

## LAW REVIEW<sup>1</sup> 21050

September 2021

### Am I Entitled to *Paid* Military Leave?

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

[About Sam Wright](#)

1.1.1.7—USERRA applies to state and local governments

1.3.2.10—Furlough or leave of absence clause

1.8—Relationship between USERRA and other laws/policies

2.0—Paid leave for government employees who are reservists or National Guard members

**Q: I am a Lance Corporal (E-3)<sup>3</sup> in the Marine Corps Reserve and a member of the Reserve Organization of America (ROA).<sup>4</sup> I have read with great interest several of your “Law Review”**

---

<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2200 “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.

<sup>2</sup> 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](mailto:SWright@roa.org).

<sup>3</sup> The factual set-up for this article is hypothetical but realistic.

<sup>4</sup> 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

**articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related laws that protect the rights and interests of reservists and National Guard members.**

**I am a police officer for a small city. My city only gives me *unpaid* military leave for my drill weekends and annual training in the Marine Corps Reserve. Another member of my reserve unit is a police officer for another city in our State, and he gets *paid* military leave from his city. Why does he get a valuable benefit that I do not get?**

**Does USERRA require my civilian employer to grant me *paid* military leave?**

**A:** Under most circumstances, USERRA only requires civilian employers to grant *unpaid but job-protected military leave*. Most State and local government employees get paid military leave under State law, not USERRA.

In your State, the State law on paid military leave only applies to the State itself, not to political subdivisions of the State (counties, cities, school districts, and other units of local government). In your State, payment of paid military leave by political subdivisions is a local option. The fact that another city in your State grants paid military leave does not mean that your city is required to do so.

I invite the reader's attention to the "State leave laws" section at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find an article for each State, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands on the State and territorial laws that provide for *paid* military leave for State or territory employees. Some of those laws only apply to the State itself, while other laws also apply to political subdivisions of the State (counties, cities, school districts, and other units of local government).

Earlier this year (2021), I reviewed all those articles on paid military leave and updated them, as necessary.

**Q: What is the relationship between USERRA and these State or territorial laws and regulations?**

**A:** USERRA is a floor and not a ceiling on the employment and reemployment rights of service members and veterans. A State or territorial or local law, ordinance, regulation, or policy can

---

senior officers. Our nation has eight Reserve Components. In ascending order of size, they are the Space Force Reserve (new and just 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.

give service members and veterans *greater or additional rights, over and above USERRA*. These laws, ordinances, regulations, or policies cannot take away the rights and benefits that Congress conferred on service members and veterans when it enacted USERRA. The pertinent USERRA section is as follows:

- (a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.<sup>5</sup>

The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

**How does USERRA relate to other laws, public and private contracts, and employer practices?**

- (a)** USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.
- (b)** USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.
- (c)** USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an

---

<sup>5</sup> 38 U.S.C. 4302.

employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

**(d)** If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.<sup>6</sup>

**Q: You wrote that under most circumstances USERRA only requires the employer to grant unpaid but job-protected military leave. Under what circumstances does USERRA require an employer to provide *paid* military leave?**

**A:** USERRA's "furlough or leave of absence" clause 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—

**(A)** deemed to be on furlough or leave of absence while performing such service; and

**(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.<sup>7</sup>

If, and to the extent, that the employer grants paid leave to employees who are away from work for comparable periods of absence for other reasons (like jury duty), the employer must grant paid military leave for comparable periods of absence.<sup>8</sup>

#### **Please join or support ROA**

This article is one of 2200-plus "Law Review" articles available at [www.roa.org/lawcenter](http://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.

---

<sup>6</sup> 20 C.F.R. 1002.7 (bold question in original).

<sup>7</sup> 38 U.S.C. 4316(b)(1).

<sup>8</sup> See *White v. United Air Lines, Inc.*, 987 F.3d 616 (7<sup>th</sup> Cir. 2021), *rehearing and rehearing en banc denied* 2021 U.S. App. LEXIS 7038 (7<sup>th</sup> Cir. March 10, 2021). I also discuss the implications of the "furlough or leave of absence" clause on paid military leave in Law Reviews 21015, 21016, and 21017 (March 2021) and Law Review 21046 (July 2021).

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, 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 eight<sup>9</sup> 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](http://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

---

<sup>9</sup> Congress recently established the United States Space Force as the eighth uniformed service.