

## As a Civilian Employer, the Department of the Navy Must Be Triply the Model Employer.

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[About Sam Wright](#)

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**Q: I am a Lieutenant Commander in the Navy Reserve (USNR) and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,200 “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), 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 90% of the articles published so far, but we are always looking for “other than Sam” articles by other lawyers who are ROA members or willing to join ROA.

<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 and retired as a Captain (O-6) in 2007. I am a life member of ROA and have served on the national staff as the Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC during its six years in operation as a funded ROA program. I have continued some of the work of the SMLC as a volunteer and ROA member since I left the national staff in 2015.

<sup>3</sup> At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>4</sup>

**For more than 10 years, I have worked as a Department of the Navy civilian (DONCIV). Over the years, I have received considerable static from my DONCIV supervisors about my periods of absence from work necessitated by my USNR training and service, although those absences were clearly protected by USERRA.**

**Recently, I volunteered to return to active duty for Fiscal Year 2022, from 10/1/2021 through 9/30/2022. I gave my DONCIV supervisor both oral and written notice more than two months in advance and requested military leave under USERRA. He repeatedly told me that my request for military leave was denied and that if I left my DONCIV job for military service he would fire me. I told him that I have the right to leave my civilian job for military service and to return to the job upon completing the period of service, under USERRA. He said that USERRA does not apply to the Federal Government or especially to the Department of the Navy. What do you say about that?**

**A:** Your supervisor is wrong and should know better. USERRA applies with special force to the Federal Government. USERRA's first section provides that "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."<sup>5</sup>

If the Federal Government is expected to be a model employer, the Department of the Navy should be triply the model employer. Without a law like USERRA, the Department of the Navy would not be able to recruit and retain enough personnel for the Navy and Marine Corps, including but not limited to the USNR and USMCR.<sup>6</sup> How can the Department of the Navy ask civilian employers to comply with USERRA for those who serve in the Navy and Marine Corps, including the USNR and USMCR, when the Department of the Navy flouts this law in its treatment of its own civilian employees?<sup>7</sup>

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<sup>4</sup> Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

<sup>5</sup> 38 U.S.C. 4301(b),

<sup>6</sup> Contrary to popular misconception, USERRA applies to service in the Active Component of the armed forces, as well as service in the Reserve and National Guard. See Law Review 07019 (May 2007).

<sup>7</sup> "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye? Or how wilt thou say to thy brother, Let me pull out the mote out of thine eye; and, behold, a beam is in thine own eye? Thou hypocrite, first cast out the beam out of thine own eye and then shalt thou see clearly to cast out the mote out of thy brother's eye." *Matthew*, Chapter 7, verses 3-5 (*King James Bible*).

USERRA applies to almost all employers in this country, including the Federal Government (Executive Branch and Legislative Branch), the States, the political subdivisions of States,<sup>8</sup> and private employers, regardless of size.<sup>9</sup>

Your supervisor, like all Federal Government supervisors and human resources personnel, is required to take periodic training in the USERRA rights of service members and the obligations of Federal agencies as employers.<sup>10</sup> Your supervisor apparently was not paying attention during that required training.

You are correct that you did not need to ask for or receive your supervisor's permission to absent yourself from your civilian job for military service. The Department of Labor (DOL) USERRA Regulation provides:

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

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 the employer notice of impending service.<sup>11</sup>

If you meet the five USERRA conditions for reemployment,<sup>12</sup> you are entitled to *prompt* reinstatement, within 14 days after you apply for reemployment.<sup>13</sup>

**Q: My supervisor said that I do not have rights under USERRA because I volunteered for this year of active duty. Is my supervisor correct?**

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<sup>8</sup> Political subdivisions include counties, cities, school districts, and other units of local government.

<sup>9</sup> You only need one employee to be an employer for purposes of the Federal reemployment statute. See *Cole v. Swint*, 961 F.2d 58, 60 (5<sup>th</sup> Cir. 1992). Please see Law Review 08051 (November 2008).

<sup>10</sup> See 38 U.S.C. 4335; Law Review 11061 (2011).

<sup>11</sup> 20 C.F.R. 1002.87 (bold question in original).

<sup>12</sup> You must have left your job to perform uniformed services, and you have already done that. You must have given the employer prior oral or written notice, and you gave such notice. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which you seek reemployment. 38 U.S.C. 4312(c). Under that subsection, there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the limit. Your year of active duty, from 10/1/2021 until 9/30/2022, may be exempt from the five-year limit, but even if this year counts, it probably will not put you over the limit. 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. You must be released from the period of service without having received a disqualifying bad discharge from the military, like a punitive discharge (by court martial) or an OTH (other than honorable) administrative discharge. 38 U.S.C. 4304. After release from the period of service, you must make a timely application for reemployment. After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>13</sup> 20 C.F.R. 1002.181.

**A:** No, your supervisor is wrong. Contrary to popular misconception, USERRA applies to *voluntary as well as involuntary service*. USERRA's definition of "service in the uniformed services" includes the following: "The term 'service in the uniformed services' means the performance of duty *on a voluntary or involuntary basis* in a uniformed service. ..."<sup>14</sup> In a larger sense, all military service in our country is voluntary. Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military.

**Q: My supervisor said that the office cannot afford to be without me for a whole year. He said that he is going to promote Mary Jones into my position and that under no circumstances will he displace Ms. Jones to make room for me when I return to work in the fall of 2022. What do you say about that?**

**A:** If you meet the five USERRA conditions, and you almost certainly will meet them, you are entitled to prompt reinstatement in the *position that you would have attained if you had been continuously employed*, or another position (for which you are qualified) that is of like seniority, status, and pay.<sup>15</sup> If it is necessary to displace Ms. Jones in order to reemploy you in the proper position, that is what the Department of the Navy is required to do. The United States Court of Appeals for the Federal Circuit has held:

The department [Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was "unavailable" because it was occupied by another and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ... Although occupied by Walsh, Nichols' former position is not unavailable, and it is irrelevant that the department will be forced to displace Walsh to restore him.<sup>16</sup>

**Q: On my last day at work, before I left to report to active duty on 10/2/2021, the civilian personnel office notified me that my use of paid military leave going back ten years is being audited. I was ordered to produce documentation showing that I performed military training or service on all the days for which I claimed paid military leave. I produced the documents that I have, but the personnel office rejected them as "insufficient."**

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<sup>14</sup> 38 U.S.C. 4303(13) (emphasis supplied).

<sup>15</sup> 38 U.S.C. 4313(a)(2)(A). The position that you would have attained if you had been continuously employed may be a better position than the one you left.

<sup>16</sup> *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). Please see Law Review 22023 (April 2021) for many additional case citations supporting the proposition that the employer must displace another employee to reinstate the returning veteran in the appropriate position.

**As best I can determine, no other employee is being audited on leave use at this time. I think that this “audit” is a sham and is intended to harass me for exercising my USERRA rights. Is it unlawful for an employer or supervisor to harass an employee, like me, because of his or her service in the Reserve or National Guard?**

**A:** As I explained in Law Review 20049 (May 2020), Congress amended USERRA in 2011 to make clear that harassing an employee for his or her uniformed service obligations, and creating a hostile work environment, violates section 4311 of USERRA.<sup>17</sup> I also invite your attention to Law Review 21006 (January 2021).

It is possible that the timing of the leave audit is coincidental, but that seems unlikely. I suggest that you contact the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR). The telephone number is 800-336-4590.

**Q: Does USERRA give me the right to *paid* military leave?**

**A:** Under most circumstances, no. USERRA gives you the right to unpaid but job-protected military leave. Your right to *paid* military leave is under section 6323 of title 5 of the United States Code.<sup>18</sup> As a Federal civilian employee who is a member of the Reserve or National Guard, you are entitled to 15 *workdays* of paid military leave per fiscal year.

USERRA does not supersede or override another Federal law that gives you *greater or additional rights*, over and above USERRA.<sup>19</sup> Section 6323 gives you greater or additional rights, the right to paid military leave, and is not superseded by USERRA. After you have exhausted your right to paid military leave under section 6323, you still have the right to unpaid but job-protected military leave under USERRA.<sup>20</sup>

**Please join or support ROA**

This article is one of 2,200-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.

ROA is almost a century old. It was established in October 1922 by a group of veterans of “The Great War” as World War I was then known. Captain Harry S. Truman was one of those veterans. As President, in 1950, he signed our congressional charter. Under that charter, our

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<sup>17</sup> 38 U.S.C. 4311.

<sup>18</sup> 5 U.S.C. 6323.

<sup>19</sup> 38 U.S.C. 4302(a).

<sup>20</sup> 20 C.F.R. 1002.7(d).

mission is to advocate for the implementation of policies that provide for adequate national defense. 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 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, attorneys, judges, employers, and others about the legal rights of service members and 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 cost 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>21</sup> uniformed services, you are eligible for full ROA membership, including the right to vote and run for office in the organization. Eligibility includes those who are serving or have served in the Active Component, the Reserve, or the National Guard, and enlisted members as well as officers are eligible.

If you are eligible, please join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448. The cost is only \$20 per year or \$450 for a life membership. If you are not eligible, please support us financially to help us continue this work. You can mail us a check as follows:

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<sup>21</sup> Congress recently established the United States Space Force as the eighth uniformed service.