LAW REVIEW[1] 21052
September 2021

Don't Lambaste the Serial Volunteers, But Don't Give them all the Duty they Want.

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About Sam Wright

1.1.3.1—USERRA applies to voluntary service
1.1.3.3—USERRA applies to National Guard service
1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.8—Relationship between USERRA and other laws/policies

Q: I am a Major General[3] in the Army National Guard (ARNG) and a member of the Reserve Organization of America (ROA).[4] I recently joined your organization because I appreciate the

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

[4] At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new "doing business as" name—the Reserve Organization of America. The point of the name change is to emphasize that the organization

great information in your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and other laws that protect the rights and interests of National Guard and Reserve personnel.

I serve as The Adjutant General (TAG) of my State. That means that I head up the ARNG and the Air National Guard (ANG) of my State, as well as our State Defense Force, a purely State entity that responds to emergencies and disasters when the ARNG soldiers and ANG airmen are fully engaged elsewhere. I fully understand that without a law like USERRA it would not be possible for us to recruit and retain qualified soldiers and airmen for the National Guard.

I frequently receive complaints from civilian employers about the burden put on them by frequent and lengthy periods of training and service performed by the soldiers and airmen I command. I patiently explain to these employers that these service members must be absent from their civilian jobs to train and to serve and that their service is essential both to our State and to the nation. I appeal to their patriotism, and most of them get on board. I work with the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR) to honor those employers who go above and beyond the requirements of USERRA in supporting employees who serve in the Guard or Reserve.

Some employers complain to me about specific employees who serially volunteer for assignments, not just the weekend drills and annual training that all National Guard members are required to attend. One complaint stands out. I will call the Guard member Sergeant Eager Beaver. I examined his military record, and it shows that over the last three years he has performed 29 voluntary assignments of varying duration, on top of his drill weekends and annual training. Some of these assignments were last-minute opportunities, meaning that Beaver gave his employer almost no advance notice in several instances.

Does USERRA protect voluntary service? Should it? How do you suggest that I respond to employer complaints about soldiers and airmen like Sergeant Eager Beaver?

Answer, bottom line up front

USERRA protects voluntary as well as involuntary service, and that must always be the case. In a larger sense, all military service is voluntary. No one has been drafted by our country since 1973, when Congress
abolished the draft and established the All-Volunteer Military.

Please do not lambaste those who volunteer, but that is not to say that you should accommodate Sergeant Eager Beaver every time he volunteers. I suggest that you designate a senior officer,

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now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

perhaps a Colonel or Lieutenant Colonel, with Statewide responsibility to review complaints about serial volunteers. This senior officer should be a full-timer at the State headquarters. He or she should have full access to records and information and the authority to say no to volunteers and to cancel or reschedule duty periods that have already been scheduled.

Q: That sounds like a great idea, but to promote the utilization of the chain of command I want to assign this responsibility to the Commanding Officer (CO) of each ARNG or ANG unit. What do you say about that?

A: Please do not put this burden on the CO of the individual unit. In most cases, the unit CO is a part-timer, like most or all the unit members. The unit CO has his or her own problems balancing responsibilities to the military with responsibilities to the civilian employer. If the unit CO has this responsibility, he or she will likely receive many telephone calls and e-mails, mostly during work hours, from the civilian employers of unit members. Please do not add to the burden on the civilian employer of the unit CO.

Q: Does USERRA apply equally to voluntary as well as involuntary military training and service?

A: Yes.

Section 4303 of USERRA defines 16 terms used in this law. The term “service in the uniformed services” is defined as follows:

> The term "service in the uniformed services" means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act, State active duty in response to a major disaster declared by the President under Section 401 of the Robert T. Stafford Disaster Relief and Assistance Act, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.[5]

The italicized phrase “on a voluntary or involuntary basis” makes clear that USERRA applies equally to voluntary and involuntary service. Of course, in a larger sense all military service today is

[5] 38 U.S.C. 4303(13) (emphasis supplied).

voluntary. In 1973, almost two generations ago, Congress abolished the draft and established the All-Volunteer Military.

Q: Is there a limit on the amount of time that an individual National Guard member or Reservist can be away from his or her civilian job for military training and service?

A: As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[6] and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. The VRRA made confusing and cumbersome distinctions among categories of military training or service. Different subsections of the law, and different rules, applied to each category. USERRA eliminated these distinctions. Under USERRA, the rules depend upon the duration of the period of service, not the category.

Under the VRRA, there was a four-year cumulative limit on the duration of the periods of *active duty* that a person could be away from a job and still have the right to reemployment. The VRRA had no limit on the duration of a specific period of *active duty for training* or on the cumulative amount of time that a person could be away from a job for active duty for training.

After Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973, the services started asking some Reserve Component service members to perform active duty for training periods that were substantially longer than the traditional two-week period for such training. There was a 20-year argument in the courts as to whether there was a "rule of reason" limiting the duration of active duty for training periods. Finally, in 1991, the Supreme Court put an end to that argument by holding, explicitly and unanimously, that there was no such implied limit.[7]

When Congress enacted USERRA in 1994, it included a provision that explicitly ratified the 1991 Supreme Court decision and precluded the application of any "rule of reason" under USERRA:

> In any determination of a person's entitlement to protection under this chapter [USERRA], the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements in subsection (a)(1) and the notification requirements established in subsection (e) are met.[8]

USERRA's legislative history explains the purpose and effect of section 4312(h) as follows:

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[6] Public Law 103-353, 108 Stat. 3162.

[7] *See King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).

[8] 38 U.S.C. 4312(h).

> Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital.* This new subsection makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements of sections 4312(a) and (e).
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> The Committee believes, however, that instances of blatant abuser of military orders should be brought to the attention of appropriate military authorities (*see Hilliard v. New Jersey Army National Guard,* 527 F. Supp. 405, 411-412 (D.N.J. 1981)[9]), and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.[10]

Under USERRA, there is a five-year cumulative limit on the period or periods of uniformed service that an individual can perform with respect to the employer relationship for which he or she seeks reemployment, but there are also nine exemptions from the limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit.[11] The annual training and inactive duty training periods performed by National Guard and Reserve members are exempt from the computation of the five-year limit.[12] Involuntary mobilizations of National Guard and Reserve members are similarly exempt.[13] Voluntary active duty periods performed by National Guard and Reserve personnel can be exempted by the Service Secretary (like the Secretary of the Army) under certain circumstances.[14] Other than the five-year limit, with its nine exemptions, the frequency and duration of National Guard and Reserve service is essentially unlimited.

This is not to say that I do not share your concern about stretching the limits of the patience of the individual employer. Military leaders like you should limit the issuance of orders for serial volunteers like Sergeant Eager Beaver. Do not lambaste him for volunteering, but do not keep giving him orders for extra assignments. Try to find other service members to volunteer for these necessary additional assignments.

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[9] I discuss the *Hilliard* case in detail in Law Review 15025 (March 2015).
[10] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix D-2 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 896-97 of the 2021 edition of the *Manual.*
[11] 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit.
[12] 38 U.S.C. 4312(c)(3).
[13] 38 U.S.C. 4312(c)(4)(A).
[14] 38 U.S.C. 4312(c)(4)(B), (C), and (D).

Q: The complaints that I receive from civilian employers relate to the lack of timely notice as well as frequency and duration. Are National Guard and Reserve service members required to give advance notice of the periods that they will be required to be away from their civilian jobs for military training or service? How much advance notice are they required to give?

A: The person who is to be away from his or her civilian job for military training must give "advance written or verbal notice of such service to such person's employer."[15] Alternatively, "an appropriate officer of the uniformed service in which such service is performed" can give the advance notice.[16] USERRA explicitly provides an exception to the advance notice requirement, as follows:

> No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.[17]

Four sections of the Department of Labor (DOL) USERRA Regulations address the prior notice requirement, as follows:

Must the employee give advance notice to the employer of his or her service in the uniformed services?

(a) Yes. The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employer, the employee, or an appropriate office of the uniformed service in which his or her service is to be performed, must notify each employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.

(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an "appropriate officer" can give notice on the employee's behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

(c) The employee's notice to the employer may be either verbal or written. The notice may be informal and does not need to follow any particular format.

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[15] 38 U.S.C. 4312(a)(1).
[16] Id.
[17] 38 U.S.C. 4312(b).

(d) Although USERRA does not specify how far in advance notice must be given to the employer, an employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense Department "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."[18]

When is the employee excused from giving advance notice of service in the uniformed services?

The employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity or is otherwise impossible or unreasonable under all the circumstances.

(a) Only a designated authority can make a determination of "military necessity," and such a determination is not subject to judicial review. Guidelines for defining "military necessity" appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by "military necessity." *See* 42 U.S.C. 300hh-11(e)(3)(B).

(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the employee's employer or the employer's representative, or a requirement that the employee report for uniformed service in an extremely short period of time.[19]

Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give notice of pending service.[20]

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

[18] 20 C.F.R. 1002.85 (bold question in original).
[19] 20 C.F.R. 1002.86 (bold question in original).
[20] 20 C.F.R. 1002.87 (bold question in original).

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.[21]

Q: Do you have other suggestions as to how I can help National Guard members in my State balance their military and civilian obligations?

A: Yes. I have the following suggestions as to how you, as The Adjutant General of your State, can minimize conflicts between National Guard members and their civilian employers.

Provide more notice to employers.

USERRA requires notice to the civilian employer, prior to a period of service,[22] except when giving such notice is precluded by military necessity or otherwise impossible or unreasonable.[23] No specific amount of notice is required, but certainly the practical advice is to give as much notice as possible. Sergeant Beaver's civilian supervisor is much less likely to complain if he or she has 30 days of notice, rather than three days or three hours. If Beaver will be away from work, the employer needs to know that in advance to make alternative arrangements to cover Beaver's assignments.

DOD and the services have established rules about adequate notice to employers, but those rules have been "honored largely in the breach." We need to do a better job of keeping employers informed of the days and times when RC members will be performing military duty.

Your office should notify employers directly.

Under USERRA, the notice to the civilian employer, before a period of military duty, can be provided by the individual employee or it can be provided by "an appropriate officer of the uniformed service in which such service is performed."[24] In several articles, I have urged the Reserve Components to utilize this provision and notify employers directly. We should encourage

[21] 20 C.F.R. 1002.88 (bold question in original).
[22] 38 U.S.C. 4312(a)(1).
[23] 38 U.S.C. 4312(b).
[24] 38 U.S.C. 4312(a)(1).

the individual RC member to give notice, but we should not depend on that. We need to establish a system whereby the Reserve Component itself gives written notice to the civilian employer.

Having the Component give the notice has several advantages. First, this method will ensure that adequate notice is provided. Second, a record can be maintained of the notice, and if the employer later denies having received notice that record can be introduced to prove the element of notice. Third, by giving such notice to the employer an appropriate officer of the Reserve Component can interpose himself or herself between the individual RC member and his or her angry employer. The individual member, especially a junior enlisted member, should not have to face the employer's wrath alone.

Provide documentation and other assurance to employers.

As I have explained in Law Review 16027 (April 2016) and Law Review 16127 (December 2016), the RC member *is not required to provide any documentation* when giving the employer notice of an impending period of service, and the requirement to provide notice when applying for reemployment only applies after periods of service of 31 days or more. But employers expect to see such documentation and employers have an inflated concept of the kind of documentation that the individual Guard or Reserve member receives for short military tours, like drill weekends. What employers really want is reassurance that the individual is telling the truth when he or she claims to be away from work for military training or service, not for other reasons. There have been substantiated cases where such claims turned out to be untruthful. We need institutional arrangements enabling the Reserve Components to provide reassurance to civilian employers.

Don't call the RC member at his or her civilian job, except in a real emergency, not an exercise.

Major Mary Jones is an Individual Mobilization Augmentee (IMA). She performs inactive duty training periods on weekdays at a major military command, for many days per year, often with short notice to her civilian employer. All these military periods are protected by USERRA. On other days, when Mary is not performing military duty and when she is at her civilian job, officers at the military command that Mary supports call her at her civilian job, during work hours, to discuss work that she did during her most recent IMA period and to arrange for the next IMA period. *USERRA does not give Mary the right to do military duty while on the clock at her civilian job, even in nominal amounts.* The officers at the supported command must be aware of Mary's civilian job schedule and must call her outside her work hours—most likely during evenings or weekends. Yes, this will be inconvenient for them, but this is a price of doing business.

Private Alice Adams recently enlisted in the Army National Guard and was away from her civilian job for about six months for basic training.

While at basic training, she made a sexual harassment complaint against a drill instructor. Despite this problem, she successfully completed the basic training and is now back at her civilian job.

Captain I.B. Ignorant, an Army judge advocate, has been assigned to investigate Alice's sexual harassment complaint. On several occasions, he calls Alice at her civilian job in the weeks after her return from Army duty, and this causes immense problems for Alice with her civilian employer, culminating in her loss of her civilian job. Captain Ignorant needs to be instructed to call Mary at her home, outside her civilian work hours.

Petty Officer Joe Smith is a Navy Reservist. At least once per year, the full-timers at the Naval Operational Support Center (formerly known as the Navy Reserve Center) call all the members of Smith's reserve unit as part of a recall exercise. The full-timers make these calls during regular work hours because that is more convenient for them. Smith's civilian employer strenuously objects to these calls, although they only happen once or twice per year, because Smith works on an assembly line. When a call like this comes in the employer must shut off the assembly line for several minutes, idling several other employees and interfering with production.

Captain Larry Lewis is the Commanding Officer of Smith's Navy Reserve unit. At his own civilian job, Lewis frequently receives calls from Smith and other unit members with various problems and questions. He also occasionally receives calls from the civilian employers of unit members, complaining about military training periods of unit members and asking Lewis, as the Commanding Officer, to cancel or reschedule those training periods. All these calls, which usually come during Lewis's work hours, seriously detract from Lewis' own job performance and magnify his problems with his civilian employer.

These are real situations of which I have been made aware in the last 44 years, in my efforts to assist RC members with their civilian job problems. We must establish and enforce a strict rule: *Do not call the individual RC member at his or her civilian job except in a real emergency.*

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 "friend of the court" briefs in the Supreme Court and other courts), we have sought to educate service members, their spouses, attorneys, judges, ESGR volunteers, DOL investigators, employers, congressional and state legislative staffers, and others about the legal rights of National Guard and Reserve 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 seven 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:

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