

LAW REVIEW¹ 22071

November 2022

You Must Give this National Guard Member a Military Leave of Absence for her MUTA-5 Training.

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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 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>.

Q: I am the owner-operator of a small diner, which has been in operation for 15 years. I have never had more than 14 employees. My brother is a lawyer, and he told me as long as I keep the number of employees below 15, I do not need to worry about federal employment laws, and I have purposely maintained 14 as the maximum number of employees for that reason.

I had 14 employees in the diner in March 2020, just before the start of the COVID-19 pandemic. During the pandemic, we were closed to in-person dining for many months, under rules of our state government. We survived by offering food for take-out and delivery, but I found it necessary to reduce the number of employees to seven. Now that we can offer in-person dining again, in addition to take-out and delivery, I would like to increase the number of employees to 14 again, but I have been unable to find employees who are willing to work for a wage that I can afford to pay. I am currently operating with just nine employees, and I am running myself ragged. I often do much of the work myself, just to keep the doors open and to serve the customers.

I have an employee (let us call her Mary Smith) who is a member of the Army National Guard of this state. In September, she gave me a document with lots of military gobbledegook, saying that she is required to perform a “MUTA-5”³ on the first weekend of each month. I asked her to translate the gobbledegook, and she said that it means that she must perform military training on Friday evening, all day Saturday, and all day Sunday on the first weekend of every month. She also said that under a law that she called “You Sarah” I am required to give her military leave for the time that she is performing military training and for the time required for her to travel to and return from the place of military training.

My brother said that I do not have to worry about these federal laws as long as I do not hire a 15th employee. What is “You Sarah?” Why does it apply to small employers like me when other federal employment laws exempt really small employers?

A: “You Sarah” is the Uniformed Services Employment and Reemployment Rights Act (USERRA). As I have explained in footnote 2 and Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was enacted in 1940. The federal reemployment statute does not have and has never had a threshold based on the size of the enterprise or the number of employees. You only need one employee to be an employer for purposes of the reemployment statute.⁴

³ UTA is the abbreviation for Unit Training Assembly. MUTA-5 means that Mary is required to perform five UTAs during a drill weekend: one Friday evening, two on Saturday, and two on Sunday.

⁴ See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992). See generally Law Review 17127 (December 2017).

Q: I have posted in the employee break room a notice, in large bold print, saying that no employee will be excused from any scheduled work shift unless he or she switches shifts with another employee to cover the scheduled shift that the employee proposes to miss. When Mary asked me for time off on October 7-9 for her “MUTA-5,” I told her that she needs to find a replacement and switch shifts. She said: “I am not required to do that, and anyway I have tried and no other employee is willing to switch with me.” If I am to keep the door open with just nine employees, I need to insist upon and enforce this posted policy. What do you think about that?

A: A federal statute, USERRA, gives Mary the right to take time off from her civilian job to perform “service in the uniformed services” including MUTA-5s. This federal statute supersedes and overrides your published policy. The pertinent section of USERRA is as follows:

- (a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, *policy*, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit*.⁵

Your “find your own replacement” rule is an example of the kind of “additional prerequisite” that you, the employer, are forbidden to impose.

Q: On Monday, October 3, Mary told me about her “MUTA-5” that Friday, Saturday, and Sunday and “requested” that I grant her “military leave” for those three days. I told her, in no uncertain terms, that I had denied her request and that if she missed work that weekend, I would fire her. Nonetheless, she was not at work, and now I am going to fire her. I gave her plenty of explicit notice that I would enforce my attendance policy. What do you say about that?

A: Mary was not required to ask for or get your permission to absent herself from work to attend her military training. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

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

⁵ 38 U.S.C. § 4302 (emphasis supplied).

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 pending service.⁶

As a matter of courtesy to you, her employer, Mary phrased her notice to you as a request for military leave. Her courtesy does not cause her to lose her USERRA rights.

Q: Mary's MUTA-5 does not start until 6 pm Friday evening. Her scheduled work shift at the diner is from 9 am until 5 pm on Friday, and Mary has asked to be excused from her entire Friday work shift. Why is that?

A: The National Guard armory where she performs her training is located 200 miles from the diner, and Mary needs to drive to the armory and to arrive in a reasonably rested and "fit for duty" status by 6 pm Friday. Mary's right to time off from work for her military training includes travel time as well as the hours of the training itself.

The pertinent section of the DOL USERRA Regulation is as follows:

Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

⁶ 20 C.F.R. § 1002.87 (bold question in original).

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.⁷

Q: After her MUTA-5 ends, when is Mary required to report back to work at the diner?

A: After a period of service that lasted fewer than 31 days, like a MUTA-5, the service member is required to report back to the employer as follows:

(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) *as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.*⁸

Mary's MUTA-5 ends at about 5 pm Sunday afternoon. If Mary's Monday shift at the diner starts at 9 am, she should be there for the shift unless the time required for her safe transportation home, after the military training, puts her at home so late that she does not have the opportunity to have at least eight hours of rest before the start of that civilian job shift.

Q: Last February, Mary was scheduled to be at work at 9 am on the Monday morning after her MUTA-5, but she did not show up until 9 am Tuesday morning.

A: When Mary completed her MUTA-5 late Sunday afternoon last February, there was a serious ice storm, and the state police closed the highway until Monday evening. Mary traveled home as soon as the police reopened the highway, and she reported for work at 9 am Tuesday morning. This is an example of a situation in which it was "impossible or unreasonable" for Mary to report for work at 9 am Monday through no fault of her own. It was permissible, under

⁷ 20 C.F.R. § 1002.74 (bold question in original).

⁸ 38 U.S.C. § 4312(e)(1)(A) (emphasis supplied).

section 4312(e)(1)(A)(ii) of USERRA,⁹ for Mary to report for work at 9 am Tuesday morning, under those circumstances.

Q: Am I required to pay Mary for the hours she does not work because of this National Guard stuff?

A: Yes, under certain circumstances. If, and to the extent, that you grant paid leave to employees for non-military reasons, like jury duty, you must grant comparable periods of paid leave for military duty.¹⁰

Q: I object to this burden, and I need to figure out a way to fire Mary Jones, and I certainly will not hire any more National Guard or Reserve members to work in my diner. What do you say about that?

A: USERRA makes it unlawful for an employer (federal, state, local, or private sector) to discriminate against service members, and that includes forbidding *discrimination in hiring*. Section 4311 of USERRA provides:

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied *initial employment*, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the

⁹ 38 U.S.C. § 4312(e)(1)(A)(ii).

¹⁰ See *Travers v. FedEx Corp.*, 8 F.4th 198 (3rd Cir. 2021); *White v. United Air Lines*, 987 F.3rd 616 (7th Cir. 2021). See generally Law Review 21067 (October 2021).

action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.¹¹

Q: I think it is unfair and unreasonable and probably unconstitutional to put this burden on me, the operator of a small business. What do you have to say about that?

A: It has now been two generations since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973. Those who are considering enlistment today have never faced the prospect of being drafted, and neither have their parents. No one has been drafted by our country since the grandparents or great-grandparents of today's service members were of military age.

Relying exclusively on volunteers, our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that it is never necessary for our country to reinstate the draft.

Defending our country in a dangerous world, without relying on compulsion to fill the ranks, means that our nation must maximize the incentives and minimize the disincentives to military service in the Active Component, the Reserve, and the National Guard.

Most of the 2,000 articles in our "Law Review" series¹² address laws that seek to minimize the disincentives to service. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the concerns of the service member or potential service member that he or she will lose out on civilian job opportunities because of service to our country in uniform. The Servicemembers Civil Relief Act (SCRA) addresses the concerns of the service member that he or she will lose the opportunity to be heard in a civil or administrative proceeding back home because he or she is serving in uniform hundreds or thousands of miles away or that he

¹¹ 38 U.S.C. § 4311 (emphasis supplied). See generally Law Review 17016 (March 2107) for a detailed discussion of the text and legislative history of section 4311 and the case law under that section.

¹² Please see footnote 1.

or she will have to continue paying rent for an apartment that is no longer needed because he or she has enlisted or has been called to active duty.

I invite the reader's attention to Law Review 14080 (July 2014), by Nathan Richardson¹³ and myself. In that article we wrote:

Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country in the armed forces. In the All-Volunteer Military recruiting is a constant challenge. Despite our country's current [2014] economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicines for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There definitely is a compelling interest in the enforcement of USERRA.

As Nathan Richardson and I predicted in 2014, the services (and especially the Army) have suffered from recruiting shortfalls and this year is the most challenging year for military recruiting since the draft was abolished in 1973.

While I am very glad that Congress abolished the draft 50 years ago, I also think that conscription is constitutional, justified, and necessary when our nation is unable to recruit

¹³ At the time (summer 2014), Nathan Richardson was an unpaid summer intern at the Service Members Law Center, of which I was the Director. Nathan is now a lawyer in New York City.

enough volunteers. In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.¹⁴

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20th Century) and by drafting young men into military service.¹⁵ A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.¹⁶

No one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

We have recently celebrated the 21st anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, Active Component (AC) and Reserve Component (RC), have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

¹⁴ Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.

¹⁵ No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

¹⁶ *Arver v. United States*, 245 U.S. 366 (1918).

Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 21 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, almost 50 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor.

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren.

You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

Please join or support ROA

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 more than 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 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 eight¹⁷ 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.

¹⁷ Congress recently established the United States Space Force as the 8th uniformed service.

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 20002¹⁸

¹⁸ You can also contribute on-line at www.roa.org.