

Your Employer’s Written Policy Is Inconsistent with USERRA, But that Does Not Mean that the Employer Is Violating the Law.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[About Sam Wright](#)

1.4—USERRA enforcement

Q: I am a Major in the Army Reserve, and I am the same person who asked the questions in Law Review 20016, the immediately preceding article in this “Law Review” series. In your article, you wrote that my employer’s published “military leave” policy is clearly inconsistent with the Uniformed Services Employment and Reemployment Rights Act (USERRA). I want to sue my employer and to ask the court to order the employer to amend the unlawful policy. What do you think about that?

A: I think that filing such a lawsuit would serve no useful purpose. Yes, your employer’s published policy is clearly inconsistent with USERRA, but having an inconsistent published policy does not, per se, violate USERRA. You can say that the employer violated USERRA only if you can show that the employer *acted upon* the policy and denied you reemployment, retention in employment, a

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.

promotion, or a benefit of employment. If you were to file suit seeking a court order requiring the employer to amend its published policy, your lawsuit would be dismissed on the pleadings under Rule 12(b)(6) of the Federal Rules of Civil Procedure—failure to state a claim for which relief can be granted.

Q: Does that mean that the employer’s written policy is irrelevant?

A: The written policy is certainly relevant if you can show that the employer acted upon the policy and unlawfully denied you reemployment. If you can show that your employer violated USERRA *willfully*, the court may require the employer to pay you “liquidated damages” in the amount of the actual damages, and in addition to the actual damages, thus doubling the cash award.³

The employer’s written policy is also relevant in that employees may read the policy and be misled about their legal rights. We established the Law Review Library 23 years ago, in 1997, to educate Reserve Component service members about their legal rights, and about how to exercise and enforce those rights. It is not realistic for you to expect your employer’s personnel director to provide you accurate information about your rights. The personnel director works for the employer, not for you.

Q: Is the employer required to notify me and other affected employees of our USERRA rights?

A: I invite your attention to USERRA’s penultimate section, which reads as follows:

(a) Requirement to provide notice. Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. *The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.*

(b) Content of notice. The Secretary [of Labor] shall provide to employers the text of the notice to be provided under this section.⁴

If you look carefully in the employee break room or some other place where notices to employees are customarily placed, you will almost certainly find a large laminated poster with many boxes containing notices—for all the federal statutes that require employers to post notices. If you look carefully at the poster, you will find a box about USERRA.

Few employees read these required notices. If you did find and read the USERRA notice, it would not help you much because the notice is necessarily terse and general. *This illustrates the need for*

³ 38 U.S.C. 4323(d)(1)(C).

⁴ 38 U.S.C. 4334 (emphasis supplied). The italicized sentence can reasonably be read to mean that the employer’s *only* obligation to employees, regarding providing USERRA information, is to post the required notice.

our “Law Review” articles, the only source for free, accurate, and understandable information about USERRA.

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 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
Washington, DC 20002