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Employer's Written Policy Is Inconsistent with USERRA

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[About Sam Wright](#)

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Q: I am a Major in the Army Reserve and a member of the Reserve Organization of America (ROA).³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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, now doing business as the Reserve Organization of America (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 (VRRRA—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 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.

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

On the civilian side, I work for a department of the state government. The department has a written policy about the circumstances under which and the period for which it will grant paid and unpaid military leave to employees like me. The policy purports to summarize USERRA and our state law that provides for 30 days of paid military leave per calendar year. The policy includes the following statement:

In addition, the department grants *non-paid* military leaves up to six months during a four-year period to employees who are attending service schools and another six months for initial Full-Time Duty Training or initial Active Duty Training to employees who enlist in a National Guard or Reserve unit.

Emphasis supplied.

When individuals with no prior military service enlist in the Reserve or National Guard, they are required to report for Initial Active Duty Training (IADT) for basic training (“boot camp”), often followed by training in a specific military occupational skill (infantry, artillery, cyber warfare, etc.). These IADT periods often last longer than six months.

Many military service schools, like the Army War College, last longer than six months, and an individual reservist or National Guard member might be asked or required to attend more than one service school in a four-year period. And what about call-ups for military missions like Operation Enduring Freedom and Operation Iraqi Freedom? My employer’s written policy seems to imply that *non-paid* military leaves of absence are strictly limited to the kinds of duty enumerated in this quoted paragraph. Does my employer have the right to limit *non-paid* military leaves in this way?

A: No. Under USERRA, you have an essentially unlimited right to absent yourself from your civilian job to perform service in the uniformed services, the employer’s objection or written policy to the contrary notwithstanding. Your right to unpaid but job-protected military leave

senior officers. 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 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.

under USERRA is limited only by the five-year limit, and there are nine exemptions to the five-year limit.⁴ Moreover, USERRA provides:

In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements [prior notice to the employer that the employee will be leaving for military service] established in subsection (a)(1) and the notification requirements [timely application for reemployment] established in subsection (e) are met.⁵

USERRA's legislative history explains the purpose and effect of section 4312(h) as follows:

Section 4312(i) [later renumbered as 4312(h)] is a codification and amplification of the Supreme Court's ruling in *King v. St. Vincent's Hospital*, 112 S. Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under former section 2024(d) of title 38. This new section makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements under section 4312(a) and (e).⁶

Q: The employer's personnel office contends that because the department grants *paid* military leave, in accordance with state law, it can limit *unpaid* military leave to accommodate the interests of the department. What do you say about that?

A: The personnel office is wrong. The Department of Labor (DOL) USERRA regulation provides:

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

⁴ Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count toward exhausting your five-year limit with respect to a specific employer relationship. Reserve and National Guard training, including initial training and service schools, do not count toward the five-year limit. 38 U.S.C. 4312(c)(3). Involuntary calls to active duty are exempted from the computation of your five-year limit. 38 U.S.C. 4312(c)(4)(A). Even voluntary active duty can be exempted from the five-year limit under certain circumstances. 38 U.S.C. 4312(c)(4)(B), (C), and (D).

⁵ 38 U.S.C. 4312(h).

⁶ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1). This report can be found in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Ed Still. The quoted paragraph can be found on pages 774-75 of the 2019 edition of the *Manual*.

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.⁷

USERRA is a floor and not a ceiling on your rights as a person who is serving or has served our country in uniform. State law can give you *greater or additional rights*. State law cannot take away the rights that Congress gave you when it enacted USERRA. The pertinent section of USERRA is as follows:

(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.⁸

Under the Supremacy Clause of the United States Constitution, a federal statute like USERRA overrides any conflicting state statute or state constitution. The Supremacy Clause reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁹

Q: The personnel office insists that I must *request a military leave of absence, even unpaid*, before absenting myself from my civilian job for service, and that the department has the discretion to deny my request for unpaid military leave if the timing, frequency, or duration of the absence is inconvenient for the department. What do you say about that?

⁷ 20 C.F.R. 1002.7(d).

⁸ 38 U.S.C. 4302.

⁹ United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

A: The DOL USERRA regulation provides:

Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.¹⁰

Right on its face, your employer's written policy violates USERRA. If the employer acts on this policy, that will be clear evidence that it is violating USERRA *willfully*, which means that the court can order it to pay double damages.¹¹

Please join or support ROA

This article is one of 1900-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted

¹⁰ 20 C.F.R. 1002.87 (bold question in original).

¹¹ 38 U.S.C. 4323(d)(1)(C).

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 mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
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