

A Federal Employee Has only 45 Days To File an EEO Complaint, But That Deadline Does Not Apply to USERRA Complaints.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

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Q: I am a Sergeant in the Army Reserve and a member of the Reserve Organization of America (ROA).³ On the civilian side, I am a Federal civil service employee. My immediate

¹ I invite the reader's attention to 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.

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 46 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>.

³ 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-1 through O-10.

supervisor and her supervisor continually give me a hard time about my Army Reserve service and my absences from work that are necessitated by that service, although those absences are clearly protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Recently, there was a vacancy at the Federal agency where I work, and I applied for that vacancy, and my getting that opportunity would have been a significant promotion for me. I was one of five finalists, and I was interviewed by a panel of three supervisors. During the interview, two of the supervisors asked me pointed questions about the Army Reserve, and one of them specifically asked me if I would be willing to quit the Army Reserve if I were selected for the position. Of course, I refused to make such a commitment.

Recently, I did an Internet search and found your Law Review 18083 (September 2018), and I learned that USERRA forbids discrimination with respect to promotions in civilian jobs, including Federal civilian jobs, and that asking a candidate about his or her Reserve Component service during the interview process could be sufficient evidence that the candidate had been unlawfully discriminated against because of his or her membership in a Reserve Component of the armed forces. Accordingly, I filed an Equal Employment Opportunity (EEO) complaint with the EEO office of the Federal agency where I work.

The EEO office told me that my complaint was too late because it was received 50 days after I learned that another candidate had been selected for the promotion opportunity. The EEO office told me that there is a strict 45-day deadline for a Federal employee to file an EEO complaint.

Is it true that there is a 45-day deadline to file a Federal EEO complaint? Does that deadline apply to my USERRA complaint?

Answer, bottom line up front

Yes, there is a 45-day deadline for filing a Federal employee EEO complaint, but that deadline does not apply to USERRA complaints. USERRA does not have a statute of limitations, and it specifically precludes the application of any statute of limitations to the initiation of a USERRA complaint.

Explanation

On its website, the United States Equal Employment Opportunity Commission (EEOC) explains that you must file a formal EEO complaint within 45 days of the violation, or within 45 days after you know or reasonably should know of the violation, *“if the complaint is that you were discriminated against because of your race, color, religion, sex (including gender identity, sexual*

*orientation, and pregnancy), age (40 or older), disability, or genetic information.”*⁴ This 45-day deadline does not apply to a complaint that you were discriminated against based on your membership in a uniformed service, your application to join a uniformed service, your performance of uniformed service, or your application or obligation to perform future uniformed service.⁵ The EEOC has no role in enforcing USERRA, and the 45-day deadline to file a Federal employee EEO complaint does not apply to USERRA complaints.

There is no statute of limitations on the filing of a USERRA complaint. The pertinent subsection of USERRA is as follows:

If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board [MSPB], or a Federal or State court under this chapter alleging a violation of this chapter, *there shall be no limit on the period for filing the complaint or claim.*⁶

Q: How does a Federal civilian employee enforce his or her USERRA rights against a Federal agency employer?

A: I discuss the enforcement mechanism for enforcing USERRA against Federal executive agencies in detail in Law Review 16012 (March 2016). Here is a link to that article:

<https://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/2016/16012-LR.pdf>.

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This article is one of 2,000-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 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.

⁴ See <https://www.eeoc.gov/federal-sector-eeo-complaint-process> (emphasis supplied).

⁵ Section 4311 of USERRA, 38 U.S.C. § 4311, makes it unlawful for any employer (Federal, State, local, or private sector) to deny a person initial employment, retention in employment, a promotion, or a benefit of employment of any of these bases.

⁶ 38 U.S.C. § 4327(b) (emphasis supplied). This is not to say that I recommend that you sleep on your rights. The longer you delay, the more difficult you are likely to find it to be to prove your case. See Law Review 13064 (May 2013).

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 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 eight⁷ 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002⁸

⁷ Congress recently established the United States Space Force as the 8th uniformed service.

⁸ You can also contribute on-line at www.roa.org.