Reserve Organization of America

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The Relationship Between USERRA and Written Employer Policies on the Rights of Employees Away for Service.
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.

In 1997, the Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated the "Law Review" column in *The Officer,* ROA's monthly magazine. In 2000, we added the "Law Review" articles to our website, www.roa.org. Starting in

[1] I invite the reader's attention to Law Center | ROA. You will find more than 2,300 "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), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 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. As of 5/1/2026, I have come out of retirement and have affiliated with Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

September 2001, when 19 terrorists killed almost 3,000 Americans in the terrible Tuesday morning, ROA started adding new articles each month. We now have more than 2,300 articles on our website, along with a detailed subject index, to facilitate finding articles about specific topics.[3]

In November 2000, we published Law Review 18. Because this is an important topic, and because 26 years have passed since we published the article, we are republishing the article now.

LAW REVIEW 18
November 2000
USERRA and Employer Policies.
By CAPT Samuel F. Wright, JAGC, USNR*

Q: I enjoyed reading "Law Reviews" Numbers 4-12, concerning the Uniformed Services Employment and Reemployment Rights Act (USERRA). [Law Reviews Numbers 2-16 are now available on the ROA Web site at www.roa.org.]

My employer has a written personnel policy on "military leave" that seems to contradict USERRA in several important respects. What is the relationship between USERRA and written employer policies?

A: You can find USERRA in Title 38 of the United States Code. It starts at section 4301 and runs through section 4333 (38 U.S.C. 4301-4333). [4]

[3] I am the author of more than 80% of the published "Law Review" articles, but I am 75 and will not be around forever to author and update these articles. We are always looking for "other than Sam" articles by other lawyers.
[4] Since this article was published in 2000, Congress has enacted two new sections at the end of USERRA. Those are sections 4334 and 4335.

USERRA supersedes any employer policy (written or otherwise) that purports to limit the rights granted by this statute or to impose additional eligibility criteria upon the exercise of those rights. 38 U.S.C. 4302(b). On the other hand, USERRA does not supersede an employer policy that provides greater or additional rights. 38 U.S.C. 4302(a). Many employers treat Reservists and veterans better than the law requires. If your employer is one of them, you can nominate your employer for an award through the National Committee for Employer Support of the Guard and Reserve (ESGR), which is part of the Department of Defense. You can reach ESGR at 800-336-4590.

Q: Is it possible to sue my employer to make it bring its written policy into compliance with USERRA?

A: No. There are probably tens of thousands (if not hundreds of thousands) of written employer policies that are not fully consistent with USERRA. We cannot make a "federal case" out of the conflict until an actual case arises and the employer violates USERRA by following its own written policy.

This is not to say that I am not concerned about the conflict. Since your employer is a large corporation with tens of thousands of employees, it is likely that intermediate supervisors will follow the written policy and thereby violate federal law. I am also concerned that affected employees (Reservists, National Guard members, and veterans) will not complain about statutory violations because the way they have been treated is in accordance with the employer's written policy. I suggest that you bring your employer's written policy to the attention of ESGR. On behalf of DoD, ESGR will point out to your employer how its policy is

inconsistent with federal law and suggest how the policy might be amended.

Q: Under my employer's written policy, the employer will pay the difference in salary for up to 90 days of service, but this entitlement is limited to full-time employees with more than 90 days of service with the company. Is this limitation lawful?

A: That depends. The employer is not required to pay you if you don't work. USERRA gives you the right to re-employment following service, if you meet USERRA's eligibility criteria. (Those criteria are set forth in Law Reviews 5-7.) The employer can lawfully limit the extra-statutory benefit (making up the difference in pay) to full-time employees with more than 90 days of company service. On the other hand, part-time employees and brand-new employees are covered by USERRA. If you meet USERRA's eligibility criteria, you are entitled to re-employment even if you were brand-new or part-time when you left. In this respect and several others, your company's written policy is poorly written and ambiguous. Your company's personnel office could benefit from ESGR's drafting assistance.

Q: The employer's written policy says that if my period of military service exceeds 90 days my job will be "terminated" and I will receive a "severance payment" of one month of salary. I am currently about 65 days into a 179 day period of active duty for special work (ADSW). What will happen when I pass the 90-day threshold next month? Is my employer violating the law?

A: That depends upon what the employer means by "terminated." Under USERRA, your period of service in the uniformed services

(cumulative with that employer) can be up to five years, and even longer in some circumstances. I invite your attention to Law Review Number 6. Your employer certainly cannot reduce the five-year period to 90 days. On the other hand, you do not have the right to reemployment until you meet all five of USERRA's eligibility criteria. Those criteria include being released from service under honorable conditions. At the time you pass the 90-day threshold, you will not yet have been released from duty, and you will not yet have the right to re-employment. In the final analysis, it doesn't really matter how the employer refers to your status until you return from service and meet USERRA's eligibility criteria.

Q: When I pass the 90-day threshold next month, the employer will probably mail me a "severance pay" check equal to one month's salary. If I cash the check, am I waiving the right to re-employment?

A: Probably not. There is case law (court decisions) to the effect that any waiver of the right to re-employment must be clear and unambiguous. Also, it has been held that you cannot waive rights that you do not yet have. (Upon request, I can provide copies of these court decisions.) Because your right to re-employment is not "ripe" until you complete your 179-day ADSW period, you cannot waive the right to re-employment at this time. Nonetheless, as a matter of prudence, I suggest that you ask the employer to clarify the purpose and effect of the "severance" check before you cash it. You could send your employer a certified letter, along with a copy of this article.

End of the reprint of Law Review 18.

Under section 4302 of USERRA,[5] USERRA is a floor and not a ceiling on your rights and benefits. I have placed the entire text of section 4302 at the end of this article.

In Law Review 18, which I wrote 26 years ago, I wrote that the employer is not required to pay the service member for the hours or days that he or she is away from work performing uniformed service. As a result of case law (court decisions) in the last 26 years, that statement is no longer completely correct. Under some circumstances, employers are required to grant **paid military leave** under USERRA's "furlough or leave of absence" clause" (FLOAC).

***Myrick v. City of Hoover,* 69 F.4th 1309 (11th Cir. 2023).[6]**

***Clarkson v. Alaska Airlines, Inc.,* 59 F.4th 424 (9th Cir. 2023).[7]**

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

***White v. United Air Lines,* 987 F.3rd 616 (7th Cir. 2021).[9]**

USERRA's "furlough or leave of absence" clause.

[5] 38 U.S.C. § 4302.
[6] The 11th Circuit is the intermediate federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia. This is a decision of a three-judge panel of the 11th Circuit. The three judges were Judge Charles R. Wilson and Judge Jill Anne Pryor of the 11th Circuit and Senior District Judge Anne Conway, sitting by designation. Judge Conway wrote the opinion, and the other two judges joined in a unanimous panel decision.
[7] 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.
[8] 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.
[9] The 7th Circuit is the intermediate federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

On 10/13/1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA).[10] USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.[11]

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, practice, or plan in effect at the commencement of such service or established while such person performs such service*.[12]

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.

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

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

Section 4331 of USERRA[13] 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 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

[13] 38 U.S.C. § 4331.

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.[14]

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).[15] In 2021, the 7th Circuit (Chicago) and the 3rd Circuit (Philadelphia) agreed with our position. In 2023, the 9th Circuit (San Francisco) and the 11th Circuit (Atlanta) joined this chorus.[16] The other nine circuits have not yet addressed the question.[17]

This issue is not limited to airlines and cargo carriers.

In Law Review 24035, the immediately preceding article in this "Law Review" series, I pointed out that USERRA's "furlough or leave of

[14] 20 C.F.R. § 1002.150 (bold question in original).
[15] *See generally* Law Review 21067 (October 2021) and Law Review 21014 (March 2021).
[16] *See White* and *Travers,* cited at the top of this article. The first 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. The 11th Circuit case deals with local police officers.
[17] When the other circuits address this question, they will likely follow the lead of the 7th Circuit, the 3rd Circuit, the 9th Circuit, and now the 11th 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.

absence" clause is not limited to pilots for airlines like United Airlines and Alaska Airlines. This clause also applies to stockers for companies like Walmart and Amazon. In *Myrick v. City of Hoover,*[18] we see the application of this clause to police officers for the City of Hoover in Alabama.

Myrick v. City of Hoover

This case involved four plaintiffs, all of whom are police officers for the City of Hoover, Alabama.[19] Thaddaeus Myrick and Nicholas Braden are members of the Alabama Army National Guard (ARNG). Jessie Popee is a member of the Alabama Air National Guard (ANG). Kenneth Fountain is a member of the United States Army Reserve (USAR). All four plaintiffs were away from their police officer jobs for short and long periods of military training and service. Myrick was deployed for 377 days to Afghanistan starting in 2017, and Braden was deployed to the same country for 354 days starting that same year. Popee was called to active duty six times, including 607 days starting in 2001, 691 days starting in 2004, and 426 days starting in 2008. Fountain was called to active duty for 1,752 days in 2007-11.[20]

In her scholarly opinion, Judge Conway cited the text and legislative history of USERRA as well as the Department of Labor (DOL) USERRA regulations, the preamble to those regulations, and the decisions of the

[18] 69 F.4th 1309 (11th Cir. 2023).
[19] All four of these individuals are eligible for membership in the Reserve Organization of America (ROA), but none of them are current members. We are trying to recruit them.
[20] It is possible to assert USERRA claims even years later because USERRA does not have a statute of limitations and it specifically precludes the application of other statutes of limitations. *See* Law Review 22018 (March 2022).

7th Circuit (*White*), the 3rd Circuit (*Travers*), and the 9th Circuit (*Clarkson).*[21]

Judge Conway also cited *Chevron U.S.A., Inc. v. Natural Resources Defense Council.*[22] When Congress has not clearly answered a legal question about the interpretation of a statute, and when Congress has empowered a federal executive agency to promulgate regulations under the statute, and when the regulations address the question, and when the answer provided by the regulations is reasonable, courts should give deference to the interpretation expressed in the regulations. Judge Conway held that the DOL interpretation was reasonable and entitled to deference.[23]

In her opinion, Judge Conway also held:

> The Supreme Court has long admonished courts to construe statutes protecting veterans liberally for the benefit of the veteran. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946). Congress adopted this rule of construction when it enacted USERRA. *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424, 429 (9th Cir. 2023). Thus, when two plausible interpretations of USERRA exist—one denying benefits, the other protecting the veteran—we must choose the interpretation that protects the veteran. *Travers*, 8 F.4th at 208 n. 25 ("[A]ny interpretive doubt is construed in favor of the service

[21] In her opinion, Judge Conway wrote: "Our conclusion is bolstered by the fact that Hoover's interpretation would split the circuits." *Myrick,* 69 F.4th at 1317. This statement buttresses the conclusion that I have expressed in previous Law Review articles that as new circuits are called upon to address questions about the application of the "furlough or leave of absence" clause they will likely follow the lead of the circuits that have already addressed these questions.
[22] 467 U.S. 837 (1964).
[23] *Myrick,* 69 F.4th at 1316.

member, under the pro-veteran canon."). In this case, the word "status" could refer to an employee's job position, or to the way the employer classifies the employee while on leave. The DOL selected the former interpretation, which prevents employers from skirting USERRA's protections by mischaracterizing military leave. *Cf*. § 1002.149; 70 Fed. Reg. at 75263. This interpretation aligns with USERRA's purpose and scheme. Therefore, it is permissible.[24]

The right to paid military leave under the "furlough or leave of absence" clause is not necessarily limited to drill weekends and traditional annual training tours.

The other three "furlough or leave of absence" clause cases cited have dealt with short periods of military training like drill weekends and annual training periods lasting two or three weeks. In this case (*Myrick)*, the district court awarded and the appellate court approved ordering the employer (the City of Hoover) to grant paid military leave measured in the hundreds of days because "since 1994, Hoover has placed at least three police department employees on paid administrative leave lasting longer than 120 consecutive days."[25]

Q: Alabama state law gives National Guard and Reserve service members the right to 168 hours of paid military leave per year, and the City of Hoover gave this paid leave to the four plaintiffs in this case. Where does a federal court get the authority to order the City of Hoover to do more than state law requires?

[24] *Myrick,* 69 F.4th at 1318.
[25] *Myrick,* 69 F.4th at 1313.

A: USERRA is *a floor and not a ceiling* on the employment rights of service members and veterans. Section 4302 of USERRA provides:

> **(a)** Nothing in this chapter 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.[26]

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

[26] 38 U.S.C. § 4302.

matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of 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.[27]

[27] 20 C.F.R. § 1002.7 (bold question in original).

State law requires the State of Alabama and its political subdivisions, including the City of Hoover, to grant employees who serve part-time in the Reserve Components of the armed forces 168 hours per year of paid military leave. Federal law (USERRA) requires all civilian employers to grant paid military leave to such employees for absences from work that were necessitated by military training or service, if and to the extent that the employer grants paid leave for comparable periods of absence from the civilian job for non-military reasons.

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

Here is a link to the Maher Legal Services website:

https://www.lawyersdefendingwarriors.com/about.

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Reserve Organization of America

This article is one of more than 2,000 "Law Review" articles available at Law Center | ROA— a free legal resource that the Reserve Organization of America (ROA) has built and maintained since 1997, adding new articles every month.

ROA is the only national military organization dedicated exclusively to America's reserve components — all eight of them. From the 6,179 members of the Coast Guard Reserve to the 329,705 soldiers of the Army National Guard, ROA exists to serve the nearly 773,000 men and women who answer the call while maintaining civilian lives. No other organization does what we do for the people we serve.

Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman, who, as President, signed ROA's congressional charter in 1950. That charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.

Beyond this library of legal resources, ROA files amicus curiae ("friend of the court") briefs in the Supreme Court and federal courts, and actively educates service members, military spouses, attorneys, employers, legislators, and others about the legal rights of those who serve — and how to enforce them. We provide this information to all service members, regardless of membership. But it's ROA members — through their dues and contributions — who make it possible.

Your membership makes the mission possible.

If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just $20 for a full year, or $450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. ROA has also recently expanded eligibility to include ancestors and lineal descendants of past or present service members, so families can stand with those who serve. Join online at Reserve Organization of America - ROA or call 800-809-9448. If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Here is the entire text of section 4302 of USERRA:

(a)
Nothing in this chapter 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.