

Paid and Unpaid Military Leave for Reserve Component Members in Vermont

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

1.18: USERRA and Other Laws

2.0: Paid Leave

The federal law

A federal statute called the Uniformed Services Employment and Reemployment Rights Act (USERRA)³ protects the civilian jobs of those who leave civilian employment for voluntary or involuntary service in the uniformed services. As I have explained in Law Review 15116 (December 2015), a person must meet five simple conditions to have the right to reemployment under USERRA:

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 (VRRA—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 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 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.

- a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.³
- b. Must have given the employer prior oral or written notice.⁴
- c. Must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.⁵
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. After release from the period of service, must have made a timely application for reemployment with the pre-service employer.⁷

A person who meets these five conditions is entitled to prompt reemployment in the position that he or she would have attained if continuously employed or another position, for which he or she is qualified, that is of like seniority, status, and pay.⁸ Upon reemployment, the person is entitled to the seniority and pension credit that he or she would have received if continuously employed.⁹

USERRA does not require the civilian employer to pay the person for time not worked because of service, but the person has federal legal protection for these absences from work. It is unlawful for an employer to deny a person initial employment, retention in employment, promotion, or a benefit of employment on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.¹⁰ USERRA applies to almost all employers in this country.¹¹

USERRA applies to persons who leave jobs for service in the Active Component (AC) of the armed forces,¹² as well as the Reserve Components (RC). In recent years, and especially since the terrorist attacks of September 11, 2001, USERRA has most commonly been applied to persons who serve in the RC of the armed forces.¹³

³ 38 U.S.C. § 4312(a).

⁴ 38 U.S.C. § 4312(a)(1).

⁵ 38 U.S.C. § 4312(c). Under that subsection, there are nine exemptions—that is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of USERRA's five-year limit.

⁶ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges awarded by court martial for serious criminal misconduct and other-than-honorable administrative discharges.

⁷ After a period of service of 181 days or more, the deadline to apply for reemployment is 90 days after the date of release. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁸ 38 U.S.C. § 4313(a)(2)(A).

⁹ 38 U.S.C. §§ 4316(a), 4318.

¹⁰ 38 U.S.C. § 4311(a).

¹¹ Only religious institutions, Native American tribes, and foreign embassies and consulates and international organizations (United Nations, World Bank) are exempt from USERRA enforcement.

¹² Please see Law Review 0719 (May 2007).

¹³ Almost one million RC members have been called to the colors since 9/11/2001.

Our nation has seven Reserve Components. In order of size (smallest first) they are the Coast Guard Reserve (USCGR), the Marine Corps Reserve (USMCR), the Navy Reserve (USNR), the Air Force Reserve (USAFR), the Air National Guard (ANG), the Army Reserve (USAR), and the Army National Guard (ARNG). The ARNG and ANG are hybrid federal-state entities, while the other five components are purely federal.

The National Guard

Today's National Guard traces its origin to 1636, when the Massachusetts Bay Colony established the Massachusetts Militia to protect the colony from the Pequot Indians. Other colonies and later states established militia forces, and the state militias were called into federal service when needed for the American Revolution, the War of 1812, the Mexican-American War, the Civil War, and the Spanish-American War. These state militias were also available to the governors for state emergencies.

Early in the 20th Century, Congress established the ARNG as a hybrid federal-state entity. The Federal Government provides most of the funding for equipping, recruiting, training, and paying ARNG members, and they are subject to federal call-up as needed. They engage in periodic and special training (paid for by the Federal Government) to maintain their readiness for federal call-up. They are also available, in their traditional "state militia" role, to be called by the Governor for state active duty for hurricanes, tornadoes, floods, fires, blizzards, riots, and other state emergencies. In 1947, when the Air Force became a separate military service, Congress created the ANG as a similar hybrid federal-state organization.

Relationship between USERRA and state laws

USERRA protects the civilian jobs of ARNG and ANG members when they are away from those jobs for voluntary or involuntary training or service under title 10 or title 32 of the United States Code. USERRA does not apply to state active duty (called by the Governor, under state authority, paid with state funds, for state emergencies). If ARNG and ANG members are to have the right to reinstatement in their civilian jobs after state active duty, it must be by state law.

Under section 4302 of USERRA, this federal law is a floor and not a ceiling on the rights of veterans and RC members, including members of the ARNG and ANG.¹⁴ Under section 4302(a), USERRA does not supersede or override a state law that provides greater or additional rights. Under section 4302(b), USERRA supersedes state laws that purport to limit USERRA rights or that impose additional prerequisites upon the exercise of USERRA rights.¹⁵

USERRA is a broad and strong law, but there is room for state laws in two ways:

¹⁴ 38 U.S.C. § 4302.

¹⁵ Under Article VI, Clause 2 of the United States Constitution (called the "Supremacy Clause"), a federal statute like USERRA overrides conflicting state statutes and state constitutions.

a. State laws can give RC members *greater or additional rights*. For example, more than 45 states grant limited periods of *paid* military leave to employees of the state and its political subdivisions.¹⁶

b. State laws are needed to protect the civilian jobs of ARNG and ANG members on state active duty.

Vermont Law¹⁷

Title 21 Section 491 of the Vermont Statutes Annotated provides as follows for employees of Vermont and its political subdivisions:

- (a)
 - (1) Any member of the Reserve Components of the U.S. Armed Forces, of the Ready Reserve, or of the Vermont National Guard or the National Guard of another state shall, when called to state or federal service, receive the same benefits, privileges, and protections in employment regardless of the activation authority or location of service.
 - (2)
 - (A) Upon request, a member of the Reserve Components of the U.S. Armed Forces, of the Ready Reserve, or of the Vermont National Guard or the National Guard of another state shall be entitled to a leave of absence to engage in military drill, training, or other temporary duty pursuant to state or federal military orders.
 - (B) A member of the Vermont National Guard or the National Guard of any state or territory who is ordered to state active duty shall be subject to the requirements of and entitled to the rights, privileges, benefits, and protections provided by the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4335.
 - (C) A leave of absence shall be with or without pay as determined by the employer.
- (b) A member of or an applicant for membership in the National Guard in either federal or state status as defined in 20 V.S.A. §§ 366 and 601 shall not be denied initial

¹⁶ Political subdivisions include counties, cities, towns, school districts, and other units of local government.

¹⁷ This section is written (January 2023) 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.

employment, reemployment, retention of employment, promotion, or any benefit of employment by an employer on the basis of membership, application for membership, performance of service, application for service, or obligation to serve.

(c) An employer shall not discriminate in employment against any person because a person has taken any of the following actions:

- (1) enforcement of a provision of this subchapter or federal law;
- (2) testified or made a statement in connection with any proceeding under this subchapter or under federal law;
- (3) assisted or participated in any investigation under this subchapter or federal law; or
- (4) exercised any right provided by this subchapter or under federal law.¹⁸

Vermont Annotated Statutes Title 21 Section 492 also provides for continued civilian health insurance coverage while on state active duty:

(a) Any absence for military training or State active duty shall not affect the employee's right to receive normal vacation, sick leave, bonus, advancement, and other advantages of employment normally to be anticipated in the employee's particular position.

(b) Any person who is absent from employment necessitated by service in the National Guard as permitted under section 491 of this title shall be entitled to the reemployment rights and benefits provided in 38 U.S.C. §§ 4312-4318.

(c)

(1) If any member of the Vermont National Guard with civilian employer-sponsored insurance coverage is ordered to State active duty by the Governor for up to 30 days, or if *any member of the National Guard of another state who is a Vermont employee with civilian employer-sponsored insurance is ordered to state active duty by the Governor of that state* for up to 30 days, the service member may, at the member's option, continue his or her civilian health insurance under the same terms and conditions as were in effect for the month preceding the member's call to state active duty, including a continuation of the same levels of employer and employee contributions toward premiums and cost-sharing.

(2) If a member of the Vermont National Guard is called to State active duty for more than 30 days, or if *a member of the National Guard of another state who is a Vermont employee is called to state active duty for more than 30 days*, the member may continue his or her civilian health insurance. For a member whose

¹⁸ VT. STAT. ANN. tit. 21, § 491 (2022).

employer chooses not to continue regular contributions toward premiums and cost-sharing during the period of the member's state active duty in excess of 30 days, the State of Vermont shall be responsible for paying the employer's share of the premium and cost-sharing.

(3) The Office of the Adjutant General shall administer this subsection and may adopt policies, procedures, and guidelines to carry out the purposes of this subsection, including developing employee notice requirements, enforcement provisions, and a process for the State to remit the employer's share of premiums and cost-sharing to the appropriate entities pursuant to subdivision (2) of this subsection.¹⁹

Providing civilian health insurance coverage for National Guard members on state active duty is important because those members are eligible to participate in the military medical system (TRICARE) for themselves and their families only when they are on federal active duty. This is the one significant area where Vermont law provides a benefit that is over and above USERRA. As amended in 2016, this provision applies to a member of the National Guard of another state who has a civilian job in Vermont.

Vermont provides for enforcement of these provisions in Section 493:

- (a) If any employer fails to comply with any of the provisions of this subchapter, the employee may bring an action in the Civil Division of the Superior Court seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or other benefits, reinstatement, costs, reasonable attorney's fees, and other appropriate relief.
- (b) The Attorney General or a State's Attorney may enforce the provisions of this subchapter by bringing an action in Superior Court for legal and equitable relief and may conduct civil investigations in accordance with the procedures established in 9 V.S.A. §§ 2458-2461 as though a violation of this subchapter were an unfair act in commerce.²⁰

Access the Vermont Statutes Annotated 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 Vermont Statutes for yourself online, for free, at <https://legislature.vermont.gov/statutes/>. To access Sections 491-493 discussed in this article, select "Title 21: Labor" → "Chapter 5 Employment Practices" →

¹⁹ VT. STAT. ANN. tit. 21, § 492 (2022).

²⁰ VT. STAT. ANN. tit. 21, § 493 (2022).

Scroll down to “Subchapter 5: Employment Rights for Reserve and National Guard Members” and select the section you want to read.

Please join or support ROA

This article is one of 2,300-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 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 eight²¹ 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 20002²²

²¹ Congress recently established the United States Space Force as the 8th uniformed service.

²² You can also contribute on-line at www.roa.org.