

Virginia Law on Paid Military Leave for Public Employees

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

1.18: USERRA and Other Laws

2.0: Paid Leave

Virginia law, Section 44-93, provides as follows concerning military leave for employees of the Commonwealth of Virginia and its political subdivisions. This section has been updated to now provide for 21 days of paid military leave instead of 15:

A. All officers and employees of the Commonwealth or of any political subdivision of the Commonwealth who are former members of the armed services or members of the organized reserve forces of any of the armed services of the United States or National Guard shall be entitled to leaves of absence from their respective duties, without loss of seniority, accrued leave, or efficiency rating, on all days during which they are engaged in federally funded military duty, to include training duty, or when called forth by the Governor pursuant to the provisions of § 44-75.1 or § 44-78.1.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find approximately 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of about 1300 of the articles. In our "state laws" section, we have an article for each state about the state laws that grant paid military leave and other benefits, over and above USERRA, to employees of the state and (often) to employees of the state's political subdivisions.

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. I have 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 35 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 SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

There shall be no loss of regular employer pay during such leaves of absence, except that paid leaves of absence for federally funded military duty, to include training duty, shall not exceed 21 workdays per federal fiscal year, and except that no officers or employees shall receive paid leave for more than 21 workdays per federally funded tour of active military duty.

When relieved from such duty, they shall be restored to positions held by them when ordered to duty. If the office or position has been abolished or otherwise has ceased to exist during such leave of absence, they shall be reinstated in a position of like seniority, status and pay, if the position exists, or in a comparable vacant position for which they are qualified, unless to do so would be unreasonable.

For the purposes of this section, with respect to employees of the Commonwealth or its political subdivisions who do not normally work approximately equal workdays on five or more days of each calendar week, the term “workday” shall mean 1/260 of the total working hours such employee would be scheduled to work during an entire federal fiscal year, not taking into account any state holidays, annual leave, military leave, or other absences. Where such employee returns from federally funded military duty and the eight-hour rest period required by the Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. § 4301 et seq.) overlaps such employee’s scheduled work shift, the employee shall receive paid military leave to the extent of such overlap.

B. In addition to the provisions of subsection A, any local government may pay such employee when activated for federally funded military duty all or any portion of the difference between his regular pay and the military pay received during all or any part of the term of active federally funded duty.³

In addition to paid military leave, Virginia law provides as follows concerning benefits and differential pay:⁴

A. In addition to the paid military leave provisions of § 44-93, the Commonwealth or any political subdivision of the Commonwealth may supplement the military pay of its officers and employees who are reservists or national guard members called to federally funded military duty in an amount necessary to bring their total salary, inclusive of their base military pay, to the level earned at the time they were called to federally funded military duty. The employer may also, in its discretion, continue to provide any health insurance and other existing benefits to such officers and employees.

³ VA. CODE ANN. § 44-93 (2022).

⁴ This section was added by Gavriel Swerling, an ROA Service Members Law Center Associate, in 2007. He is in his third year at the University Of Maryland School Of Law and is a First Lieutenant in the Marine Corps Reserve. After he graduates from law school and passes the Maryland bar exam, he will go on active duty in the Marine Corps, as a judge advocate, for at least four years. Thank you to RADM James J. Carey and the Washington Scholars for sending him our way. *The views expressed in this article do not represent the Maryland Law School or the Marine Corps.

B. In addition to any other benefit provided by law, if an employee of the Commonwealth or of any political subdivision has been called to federal active duty services under Title 10 of the United States Code, the Commonwealth shall provide an additional death benefit in the amount of \$20,000 to be paid if the employee is killed in action in any armed conflict while serving with any reserve component of the Army, Navy, Marine Corps, Air Force, or Coast Guard or with any unit of these respective services of the United States.⁵

Virginia law also addresses a service member's reemployment rights in Section 44-93.3:⁶

Upon honorable release from state active duty or military duty pursuant to Title 32 of the United States Code, a member of the Virginia National Guard or Virginia Defense Force, or a person who is a member of the National Guard of another state and who was previously employed in the Commonwealth, shall make written application to his previous employer for reemployment within (i) 14 days of his release from duty or from hospitalization following release if the length of the member's absence by reason of service in the uniformed services does not exceed 180 days or (ii) 90 days of his release from duty or from hospitalization following release if the length of the member's absence by reason of service in the uniformed services exceeds 180 days. When released from such duty, they shall be restored to positions held by them when ordered to duty. If the office or position has been abolished or otherwise has ceased to exist during such leave of absence, they shall be reinstated in a position of like seniority, status and pay if the position exists, or to a comparable vacant position for which they are qualified, unless to do so would be unreasonable. This section shall not apply when the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services exceeds five years.⁷

Section 44-93.3 must be read together with the federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁸ USERRA applies to state and local governments, private employers, and the Federal Government. USERRA accords the right to unpaid but job-protected military leave to persons who have left civilian jobs to perform voluntary or involuntary service in the uniformed services, as defined by USERRA.

⁵ VA. CODE ANN. § 44-93.1 (2022).

⁶ This section is written by First Lieutenant Tara Buckles. Tara, a life member of ROA, is a First Lieutenant in the Marine Corps. Tara holds a B.S. in Business Administration with a second major in Public Policy from the University of North Carolina at Chapel Hill. She graduated cum laude from the University of Pittsburgh School of Law in May 2022 and sat for the Texas bar exam. After passing the bar exam, she will go on active duty in the Marine Corps. Military title is used for identification only. The views expressed in this article are the views of the author, and not necessarily the views of the Marine Corps, the Department of the Navy, the Department of Defense, or of the U.S. Government.

⁷ VA. CODE ANN. § 44-93.3 (2022).

⁸ 38 U.S.C. 4301-35.

USERRA is a floor and not a ceiling on the employment and reemployment rights of veterans and Reserve and National Guard personnel. USERRA does not supersede a state law that provides greater or additional rights.⁹ USERRA supersedes a state law that purports to limit USERRA rights or that imposes an additional prerequisite on the exercise of USERRA rights.

This particular Virginia statute appears to run afoul of USERRA in two ways. First, under Section 4312(e) of USERRA, a timely application for reemployment is based on how long the employee's period of uniformed service was:

- Less than 31 days → “not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person’s residence”
- More than 30 days but less than 181 → “submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible”
- More than 180 days → “not later than 90 days after the completion of the period of service”
- If the service member is hospitalized or convalescing from an illness or injury incurred in or aggravated during the period of uniformed service → at the end of the period that is necessary for the person to recover from such illness or injury, report to the person’s employer or submit an application for reemployment with such employer. Such period of recovery may not exceed two years. Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person’s control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.¹⁰

Therefore, it seems like the requirement to apply within 14 days provides additional rights to servicemembers who have been gone less than 31 days, in which case it does not run afoul of USERRA. The Virginia statute provides the same rights as USERRA for employees who have been gone more than 30 but less than 81 days and more than 180 days. However, regarding employees who have been hospitalized, the state law would not be applicable and they would have a full two years to recover and then reapply for employment.

Virginia provides an enforcement mechanism for all of the above provisions in Section 44-98.

A person who, either by himself or with another, deprives a member of the Virginia National Guard or Virginia Defense Force of his employment, or prevents, by himself or

⁹ 38 U.S.C. 4302(a).

¹⁰ 38 U.S.C. 4312(e).

another, such member being employed, or obstructs or annoys such member or his employer at his trade, business, or employment, because such member of such organization is such member, or dissuades any person from enlistment in the Virginia National Guard or Virginia Defense Force by threat or injury to him in his trade, business, or employment in case he shall so enlist, shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not exceeding \$500, or imprisonment in jail not more than 30 days, or shall suffer both fine and imprisonment.¹¹

Access the Virginia Code on Your Own

We do our best to keep these state law articles up-to-date and provide the most relevant sections of the applicable statute for you to review. Nonetheless, we still recommend you consult the most recent version of the law to make sure nothing has changed from what we discussed in this article. You can find a public version of the entirety of the Virginia Code for yourself online, for free, at <https://law.lis.virginia.gov/vacode/>. To access the sections discussed in this article, follow this link and select “Title 44 Military and Emergency Laws” → “Chapter 1. Military Laws of Virginia” → Scroll to Article 10 where you will find all of the sections discussed in this article.

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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.

¹¹ VA. CODE ANN. § 44-98 (2022).

If you are now serving or have ever served in any one of our nation's eight¹² 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 20002¹³

¹² Congress recently established the United States Space Force as the 8th uniformed service.

¹³ You can also contribute on-line at www.roa.org.