

LAW REVIEW 23041

JULY 17, 2023

President Biden Signs Executive Order Authorizing Call-up of up to 3,000 Reserve Component Service Members for Operation Atlantic Resolve.

On Thursday, July 13, 2023, President Biden signed an executive order that authorizes the Department of Defense (DOD) to call up to 3,000 Reserve Component (RC) service members to active duty for Operation Atlantic Resolve (OAR), the military operation that was launched in 2014 after Russia annexed Crimea from Ukraine. OAR is the mechanism for our country providing military equipment and supplies to Ukraine to defend itself against the Russian invasion that began in February 2022. United States troops have not been and presumably will not be involved in the fighting but are providing training and logistical support to Ukraine.

In a letter to Congress announcing the new executive order, President Biden wrote: “These reserve component forces are to augment the active forces . . . to enhance the United States’ ability to sustain its heightened level of presence and operations.” During a press conference, Lt. Gen. Douglas Sims, the director of operations for the Joint Staff, said: “Commanders in Europe might decide a Reserve unit is better suited to handle certain tasks than active duty troops who are already there.”

Under the new executive order, OAR has now been designated as a “contingency operation.” Under [section 5538 of title 5 of the United States Code, 5 U.S.C. § 5538](#), a federal employee who is called up or volunteers for OAR or another contingency operation is entitled to differential pay if his or her military pay on active duty is less than his or her regular federal civilian pay. See [Law Review 21076](#) (November 2021).

Question: My daughter is a sergeant in the Army Reserve. If she is called up under this new executive order, or if she otherwise enters active duty voluntarily or involuntarily, she will have to leave her civilian job at a large company—let us call it Acme Industries. Will my daughter have the right to return to her Acme job at the end of her active duty period?

Answer: Yes, under a federal law called the [Uniformed Services Employment and Reemployment Rights Act](#) (USERRA). USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335, 38 U.S.C. §§ 4301-35. USERRA applies to almost all employers in the United States, including the federal government, the states, the political subdivisions of states (local governments), and private employers, *regardless of size*. You only need one employee to be an employer subject to the federal reemployment statute. See [Cole v. Swint, 961 F.2d 58, 60](#) (5th Cir. 1992).

USERRA applies to *voluntary as well as involuntary service*. Your daughter will have the right to reemployment if she meets five simple conditions. She must have left her civilian job to perform uniformed service, and she must have given the employer prior oral or written notice. Her cumulative period of uniformed service must not have

exceeded five years, with certain exceptions. She must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from the period of service, she must have made a timely application for reemployment. See [Law Review 15116](#) (December 2015) for a detailed discussion of the five USERRA conditions.

If your daughter meets the five conditions, she is entitled to prompt reemployment in the position that she would have attained if she had been continuously employed by Acme for the entire period that she was away from her job for uniformed service. See [38 U.S.C. § 4313\(a\)\(2\)\(A\)](#). She is also entitled to be treated as if she had been continuously employed for seniority and pension purposes. See [38 U.S.C. §§ 4316\(a\), 4318](#).

Question: How does the five-year limit work?

Answer: The five-year limit applies with respect to the employer relationship for which the person seeks reemployment. Service that your daughter performed before she began her Acme job does not count toward her five-year limit with Acme. If your daughter leaves her Acme job and starts a new job with a new employer, she gets a fresh five-year limit with her new employer. See [38 U.S.C. § 4312\(c\)](#).

If your daughter is called to active duty involuntarily, as in a mobilization, her period of involuntary service does not count toward exhausting her five-year limit. See [38 U.S.C. § 4312\(c\)\(4\)\(A\)](#). If your daughter volunteers, her period of service will count toward the limit unless the service secretary (like the secretary of the Army) determines that her voluntary service was for a critical mission or requirement. See

38 U.S.C. § 4312(c)(4)(D). See generally [Law Review 16043](#) (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit.

Question: Where can my daughter or any service member go for detailed information about USERRA?

Answer: Go to www.roa.org/lawcenter. You will find more than 2,000 “Law Review” articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with 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, and we add new articles each month. The articles are available for free to everyone, not just ROA members. 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, ROA advocates for the rights and interests of those who serve our country in uniform. A recent example of ROA *amicus briefs* was in the landmark 2022 *Torres v. Texas Department of Public Safety* Supreme Court USERRA-connected case that ROA helped win.

Question: What is the Reserve Organization of America (ROA)?

Answer: ROA is the only national military organization that exclusively and solely supports the nation’s reserve components. ROA is more than a century old. On October 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, the commander of American forces in that war. One of those veterans was Capt. Harry S. Truman. As president, in 1950, Truman signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For a century, we have advocated that the reserve components, including the National Guard, are an effective way to help assure our national security. ROA is responsible for many improvements in law and policy that have enhanced the readiness of our reserve components.

If you are now serving or have ever served in any one of our nation's eight¹ uniformed services, you are eligible for membership in ROA; 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 www.roa.org or call ROA at 800-809-9448.

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 make such a donation through our website or mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002²

¹ Congress recently established the United States Space Force as the 8th uniformed service.

² You can also contribute on-line at www.roa.org.