

**LAW REVIEW<sup>1</sup> 22047**

**August 2022**

**Please Do Not Fire the National Guard Technician While He Is on Active Duty.**

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

1.1.1.7—USERRA applies to State and local governments.

1.1.3.3—USERRA applies to National Guard service.

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

**Q: I am The Adjutant General (TAG)of my State.<sup>3</sup> That means that I am in charge of the Army National Guard (ARNG) and Air National Guard (ANG) of my State, as well as our “State Defense Force” which is a purely State entity. I am also “double-hatted” as the Director of Emergency Preparedness for my State. I am a State official, appointed by the Governor with**

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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 2,000 “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 Spouses’ 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 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

<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 45 years, I have collaborated 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 <mailto:swright@roa.org>.

<sup>3</sup> The factual set-up for this article is based, in part, on a real situation, but I have changed several of the facts to disguise the identity of the person who contacted me. That person is not the TAG of a State. I have not heard from a TAG.

**the consent of the State Legislature, but I am also a Major General in the Army National Guard of the United States, one of our nation's Reserve Components. I have important Federal responsibilities as well as State responsibilities.**

I have read with great interest several of your recent "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform. I was particularly interested in Law Reviews 22002 and 22005 (about the recent—January 2021-USERRA amendment expanding USERRA coverage to include State active duty performed by National Guard members), Law Review 22026 (about the four statuses of National Guard members), and Law Review 22035 (about the treatment of National Guard technicians for purposes of the Social Security offset).

I recently joined your organization, the Reserve Organization of America (ROA), as a life member because I want to support what you are doing to inform Reserve Component personnel of their legal rights and helping them to exercise and enforce those rights.

We have an ARNG technician in our State who has managed to annoy me greatly. Let us call him "Joe Smith." He has only been a technician in our State for about a year, and he recently left to accept title 32 Active Guard & Reserve (AGR) orders in another State that is more than 1,000 miles away, and after he got to that distant State, he changed his membership from the ARNG of this State to the ARNG of that distant State. My personnel office sent him a certified letter, asking him to resign from his technician job in this State, but he has adamantly refused to do so, stating that it is possible that he will return to this State and seek reemployment in his technician position when he completes his three-year AGR tour.

Our personnel office has asked me to sign paperwork firing Smith from his technician position, but our Employer Support (ESGR) State Chair has adamantly objected to the proposal to fire Smith, saying that my firing Smith would detract from my moral suasion with other employers in this State. What do you think?

**Answer, bottom line up front**

I think that the ESGR State Chair makes an excellent point. If the word gets out, and it almost always does, that the TAG does not comply with USERRA with respect to his civilian employees, the technicians, how will we ever persuade the gas station owner in your State capital to comply with USERRA with respect to her employees? "Do as I say and not as I do" has always been a losing argument.

It is conceivable, although unlikely, that Smith will have the right to reemployment in a technician position at some point, but he is not entitled to reemployment now and he has not

applied for reemployment now. Today, there is no application for reemployment for you to accept or reject, but if you fire him now to cut off the possibility that he will apply for reemployment in the future, you will be violating section 4311 of USERRA.<sup>4</sup>

## Explanation

As I have explained in Law Review 15116 (December 2015) and many other articles, Joe Smith (or any service member or veteran) must meet five conditions to have the right to reemployment under USERRA:

- a. He must have left a civilian job (Federal, State, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.<sup>5</sup> Smith clearly meets this condition. He left his technician job on 9/30/2021 to report to AGR duty the next day.
- b. He must have given the employer prior oral or written notice.<sup>6</sup> Joe gave notice on 9/30/2021 that he was leaving to report to active duty the next day. While it would have been better if Smith had given more notice, he met the requirement of having given notice before he left the civilian job.
- c. He must not have exceeded the cumulative five-year limit on the duration of his period or periods of uniformed service, relating to the employer relationship for which he seeks reemployment.<sup>7</sup> It is impossible to say, and there is no reason to speculate, that Smith will be within or beyond the five-year limit when he leaves active duty.
- d. He must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>8</sup> It is possible but not likely that Smith will do something stupid and receive a disqualifying bad discharge from the Army.
- e. After release from the period of service, he must have made a timely application for reemployment.<sup>9</sup>

Let us say that Smith is released from active duty on 9/30/2024, at the end of his current three-year AGR orders. Let us say further that at that point Smith has not exceeded the five-year limit and has not received a disqualifying bad discharge. Let us say that Smith applies for reemployment on 10/10/2024, well within the 90-day deadline. At that point, and only at that point, Smith will have the right to reemployment.

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<sup>4</sup> 38 U.S.C. § 4311. *See also Erickson v. United States Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009). *See generally* Law Review 17016 (March 2017).

<sup>5</sup> 38 U.S.C. § 4312(a).

<sup>6</sup> 38 U.S.C. § 4312(a)(1).

<sup>7</sup> 38 U.S.C. § 4312(c). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting Smith’s five-year limit.

<sup>8</sup> 38 U.S.C. § 4304. Disqualifying bad discharges include dishonorable discharges and bad-conduct discharges, awarded by court martial for serious crimes, and “other than honorable” administrative discharges.

<sup>9</sup> After a period of service of 181 days or more, Joe has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

**Q: Federal law requires that a National Guard technician in this State must be a member of the National Guard of *this State*. I (or my successor) will not be able to reemploy Smith in October 2024 because he is not a member of the National Guard of this State. What do you say about that?**

**A:** I invite your attention to section 4314 of USERRA, which provides:

**(a)** Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.

**(b)**

**(1)** If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall—

**(A)** identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and

**(B)** ensure that the person is offered such position.

**(2)** The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that—

**(A)** the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or

**(B)** it is impossible or unreasonable for the agency to reemploy the person.

**(c)** If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

**(d)** *If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel*

*Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).*<sup>10</sup>

Under section 4314(d), italicized above, you can determine, in October 2024, that it is “impossible or unreasonable” to reemploy Smith as a technician in the Army National Guard of your State because he is no longer a member of the Army National Guard of your State. You should make that determination in writing and provide a copy to Smith. He will then be able to take that document to the United States Office of Personnel Management (OPM), and OPM will then have the obligation to find Smith an appropriate position in the Executive Branch of the Federal Government and to ensure that Smith is offered that position.

## **Summary**

There is no good reason to fire Smith now, while he is on active duty, and several good reasons to refrain from taking any such action. Please leave well enough alone.

**Q: I see your point that firing Smith could very well detract from my moral authority, as The Adjutant General of this State, in persuading other employers (Federal, State, local, and private sector) to comply with USERRA and to go over and above USERRA in supporting National Guard and Reserve personnel who are employees or applicants for employment. I have directed our personnel department not to fire Smith and to send him a polite letter wishing him good luck in his new assignment in the National Guard of another State.**

**Do you have other suggestions as to how I, as the TAG, can help the National Guard soldiers and airmen that I command to balance their responsibilities to their civilian employers with their military duties?**

**A: Yes.**

- a. Pass the word to National Guard soldiers and airmen about the availability of the ROA Law Review Library.**

At [www.roa.org/lawcenter](http://www.roa.org/lawcenter), you can find more than 2,000 “Law Review” articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index, to facilitate finding articles about specific topics. These articles are available for free to everyone, not just ROA members. The articles contain much information that Reserve Component service members need in order to be able to exercise and enforce their rights. Please pass the word about the availability of these articles.

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<sup>10</sup> § 4314 (emphasis supplied).

You can also find, at that same website, a 45-minute presentation, with PowerPoint slides, about USERRA. This presentation can be used to train National Guard members on their drill weekends. Here is a link to the presentation:

[https://www.youtube.com/embed/\\_XhVyECa7QY](https://www.youtube.com/embed/_XhVyECa7QY)

**b. Pass the word about ESGR.**

Half a century ago, the Department of Defense (DOD) established an organization called “Employer Support of the Guard and Reserve” (ESGR).<sup>11</sup> Ensure that ESGR posters are prominently displayed at National Guard armories and other training locations and that ESGR volunteers have access to National Guard members during their drill weekends.

**c. Give notice to the civilian employers of National Guard members.**

Under section 4312(a)(1) of USERRA, the required notice to civilian employers can be given by “an appropriate officer of the uniformed service in which the service is to be performed.”<sup>12</sup> Please consider establishing a system for giving notice directly to civilian employers of inactive duty training (drill) periods, annual training periods, and voluntary or involuntary active duty periods, as well as State Active Duty. Such a system will have two advantages. First, it will reassure the employer that the individual service member really is performing military duty during the periods when he or she is away from work. Second, it will provide documentation that prior notice was given if the employer denies having received such notice.

**d. Do not lambaste serial volunteers for volunteering, but do not give them all the duty they request.**

Some Reserve Component service members repeatedly volunteer for extra duty assignments, over and above the training and duty that all unit members perform. These serial volunteers often greatly annoy their civilian employers with these repeated military-related absences from work. All of these absences are protected by USERRA,<sup>13</sup> but that is not to say that the Reserve Component should always accommodate the extra duty requests of serial volunteers.

Sometimes, the right answer is to tell Sergeant Eager Beaver: “Thank you for volunteering, but this time we are going to find someone else for this extra duty assignment.”

Please assign a senior officer the duty of receiving complaints from civilian employers and addressing them tactfully. This senior officer should have ready access to military records and

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<sup>11</sup> The ESGR website is [www.esgr.mil](http://www.esgr.mil). The toll-free number is 800-336-4590.

<sup>12</sup> 38 U.S.C. § 4312(a)(1).

<sup>13</sup> See Law Review 13099 (July 2013).

the authority to cancel or reschedule military duty, as appropriate. Please do not assign this responsibility to the unit commanding officer, who is usually a part-timer, like most or all of the unit members. The unit commanding officer has his or her own civilian employer to work with. Do not add to the stress on that relationship by causing the civilian employers of other unit members to call the unit commanding officer during his or her own civilian workday.<sup>14</sup>

I most respectfully suggest that you need to establish an intermediary between the individual service member, especially the junior enlisted service member, and his or her civilian employer. The senior officer that you assign this role, perhaps on a regional basis, can fill this important function.

- e. **Establish a way for individual reservists to obtain inactive duty training orders for medical appointments necessitated by wounds, injuries, or illnesses incurred during active duty periods and for necessary administrative functions that cannot reasonably be accomplished during scheduled drill periods.**

USERRA does not protect absences from work for medical appointments, even appointments that are necessary because of wounds, injuries, or illnesses incurred during active duty periods. Similarly, the commanding officer of a Reserve component unit needs to spend a lot of time on military responsibilities, far more than scheduled drill weekends. USERRA does not give the commanding officer the right to time off from his or her own civilian job to fulfill those responsibilities.<sup>15</sup> Please establish a procedure that enables individual soldiers and airmen to receive inactive duty training orders (at least orders for retirement points only) for these situations.

Section 4303 of USERRA<sup>16</sup> defines 17 terms that are used in this law. The term “service in the uniformed services” is defined as follows:

(13) 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 Emergency 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

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<sup>14</sup> See generally Law Review 17103 (November 2017).

<sup>15</sup> See Law Review 22041 (July 2022) and Law Review 12034 (April 2012).

<sup>16</sup> 38 U.S.C. § 4303.

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.<sup>17</sup>

Yes, it is necessary for the Commanding Officer of the unit to draft and sign performance evaluations, but in the absence of documentation that the military service has directed the individual to perform this activity on a particular day this activity does not meet the “under competent authority” requirement, and the individual’s absence from work on these days is not protected by USERRA.<sup>18</sup>

As I have explained in Law Review 16044 (May 2016) and other articles, *The USERRA Manual*, by Kathryn Piscitelli and Edward Still, is the definitive reference book about USERRA. In their book, Ms. Piscitelli and Mr. Still write:

Service must be performed under competent authority to be covered under USERRA.<sup>19</sup> For example, in *Moore v. Epperson Underwriting Co.*, a reservist’s absences to treat his service-related medical conditions were not service in a uniformed service because the reservist was not placed on duty for his medical appointments by a commanding officer in his chain of command.<sup>20</sup>

*The USERRA Manual*, 2021 edition, section 4:3. (The quoted paragraph can be found on page 125 of the 2021 edition of the *Manual*.) I entirely agree with the Piscitelli-Still analysis on this point. I invite your attention to our Law Review 11031, published in 2011.<sup>21</sup>

**f. Help individual service members, especially serial volunteers, to understand what counts and what does not count toward exhausting the five-year limit.**

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

<sup>18</sup> If the individual can get the service to give him or her inactive duty training (drill) credit for these days, even for retirement points only, then this activity would be protected by USERRA.

<sup>19</sup> 38 U.S.C. § 4303(13). Cf. *Bradberry v. Jefferson County, Tex.*, 732 F.3d 540, 545, 197 L.R.R.M. (BNA) 2297, 97 Empl. Prac. Dec. (CCH) P 44934, 163 Lab. Cas. (CCH) P 10647 (5th Cir. 2013) (noting that 38 U.S.C.A. § 4312 “applies to any military-approved absence from a civilian position”).

<sup>20</sup> *Moore v. Epperson Underwriting Co.*, 19 A.D. Cas. (BNA) 1685, 182 L.R.R.M.(BNA) 2757, 90 Empl. Prac. Dec. (CCH) P 42936, 154 Lab. Cas. (CCH) P 10901, 2007 WL 2332755, \*8 (D. Minn. 2007). See also *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900-01 (9th Cir. 2002) (employee’s attendance at National Guard ballooning event without receiving National Guard orders, whether oral or written, to do so was not necessitated by reason of service in the uniformed services).

<sup>21</sup> Law Review 11031 discusses *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9<sup>th</sup> Cir. 2002).

The individual National Guard soldier or airman who performs his or her drills and annual training periods and who reports as ordered when involuntarily called to active duty does not need to worry about USERRA's five-year limit on the cumulative duration of the period or periods of uniformed service relating to the employer relationship with the current civilian employer because all of these periods of service are exempt from the computation of the five-year limit.<sup>22</sup>

On the other hand, the serial volunteer needs to understand, before volunteering for a new period of service, whether the new period counts or does not count toward the five-year limit. Please establish a system to provide this information to individuals before they volunteer or before you give them orders.

### **Conclusion**

By establishing these procedures and providing this information to individual service members, their commanding officers, and their civilian employers, you can help the soldiers and airmen in your organization to balance their military responsibilities with their responsibilities to their civilian employers.

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

This article is one of 2,000-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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, 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

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<sup>22</sup> See Law Review 16043 (May 2016).

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>23</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>24</sup>

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<sup>23</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>24</sup> You can also donate on-line at [www.roa.org](http://www.roa.org).