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Must-Read for HR Professionals: Employer Obligations To Assist the Returning Service Member
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.3.2.1—Prompt reinstatement after return from service.
1.3.2.8—Training or retraining to enable the returning service member to return to work.

Q: I am the Personnel Director for a major freight railroad. I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). This "Law Review" Library" is a great service that the

[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.

Reserve Organization of America

Reserve Organization of America (ROA) provides to personnel officials like me, to help us understand our USERRA obligations to employees who left their civilian jobs for voluntary or involuntary military service or training and now are returning to work after release from a period of service. We certainly want to do all that is required, and more, for those who serve our country in the armed forces.

We have an employee (let us call her "Josephine Smith" or JS) who worked for our railroad for nine years, and during that time she was away from work numerous times for training requirements of her Army National Guard (ARNG) unit. In 2023, she volunteered for a three-year Active Guard & Reserve (AGR) assignment of full-time Army service. She recently completed that assignment and returned to her civilian job.

I am satisfied that JS meets the five USERRA conditions for reemployment. She left her civilian job in 2023 for full-time military service, and she gave us prior oral and written notice. Her three-year AGR tour counts toward her five-year limit under section 4312(c) of USERRA, but the other periods when she was away from her railroad job are exempt from the limit. JS has not exceeded the five-year limit. She served honorably and did not receive a disqualifying bad discharge from the Army. Indeed, she was not discharged at all. She was released from active duty and returned to the status of a part-time ARNG soldier. JS was released from active duty on 9/30/2026, and she applied for reemployment just three days later—well within the 90-day deadline to apply for reemployment.

Our railroad and other railroads are regulated by the Federal Railroad Administration (FRA), an agency in the United States Department of

Transportation. The FRA has established training, testing, and competency requirements for specific railroad jobs. Before she left her railroad job in 2023, JS qualified for three FRA licenses for three job categories. During the three years that she was serving full-time in the Army, her three licenses expired. She cannot lawfully return to work in one of those job functions until she completes retraining and retaking the FRA examinations.

During the three years when JS was serving full-time in the Army, there were several highly-publicized railroad accidents involving derailment and flammable or toxic materials. Fortunately, none of those accidents involved our railroad. Nonetheless, we are committed to learning lessons from all railroad accidents, whether our company was involved or not.

During the time that JS was away from her railroad job, there have been some technological developments, and there are also some new FRA and company safety rules. There are new things that JS needs to learn before she can return to work. This is not just a matter of sitting down for a one-hour multiple choice test.

What are our company's responsibilities regarding helping JS to requalify before she returns to work?

I have read several of your "Law Review" articles about the obligations of the employer to the veteran who meets the five USERRA conditions and who returns to work with a temporary or permanent disability incurred or aggravated during the period of uniformed service. Fortunately, JS was not injured during her service

and does not have a disability. What are the railroad's obligations to JS under these circumstances?

A: Thank you for your question and for your kind words about our Law Review Library. I can see that you are committed to helping returning veterans and to complying with USERRA. I can also appreciate that safety must always be at the forefront in the transportation industry.

Section 4313 of USERRA[3] sets forth the obligations of the employer to the returning veteran or service member who meets the USERRA conditions. I have placed the entire text of that section at the end of this article, and I have highlighted certain subsections that are especially pertinent to the scenario that you have described.

Section 4331 of USERRA[4] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to State and local governments and private employers. The Secretary has promulgated such regulations, and they are codified in title 20 of the Code of Federal Regulations (C.F.R.). One section of the USERRA Regulations applies to this scenario:

> **What efforts must the employer make to help the employee become qualified for the reemployment position?**
>
> The employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her

[3] 38 U.S.C. § 4313.
[4] 38 U.S.C. § 4331.

return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.
(a)
(1) "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.
(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:
(i) The employer's judgment as to which functions are essential;
(ii) Written job descriptions developed before the hiring process begins;
(iii) The amount of time on the job spent performing the function;
(iv) The consequences of not requiring the individual to perform the function;
(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs.
(b) Only after the employer makes reasonable efforts, as defined in section 1002.5(i) may it determine that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.[5]

USERRA's legislative history addresses the "training or retraining" issue as follows:

> The Committee [Senate Committee on Veterans' Affairs] understands that absence from a job may cause an employee's skills to become rusty. Also, rapidly changing technology in the

[5] 20 C.F.R. § 1002.198 (bold question in original).

> workplace may require that employees be given a significant period of time to learn current job skills. The Committee intends that returning employees be provided training on new equipment installed in their absence. Before an employer can make a good-faith determination that a returning employee is not qualified for reemployment, the Committee believes that, at a minimum, the employer must provide refresher training and any training that an employee would have received if he or she had remained continuously employed or to make other reasonable efforts to update the employee's skills.[6]

The United States Court of Appeals for the 6th Circuit[7] has held that: "The burden of proving that a returning veteran is not qualified under section 4313 falls on the employer, not on the employee."[8] Thus, if you (the railroad) deny JS reemployment on the grounds that she is not qualified, you have the burden of proving that she is unable to perform the essential duties of the job, despite your "reasonable efforts" to become qualified.

I hope that this discussion and the cited authorities help you in understanding the railroad's obligations to JS.

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

[6] 1993 Senate Committee Report, October 18, 1993, S. Rep. 103-158, 1993 WL 432576 (LEG. HIST.) The complete text of this committee report is reprinted in Appendix D-2 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 797 of the 2025 edition of the *Manual.*

[7] The 6th Circuit is the intermediate federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[8] *Petty v. Metro Government of Nashville-Davidson County,* 538 F.3d 431, 444 (6th Cir. 2008).

Uniform Code of Military Justice (UCMJ), and other laws that are especially relevant to individuals 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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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.

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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 4313 of title 43 of the United States Code:

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:
(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days—
(A)
in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or
(B)
in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the

position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—

(A)

in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

(B)

in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) **after reasonable efforts by the employer to qualify the person.**

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

(A)

in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B)

if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

(4)

In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (**other than disability incurred in, or aggravated during, service in the uniformed services**), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

(b)

(1)

If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.

(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

(A)

Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that

provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.

(B)

In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

(Added by Pub. L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3157; amended by Pub. L. 104-275,title III, § 311(5), Oct. 9, 1996, 110 Stat. 3335).

38 U.S.C. § 4313 (emphasis supplied).