

## **USERRA Protects Inactive Duty Training and Active Duty for Training for Retirement Points Only**

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[About Sam Wright](#)

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**Q: I am a 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 Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>4</sup>**

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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.

<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).

**In the USNR, I am a member of a Volunteer Training Unit (VTU). That means that I perform inactive duty training (drills) and active duty for training for retirement points only—no pay.<sup>5</sup> I have been taking unpaid but job-protected military leaves of absence from my job at a major multinational corporation (let us call it Daddy Warbucks Industries or DWI) for these military periods.**

**Recently, my DWI supervisor learned that I am not paid for my USNR training periods and he “wrote me up on charges” within the company, accusing me of “defrauding” the company, taking military leave that I was not entitled to take. He said that USERRA does not apply to “no pay” training periods like this. Is my supervisor correct?**

**Answer, bottom line up front:**

No, your supervisor is wrong. USERRA gives you the right to time off from your civilian job (Federal, State, local, or private sector) to perform “service in the uniformed services” as defined by USERRA, and your points-only inactive duty training and active duty for training periods constitute “service in the uniformed services” under USERRA’s definition.<sup>6</sup>

**Explanation:**

As I have explained in Law Review 15116 (December 2015) and many other articles, you have the right to unpaid but job-protected military leave under USERRA if you meet five simple conditions. First, you must have left a civilian job (Federal, State, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.<sup>7</sup> Second, you must have given the employer prior oral or written notice.<sup>8</sup> Third, you must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that

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<sup>5</sup> As I have explained in detail in Law Reviews 16086 and 16087 (September 2016), a reservist or National Guard member must have accumulated at least 20 “good years” to qualify for Reserve Component retirement at age 60 (earlier under some circumstances), and the number of retirement points factors into the formula that determines the amount of the individual’s monthly retirement check. The individual receives one retirement point for each period of inactive duty training (typically four hours) and one point for each day of active duty or active duty for training.

<sup>6</sup> This is a matter of intense interest to me because of my own USNR history. I served in the Navy and Navy Reserve as a judge advocate (lawyer) and retired in 2007, with 4,401 retirement points. More than 1,000 of those points were for “points-only” inactive duty training and active duty for training in VTU Law 0601 in Washington, DC. During the 1980s and 1990s, there were twice as many USNR judge advocates as there were pay billets for reserve judge advocates. I was in VTU Law 0601 from 1987 until 1990, as a Lieutenant Commander and Commander, and from 1993 until my retirement in 2007, as a Commander and a Captain.

<sup>7</sup> 38 U.S.C. 4312(a).

<sup>8</sup> 38 U.S.C. 4312(a)(1). Prior notice to the employer is not required when giving such notice is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b).

you have performed, related to your employer relationship with that employer.<sup>9</sup> Fourth, you must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>10</sup> Fifth, you must have been timely in reporting back to work or applying for reemployment after release from the period of service.<sup>11</sup>

It seems clear that you have met and are continuing to meet these five conditions for each period when you have been absent from your DWI job for uniformed service. I will discuss the first, second, and third conditions in this article, as the fourth and fifth conditions are self-explanatory.

### **Active duty for training and inactive duty training for retirement points alone qualify as “service in the uniformed services” under USERRA.**

Section 4303 of USERRA<sup>12</sup> defines 17 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](#) (50 U.S.C. 1601 et seq.), [State active duty](#) in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Response and Assistance Act (42 U.S.C. 5170), 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

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<sup>9</sup> 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 your five-year limit. See Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count toward exhausting your five-year limit.

<sup>10</sup> 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious crimes) and OTH (other than honorable) administrative discharges.

<sup>11</sup> After a period of service lasting fewer than 31 days, like a drill weekend or a traditional two-week annual training period, you must report back to work at the start of the first full regularly scheduled work period on the first calendar day after you are released from the period of service and after the expiration of a period of eight hours (for rest) after the time needed for safe transportation from the place of service to your residence. 38 U.S.C. 4312(e)(1)(A). After a period of service that lasted for more than 30 days but fewer than 181 days, you must apply for reemployment within 14 days after the date of your release from service. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, you must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D).

<sup>12</sup> 38 U.S.C. 4303.

funeral honors duty as authorized by [section 12503 of title 10](#) or [section 115 of title 32](#).<sup>13</sup>

Active duty for training and inactive duty training, along with other categories of service, qualify as “service in the uniformed services” for USERRA purposes. USERRA does not make a distinction between active duty for training and inactive duty training performed for pay and retirement points and such duty performed for retirement points alone. The duty periods that you have performed and are performing is clearly protected by USERRA.

**Q: Does that mean that anything that I do to benefit the Navy and Navy Reserve qualifies as “service in the uniformed services” for USERRA purposes?**

**A:** No, it does not mean that. Only duty that you perform *under competent authority* qualifies as “service in the uniformed services.”<sup>14</sup>

**You gave appropriate prior notice to DWI that you would be absent from your DWI job to perform uniformed service.**

You provided me a copy of a form<sup>15</sup> dated 12/31/2020, on the letterhead of the VTU and signed by the VTU commanding officer, attesting to the dates in January 2021 when you would be performing, and did perform, inactive duty training or active duty for training. I understand that you provided a copy of this form to your DWI supervisor and the DWI personnel office. Thus, you gave sufficient prior notice to your employer of the dates that you would be absent from work to perform uniformed service.

**Q: My DWI supervisor acknowledges that I requested military leave for these January dates, but he insists that he did not grant my request for military leave and that my absences from work on those dates are not protected. What do you say about that?**

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

<sup>14</sup> See *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9<sup>th</sup> Cir. 2002). John C. Leisek, a National Guard member, owned a hot air balloon that promoted the National Guard. He took the whole summer of 1996 off from his civilian job to take his balloon to county fairs and similar events, to promote National Guard recruiting. The National Guard gave him points-only inactive duty training orders for some of these events but then cut him off because of concern about the possibility of liability for possible injury caused by a balloon accident. The periods when he had inactive duty training orders were protected by USERRA, but the later periods, when he had no orders, were not protected. I discuss *Leisek* in detail in Law Review 11031 (2011).

<sup>15</sup> The form is almost 30 years old and needs to be updated. The form refers to section 270 of title 10 of the United States Code. In 1994, Congress renumbered title 10, and the pertinent section is now section 10147. The form refers to reemployment rights for Reserve Component members “who hold positions other than temporary” and who leave those positions to perform uniformed service. Under the Veterans’ Reemployment Rights Act (VRRRA), in effect before the enactment of USERRA in 1994, the returning service member or veteran was required to prove, as an eligibility criterion for reemployment, that his or her pre-service job was “other than temporary.” USERRA, enacted in 1994, eliminated this “other than temporary” eligibility criterion.

**A:** 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>16</sup>

**Q: My supervisor said that I do not have rights under USERRA because I volunteered for these USNR periods. Is my supervisor correct?**

**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>17</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.

**These periods of inactive duty training and active duty for training do not count toward exhausting your five-year limit under USERRA.**

USERRA's five-year limit is set forth in section 4312(c), as follows:

Subsection (a) shall apply to a person who is absent from a position of employment by reason of [service in the uniformed services](#) if such person's cumulative period of [service in the uniformed services](#), with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

**(1)**

that is required, beyond five years, to complete an initial period of obligated service;

**(2)**

during which such person was unable to obtain orders releasing such person from a period of [service in the uniformed services](#) before the expiration of such five-year period and such inability was through no fault of such person;

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<sup>16</sup> 20 C.F.R. 1002.87 (bold question in original).

<sup>17</sup> 38 U.S.C. 4303(13) (emphasis supplied).

**(3)**

*performed as required pursuant to [section 10147 of title 10](#), under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the [Secretary](#) concerned, to be necessary for professional development, or for completion of skill training or retraining; or*

**(4)** performed by a member of a uniformed service who is—

**(A)**

ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

**(B)**

ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the [Secretary](#) concerned;

**(C)**

ordered to active duty (other than for training) in support, as determined by the [Secretary](#) concerned, of an operational mission for which personnel have been ordered to active duty under [section 12304 of title 10](#);

**(D)**

ordered to active duty in support, as determined by the [Secretary](#) concerned, of a critical mission or requirement of the [uniformed services](#);

**(E)**

called into Federal service as a member of the National Guard under chapter 15 of title 10 or under [section 12406 of title 10](#); or

**(F)**

ordered to full-time National Guard duty (other than for training) under [section 502\(f\)\(2\)\(A\) of title 32](#) when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the [Secretary](#) concerned.<sup>18</sup>

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<sup>18</sup> 38 U.S.C. 4312(c) (emphasis supplied).

Section 4312(c)(3), above, provides that duty performed as required by section 10147 of title 10 is exempt from the five-year limit. Section 10147 provides:

(a) Except as specifically provided in regulations to be prescribed by the Secretary of Defense, or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, each person who is enlisted, inducted, or appointed in an armed force, and who becomes a member of the Ready Reserve under any provision of law except section 513 or 10145(b) of this title, shall be required, while in the Ready Reserve, to—

(1)

participate in at least 48 scheduled drills or training periods during each year and serve on active duty for training of not less than 14 days (exclusive of traveltime) during each year; or

(2)

serve on active duty for training not more than 30 days during each year.

(b)

A member who has served on active duty for one year or longer may not be required to perform a period of active duty for training if the first day of that period falls during the last 120 days of the member's required membership in the Ready Reserve.<sup>19</sup>

Active duty for training and inactive duty training, whether performed for pay and retirement points or for retirement points alone, are exempted from the computation of the individual's five-year limit.

**Q: My employer has a policy (in the *Employee Handbook*) to pay differential pay to Reserve and National Guard personnel when they lose pay because their Reserve or National Guard service necessitates absences from DWI work. The company has refused to pay me differential pay because I receive no Navy pay for these periods of inactive duty training and active duty for training. Does USERRA require the employer to follow its own policy and pay me differential pay?**

**A:** No. Under most circumstances, USERRA gives you the right to *unpaid but job-protected* military leave from your civilian job. Your claim for differential pay is, at best, a claim under the contract, not a claim under USERRA. USERRA's enforcement mechanism, including free

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<sup>19</sup> 10 U.S.C. 10147.

assistance from the United States Department of Labor and the United States Department of Justice, does not apply to a contractual claim.

If you sue DWI to enforce the differential pay paragraph in the *Employee Handbook*, the company will point out that the *Handbook* contains a disclaimer to the effect that the *Handbook* is not a contract and that the company retains the right to change anything in the *Handbook* or to make exceptions to provisions in the *Handbook*. The company will also assert that the promise to pay differential pay is gratuitous—not supported by *consideration* (a quid pro quo) and thus is unenforceable under the common law of contracts.

### **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 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>20</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.

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<sup>20</sup> Congress recently established the United States Space Force as the eighth uniformed service.



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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