

LAW REVIEW¹ 22042

July 2022

As the Personnel Chief of a Reserve Component, What Do I Need to Know about USERRA? And What Can I Do to Help Reservists Manage their Relationships with their Civilian Employers?

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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 (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>.

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- 1.3.1.2—Character and duration of service
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Q: I am a Colonel (O-6) on full-time Active Guard & Reserve (AGR) duty.³ I currently serve as the personnel chief of a Reserve Component. Recently, another officer brought to my attention your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and especially Law Review 22041 (July 2022). Because I want to support what you and your organization are doing for Reserve Component members, I joined the Reserve Organization of America (ROA)⁴ as a life member.

What do I (as the personnel chief) need to know about USERRA? And what can I do to help the part-time service members of my component manage their relationships with their civilian employers?

Answer—what you need to know:

- a. **Without a law like USERRA, and without effective enforcement of that law, the services would not be able to recruit and retain enough qualified young men and women to defend our country.**

Eight years ago, Nathan Richardson and I wrote:

Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military⁵ recruiting is a constant challenge. Despite our country’s current economic difficulties and the military’s recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have

³ The factual set-up for this article is hypothetical but realistic. I have not heard from the personnel chief of a Reserve Component, but I would welcome such a contact. I hope that this article will be helpful to the leaders of Reserve Components in helping their part-time soldiers, sailors, airmen, Marines, Guardians, and Coast Guard Reservists in balancing their obligations to the military with their relationships with their civilian employers.

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-1 through O-10.

⁵ Congress abolished the draft 41 years ago [now almost 50 years ago] in 1973.

more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs and certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).⁶

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks.⁷ A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications.⁸ The services will need to recruit a very high percentage of that 1%.⁹ As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There definitely is a compelling government interest in the enforcement of USERRA, and there is no less restrictive means by which the compelling interest can be advanced without requiring employers to reemploy returning service members, even when employers can establish that they have sincere religious objections to the requirement.¹⁰

b. Our "Law Review" articles, available at www.roa.org/lawcenter, have the information that service members need about USERRA.

At www.roa.org/lawcenter, one can find more than 2,000 "Law Review" articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index, to facilitate finding articles about specific topics. These articles are available for free to everyone, not just ROA members.

c. USERRA applies to voluntary as well as involuntary military service.

⁶ Source: Mission Readiness Press Release, November 5, 2009, available at: <http://cdn.missionreadiness.org/NATPR1109.pdf>.

⁷ Source: Pew Research Center, *War and Sacrifice in the Post-Modern Era*, available at <http://www.pewsocialtrends.org/2011/10/05/chapter-6-a-profile-of-the-modern-military/>.

⁸ Source: The Wall Street Journal, *Recruits' Ineligibility Tests the Military*, June 27, 2014, by Miriam Jordan, available at <http://online.wsj.com/articles/recruits-ineligibility-tests-the-military-1403909945>.

⁹ According to the 2010 Census estimates and military demographic surveys, there are approximately 34.5 million civilian Americans between the ages of 17 and 24. Of those, only approximately 1% (roughly 344,500) will be both interested and qualified for military service. In 2014, the Defense Department's recruiting goal for both active and reserve components was 121,363 personnel. Assuming those numbers remain constant, the DOD would have to recruit about 35% of all interested and qualified individuals from ages 17-24 in order to meet its recruiting goals. And to the extent that more are recruited this year, there are fewer available next year.

¹⁰ Law Review 14080 (July 2014).

Contrary to popular belief, USERRA applies equally to voluntary and involuntary military service.¹¹ Of course, in a larger sense all military service in our country is voluntary. Almost 50 years ago, in January 1973, Congress abolished the draft and established the All-Volunteer Military.

d. USERRA applies to almost all employers in this country.

USERRA applies to almost all employers in the United States, including the Executive Branch¹² and Legislative Branch¹³ of the Federal Government, the States¹⁴ and their political subdivisions,¹⁵ and private employers, regardless of size.¹⁶ Among employers in the United States, only religious institutions,¹⁷ Native American tribes,¹⁸ and foreign embassies and consulates and international organizations¹⁹ and the Judicial Branch of the Federal Government²⁰ are exempt from USERRA enforcement.

USERRA also applies all over the world to the United States Government, to United States companies, and to foreign companies that are controlled by United States companies.²¹

e. USERRA applies to all employees

USERRA applies to employees in all employment positions.²² This includes executive, managerial, and professional positions.²³ Even persons holding temporary, probationary, or at-will positions have rights under USERRA.²⁴

USERRA does not apply to independent contractors, but calling a person an “independent contractor” does not make the person an independent contractor.²⁵ Similarly, a bona fide

¹¹ See Law Review 15075 (September 2015).

¹² See Law Review 15067 (July 2015).

¹³ See Law Review 15009 (January 2015).

¹⁴ See Law Review 22001 (January 2022).

¹⁵ See *Weaver v. Madison City Board of Education*, 771 F.3d 748 (11th Cir. 2014). See generally Law Review 15011 (January 2015). Political subdivisions are counties, cities, villages, school districts, and other units of local government.

¹⁶ You only need one employee to be an employer subject to the reemployment statute. See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

¹⁷ See Law Review 15112 (December 2015).

¹⁸ See Law Review 15111 (December 2015).

¹⁹ See Law Review 24 (April 2001).

²⁰ 38 U.S.C. § 4324.

²¹ See Law Review 21023 (April 2021).

²² See 20 C.F.R. § 1002.21.

²³ See 20 C.F.R. § 1002.43.

²⁴ See 20 C.F.R. § 1002.41.

²⁵ See 20 C.F.R. § 1002.44.

partner does not have USERRA rights, but labeling someone a “partner” does not make that person a partner.²⁶

f. The service member must meet five conditions to have the right to reemployment under USERRA.

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, the service member must meet five conditions to have the right to reemployment under USERRA:

1. Must have left a civilian job (Federal, State, local, or private sector) to perform “service in the uniformed services” *as defined by USERRA*.²⁷
2. Must have given the employer prior oral or written notice.²⁸
3. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship with that employer.²⁹
4. Must have been released from the period of service without having received a disqualifying bad discharge from the military.³⁰
5. Must have made a timely application for reemployment.³¹

g. The service member must have given the employer prior oral or written notice, or an “appropriate officer” of the uniformed service must have given notice for the service member.

The person who is to perform a period of uniformed service must have given the employer prior written or oral notice.³² Alternatively, an “appropriate officer of the uniformed service in which such service is performed” can give the notice, on behalf of the service member.³³

USERRA has an exception to the prior notice requirement, as follows:

No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the

²⁶ See Law Review 18109 (November 2018).

²⁷ 38 U.S.C. §§ 4303(13), 4312(a). See generally Law Review 22041 (July 2022).

²⁸ 38 U.S.C. § 4312(a)(1). This condition is discussed further, below.

²⁹ 38 U.S.C. § 4312(c). This condition is discussed further, below.

³⁰ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious offenses, and OTH (other than honorable) administrative discharges.

³¹ After a period of service of 181 days or more, the person must have applied for reemployment within 90 days.

38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

³² 38 U.S.C. § 4312(a)(1).

³³ Id.

purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.³⁴

h. The service member must not have exceeded the cumulative five-year limit.

USERRA's five-year limit is set forth as follows:

(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

- (1)** that is required, beyond five years, to complete an initial period of obligated service;
- (2)** during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
- (3)** performed as required pursuant to section 10147 of title 10, 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
- (4)** performed by a member of a uniformed service who is—
 - (A)** ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14 [14 USCS § 2127, 2128, 2308, 2309, 2314, or 3713];
 - (B)** ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
 - (C)** ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
 - (D)** ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
 - (E)** called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

³⁴ 38 U.S.C. § 4312(b).

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.³⁵

Answer—what you can do

a. Pass the word to reservists about the availability of the ROA Law Review Library.

At www.roa.org/lawcenter, you can find more than 2,000 “Law Review” articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index, to facilitate finding articles about specific topics. These articles are available for free to everyone, not just ROA members. The articles contain much information that reservists need in order to be able to exercise and enforce their rights. Please pass the word about the availability of these articles.

You can also find, at that same website, a 45-minute presentation, with PowerPoint slides, about USERRA. This presentation can be used to train reservists on their drill weekends. Here is a link to the presentation:

https://www.youtube.com/embed/_XhVyECa7QY

b. Pass the word about ESGR.

Half a century ago, the Department of Defense (DOD) established an organization called “Employer Support of the Guard and Reserve” (ESGR).³⁶ Ensure that ESGR posters are prominently displayed at reserve centers and other reserve training locations and that ESGR volunteers have access to reservists during their drill weekends.

c. Give notice to the civilian employers of reservists.

Under section 4312(a)(1) of USERRA, the required notice to civilian employers can be given by “an appropriate officer of the uniformed service in which the service is to be performed.”³⁷ Please consider establishing a system for giving notice directly to civilian employers of inactive duty training (drills) periods, annual training periods, and voluntary or involuntary active duty periods. Such a system will have two advantages. First, it will reassure the employer that the individual reservist really is performing military duty during the periods when he or she is away

³⁵ 38 U.S.C. § 4312(c). See generally Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting an individual’s five-year limit.

³⁶ The ESGR website is www.esgr.mil. The toll-free number is 800-336-4590.

³⁷ 38 U.S.C. § 4312(a)(1).

from work. Second, it will provide documentation that prior notice was given if the employer denies having received such notice.

d. Do not lambaste serial volunteers for volunteering, but do not give them all the duty they request.

Some reservists repeatedly volunteer for extra duty assignments, over and above the training and duty that all unit members perform. These serial volunteers often greatly annoy their civilian employers with these repeated military-related absences from work. All of these absences are protected by USERRA,³⁸ but that is not to say that the Reserve Component should always accommodate the extra duty requests of serial volunteers. Sometimes, the right answer is to tell Sergeant Eager Beaver: “Thank you for volunteering, but this time we are going to find someone else for this extra duty assignment.”

Please assign a senior officer the duty of receiving complaints from civilian employers and addressing them tactfully. This senior officer should have ready access to military records and the authority to cancel or reschedule military duty, as appropriate. Please do not assign this responsibility to the unit commanding officer, who is usually a part-timer, like most or all of the unit members. The unit commanding officer has his or her own civilian employer to work with. Do not add to the stress on that relationship by causing the civilian employers of other unit members to call the unit commanding officer during his or her own civilian workday.³⁹

I most respectfully suggest that you need to establish an intermediary between the individual reservist, especially the junior enlisted reservist, and his or her civilian employer. The senior officer that you assign this role, perhaps on a regional basis, can fill this important function.

e. Establish a way for individual reservists to obtain inactive duty training orders for medical appointments necessitated by wounds, injuries, or illnesses incurred during active duty periods and for necessary administrative functions that cannot reasonably be accomplished during scheduled drill periods.

USERRA does not protect absences from work for medical appointments, even appointments that are necessary because of wounds, injuries, or illnesses incurred during active duty periods. Similarly, the commanding officer of a reserve unit needs to spend a lot of time on military responsibilities, far more than scheduled drill weekends. USERRA does not give the commanding officer the right to time off from his or her own civilian job to fulfill those responsibilities.⁴⁰ Please establish a procedure that enables individual reservists to receive inactive duty training orders (at least orders for retirement points only) for these situations.

³⁸ See Law Review 13099 (July 2013).

³⁹ See generally Law Review 17103 (November 2017).

⁴⁰ See Law Review 22041 (July 2022) and Law Review 12034 (April 2012).

Section 4303 of USERRA⁴¹ 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 [10 USCS § 12503] or section 115 of title 32 [32 USCS § 115].⁴²

Yes, it is necessary for the Commanding Officer of the unit to draft and sign performance evaluations, but in the absence of documentation that the Navy has directed the individual to perform this activity on a particular day this activity does not meet the “under competent authority” requirement, and the individual’s absence from work on these days is not protected by USERRA.⁴³

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.⁴⁴ 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

⁴¹ 38 U.S.C. § 4303.

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

⁴³ 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.

⁴⁴ 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.⁴⁵

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 2011.⁴⁶

f. Help individual reservists, especially serial volunteers, to understand what counts and what does not count toward exhausting the five-year limit.

The individual reservist who performs his or her drills and annual training periods and who reports as ordered when involuntarily called to active duty does not need to worry about USERRA's five-year limit on the cumulative duration of the period or periods of uniformed service relating to the employer relationship with the current civilian employer because all of these periods of service are exempt from the computation of the five-year limit.⁴⁷

On the other hand, the serial volunteer needs to understand, before volunteering for a new period of service, whether the new period counts or does not count toward the five-year limit. Please establish a system to provide this information to individuals before they volunteer or before you give them orders.

Conclusion

By establishing these procedures and providing this information to individual reservists, their commanding officers, and their civilian employers, you can help the reservists in your organization to balance their military responsibilities with their responsibilities to their civilian employers.

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.

⁴⁵ *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).

⁴⁶ Law Review 11031 discusses *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002).

⁴⁷ See Law Review 16043 (May 2016).

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.

If you are now serving or have ever served in any one of our nation’s eight⁴⁸ 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 20002⁴⁹

⁴⁸ Congress recently established the United States Space Force as the 8th uniformed service.

⁴⁹ You can also contribute on-line at www.roa.org.