

## LAW REVIEW<sup>1</sup> 22074

December 2022

### **Do Not Give your Civilian Employer “Ammunition” in Support of an Argument that you Have “Abandoned” your Civilian Career.**

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

- 1.1.1.8—USERRA applies to the Federal Government
- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.3.1.3—Timely application for reemployment
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a Captain (O-6) in the Navy Reserve and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the**

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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 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.

<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 its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing business as” name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

**Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I am a GS-15 employee of a Federal executive agency.**

**I have been away from my Federal civilian job for three years, for active duty in the Navy, and I have just agreed to remain on active duty for an additional year, through 9/30/2023. I notified my direct civilian supervisor and the personnel office of the Federal agency of the extension, and the agency's chief personnel officer sent me a lengthy e-mail, demanding that I state the date of my return to Federal civilian employment. Am I required to respond to this e-mail or to predict that I will return to the Federal agency by a specific future date?**

**A: No.** You were required to give notice to the civilian employer when you left the job in 2019.<sup>4</sup> You were not required to give your civilian employer continuing notice of extensions to your active duty period.<sup>5</sup>

Keeping your civilian employer informed about extensions is certainly advisable, but you are not required to promise or predict that you will return to the civilian job by a particular date or even at all. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

**Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?**

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No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.<sup>6</sup>

The point of USERRA is to keep your civilian job behind you as an unburned bridge. You can wait until you leave active duty, and then for another 90 days, to decide whether you want to seek reemployment in the pre-service civilian job.

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<sup>4</sup> See 38 U.S.C. § 4312(a)(1).

<sup>5</sup> See *Sutton v. City of Chesapeake*, 713 F. Supp. 2d 547, 551 (E.D. Va. 2010).

<sup>6</sup> 20 C.F.R. § 1002.88 (bold question in original).

**Q: The personnel officer also demanded, in the e-mail and in a follow-up telephone call to me by his principal deputy, that I provide documentation showing that I have not exceeded USERRA's five-year limit. What is that about?**

**A:** Under section 4312(c) of USERRA,<sup>7</sup> there is a cumulative limit of five years on the duration of your period or periods of uniformed service, related to the employer relationship for which you seek reemployment, but there are also nine exemptions—kinds of service that do not count toward exhausting your five-year limit.<sup>8</sup>

If and when you leave active duty and apply for reemployment, and if the employer requests documentation at that time, you will be required to provide such documentation as is readily available to show that you have not exceeded the five-year cumulative limit on the duration of your uniformed service periods related to your employer relationship with the Federal Government.<sup>9</sup> You are not required to document that you are still within the five-year limit while you are still on active duty.

As I have explained in Law Review 16043 (May 2016) and many other articles, it is important that you keep careful track of your own five-year limit to avoid inadvertently going over the limit and losing the right to reemployment. You may find it necessary to refer to Law Review 16043, or even to seek legal advice, to understand what counts and what does not count in computing the five-year limit. *Do not seek legal advice from your employer's personnel department, and do not engage in conversation with the personnel department about the five-year limit until you leave active duty and apply for reemployment.*

**Q: When she called me on the telephone at my military assignment, the deputy personnel director of the Federal agency aggressively pushed me to comment upon my "intentions" about returning to Federal civilian employment, and she pointedly asked me whether I preferred military service to Federal civilian employment. What is this about?**

**A:** The deputy personnel director is probably trying to get you to say something that might support a claim that you have waived your USERRA rights by "abandoning" your Federal civilian career.<sup>10</sup> You should keep in mind that the personnel officer is not your friend and is not looking out for your interests. You should be very careful about what you say to the personnel officer about your intentions or about whether you prefer military service to Federal civilian employment.<sup>11</sup>

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<sup>7</sup> 38 U.S.C. § 4312(c).

<sup>8</sup> See Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

<sup>9</sup> See 38 U.S.C. § 4312(f)(1)(B).

<sup>10</sup> See Law Review 22074, the immediately preceding article in this "Law Review" series.

<sup>11</sup> See Law Review 14004 (January 2014).

## **Please join or support ROA**

This article is one of 2,000-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 more than 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 eight<sup>12</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:

Reserve Organization of America  
1 Constitution Ave. NE  
Washington, DC 20002<sup>13</sup>

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<sup>12</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>13</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).