LAW REVIEW[1] 19109
December 2019

USERRA Protects all Absences from Work that Were *Necessitated by your Uniformed Service*

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
About Sam Wright

1.1.1.7—USERRA applies to state and local governments
1.1.3.3—USERRA applies to National Guard service
1.3.1.1—Left job for service and gave prior notice
1.3.1.3—Timely application for reemployment
1.3.2.2—Continuous accumulation of seniority-escalator principle

Q: I am a Captain in the Army National Guard and a member of the Reserve Organization of America.[3] On the civilian side, I am a teacher for a school district. The principal of the school

---

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 Spouse 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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1700 of the articles.

[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 43 years, I have worked 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 36 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 SWright@roa.org.

[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers.

and the superintendent of the district give me a hard time about my absences from work for National Guard training and service. I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

My National Guard unit has a six-drill weekend every month. That means that we train all day on Friday, Saturday, and Sunday. The training location is 400 miles from my home and civilian job. That means that I must miss work on Thursday to travel to the training location, check into a hotel, get a reasonable night's sleep, in order to be "fit for duty" when the training starts early Friday morning. After the training ends late Sunday afternoon, traveling home takes most of the day on Monday, so I am also absent from work on Monday.

The superintendent of the school district contacted the Office of the Adjutant General of my state and obtained information about my National Guard training dates. Now, he is trying to fire me for "unauthorized absence" from the teaching job on Thursdays and Mondays, because the National Guard records do not show that I performed "service in the uniformed services" on those dates. Help!

A: As I explained in Law Review 19108 (December 2019), USERRA protects "any person whose absence from a position of employment is *necessitated* by reason of service in the uniformed services."[4] The period of absence from your civilian job that is *necessitated* by your drill weekend includes the days that you perform service (Friday, Saturday, and Sunday), and it also includes the time (on Thursday) when you travel to the training location and arrive early enough to have a night of sleep, so that you will be fit for duty when the training starts on Friday morning. The Department of Labor (DOL) USERRA regulation provides:

> **Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?**
>
> No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The

Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

[4] 38 U.S.C. 4312(a) (emphasis supplied).

following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) 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.

(b) 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.

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.[5]

After a period of service lasting fewer than 31 days, like a drill weekend, the deadline for reporting back to work is as follows:

In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.[6]

If the time reasonably required for safe transportation from the training location to your residence takes so long that you do not have the opportunity to have eight hours of rest before reporting for work Monday at the start of the school day, USERRA gives you the right to wait until Tuesday morning to report back to work.

For the entire period of your service-necessitated absence from work, including Thursday and Monday, your civilian job is protected by USERRA, and you must be treated (for seniority and pension purposes) as if you had been continuously employed in the civilian job for that entire period.[7]

---

[5] 20 C.F.R. 1002.74 (bold question in original).
[6] 38 U.S.C. 4312(e)(1)(A).
[7] Please see Law Review 19052 (June 2019).