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How Does USERRA's "Furlough or Leave of Absence" Clause Apply to your Airline's "Crisis Time Off" Program?

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About Sam Wright

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1.8—Relationship between USERRA and other laws/policies

Q: I am a Major in the Air Force Reserve and a life member of the Reserve Organization of America (ROA).[3] I have read with great interest several of your "Law Review" articles about

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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 Spouse 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 1800 of the articles.

[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 44 years, I have worked 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 SWright@roa.org.

[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army

the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve our country in uniform, especially in the National Guard or Reserve. I am particularly interested in two recent articles, Law Review 20035 (April 2020) and Law Review 20052 (May 2020).

As you correctly pointed out in Law Review 20035, the nationwide shortage of qualified airline pilots became a glut almost overnight. Because of the COVID-19 pandemic, the number of customers seeking to travel by air was drastically reduced. Scheduled flights that had been traveling with almost every seat filled became flights that were empty or almost empty.

An airline needs at least a certain minimum number of paying passengers on board to break even. There are marginal costs for the fuel, the pay for the Captain, First Officer and flight attendants, the maintenance, etc. It costs almost as much to fly an airliner empty as to fly it full. It does not make economic sense to fly empty airplanes across the country.

In response to the plummeting demand for airline tickets, my airline and other major airlines have drastically reduced the number of scheduled flights. Instead of having five scheduled flights per day from Point A to Point B, the schedule has been reduced to one per day, or maybe one every other day.

As the number of scheduled flights is reduced, the need for personnel plummets. Until March of last year (2020), major airlines had difficulty filling all the left and right seats in cockpits with qualified pilots, and as a result airlines strenuously objected when pilots who were Reserve Component (RC) personnel left their jobs for short or long periods of voluntary or involuntary service or training in the armed forces. Now, airlines are encouraging rather than discouraging pilots to return to active duty. If Smith returns to active duty for three years, that reduces the need to furlough (lay off) Jones or other pilots who are not active RC participants.

In Law Review 20052, you discussed USERRA's "furlough or leave of absence" clause and the important new case of *White v. United Air Lines,* 416 F. Supp. 3d 736 (N.D. Ill. 2019). You also attached a copy of the amicus curiae (friend of the court) brief that ROA filed in that case,

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Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

supporting the arguments of Eric White, a Lieutenant Colonel in the Air Force Reserve and ROA member who works for United Air Lines (UAL) as a pilot.[4]

Under USERRA's "furlough or leave of absence clause," as I understand it, based on your explanation in Law Review 20052, an employer is required to provide a benefit (like full or partial pay) to employees who are away from their jobs for uniformed service, if and to the extent that the employer provides that benefit to employees who have been furloughed (laid off)[5] or who are on non-military leaves of absence of comparable duration. I am wondering how USERRA's "furlough or leave of absence" clause applies to me and my situation.

I was commissioned a Second Lieutenant in 2007, via the Air Force Reserve Officers Training Corps (ROTC), and I served on active duty for the next seven years. After I left active duty in 2014, I affiliated with the Air Force Reserve and I was hired by a large airline as a rookie pilot. Let us call my employer Very Big Air Line or VBAL.

In July 2019, the Air Force offered me the opportunity to return to active duty for three years, from 10/1/2019 until 9/30/2022, and I took that opportunity. I gave VBAL oral and written notice that I was leaving my job to return to active duty. I expect to leave active duty at the end of my current orders and to return to the airline shortly thereafter, in accordance with USERRA.

Recently, in response to the COVID-19 emergency, VBAL established its "Crisis Time Off" (CTO) Program. Under this program, VBAL pilots can volunteer to take "CTO" periods ranging from six months to five years. While on CTO status, a pilot receives pay from the airline that is equal to almost half of what he or she would ordinarily earn as an active pilot, and the pilot on CTO status receives certain other benefits from the airline. From the airline's point of view, the purpose of the CTO Program is to encourage some pilots to leave the airline temporarily, but to return later when their services will be needed as business conditions

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[4] A person or organization that is not a party to a lawsuit but that may be affected by a precedent that the case may set has the opportunity to file an amicus curiae brief in an appellate court supporting the arguments of one of the parties or perhaps making legal arguments that no party made. An amicus curiae brief can be a powerful tool in helping to shape the development of case law. Over the last 15 years, ROA has filed several amicus curiae briefs in the United States Supreme Court and other courts, but filing such briefs is not cheap. As resources permit, ROA will continue to file amicus curiae briefs as an important way to protect the interests of serving RC personnel who are our members and potential members.

[5] When an employer has a reduced need for employees, because of changing economic circumstances, the employer may "furlough" or "lay-off" employees. In the airline industry, this action is called a furlough, while in most other industries it is called a layoff. Employees who have been furloughed or laid off receive lesser pay and benefits from the employer, or no pay at all, but they have not been fired. Employees who have been furloughed or laid off can ordinarily expect to be called back to work when business conditions improve, but that may be months or even years later. I know of airline pilots who were furloughed in the immediate aftermath of the terrorist attacks of 9/11/2001 and who were not called back to work until 2006 or 2007. At unionized airlines (and the pilot workforces of almost all airlines are unionized), furloughs and recalls from furlough are based strictly on seniority. The most junior pilots are the first to be furloughed and the last to be called back from furlough.

improve and the most senior pilots retire. VBAL is trying to minimize or eliminate the need to furlough pilots involuntarily by encouraging other pilots to take an "intermission" in their airline pilot careers. A pilot on CTO status is permitted but not required to perform military service while in the CTO status.

When I heard about the CTO Program, I contacted the VBAL personnel office to inquire about applying. I have enough VBAL seniority to make it likely that I would get a CTO slot if I were to apply for it. It would be great to receive half pay and other benefits from VBAL during the rest of my current three-year active duty period (scheduled to end 9/30/2022).

I contacted the VBAL personnel office to inquire about applying for a CTO slot. The personnel director told me that I am ineligible to apply and that if I do apply my application will not be considered. She said that the purpose of the CTO Program is to get pilots "off the books" to minimize the need to furlough other pilots. She said that I am already off the books because I have been on active duty for a year, with two more years to go on my current orders.

In Law Review 20052, you wrote that the "furlough or leave of absence" clause applies to benefits that were "established while such person performs such [uniformed] service" as well as benefits "in effect under a contract, agreement, policy, practice, or plan in effect at the commencement of such service." I think that denying me the opportunity to participate in the CTO Program because I was already away from my VBAL job for active duty for several months before the CTO Program was announced violates the "furlough or leave of absence" clause. What do you think?

Answer, bottom line up front

I think that you are correct that the "furlough or leave of absence" clause applies to you and to the VBAL CTO Program. Denying you the opportunity to apply because you were already on active duty when the program was announced violates USERRA. I suggest that you formally apply for the program, if only for the purpose of getting a formal denial that you can challenge in court.

We must recognize that challenging the VBAL policy will not be easy. This involves a new application of an existing law, to a new and unanticipated situation.

Explanation

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, more than 26 years ago. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act,

the law that led to the drafting of millions of young men (including my late father) for World War II.[6] The pertinent clause of USERRA is as follows:

> **(1)** Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
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> **(A)** deemed to be on furlough or leave of absence while performing such service; and
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> **(B)** entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service *or established while such person performs such service*.[7]

Like much of USERRA, the furlough or leave of absence clause was carried over from the comparable provision of the VRRA. The prior law provided that a person away from work for military service "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such [military] forces."[8]

USERRA's legislative history addresses the purpose and effect of the furlough or leave of absence clause as follows:

> New section 4316(b)(1) would provide that, subject to new paragraphs (2) through (6) discussed below, an individual who serves in the uniformed services will be considered to be on furlough or leave of absence while in the service. That person will be entitled to the same rights and benefits not determined by seniority that are generally provided to the employer's other employees with similar seniority, status, and pay who are onfurlough or leave of absence. The rights and benefits to which the person is entitled will be those under a practice, policy, agreement, or plan in force at the beginning of the period of uniformed service *or which becomes effective during the period of service.*
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> Current section 4301(b)(1), which is similar to new section 4316(b)(1), provides that an individual restored to or employed in a position under chapter 43 [the reemployment statute] is considered as having been on furlough or leave of absence during the

[6] Although the VRRA was part of the draft law from 1940 until 1974, it has applied to voluntary enlistees as well as draftees since 1941,

[7] 38 U.S.C. 4316(b)(1) (emphasis supplied). This provision is referred to as the "furlough or leave of absence clause." It means that an employee who is away from his or her civilian job for uniformed service must be given the same benefits, during the absence from work for service, that other employees of the same employer receive while on furlough or non-military leaves of absence of comparable duration.

[8] 38 U.S.C. 4301(b)(1) (1988 version of the United States Code).

> individual's period of training and service and that the individual is entitled to participate in benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time the individual was inducted into the Armed Forces.
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> The Committee [Senate Committee on Veterans' Affairs] bill would codify court decisions that have interpreted current law [the VRRA] as providing a statutorily-mandated leave of absence for military service that entitles servicemembers to participate in benefits that are accorded other employees. *See Waltermeyer v. Aluminum Company of America,* 804 F.2d 821 (3rd Cir. 1986); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1519 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985). *The new provision would expand upon the current protection by clarifying that the returning employee would be entitled not only to the rights and benefits of agreements and practices in force at the time he or she left the employment, but also to rights and benefits of agreements and practices which become effective during the period of service.*
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> Current section 4301(b)(1) also provides that an individual who is reemployed under chapter 43 must be considered as having been on furlough or leave of absence and is entitled to participate in insurance offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer when the individual was inducted into the Armed Forces.
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> The Committee bill would preserve the servicemember's right to retention of existing insurance if that same right would generally be extended to employees during a period of furlough or leave of absence.[9]

On the House side, the legislative history of USERRA makes clear that court decisions under the VRRA remain in effect under USERRA unless the law changed in a pertinent way in 1994:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with this Act [USERRA], remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See*

[9] 1993 Senate Committee Report, October 18, 1993 (S. Rep. 103-158, 1993 WL 432576 (Leg. History) (emphasis supplied), reprinted in Appendix D-2 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found at pages 900-01 of the 2020 edition of the *Manual.*

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[10]

Cases like *Waltermeyer* and *Winders,* construing the furlough or leave of absence clause of the VRRA, should be cited and relied upon in construing the similar clause in USERRA.

Two sections of the Department of Labor (DOL) USERRA Regulations are pertinent here:

> **What is the employee's status with his or her civilian employer while performing service in the uniformed services?**
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> During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.[11]
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> **Which non-seniority rights and benefits is the employee entitled to during a period of service?**
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> **(a)** The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. *They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.*
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> **(b)** If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for

[10] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual.* The quoted paragraph can be found at pages 795-96 of the 2020 edition of the *Manual.*
[11] 20 C.F.R. 1002.149 (bold question in original).

> service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.
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> **(c)** As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[12]

In his lawsuit, Eric White sought to apply USERRA's "furlough or leave of absence" clause to short periods of military training or service, like drill weekends or two-week annual training tours. White argued (on behalf of himself and all similarly situated UAL pilots) that since UAL pays pilots their full pay while they are away from work for jury duty, it is required to pay full pay to pilots who are away from their UAL jobs for short tours of military training, like two-week annual training tours.

It is reasonable to compare a two-week jury trial with a two-week annual training tour for a reservist. It is not reasonable to compare a typical jury leave with a military tour lasting for years.[13]

Non-military leaves of absence, like jury leave, are normally for short periods measured in days or at most weeks, but furloughs in the airline industry can last for years. I know of airline pilots who were furloughed by their employers in the immediate aftermath of 9/11/2001 and who were not called back to their airline jobs until five or more years later.

I think that you have an excellent argument that you are entitled, under USERRA's "furlough or leave of absence" clause, to participate in VBAL's CTO Program. Denying you that opportunity violates USERRA, in my opinion.

We will keep the readers apprised of developments on this interesting and important issue.

Please join or support ROA

This article is one of 2000-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 in 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

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[12] 20 C.F.R. 1002.150 (bold question in original, emphasis by italics supplied).

[13] The O.J. Simpson murder trial lasted from 1/25/1995 until 10/2/1995, but such a lengthy jury trial is unusual.

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 many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights 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 seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. 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:

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