

LAW REVIEW¹ 23056

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**You Are Entitled to Time Off from your Civilian Job for a
Friday Night Shift so that you Can Be Rested and Fit for
Duty for your Saturday Drill.**

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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 (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>.

2.0—Paid leave for government employees who are Reserve Component service members.

Q: I am a Sergeant in the Alabama Army National Guard³ and a member of the Reserve Organization of America (ROA).⁴ On the civilian side, I am a state police officer. I have read with great interest several of your “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. Your USERRA articles have been very helpful to me because I get substantial resistance from my immediate state police force supervisor about job shifts that I must miss to perform my National Guard training and service.

Because I am new on the state police force, I get stuck with the less desirable job shifts. My usual shift starts at 4 pm and ends at midnight. On the first non-holiday weekend of every month, my National Guard unit drills at a National Guard armory that is a five-hour drive from my home and civilian job.

More than once in the last few months, I have completed my civilian job shift at midnight and have then driven home to change out of my police uniform and into my Army uniform, and then I have driven to the armory and have arrived just in time for my Saturday drill, which starts at 7 am. This is possible, but it means that I have had no rest Friday night before my 8-hour drill on Saturday.

³ The factual set-up for this article is hypothetical but realistic.

⁴ In 2018, members of the Reserve Officers Association amended the ROA Constitution, making enlisted service members, as well as officers, eligible for full membership in the organization, including voting and running for office. The organization adopted the “doing business as” name of Reserve Organization of America to emphasize that the organization represents and seeks to recruit as members those who are serving or have served our country in uniform, from E-1 to P-10.

During my most recent drill weekend, the commanding officer of my National Guard unit noticed that I dozed off during an important training session on Saturday afternoon, and she counseled me that I need to arrive for drill rested and fit-for-duty. She said that she was concerned that I would miss learning something important that I will need if our unit is mobilized and deployed for combat.

I told her about my problem—that I do not complete my Friday night shift until midnight and then I must drive to the armory where our drills are conducted, so that leaves me no time for sleep Friday evening. She told me that USERRA gives me the right to absent myself from my civilian job for this Friday-evening shift so that I can be fit for duty for the Saturday drill. Is my commander correct?

A: Yes. The pertinent subsection of the Department of Labor (DOL) USERRA regulation is as follows:

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.⁵

Q: I told my state police supervisor that my November National Guard drill weekend will be held on Saturday, November 4, and Sunday, November 5. I told him that I need to be excused from the 4-12 pm shifts on Friday, November 3, Saturday, November 4, and Sunday,

⁵ 20 C.F.R. § 1002.74(a)

November 5, so that I can arrive at my Saturday morning drill fit for duty. My supervisor told me that he will take me off the schedule for the Saturday shift and the Sunday shift, but not the Friday shift. Where do I go from here?

A: You do not need to get your employer's permission to absent yourself from work to perform service in the uniformed services, and the supervisor does not get a veto. The pertinent section of the 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?

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

To cover yourself, I suggest that you send a letter to the commander of the state police, with a copy to the director of the personnel department of the state police. Send the letter by certified mail or the e-mail equivalent, so that you can prove that you sent the notice and that it was received. You can include a copy of this article with your letter.

I also suggest that you contact the Department of Defense organization called "Employer Support of the Guard and Reserve" or "ESGR." The telephone number is 800-336-4590. ESGR headquarters will put you in touch with a volunteer ombudsman in your city. The ombudsman will

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

contact your supervisor and the personnel department to explain your legal rights and to appeal to them for their cooperation.

Q: As a state employee in Alabama, I have the right to 168 hours per year of paid military leave. I want to use eight hours of that paid leave for the Friday evening shift before my drill weekend, so that I can arrive fit for duty for my Saturday drill without losing any part of my civilian pay. Do I have the right to use my paid military leave in this way?

A: Your right to *paid* military leave is by state law, not by USERRA. Employees of the State of Alabama and its political subdivisions (counties, cities, school districts, etc.) who are members of the Reserve or National Guard have the right to up to 168 hours of paid military leave per year, and they can use that paid military leave “on all days that they are engaged in field or coast defense or other training or on other service ordered.”⁷ Because you will not be performing military duty on Friday, November 3, you do not have the right to use eight hours of paid military leave on that date. But under USERRA you have the right to unpaid but job-protected military leave for the entire weekend, including the Friday evening shift.

Q: What is the relationship between USERRA and state laws, local ordinances, and collective bargaining agreements?

A: USERRA is a floor and not a ceiling on your rights. The pertinent section of USERRA is as follows:

⁷ Ala. Code § 31-2-13(a). See generally the “state leave laws” section at www.roa.org/lawcenter. You will find 54 articles (50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands) about the state laws that give greater or additional rights, over and above USERRA, to state and local government employees who serve in the Reserve Components of the armed forces.

(a) Nothing in this chapter [USERRA] 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.⁸

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

How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA 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 USERRA, including the establishment of

⁸ 38 U.S.C. § 4302.

additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not 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 an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.⁹

Q: As a member of the Alabama Army National Guard, I have a hybrid federal-state status. As a member of the Army National Guard of the

⁹ 20 C.F.R. § 1002.7 (bold question in original).

United States, I am subject to a mandatory call-up by the President for duty under Title 10 of the United States Code, or I can volunteer for federal title 10 service. I also engage in regular monthly drills (inactive duty training) and annual training (active duty for training) to prepare me for the possibility of a federal call-up, and that sort of duty is called “Title 32 duty” (referring to title 32 of the United States Code). In my state status, I am subject to being called by the Governor to state active duty for state emergencies.

I have already been called to state active duty once, and I think that I will be called again in the next year or two. I have heard that USERRA protects my civilian job when I am on Title 10 duty or Title 32 duty, but not when I am on state active duty. Is that true?

A: As of January 5, 2021, USERRA protects the civilian jobs of National Guard members when they are on state active duty, under most circumstances.

When an individual (let us call her Josephine Smith) enlisted in the Army National Guard, she joined two overlapping but legally distinct entities. She joined the Army National Guard of the United States (ARNGUS), which is one of the eight Reserve Components of the United States armed forces. She also joined the Army National Guard of her specific state—let us say Alabama. The Army National Guard of Alabama is the modern-day equivalent of the Alabama Militia.

In her ARNGUS (federal) status, Josephine can volunteer for or can be involuntarily called to federal active duty under title 10 of the United States Code. In that situation, her civilian job is protected by USERRA

(the federal law), just like a member of the Army Reserve or any other Reserve Component.

Josephine is in a “federal status” or “title 10 status” when she volunteers for or is called to federal active duty under title 10. The rest of the time, she is in a “state status” or “title 32 status.” This includes the days when she performs no military duty, the days when she performs State active duty, and the days when she performs training or other duty under title 32 of the United States Code. Although Josephine is in a State status when performing title 32 duty, *USERRA protects her civilian job at those times*.

Section 4303 of USERRA,¹⁰ as amended, defines 17 terms used in this law. When a statute defines a term, that definition controls for purposes of that statute, not the definition used somewhere else in the United States Code or the dictionary definition.

USERRA’s definition of “uniformed services” (quoted above) includes “the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty.”

Until very recently, Section 4303(13) of USERRA defined “service in the uniformed service” as follows:

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,

¹⁰ 38 U.S.C. § 4303.

inactive duty training, *full-time National Guard duty*, 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 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 32.¹¹

On 1/5/2021, President Trump signed into law the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.¹² Section 7004 of that new law amended section 4303(13) of USERRA¹³ by inserting the following after “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 (50 U.S.C. 1601 et seq.), and 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 (42 U.S.C. 5170).”

Section 7004 also added a new subsection (15) to section 4303 of USERRA,¹⁴ as follows:

¹¹ 38 U.S.C. § 4303(13) (emphasis supplied).

¹² Public Law 116-315.

¹³ 38 U.S.C. 4303(13).

¹⁴ Section 7004 of the amending legislation redesignated former 38 U.S.C. § 4303(15) (defining the term “undue hardship”) as 38 U.S.C. § 4303(16). Presumably, with this change the definition of “uniformed services” previously at 38 U.S.C. § 4303(16) is now located at 38 U.S.C. § 4303(17).

The term “State active duty” means training or other duty, other than inactive duty, performed by a member of the National Guard of a State—(A) not under section 502 of title 32 or under title 10; (B) in the service of the Governor of a State; and (C) for which the member is not entitled to pay from the Federal Government.

Previously, USERRA did not protect the civilian jobs of National Guard members on State active duty—called by the Governor, under State authority, paid with State funds, for State missions. Effective 1/5/2021, most State active duty is now protected by USERRA.

Alabama law also protects your civilian job when you are away from that job for state active duty.¹⁵

Q: The General Counsel of the state police said that I cannot sue the State of Alabama for violating USERRA because the State has sovereign immunity. He said that the Alabama Supreme Court so held in 2001. What do you say about that?

A: Yes, the Alabama Supreme Court did say that in 2001.¹⁶ Last year, the United States Supreme Court expressly overruled that Alabama Supreme Court precedent and other state high court precedents holding that state government agencies cannot be sued under USERRA because of state sovereign immunity.¹⁷

¹⁵ See Ala. Code § 31-12-2. See generally the “state leave laws” section at www.roa.org/lawcenter. You will find 54 articles about the state and territorial laws that protect the civilian jobs of National Guard members when they are on state active duty.

¹⁶ See *Larkins v. Department of Mental Health and Mental Retardation*, 806 So. 2d 358 (Ala. 2001).

¹⁷ See *Torres v. Texas Department of Public Safety*, 142 S. Ct. 2455 (2022). See generally Law Review 22046 (July 2022) and Law Review 23013 (March 2023).

State agencies in Alabama and 49 other states can no longer hide behind the hoary doctrine of sovereign immunity to avoid their obligations to those who are serving or have served our country in uniform.

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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. 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).¹⁸

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

¹⁸ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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 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 legislators and 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 eight¹⁹ 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:

¹⁹ Congress recently established the United States Space Force as the eighth uniformed service.

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²⁰ You can also contribute on-line at www.roa.org.