

USERRA Extends Job Protections to FEMA Reservists

By First Lieutenant Tara Buckles², USMCR

1.0 USERRA Generally

1.1.3.6b USERRA and FEMA Reservists

The CREW Act

On September 29, 2022, President Biden signed into law the Civilian Reservist Emergency Workforce Act of 2021 (the CREW Act).³ The CREW Act provides that all current and future FEMA reservists be afforded USERRA employment and reemployment rights. The CREW Act became effective on the date of enactment and thereafter -- it is not retroactive.

USERRA now protects FEMA Reservists' jobs like military service members' jobs

There is a long tradition in the United States of protecting service members' rights that goes back to the Civil War.⁴ Over time, the government has enacted more legislation that gradually increased the protections and rights available to Reserve and National Guard military members. The current law providing such protections is the Uniformed Services Employment and Reemployment Rights Act (USERRA), codified at 38 U.S.C. §§ 4301-35. USERRA was first signed into law by President Bill Clinton in 1994 and served as a significant update to the outdated veterans' employment and reemployment rights laws (VRRA), which date back to 1940.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find approximately 1500 "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, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. In our "state laws" section, we have an article for each state about the state laws that grant paid military leave and other benefits, over and above USERRA, to employees of the state and (often) to employees of the state's political subdivisions.

² Tara, a life member of ROA, is a First Lieutenant in the Marine Corps. Tara holds a B.S. in Business Administration with a second major in Public Policy from the University of North Carolina at Chapel Hill. She graduated cum laude from the University of Pittsburgh School of Law in May 2022 and sat for the Texas bar exam. After passing the bar exam, she will go on active duty in the Marine Corps. Military title is used for identification only. The views expressed in this article are the views of the author, and not necessarily the views of the Marine Corps, the Department of the Navy, the Department of Defense, or of the U.S. Government.

³ Pub. L. No. 117-178, 136 Stat. 2110.

⁴ CONGRESSIONAL RESEARCH SERVICE, THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): SECTION-BY-SECTION SUMMARY (2019), <https://sgp.fas.org/crs/natsec/R45283.pdf>.

USERRA provides a plethora of rights and protections to eligible employees who perform “service in uniformed services” as defined by USERRA.⁵ Service in the uniformed services includes voluntary or involuntary duty, multiple forms of training, and even absence for the purpose of an examination to determine the fitness of a person for such duty. In addition to the CREW Act, in December 2022, Congress updated the definition of “service in uniformed services” which now includes “[A] period for which a person is absent from a position of employment due to an appointment into service in the Federal Emergency Management Agency as intermittent personnel under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5149(b)(1)).”⁶

USERRA Protections now available for FEMA Reservists

Under 38 U.S.C. § 4312, an employee who is able to meet five conditions is entitled to prompt reemployment in the job that they left to perform “service in the uniformed services,” as well as the seniority and pension credit that they would have received if continuously employed. These five conditions are as follows:

- a. Must have left a civilian job (Federal, State, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.⁷
- b. Must have given the employer prior oral or written notice.⁸
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.⁹
- d. Must have been released from the period of service without having received a disqualifying bad conduct discharge from the military.¹⁰
- e. After release from the period of service, must have made a timely application for reemployment.¹¹

Under 38 U.S.C. § 4311, it is unlawful for employers to discriminate against “[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.”¹² Discrimination includes being “denied

⁵ 38 U.S.C. 4303(13).

⁶ *Id.*

⁷ 38 U.S.C. § 4312(a) (2018).

⁸ *Id.* § 4312(a)(1).

⁹ *Id.* § 4312(c); See ROA Law Review 16403, May 2016. There are nine exceptions to the five-year that do not count toward exhausting an individual’s limit with respect to a specific employer.

¹⁰ *Id.* § 4304. Disqualifying discharges include punitive discharges (awarded by court martial for serious offenses) and other-than-honorable administrative discharges.

¹¹ *Id.* § 4312(e)(1)(D). After a period of service lasting 181 days or more, the returning service member has 90 days to apply for reemployment. Shorter deadlines apply after shorter periods of service.

¹² 38 U.S.C. § 4311.

initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer.”¹³

USERRA Applicability

USERRA applies to essentially all employers in the country, including the federal government, state governments and their political subdivisions, and private employers – of all sizes. In fact, you only need one employee in order to be an “employer” under 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, and we add new articles 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national 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, ESGR volunteers, DOL investigators, 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 their membership status, or lack thereof, in our organization, 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 of our country’s eight uniformed services,¹⁴ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.¹⁵ Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve.

¹³ *Id.*

¹⁴ Congress recently created the United States Space Force as the 8th uniformed service.

¹⁵ If you are under the age of 35, you can become an associate member for free for five years or when you turn 35, whichever comes first.

If you are eligible, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

Reserve Organization of America
1 Constitution Avenue NE
Washington, DC 20002¹⁶

¹⁶ You can also contribute on-line at www.roa.org.