

LAW REVIEW¹ 21026

April 2021

USERRA and the SCRA Are Great Laws, but there Are Limits

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

[About Sam Wright](#)

1.1.2.2—Independent contractors and partners

4.3—SCRA right to a continuance and protection against default judgment

Q: I am a 30-year-old lawyer in private practice as a sole practitioner. When I graduated from law school five years ago, I “hung out a shingle” in a small city. I really struggled for the first three years, but then my practice took off. I am interested in enlisting in the Navy Reserve as an intelligence officer or a judge advocate, and I realize that I am approaching the maximum age to enlist.

I have never served our country in uniform, but I feel that I should serve. I have read with great interest several of your “Law Review” articles about the Uniformed Services

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 45 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.

Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA). If I were to enlist in the Navy Reserve or another Reserve Component (RC), how would those laws apply to me as a lawyer in private practice?

A: Unfortunately, those two laws would not protect you as a lawyer in private practice. The clients in your law practice are not your employer, and they have no obligation to put their legal problems on hold while you are away for training or service in the Navy Reserve. USERRA simply would not apply to your situation.

Under the SCRA, a service member has the right to a continuance in a civil case when the member is a party and the member's service precludes his or her presence for a trial or hearing, and the service member is protected against a default judgment.³ This protection does not apply to the lawyer. If you are unable to attend a trial or hearing for one of your clients because of service or training in the Navy Reserve, you should not expect the judge to cut you any slack.

I congratulate you for your motivation to serve our country, but I question whether your plan to serve in the Navy Reserve while you are a solo-practice lawyer is feasible.

Q: Does USERRA apply to an associate in a law firm? What about a partner?

A: As I have explained in Law Review 15116 (December 2015) and many other articles, a person must meet five conditions to have the right to reemployment under USERRA. The first condition is that the person must have left a *position of employment* to perform voluntary or involuntary service in the uniformed services, of short duration or long duration. An associate at a law firm is clearly an employee, and if he or she leaves that position of employment to perform uniformed service, and if he or she meets the other four conditions,⁴ he or she is entitled to reemployment under USERRA.

If you are a bona fide partner, you do not have rights under USERRA and other federal employment laws but calling you a "partner" does not make you one.⁵

³ 50 U.S.C. 3931, 3932.

⁴ The person must have given prior notice to the employer. The person's cumulative periods of service relating to that employer relationship must not have exceeded five years, but there are nine exemptions—kinds of service that do not count toward exhausting the five-year limit. See Law Review 16043 (May 2016). The person must have been released from the period of service without having received a disqualifying bad discharge from the military, like a dishonorable discharge or an OTH (other than honorable administrative discharge). After release from the period of service, the person must have reported back to work or applied for reemployment in a timely manner.

⁵ See *Serapion v. Martinez*, 119 F.3d 982, 989-90 (1st Cir. 1997), cert. denied, 522 U.S. 1047 (1998). See generally Law Review 18109 (November 2018).

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 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002