

Not Everything that You Do for the USNR Qualifies as “Service in the Uniformed Services” for USERRA Purposes.

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

1.1.2.5—USERRA applies to executive employees

1.3.1.1—Left job for service and gave prior notice

1.3.2.11—Vacations, holidays, and days off

Q: I am a Captain in the Navy Reserve and a life member of the Reserve Organization of America (ROA).³ For many years, I have read with great interest your “Law Review” articles

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “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 Spouses’ 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 (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 <mailto:swright@roa.org>.

³ 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-1 through O-10.

about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have frequently referred my colleagues and subordinates to your articles.

On the civilian side, I am a mid-level executive⁴ for a huge company—let us call it Daddy Warbucks Industries or DWI. Over the years, I have gotten a lot of criticism from higher-level DWI executives about my absences from work for Navy Reserve training and service, although all of those absences were protected by USERRA. In resolving these issues, I have relied upon your “Law Review” articles, and I have also called upon the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR) for assistance several times.⁵

I am the Commanding Officer (CO) of a large Navy Reserve unit, and I have many responsibilities that I cannot complete just during my drill weekends. One very important and time-consuming responsibility is drafting and signing fitness reports and performance evaluations for the officers and enlisted personnel who serve in my unit.

These reports are due soon, and I want to take a week off my from civilian job, possibly without pay, to complete them before the deadline. I contacted the DWI personnel office and asked for one week of military leave for this purpose. The personnel director told me that my request was denied and that I am not entitled to military leave under USERRA, even without pay, because the activity that I propose to perform during the week does not constitute “service in the uniformed services” as defined by USERRA. What do you think?

Answer, bottom line up front

Unfortunately, the personnel director is correct. As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment under USERRA. The first condition is that you must have left the civilian job to perform “service in the uniformed services” *as defined by USERRA*. Unless you have some documentation from the Navy for this five-day period, you do not have the right to time off from your civilian job for this purpose.

Explanation

USERRA’S definition of “service in the uniformed services”

⁴ Unlike other Federal laws that apply to the employer-employee relationship, USERRA applies to all employees, from the rank-and-file assembly line worker to the president of the company. The pertinent section of the Department of Labor (DOL) USERRA regulation provides: “USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.” 20 C.F.R. § 1002.43.

⁵ You can reach ESGR at 800-336-4590. The ESGR website is www.esgr.mil.

Section 4303 of USERRA⁶ defines 17 terms that are used in this law. The term “service in the uniformed services” is defined as follows:

(13) The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service *under competent authority* and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.), State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 USCS § 5165f], and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.⁷

Yes, it is necessary for you, as the Commanding Officer of the unit, to draft and sign performance evaluations, but in the absence of documentation that the Navy has directed you perform this activity on a particular day this activity does not meet the “under competent authority” requirement, and your absence from work on these days is not protected by USERRA.⁸

As I have explained in Law Review 16044 (May 2016) and other articles, *The USERRA Manual*, by Kathryn Piscitelli and Edward Still, is the definitive reference book about USERRA. In their book, Ms. Piscitelli and Mr. Still write:

Service must be performed under competent authority to be covered under USERRA.⁹ For example, in *Moore v. Epperson Underwriting Co.*, a reservist’s absences to treat his service-related medical conditions were not service in a uniformed service because the

⁶ 38 U.S.C. § 4303.

⁷ 38 U.S.C. § 4303(13) (emphasis supplied).

⁸ If you can get the Navy to give you inactive duty training (drill) credit for these days, even for retirement points only, then this activity would be protected by USERRA.

⁹ 38 U.S.C. § 4303(13). Cf. *Bradberry v. Jefferson County, Tex.*, 732 F.3d 540, 545, 197 L.R.R.M. (BNA) 2297, 97 Empl. Prac. Dec. (CCH) P 44934, 163 Lab. Cas. (CCH) P 10647 (5th Cir. 2013) (noting that 38 U.S.C.A. § 4312 “applies to any military-approved absence from a civilian position”).

reservist was not placed on duty for his medical appointments by a commanding officer in his chain of command.¹⁰

The USERRA Manual, 2021 edition, section 4:3. (The quoted paragraph can be found on page 125 of the 2021 edition of the *Manual*.) I entirely agree with the Piscitelli-Still analysis on this point. I invite your attention to our Law Review 11031, published in 2011.¹¹

Q: Your answer disappoints me. I do not see how I can fulfill all my important responsibilities as the Commanding Officer of a Navy Reserve unit without occasionally taking a day off from my civilian job to do all the important things that I must do for the unit outside of our drill weekends. What gives?

A: In this article, as in most of our “Law Review” articles, I discuss *what the law is, not what I want it to be*. When I am suggesting how Congress should improve USERRA, I always make clear in the title and text of the article that I am proposing amendments to the law, not just explaining the meaning of the law as currently written. For example, I invite your attention to Law Review 15089 (October 2015). The title of that 20-page article is “Proposals to Improve USERRA.”¹²

Q: In your Law Review 22030 (May 2022), you wrote that a service member like me has the right to use, during a period of uniformed service, any vacation, annual leave, or similar leave with pay that the person has accrued before the start of the period of service. I made a written request of the DWI personnel office to use five days of vacation, for the week starting on 9/26/2022, so that I can complete the performance evaluations before the due date. I have plenty of vacation time in the bank, but the personnel office told me that I cannot take vacation in late September because that is a very busy time in our department and another mid-level executive in the department has already requested and been granted vacation for that week. What gives?

A: As I explained in Law Review 22030, section 4316(d) of USERRA provides:

¹⁰ *Moore v. Epperson Underwriting Co.*, 19 A.D. Cas. (BNA) 1685, 182 L.R.R.M.(BNA) 2757, 90 Empl. Prac. Dec. (CCH) P 42936, 154 Lab. Cas. (CCH) P 10901, 2007 WL 2332755, *8 (D. Minn. 2007). *See also Leisek v. Brightwood Corp.*, 278 F.3d 895, 900-01 (9th Cir. 2002) (employee’s attendance at National Guard ballooning event without receiving National Guard orders, whether oral or written, to do so was not necessitated by reason of service in the uniformed services).

¹¹ Law Review 11031 discusses *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002).

¹² One of my proposals was to “Amend USERRA’s definition of ‘service in the uniformed services’ to include time required to be away from civilian employment for medical treatment necessitated by military service.” That proposal has not been enacted by Congress, but we are still working on it. This proposal is necessary to address the problem illustrated by *Moore v. Epperson Underwriting Co.*

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.¹³

As I have explained above, spending five workdays preparing performance evaluations for your Navy Reserve unit members does not qualify as “service in the uniformed services” as defined by USERRA. Accordingly, section 4316(d) does not entitle you to take five vacation days in late September 2022.

Under general rules (not USERRA), you have the right to use the vacation days that you have earned, but you do not have the unilateral right to insist on using your vacation days at a specific time that your employer finds inconvenient. If you were performing “service in the uniformed services” during that week, you would have the absolute right to the time off that week and to use your accrued vacation days for that purpose.¹⁴

Q: What can the Navy Reserve do to address this problem?

A: The Chief of Navy Reserve and each of the other Reserve Component Chiefs should establish procedures whereby Reserve Component members can be granted inactive duty training (drill) orders, at least for retirement points only, for administrative requirements like yours and also for medical care appointments that have been necessitated by wounds, injuries, and illnesses incurred in the line of duty.

Please join or support ROA

This article is one of 2,000-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 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.

¹³ 38 U.S.C. § 4316(d) (emphasis supplied).

¹⁴ See 20 C.F.R. § 1002.104.

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 eight¹⁵ 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
Washington, DC 20002¹⁶

¹⁵ Congress recently established the United States Space Force as the 8th uniformed service.

¹⁶ You can also donate on-line on the ROA website, www.roa.org.