

## LAW REVIEW<sup>1</sup> 22030

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### **Cashing out your Paid Time Off while you Are on Active Duty**

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

1.3.2.11—Vacations, holidays, and days off

1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

**Q: I am a Sergeant (E-5) in the Army Reserve and a member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the Reserve and National Guard. I**

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

<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 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>.

<sup>3</sup> 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.

**decided to join ROA because I want to support the organization that does such great things for me and my Reserve colleagues.**

**On the civilian side, I am a police officer for a small city. In our small police department, it is often necessary for me and my colleagues to work overtime, and the city cannot afford to pay officers at the time-and-a-half rate. In lieu of overtime pay, the city awards Paid Time Off (PTO).**

**I have a current balance of 600 hours of PTO. Under the collective bargaining agreement (CBA) between my union and the city, a police officer is permitted to carry over up to 400 hours of PTO from one calendar year to the next. PTO in excess of 400 hours is forfeited on January 1 of the new year.**

**I have orders for exactly one year of active duty, from 10/1/2022 until 9/30/2023. I understand that, under USERRA, I have the right but not the obligation to use, during the time that I am away from my civilian job for active duty, any vacation, annual leave, or other paid leave that I have earned before the start of my active-duty period. I further understand that it is unlawful for the employer to *make me* use up my vacation or PTO in this way.**

**I do not want to use any of the PTO that I have earned and accumulated in the “bank.” I want to save all 600 hours to use after I return to work in October 2023. The personnel director for the city told me that I can use and be paid for all or part of my accumulated PTO after I enter active duty but that my being on active duty does not exempt me from the rule that only 400 hours of PTO can be carried over from the end of a calendar year to the start of the new calendar year. I think that this is unlawful because it amounts to *making me* use up my PTO during the time that I am on active duty. What do you think?**

#### **Answer, bottom line up front**

Yes, section 4316(d) of USERRA gives you the right to use your vacation or PTO while you are on active duty, and thus to get double pay for a period of time, and yes it is unlawful for the employer to *make you* use your PTO in this way, but that does not mean that you are exempt from the employer’s “use it or lose it” rule about PTO in excess of 400 hours at the start of a calendar year. I suggest that you use at least 200 hours of your PTO balance during the last three months of calendar year 2022 so that your PTO balance on 1/1/2023 will not exceed 400 hours.

#### **Explanation**

The pertinent subsection of USERRA is as follows:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. *No employer may require any such person to use vacation, annual, or similar leave during such period of service.*<sup>4</sup>

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law in 1994. In the 28 years since Congress enacted USERRA it has amended it many times, the first time in 1996.<sup>5</sup> The terse legislative history of the 1996 amendment is as follows: “Clarify that an employer may not require a person whose employment is interrupted by service to use vacation, annual, or similar leave during such service (section 406).”<sup>6</sup>

Section 4331(a) of USERRA<sup>7</sup> gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to State and local governments and private employers. DOL promulgated USERRA regulations in 2005, and those regulations are codified in title 20 of the Code of Federal Regulations (C.F.R.) Part 1002. No provision of the USERRA regulations supports the conclusion that section 4316(d) supersedes “use-it-or-lose-it” rules limiting the accumulation of vacation days or PTO. Moreover, I am not aware of any published court decision supporting that interpretation.

**Q: In several of your “Law Review” articles, you have written that the CBA between the union and the employer cannot override USERRA. Now, you are saying that I cannot preserve my PTO while I am on active duty because the CBA says otherwise. Are you not being inconsistent?**

**A:** No, I am not being inconsistent. If USERRA’s section 4316(d) meant that “use-it-or-lose-it” rules are superseded during the active-duty service of employees, that would of course override the CBA provision to the contrary. The problem is that USERRA does not include such a provision.

**Q: What is the relationship between USERRA and a CBA?**

**A:** USERRA is a floor and not a ceiling on the employment and reemployment rights of those who are serving or have served our country in uniform. The pertinent section of USERRA is as follows:

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<sup>4</sup> 38 U.S.C. § 4316(d)( emphasis supplied).

<sup>5</sup> See Public Law 104-275, Title III, Subtitle B, § 311(6), 110 Stat. 3335 (Oct. 9, 1996).

<sup>6</sup> S. Rep. 104-371, Sept. 24, 1996. This legislative history can be found in Appendix E-1 of *The USERRA Manual* by Kathryn Piscitelli and Ed Still. The quoted statement can be found on page 965 of the 2021 edition of the *Manual*.

<sup>7</sup> 38 U.S.C. § 4331(a).

**(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.

**(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.<sup>8</sup>

The pertinent section of the DOL USERRA regulation is as follows:

**How does USERRA relate to other laws, public and private contracts, and employer practices?**

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**(a)** USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

**(b)** USERRA 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 USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

**(c)** USERRA does not 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 an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

**(d)** If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of

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<sup>8</sup> 38 U.S.C. § 4302.

paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.<sup>9</sup>

**Q: My good friend Joe Smith is a member of the same Army Reserve unit, and he is a police officer in a nearby city. That city's policy on PTO is similar to my city's policy. When Joe was on active duty last year, his city allowed him to preserve PTO that he had earned before he entered active duty and exempted him from the application of the "use-it-or-lose-it" rule. What gives?**

**A:** Under section 4302 of USERRA,<sup>10</sup> an employer can always do more than the law requires. The fact that Joe's city chose to make that accommodation, over and above USERRA, does not mean that your city is required to do likewise.

#### **Please join or support ROA**

This article is one of 2,300-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 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. 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.

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<sup>9</sup> 20 C.F.R. § 1002.7 (bold question in original).

<sup>10</sup> 38 U.S.C. § 4302.

If you are now serving or have ever served in any one of our nation's eight<sup>11</sup> 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](http://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:

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<sup>11</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.