

# LAW REVIEW<sup>1</sup> 24041

August 2024

## You Must Sign the Settlement Agreement To Get Relief.

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

### 1.3.2.3—Pension credit for service time.

### 1.4—USERRA enforcement.

**Q: I am a Lieutenant Colonel in the Air Force Reserve (USAFR)<sup>3</sup> and a life member of the Reserve Organization of America (ROA).<sup>4</sup> I have read with great interest many of your “Law Review” articles about the**

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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 (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>.

<sup>3</sup> This is a real situation, but I changed several of the facts to disguise the identity of the person who contacted me.

<sup>4</sup> The Reserve Officers Association was founded in 1922 and congressionally chartered in 1950. In 2018, ROA members amended the ROA Constitution and expanded membership eligibility to include enlisted personnel as well as officers. 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 service members of all ranks, from E-1 to O-10.

## **Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I was especially interested in your Law Review 24014 (February 2024) about the lawsuit that the United States Department of Justice (DOJ) has brought against the State of Nevada to enforce section 4318 of USERRA, concerning pension entitlements. Like the situation discussed in that article, I work (on the civilian side) for a local government and my civilian pension is administered by a state agency, but I am not in Nevada. While I am working at my civilian job, I contribute 5% of my salary to the pension plan, and the employer matches my contribution.**

**Recently, I was away from my civilian job for exactly one year of Air Force active duty, from 10/1/2022 until 9/30/2023. I carefully met and documented that I have met the five USERRA conditions for reemployment, as you have explained them in detail in your Law Review 15116 (December 2015). I returned to work in October 2023, just a few days after I was released from active duty on 9/30/2023.**

**When I returned to work, I visited the city's personnel office and requested that the payroll deduction for my employee contribution to the pension plan be reinstated and it was reinstated. I also requested that there be an additional amount withheld from my salary each pay period to make up for the employee contributions that I missed during the year that I was away from work for military service. The personnel director told me that if I want to be treated as if I had been continuously employed during the 2022-23 active duty, I must pay not only the employee share but also the employer share of the contributions that would have been made if I had remained at the civilian job during the time that I was away for military service.**

**I told the personnel director that the city is required to make up the missed employer contributions to my pension plan account promptly**

after I return to work because I met the five USERRA conditions for reemployment. I cited your Law Review 22070 and provided a copy of that article. She said: “That does not apply here because our state law does not provide for the city to make up missed employer contributions for employees who have been away from work for any reason.”

I made a formal complaint to the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), and the investigator for that agency explained section 4318 of USERRA to the city attorney. The city reluctantly agreed to make up the missed employer contributions, and the city attorney and the DOL-VETS investigator drafted a settlement agreement and asked me to sign it.

**I refused to sign the agreement. The agreement provides me with nothing beyond that which the city is clearly required to do by federal law, so why should I have to sign the agreement? What do you think?**

**A:** I think that you should sign the agreement. No defendant or prospective defendant will ever pay money or take an action that costs money without first obtaining a signature from the claimant. You must agree in writing that you are satisfied that the remedy that DOL-VETS has obtained for you is sufficient.<sup>5</sup> The city has the right to insist on “legal peace” before paying out money.

**Q: I do not want to sign the settlement agreement because the city is trying to buy my silence. I am aware that there are other city employees who have been away from their city jobs for military service and who were required, after they returned to work, to make up the missed employer contributions, as well as the employee contributions. I can think of three such employees. Let us call them Alice Adams, Bob Barnes, and Connie Cox. I want those three**

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<sup>5</sup> Do not sign the agreement until you are certain that the agreement is sufficient. If necessary, I can help you make that determination.

**employees to benefit from my settlement with the city. What do you think?**

**A:** You have *standing* to complain that your own rights were violated. You do not have standing to complain about violations suffered by Alice, Bob, and Connie. If these three individuals seek to have their own USERRA rights vindicated, they need to make their own complaints to DOL-VETS.

The legal concept of standing has been described as follows:

Standing, or *locus standi*, is capacity of a person to bring a claim in court.

### ***Standing in State Court***

A state's statutes will determine what constitutes standing in that particular state's courts. These typically revolve around the requirement that plaintiffs have sustained or will sustain direct injury or harm and that this harm is redressable.

### ***Standing in Federal Court***

At the federal level, legal actions cannot be brought simply on the ground that an individual or group is displeased with a government action or law. Federal courts only have constitutional authority to resolve actual disputes (see [Case or Controversy](#)).

In [Lujan v. Defenders of Wildlife \(90-1424\), 504 U.S. 555 \(1992\)](#), the [Supreme Court](#) created a three-part test to determine whether a party has standing to sue:

1. The plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent

2. There must be a causal connection between the injury and the conduct brought before the court
3. It must be likely, rather than speculative, that a favorable decision by the court will redress the injury

### ***Further Reading***

For Supreme Court decisions focusing on the "standing" issue, see, e.g., County of Riverside v. McLaughlin, 500 U.S. 44 (1991), Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993) and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).<sup>6</sup>

You are no doubt correct that other employees (not just the ones you have named) have been affected by this violation. If the city does not change its policy, there will be many more people affected by this sort of violation in the future. But you cannot fix this problem for them by refusing to sign the agreement. Through our "Law Review" articles and by other means, we (the Reserve Organization of America) inform service members of their rights so they can take action to enforce their rights.

**Q: Why can't DOL-VETS just order the city to comply with USERRA?**

**A: DOL-VETS has no such authority. Here is the pertinent section of the DOL USERRA Regulation:**

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#### **Does VETS have the authority to order compliance with USERRA?**

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No. If VETS determines as a result of an investigation that the complaint is meritorious, VETS attempts to resolve the complaint

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<sup>6</sup> See <https://www.law.cornell.edu/wex/standing>.

by making reasonable efforts to ensure that any persons or entities named in the complaint comply with the Act.

If VETS' efforts do not resolve the complaint, VETS notifies the person who submitted the complaint of:

- (a)** The results of the investigation; and,
- (b)** The person's right to proceed under the enforcement of rights provisions in 38 U.S.C. 4323 (against a State or private employer), or 38 U.S.C. 4324 (against a Federal executive agency or the Office of Personnel Management (OPM)).<sup>7</sup>

I agree that section 1002.290 correctly states the law. DOL-VETS does not have the authority to order the city to comply with USERRA. If you sue the city in federal court, or if DOJ sues the city on your behalf, the court has the authority to order the city to comply with USERRA and to compensate you for the salary, wages, or benefits that you lost because of the city's USERRA violation.<sup>8</sup>

### **Please join or support ROA.**

This article is one of 2,100-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

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<sup>7</sup> 20 C.F.R. § 1002.290 (bold question in original).

<sup>8</sup> See 38 U.S.C. § 4323(d).

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>9</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 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.

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<sup>9</sup> 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 eight<sup>10</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 <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 20002<sup>11</sup>

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<sup>10</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>11</sup> You can also contribute on-line at [www.roa.org](https://www.roa.org).