

LAW REVIEW¹ 21049
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The USERRA-like Law for Students Does Not Apply to Typical Reserve Component Service

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

[About Sam Wright](#)

1.1.2.4—USERRA-like law for students

1.8—Relationship between USERRA and other laws/policies

Q: I am a Major³ in the Army Reserve (USAR) and a life member of the Reserve Organization of America (ROA).⁴ I have read with great interest many of your “Law Review” articles about the

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 The factual set-up for this article is fictitious but realistic.

⁴ 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 eight Reserve Components. In ascending order of size, they are the Space Force Reserve (new and just

Uniformed Services Employment and Reemployment Rights Act (USERRA). I have used your articles to help me manage my relationship between my obligations to the USAR and my obligations to my civilian employer. In the USAR units where I have served and the unit I now command, I have referred other USAR members (officers and enlisted personnel) to your articles.

In the unit I command there is a very bright and ambitious enlisted member—let us call her Mary Jones. Mary is a college undergraduate (pre-med major) and a full-time student. I see a great future for Mary in the Army, perhaps as a physician. I certainly do not want to lose her from the USAR.

Our unit is scheduled to participate in annual training for three weeks in October 2021, and all unit members are expected to attend. Mary came to me recently and told me that she cannot attend our annual training because her university will not permit her to be away from classes for more than one week during a semester. Does USERRA require the university to give Mary a military leave of absence to attend our unit's annual training?

A: No. USERRA does not apply because the university is not Mary's employer. As I have explained in Law Review 21048, the immediately preceding article in this "Law Review" series, Congress enacted a USERRA-like law for students in 2008.⁵ That USERRA-like law only applies to absences from an educational program of more than 30 days. Moreover, the USERRA-like law gives the student the right to withdraw from the educational program and to return to the program during a later term. Mary does not want to withdraw from the fall semester—if she withdraws from the university every time her USAR duty interferes with her education, she will never graduate. The USAR and the other Reserve Components need to make accommodations for service members like Mary. Perhaps she can transition to a lower readiness status (like the Individual Ready Reserve) during her college and medical school education.

Q: I have heard that some states have USERRA-like laws for students. Is that true?

A: Yes, but those state laws typically only apply to public educational institutions, like state universities and community colleges. If Mary is a student at a private university, the state law (if any) most likely does not apply. Please see Law Review 21038 (July 2021), by Commander Wayne Johnson, JAGC, USN (Ret.), for detailed information about those State laws.

getting organized), Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army 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.

⁵ 20 U.S.C. 1091c. You can find the complete text of that section in Law Review 21048.

Moreover, if Mary has rights under state law, she will need to utilize the enforcement mechanism provided by the state law to enforce those rights. She cannot expect assistance from the United States Department of Labor or Department of Education in enforcing state law rights.

Q: Over the years, I have referred many USAR service members to the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR). Will ESGR help reservists who are students?

A: I carefully reviewed the ESGR website.⁶ I saw no mention of section 1091c of title 20 or of the problems that students have in balancing their military obligations with their educational programs. If Mary were to call ESGR (800-336-4590), she would probably be told “sorry, we don’t do students.”

Summary

There is a need for better protection of students with respect to participation in Reserve Components of the armed forces. That will require action by Congress or the State legislatures. We (ROA) are working on this issue.

Please join or support ROA

This article is one of 2200-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, including amicus curiae (“friend of the court”) briefs in the Supreme Court and other courts, we educate service members, military spouses, attorneys, employers, educational institutions, judges, 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,

⁶ www.esgr.mil.

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 eight⁷ 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 20002

ROA sent the letter below to Secretary of Education Michael Cardona. If we receive a response, we will post it here.

Honorable Miguel Cardona
Secretary of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Protecting the rights of National Guard and Reserve service members who are postsecondary students

Dear Secretary Cardona:

As we celebrate Veterans Day, let us all remember that delegates to the Continental Congress *declared* our nation's independence 245 years ago, but military personnel of the nascent United States Army, Navy, and Marine Corps *secured* that independence over the next 6 years of hard fighting, defeating Great Britain, the major naval and military superpower of the late 18th Century. And over the next two and ½ centuries ten generations of American military personnel have ensured that "government of the people, by the people, and for the people shall not perish from the earth."

In a 2016 Memorial Day address at Arlington National Cemetery, General Joseph Dunford, USMC, the Chairman of the Joint Chiefs of Staff, said:

⁷ Congress recently established the United States Space Force as the eighth uniformed service.

Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure of devotion. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that is the human cost.

Two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military. Without conscription, it is necessary for our country to establish incentives to encourage qualified young men and women to enlist and remain in our country's six armed forces, the Army, Navy, Marine Corps, Air Force, Coast Guard, and the nascent Space Force. An important incentive is the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4335.

Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans Reemployment Rights Act (VRRA), which was enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of nine million young men for World War II. The Federal reemployment statute guarantees that those who leave civilian jobs to serve our country in uniform shall not lose their civilian jobs or fall behind those of their age cohort who remain behind enjoying the protection of those who serve. *This law has always applied to voluntary as well as involuntary military service.*

Today, 48 years after the end of the draft, our country has the best-motivated, best-led, best equipped, and most effective military in the world, and in the history of the world. I hope that it will never be necessary to reinstate conscription. In the first decade of this century, Representative Charles Rangel of New York repeatedly introduced bills to reinstate the draft. *He never found a single co-sponsor.*

In the all-volunteer era, the effective enforcement of USERRA is essential to making it possible for our nation's six armed forces to recruit and retain the necessary quality and quantity of young men and women to defend our country and its vital interests. I invite your attention to our Law Review 14080 (July 2014). For your convenience, I am enclosing a copy of that article.

Our nation has 8 Reserve Components of the armed forces. In ascending order of size, they are the nascent Space Force Reserve, the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. One million men and women serve in these 8 Reserve Components, almost equal to the number of people serving full-time in the Active Component of the armed forces. Thus, the Reserve Components make up almost half of our nation's pool of trained and available military personnel.

More than one million Reserve Component personnel have been called to the colors since 9/11/2001. Through their efforts and sacrifices, along with the efforts and sacrifices of their Active

Component comrades in arms, they have protected our nation from a repetition of the tragic events of that terrible Tuesday morning 20 years ago.

More than 10% of Reserve Component part-timers are *students not employees*. The Congressional Budget Office has reported: "In 2016, about 78,500 members of the reserve component used the program [Post-9/11 GI Bill benefits]." See <https://www.cbo.gov/publication/56308>. When you add in Reserve Component personnel who are financing their education by other means, the number must be greater than 100,000, or 10% of the Reserve and National Guard force. These student-servicemembers are among the youngest of our nation's Reserve Component force and represent the future of our nation's defense.

USERRA does not protect these student-servicemembers because the educational institution is not the *employer* of such a person. But in 2008 Congress enacted a USERRA-like law for postsecondary students. I invite your attention to 20 U.S.C. 1091c. Law Review 21038 (July 2021), by Commander Wayne Johnson, JAGC, USN (Ret.), explains section 1091c in detail. For your convenience, I am enclosing a copy of that article.

Unlike USERRA, section 1091c *does not create a private right of action*. The *exclusive* means of enforcement of this section is by the Department of Education cutting off or threatening to cut off Federal funding (including access to Federal student loans) for educational institutions that flout this vital law. That means that student-servicemembers are entirely dependent upon your Department to enforce their reinstatement rights when calls to the colors interrupt their educational pursuits.

The enforcement of section 1091c has been a *neglected stepchild* in the Department you lead. The mention of section 1091c is hidden away in an almost-inaccessible part of your Department's website. That page lists an employee who left Federal service years ago and a telephone number that is no longer operational.

I call upon you to ensure that enforcement of 20 U.S.C. 1091c is given appropriate priority by your Department. I recognize that the Department of Education has many important responsibilities, but *nothing is more important than defending our country*.

Very respectfully,

Jeffrey Phillips

Major General (retired), United States Army
Executive Director

Enclosures (as stated)