

## **LAW REVIEW<sup>1</sup> 23054**

**October 2023**

### **My Daughter Is Leaving a Department of the Army Civilian Job To Enter Active Duty. Should they Put her on “Absent-US” Status?**

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

**1.1.1.8—USERRA applies to the Federal Government.**

**1.1.3.2—USERRA applies to regular military service.**

**1.3.1.1—Left job for service and gave prior notice.**

**1.3.1.3—Timely application for reemployment.**

**1.3.2.10—Furlough or leave of absence clause.**

**1.3.2.11—Vacations, holidays, and days off.**

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**1.8—Relationship between USERRA and other laws/policies**

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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 (VRRRA—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 VRRRA 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 VRRRA 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 a life member<sup>3</sup> of the Reserve Organization of America<sup>4</sup> and a retired Navy Reserve Captain. For many years, I have read and utilized your “Law Review” articles to help me understand my rights and obligations under the Uniformed Services Employment and Reemployment Rights Act (USERRA), in balancing my career in the Navy and Navy Reserve with my career as a federal civilian employee.**

**My daughter, age 24, graduated from college two years ago and was hired by the Department of the Army as a civilian employee. This summer, she visited an Army recruiter and enlisted. She will report to Officer Candidate School at Fort Gordon, Georgia, on 11/1/2023.**

**My daughter gave almost four months of oral notice to her direct civilian supervisor and three months of advance written notice to the civilian personnel office of the Army base where she works. My daughter plans to make Friday, 10/13/2023, her last day at work at her civilian job. She needs 18 days to get her affairs in order and travel to Georgia for the start of Officer Candidate School.<sup>5</sup>**

**The head of the civilian personnel office at the Army base where my daughter works called my daughter into his office for an extended “exit interview.” He asked her pointed questions about why she prefers service as an Army officer over civilian employment for the**

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<sup>3</sup> The factual set-up for this article is real, but I have changed some of the facts to protect the privacy of the individual who contacted me.

<sup>4</sup> In 2018 members of the Reserve Officers Association amended the association’s constitution and made enlisted service members, as well as officers, eligible for full membership in the organization, including voting and running for office.

<sup>5</sup> Your daughter is not required to work at her civilian job until the day before she is required to report for duty. The Department of Labor (DOL) USERRA regulation provides: “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.” 20 C.F.R. § 1002.74(b).

Department of the Army. He pressed her to give him assurance that she will be returning to her Department of the Army civilian job in the fall of 2027, at the end of her initial four years of active duty service.

My daughter refused to give the personnel director any such assurance. She said that she intends to remain on active duty for a full career of 20 years or more and that she will not be returning to her civilian job in the fall of 2027. The civilian personnel director pressed her to put that statement in writing and sign it, but she refused.

In advising and assisting my daughter, I referred her to your “Law Review” articles about USERRA, and I also found Army Regulation (AR) 690-630, concerning “Civilian Personnel of the Department of the Army.” That regulation “provides policy concerning Department of the Army civilian absence and leave administration.” Section 9-1(c) of the regulation provides:

However, if the employee (except a temporary employee) is to continue on active duty for an extended period (usually more than 1 year), the employee must be placed in Absent-US status unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the DoD, *in which case the employee can be separated.*

(Emphasis supplied.)

In your Law Review 22065 (October 2022), you wrote:

**Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment whether he or she will seek reemployment after completing uniformed service.<sup>6</sup>**

**Is the quoted language from AR 690-630 inconsistent with what you wrote in Law Review 22065?**

**A: Yes.** AR 690-630 is poorly written and misleading. A better statement can be found in the Office of Personnel Management (OPM) USERRA regulation governing the application of USERRA to federal executive agencies as employers:

An employee absent [from a federal civilian job] because of service in the uniformed services is to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the [federal] agency, in which case the employee can be separated. *(Note: A separation under this provision affects only the employee's seniority while gone; it does not affect his or her restoration rights.)*<sup>7</sup>

**Q: Who has the authority to promulgate regulations under USERRA?**

**A: Section 4331 of USERRA provides:**

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<sup>6</sup> This is a direct quote from 20 C.F.R. § 1002.88.

<sup>7</sup> 5 C.F.R. § 353.106(a) (emphasis supplied).

**(a)** The Secretary [of Labor] (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

**(b)**

**(1)** The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

**(2)** The following entities may prescribe regulations to carry out the activities of such entities under this chapter:

**(A)** The Merit Systems Protection Board.

**(B)** The Office of Special Counsel.

**(C)** The agencies referred to in section 2302(a)(2)(C)(ii) of title 5 [intelligence agencies].<sup>8</sup>

The regulations promulgated by the Secretary of Labor, about the application of USERRA to state and local governments and private employers, can be found in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The regulations promulgated by the Director of the

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<sup>8</sup> 38 U.S.C. § 4331.

Office of Personnel Management (OPM), about the application of USERRA to federal executive agencies, can be found in title 5 of the C.F.R., Part 353, Subparts A and B.

**Q: Why does USERRA provide the right to reemployment even to a person who firmly believes, at the time of departure from the civilian job, that she will not want reemployment after she completes her service?**

**A:** USERRA's legislative history answers that question in one eloquent paragraph:

The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time a person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an "unburned bridge." Not until the individual's discharge or release from service and/or transportation back home, which triggers the application time, does the servicemember have to decide whether to recross that bridge. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946): "He [the returning veteran] is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life."<sup>9</sup>

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<sup>9</sup> House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1, page 26. This report can be found in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 809 of the 2021 edition of the *Manual*.

In October 2023, as your daughter is preparing to report to Officer Candidate School, her firm intention is to remain on active duty for a full career of 20 years or more, but she could change her mind. Moreover, some unforeseen development, like an injury or illness, could make it impossible for her to remain on active duty for the long haul. Indeed, it is possible that she could suffer a disabling injury during her Officer Candidate School class. USERRA's "unburned bridge" is very valuable for a person like your daughter.

**Q: If my daughter signs the "I intend not to return to my Department of the Army civilian job" notice that the civilian personnel director is pressing her to sign, does that mean that she will not have the right to reemployment in the unlikely but not impossible contingency that she leaves active duty in the fall of 2027 and applies for reemployment?**

**A: No.** Signing that document would, at most, mean that she is waiving her right to non-seniority benefits during her period of service under USERRA's "furlough or leave of absence" clause.<sup>10</sup> Here is the pertinent USERRA subsection about the purpose and effect of these "I intend not to return" notices:

- (A) Subject to subparagraph (B), a person who—
  - (i) is absent from a position of employment by reason of service in the uniformed services, and
  - (ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service, *is not entitled to rights and benefits under paragraph (1)(B).*
- (B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear

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<sup>10</sup> See 38 U.S.C. § 4316(b). See generally Law Review 23026 (May 2023) for a detailed discussion of this important USERRA provision.

written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).<sup>11</sup>

If your daughter signs the proposed “I intend not to return” notice, and if the employer (the Department of the Army) can prove that she signed the notice knowingly and that she was aware of the benefits that she was giving up by signing it, then she would waive her “rights and benefits under paragraph (1)(B).” That paragraph provides that a person who is absent from his or her civilian job for service in the uniformed services is:

(B) entitled to such other rights and benefits *not determined by seniority* as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.<sup>12</sup>

*Signing the proposed “I intend not to return” notice will not defeat your daughter’s right to reemployment* if she meets the five USERRA conditions, but signing the notice knowingly and voluntarily will likely deprive her of important benefits, during her period of service, under section 4316(b) of USERRA.

**Q: Section 9-1(c) of AR 690-630 provides that an employee who is away from his or her civilian Department of the Army job for an extended period of military service should be placed on “Absent-US”**

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<sup>11</sup> 38 U.S.C. § 4316(b)(2) (emphasis supplied).

<sup>12</sup> 38 U.S.C. § 4316(b)(1)(B) (emphasis supplied).

**status “unless the employee elects to use other leave.” What does this mean?**

**A:** This is a reference to section 4316(d) of USERRA. That subsection provides:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.<sup>13</sup>

For example, let us say that your daughter has a positive annual leave balance of 80 hours (ten workdays) when she leaves her civilian job in October 2023. Because your daughter is reasonably certain that she will not be returning to her civilian Department of the Army job after she leaves active duty, it makes sense for her to sell this leave back under section 4316(d). This will give her a pay period of her civilian pay, on top of her military pay, at the start of her active duty career. After she exhausts her annual leave balance, she should be transitioned to the “Absent-US” status.

**Q: What conditions must my daughter meet to have the right to reemployment under USERRA?**

**A:** I have explained the conditions in detail in Law Review 15116 (December 2016). Like any returning service member or veteran, she must meet five simple conditions:

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<sup>13</sup> 38 U.S.C. § 4316(d).

- a. She must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services.<sup>14</sup> That is what she is doing now.
- b. She must have given the employer prior oral or written notice.<sup>15</sup> She has already met this condition.
- c. She must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that she has performed with respect to the employer relationship for which she seeks reemployment.<sup>16</sup>
- d. She must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>17</sup>
- e. She must have made a timely application for reemployment.<sup>18</sup>

## Bottom line

Persons who serve in the Active Component of the armed forces, as well as the Reserve or National Guard, have rights under USERRA. They need to understand their rights and the conditions they need to meet to exercise those rights. Folks like your daughter need to be made aware of the “Law Review Library” operated by the Reserve Organization of America (ROA).

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<sup>14</sup> 38 U.S.C. § 4312(a).

<sup>15</sup> 38 U.S.C. § 4312(a)(1).

<sup>16</sup> 38 U.S.C. § 4312(c). There are nine exemptions. That is to say, there are nine kinds of service that do not count toward exhausting her five-year limit. *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit.

<sup>17</sup> 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious criminal offenses, and other-than-honorable administrative discharges.

<sup>18</sup> After a period of service of 181 days or more, the returning service member or veteran must apply for reemployment within 90 days after the date of release from duty. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. For example, if your daughter is released from active duty on 9/30/2027, she must apply for reemployment by 12/29/2027 (90 days later).

## **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. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).<sup>19</sup>

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” 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 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

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<sup>19</sup> See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (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 eight<sup>20</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>21</sup>

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

<sup>21</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).