

LAW REVIEW¹ 24037

July 2024

USERRA's Furlough or Leave of Absence Clause Is Not Just for Airline Pilots.

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

1.3.2.10—Furlough or leave of absence clause.

1.4—USERRA enforcement.

1.8—Relationship between USERRA and other laws/policies.

***Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424 (9th Cir. 2023).³**

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>.

³ The 9th Circuit is the intermediate federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, and Washington.

***Travers v. FedEx Corp.*, 8 F.4th 198 (3rd Cir. 2021).**⁴

***White v. United Air Lines*, 987 F.3rd 616 (7th Cir. 2021).**⁵

USERRA’s “furlough or leave of absence” clause.

On 10/13/1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁶ USERRA was a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940.⁷

USERRA’s “furlough or leave of absence” provision reads as follows:

(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—

(A) deemed to be on furlough or leave of absence while performing such service; and

(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,*

⁴ The 3rd Circuit is the intermediate federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the United States Virgin Islands.

⁵ The 7th Circuit is the intermediate federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

⁶ Public Law 103-353, 108 Stat. 3149. USERRA has been amended several times since 1994 and is now codified at 38 U.S.C. §§ 4301-35.

⁷ See *generally* Law Review 15067 (August 2015) for a detailed discussion of the federal reemployment statute.

*practice, or plan in effect at the commencement of such service or established while such person performs such service.*⁸

This language, or something very much like it, has been part of the reemployment statute since 1940. When Congress enacted USERRA in 1994, this provision was carried over without significant change.

Section 4331 of USERRA⁹ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The pertinent subsection of the DOL USERRA Regulation is as follows:

Which non-seniority rights and benefits is the employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she

⁹ 38 U.S.C. § 4331.

performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be “comparable” to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.¹⁰

In several of the amicus curiae (“friend of the court”) briefs that we have filed, and in several of our “Law Review” articles, we (the Reserve Organization of America) have taken the position that an employer must grant *paid* military leave to an employee who is away from his or her civilian job for a short period of military training or service if and to the extent that the employer grants paid leave for comparable periods of leave for non-military reasons (like jury service).¹¹ In 2021, the 7th Circuit (Chicago) and the 3rd Circuit (Philadelphia) agreed with our position, and the 9th Circuit (San Francisco) has joined this chorus.¹² The other ten circuits have not yet addressed the question.¹³

¹⁰ 20 C.F.R. § 1002.150 (bold question in original).

¹¹ See *generally* Law Review 21067 (October 2021) and Law Review 21014 (March 2021).

¹² See *White* and *Travers*, cited at the top of this article. The three published Court of Appeals decisions deal with pilots for airlines (United Air Lines and Alaska Air Lines) and a cargo carrier (FedEx), but this legal principle is not limited to pilots.

¹³ When the other circuits address this question, they will likely follow the lead of the 7th Circuit, the 3rd Circuit, and now the 9th Circuit. If another circuit reaches the opposite conclusion on this point, that will set up a conflict among the circuits, and it would likely then be necessary for the Supreme Court to grant certiorari to resolve the conflict.

This issue is not limited to airlines and cargo carriers.

Attorney Mathew M. Meyer of Minneapolis has written an excellent article about USERRA's "furlough or leave of absence" clause in the context of a class-action lawsuit against Walmart Corporation.¹⁴ The lawsuit settled on 1/5/2021, and Walmart agreed to pay \$14 million to the class members, who were Walmart associates who were part-time members of the National Guard or Reserve and who should have been paid, but were not paid, for short periods of time when they were away from their Walmart jobs for drills (inactive duty training) and annual training in the Reserve or National Guard. I have placed a link to Mr. Meyer's article at the end of this article.

I also invite the reader's attention to *Won v. Amazon, Inc.*, 2022 U.S. Dist. LEXIS 149208 (E.D.N.Y. Aug. 19, 2022). This is a lawsuit by Army Reservist Caonaissa Won against Amazon, Inc.¹⁵ Ms. Won claims that Amazon is required by USERRA's furlough or leave of absence clause to pay her regular Amazon pay (not just differential pay) for short periods when she was away from her Amazon job for Army Reserve training.

Whether you are an airline pilot, or whether you are a stocker for Walmart or Amazon, or whether you hold some other job, you are entitled to *paid military leave* for short periods of military service or training as a member of the National Guard or Reserve if your employer grants paid leave for comparable periods of absence for non-military reasons, like jury service.

¹⁴ As of the end of the company's 2024 fiscal year, Walmart employed approximately 2.1 million employees worldwide, including approximately 1.6 million in the United States. See <https://corporate.walmart.com/askwalmart/how-many-people-work-at-walmart>.

¹⁵ It has been reported that Amazon has 1,525,000 employees as of 2/8/2024. See <https://www.statista.com/statistics/1324557/quarterly-number-of-amazon-employees/>.

Q: I am a member of the Army National Guard of my home state. In addition to voluntary or involuntary active duty under title 10 of the United States Code and training duty under title 32, I am also subject to being called to state active duty by the Governor for state emergencies like tornadoes, floods, riots, and crime spikes in the subway system. How does USERRA, and specifically USERRA’s “furlough or leave of absence” clause, apply to me when I am called away from my civilian job for state active duty?

A: Starting on 1/5/2021, USERRA applies to state active duty under most circumstances.

When an individual (like Joe Smith) enlisted in the Army National Guard, he joined two overlapping but legally distinct entities. He joined the Army National Guard of the United States (ARNGUS), which is one of the Reserve Components of the United States armed forces. He also joined the Army National Guard of his specific State—let us say New York.¹⁶ The Army National Guard of New York is the modern-day equivalent of the New York Militia.¹⁷

In his ARNGUS (Federal) status, Joe can serve on active duty voluntarily or involuntarily under title 10 of the United States Code. In that situation, USERRA protects his civilian job, just like a member of the Army Reserve or any other Reserve Component.

¹⁶ Joe also has reinstatement rights under State law. Please see the “State leave laws” section at www.roa.org/lawcenter. You will find fifty-four articles about the State and territorial laws that protect the civilian jobs of National Guard members on State or territorial active duty.

¹⁷ New York has another military organization, the New York Naval Militia (NYNM). The NYNM is a purely state entity. It does not receive federal funding, and its members are not subject to being called up by the Federal Government.

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

Section 4303 of USERRA,¹⁸ as amended, defines seventeen 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” 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.”¹⁹

Until 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, 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

¹⁸ 38 U.S.C. § 4303.

¹⁹ 38 U.S.C. § 4303(17).

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 32.²⁰

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 2020.²¹ Section 7004 of that new law amended section 4303(13) of USERRA²² 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,²³ as follows:

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

²⁰ 38 U.S.C. § 4303(13).

²¹ Public Law 116-315.

²² 38 U.S.C. § 4303(13).

²³ 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). 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).

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, USERRA applies to State active duty if the continuous period of State active duty lasts for fourteen days or more or if the State active duty is for a national emergency or major disaster declared by the President.²⁴

If you are away from your regular civilian job for a short period of state active duty, you may be entitled to paid military leave under USERRA’s “furlough or leave of absence” clause.

You need to read our “Law Review” articles to help you understand your legal rights under USERRA and other military-relevant laws and to help you figure out how to exercise and enforce your rights.

Please join or support ROA.

This article is one of 2,200-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

²⁴ If the period of State active duty is for 14 continuous days or more, the State active duty is protected by USERRA even if it is not for a national emergency or major disaster declared by the President. If the State active duty is for a national emergency or major disaster declared by the President, the State active duty is protected by USERRA even if the continuous period of State active duty lasts for fewer than 14 days.

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).²⁵

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 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, federal 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.

²⁵ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight²⁶ 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 <https://www.roa.org/page/memberoptions>.

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 20002²⁷

Minnesota attorney Mathew M. Meyer has authored an excellent article about USERRA's "furlough or leave of absence" clause in the context of claims for paid military leave under that clause and the class-action lawsuit against Walmart and the settlement of that lawsuit. Here is the link to Mr. Meyer's article:

<https://mathewmeyerlaw.com/walmart-agrees-to-14-million-userra-settlement/>

²⁶ Congress recently established the United States Space Force as the eighth uniformed service.

²⁷ You can also contribute on-line at www.roa.org.