCUSED ABSENCES IN ANY WAY TO ADVERSELY IMPACT THE STUDENT'S GRADE OR STANDING IN CLASS.
- D.
IF THE FACULTY MEMBER TEACHING THE COURSE DETERMINES THAT THE STUDENT HAS COMPLETED A SUFFICIENT AMOUNT OF WORK AND HAS DEMONSTRATED SUFFICIENT PROGRESS TOWARD MEETING COURSE REQUIREMENTS TO JUSTIFY THE GRADE WITHOUT MAKING UP THE TEST, EXAMINATION, LABORATORY, PRESENTATION, CLASS OR EVENT, A GRADE MAY BE AWARDED WITHOUT THE MAKEUP ACTIVITY AND THE MISSED TEST, EXAMINATION, LABORATORY, PRESENTATION, CLASS OR EVENT MAY NOT BE USED IN ANY WAY TO ADVERSELY IMPACT THE STUDENT'S GRADE OR STANDING IN THE CLASS.
- E.
THE PROTECTIONS IN THIS SECTION MAY BE INVOKED AS FOLLOWS:
 - 1.
IF THE STATE OR FEDERAL RESERVE COMPONENT DUTY IS KNOWN IN ADVANCE, THE STUDENT MUST SUBMIT EVIDENCE DOCUMENTING THE STATE OR FEDERAL RESERVE COMPONENT DUTY TO THE FACULTY MEMBER TEACHING THE COURSE EARLY IN THE SEMESTER OR AS SOON AS PRACTICABLE BEFORE THE MISSED CLASS,

ASSIGNMENT OR EXAMINATION. IF THE STATE OR FEDERAL RESERVE COMPONENT DUTY IS NOT KNOWN IN ADVANCE, THE STUDENT IS RESPONSIBLE FOR PROVIDING EVIDENCE OF THE STATE OR FEDERAL RESERVE COMPONENT DUTY TO THE FACULTY MEMBER TEACHING THE COURSE AS SOON AS PRACTICABLE AFTER THE MISSED CLASS, ASSIGNMENT OR EXAMINATION.

- 2. THE STUDENT OR AN APPROPRIATE OFFICER FROM THE MILITARY ORGANIZATION IN WHICH THE STUDENT OR STUDENT'S SPOUSE WILL BE SERVING MUST GIVE WRITTEN NOTICE THAT THE STUDENT OR STUDENT'S SPOUSE IS BEING OR HAS BEEN ORDERED TO RESERVE COMPONENT DUTY AS PRESCRIBED IN THIS SECTION.
- 3. ON WRITTEN REQUEST FROM THE INSTITUTION OF HIGHER EDUCATION, THE STUDENT SHALL PROVIDE WRITTEN VERIFICATION OF SERVICE.
- F. THIS SECTION DOES NOT PREVENT INSTITUTIONS OF HIGHER EDUCATION FROM PROVIDING ADDITIONAL OPTIONS OR PROTECTIONS TO STUDENTS DESCRIBED IN SUBSECTION A OF THIS SECTION WHO ARE ORDERED TO STATE OR FEDERAL RESERVE COMPONENT DUTY.
- G. FOR THE PURPOSES OF THIS SECTION, "INSTITUTION OF HIGHER EDUCATION" MEANS:
 - 1. A UNIVERSITY UNDER THE JURISDICTION OF THE ARIZONA BOARD OF REGENTS.
 - 2. A COMMUNITY COLLEGE AS DEFINED IN SECTION 15-1401.
 - 3. A PRIVATE UNIVERSITY.⁴

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ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S.

⁴ Arizona Revised Statutes § 26-168.01.

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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, 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 eight⁵ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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
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⁵ Congress recently established the United States Space Force as the 8th uniformed service.