

LAW REVIEW¹ 26018

May 2026

Presentation to the WV Air National Guard about USERRA.

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On Saturday, 3/28/2026, I made a TEAMS presentation to unit commanders, judge advocates, and senior enlisted personnel of the West Virginia Air National Guard (ANG). This is a reprint.

USERRA Coverage

USERRA applies to the Federal Government (Executive Branch and Legislative Branch) as a civilian employer. *See* Law Review 24052 (November 2024).

¹ I invite the reader's attention to 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), 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 80% 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 (VRRRA—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 VRRRA 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 VRRRA 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.

Go to www.roa.org/lawcenter. Click on “numerical index” and then “2024.” The 2024 articles are listed chronologically.

USERRA applies to State government agencies as civilian employers. See Law Review 24054 (November 2024).

USERRA applies to local government agencies as civilian employers. See Law Review 23012 (March 2023).

USERRA applies to private employers, regardless of size. You only need one employee to have the obligations of an employer for purposes of the federal reemployment statute. See *Cole v. Swint*, 961 F.2d 58,60 (5th Cir. 1992).

The following kinds of employers are exempt from USERRA enforcement:

- a. Foreign embassies and consulates. (diplomatic immunity)
- b. International organizations like the United Nations and the World Bank. (diplomatic immunity).
- c. Judicial Branch of the Federal Government. Law Review 24053 (November 2024).
- d. Indian tribes. Law Review 15111 (December 2015).
- e. Houses of worship and religious schools, at least for “religious” employees. Law Review 19048 (May 2019).

USERRA Criteria

To have the right to reemployment after a period of absence from the civilian job, the individual must meet five simple criteria:

- a. Must have left the job to perform voluntary or involuntary service in uniformed services, as defined by USERRA.
- b. Must have given the employer prior oral or written notice, unless giving prior notice was precluded by military necessity or otherwise impossible or unreasonable.
- c. Must not have exceeded the five-year cumulative limit on the period or periods of uniformed service relating to that employer relationship.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. Must have been timely in returning to work or applying for reemployment.

See Law Review 24047 (October 2024).

The Five-Year Limit

The five-year limit is cumulative with respect to the employer relationship for which the person seeks reemployment. If the person leaves that job and starts a new job with a new employer, he or she receives a fresh five-year limit.

The limit is on *the duration of the period of service, not the duration of the person's absence from the civilian job*. The period of absence will almost always be at least a few days longer than the period of service.

For example, Specialist Mary Jones was on active duty for exactly one year, from 10/1/2024 until 9/30/2025. But Mary left her civilian job on 9/20/2024, to get her affairs in order prior to reporting to active duty.

After her release from active duty on 9/30/2025, she waited 60 days to apply for reemployment. Her period of service was exactly one year, but her period of absence was one year plus 70 days. Only the one year of uniformed service counts toward her 5-year limit (unless that period was exempt under one of the 9 statutory exemptions).

Please see Law Review 26020 (May 2026) for a detailed discussion of what counts and what does not count toward exhausting an individual's 5-year limit with respect to a specific employer relationship.

State Active Duty

State active duty performed by Army National Guard (ARNG) soldiers or Air National Guard (ANG) airmen was not protected by USERRA until 1/5/2021. On that date, President Trump signed the Johnny Isakson and David P. Roe, MD Veterans Health Care and Benefits Improvement Act, Public Law 116-315, 134 Stat. 5058.

Now, State active duty is protected by USERRA in three circumstances:

- a. If it is for a continuous period of 14 days or more.
- b. If the State active duty was necessitated by a national emergency declared by the President.
- c. If the State active duty was necessitated by a major disaster declared by the President.

See Law Review 24047 (August 2024).

Important Lesson

If the State active duty was not necessitated by a major disaster or national emergency declared by the President, it is important that the State active duty orders be written in increments of 14 days or more, to ensure that the civilian jobs of the ARNG soldiers and ANG airmen will be protected.

State active duty on or after 1/5/2021 now counts toward the 5-year limit even if involuntary. For example, Chief Master Sergeant Joe Smith has been employed by Daddy Warbucks Industries (DWI) since 1/1/2006. During that period, he has utilized 4 years, 11 months, and 15 days of his 5-year limit with respect to DWI. If he volunteers for state active duty, or if he is called to state active duty involuntarily, this could put him over the 5-year limit and cause him to lose his DWI job. The Adjutant General, the Personnel Chief, and the commanders and judge advocates need to be aware of this issue.

Entitlements of the Returning Service Member

Staff Sergeant Mary Jones, ANG was away from her civilian job (federal, state, local, or private sector) for one year of active duty. She has met the 5 USERRA conditions for reemployment. She left her job to perform uniformed service. She gave the employer prior notice. She has not exceeded the cumulative 5-year limit with that employer, and she did not receive a disqualifying bad discharge from the Air Force. After she was released from the period of active duty, she made a timely application for reemployment.

Accordingly, Mary is entitled to the following:

- a. Prompt reinstatement in the position that she would have attained if she had been continuously employed (usually but not always the position she left) or in another position, for which she is qualified, that is of like seniority, status and pay.
- b. Continuous accumulation of seniority, as if she had remained continuously employed.
- c. Civilian pension credit, as if she had remained continuously employed.

See Law Review 25011 (March 2025).

Except in unusual circumstances, Mary is not entitled under USERRA to pay from the civilian employer for the time that she was away from work for military training or service. If she works for the State of West Virginia or one of its political subdivisions (local governments), she is entitled to paid leave under State law. See <https://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/StateLaws/WV-2013-LV.pdf>. On the ROA website, we have an article like this for each State and territory.

If Mary's private sector employer grants paid leave for non-military reasons, like jury duty, the employer must grant PAID military leave for a comparable period of absence for military training or service. See Law Review 23026 (May 2023).

USERRA Forbids Discrimination

Section 4311 of USERRA provides:

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action or other retaliatory action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited-

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony

or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 U.S.C. 4311. *See generally* Law Review 17016 (March 2017) and Law Review 22054 (September 2022).

Section 4311 forbids discrimination in initial hiring, in retention in employment (firing), and in promotions and benefits of employment.

The Serial Volunteer

Sergeant Eager Beaver, ARNG is a serial volunteer for National Guard duty, far beyond the minimum required for members of his National Guard unit. Mr. Objecting Employer, the owner-operator of a small store with only 10 employees, has complained to the Adjutant General, to the Governor, and to his state legislators about the burden that Beaver's serial volunteerism puts on this small employer.

So long as Beaver does not exceed the 5-year limit, all of his military service is protected by USERRA. *See* 38 U.S.C. 4312(h). This is not to say that I have no sympathy for this small employer.

Since Congress abolished the draft and established the All-Volunteer Military in 1973, our nation has been entirely dependent upon voluntary military service. We must never lambaste Beaver for volunteering, but that does not mean that the Adjutant General should give Beaver orders every time that he asks for them.

I suggest that the Adjutant General appoint a senior officer to receive employer complaints about the burden on employers and to respond to those complaints promptly and tactfully. **This duty should not be assigned to the unit commander.** In most cases, the unit commander is a part-timer with his or her own civilian employer to satisfy. If the unit commander is bombarded by calls from the employers of unit members during work hours, that will magnify the unit commander's problems with his or her own civilian employer.

This senior officer should have ready access to military records and should be able to reassure the civilian employer that the soldier or airman really did perform military duty during the time that he or she was away from the civilian job. If the senior officer finds that an individual soldier or airman is a serial volunteer, the senior officer should have the authority to limit orders for that individual going forward.

The individual soldier or airman, and especially a junior enlisted soldier or airman, should not have to suffer the wrath of the civilian employer. The Adjutant General or his or her designated senior officer representative should serve as a buffer between the angry employer and the individual soldier or airman. See Law Review 30 (October 2001).

Where Should I Go for Help and Information in Dealing with my Employer?

If you are having difficulty with your civilian employer about your right to time off from work to perform military training or service, I suggest that your first step should be to contact the Department of War (DOW) organization called “Employer Support of the Guard and Reserve” or “ESGR.” Call them: 800-336-4590. Visit their website at www.esgr.mil. See Law Review 12036 (April 2012).

If ESGR is unable to help you, your next step should be to contact the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). You can use the following link to make a formal USERRA complaint against your civilian employer: <https://www.dol.gov/agencies/vets/programs/userra/vets1010>. See Law Review 25035 (September 2025).

I also invite your attention to www.roa.org/lawcenter. This is part of the website of the Reserve Organization of America (ROA). You will find more than 2,000 “Law Review” articles about military-legal topics, including more than 1,400 articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), along with a detailed subject index, to facilitate finding articles about specific topics. If you do not find what you are looking for, you may contact me by email, at no charge.

End of the handout for the March presentation.

Join the Organization That Fights for You

This article is one of more than 2,000 "Law Review" articles available at www.roa.org/lawcenter— 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 other 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 roa.org/memberoptions 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
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