

## **LAW REVIEW<sup>1</sup> 26043**

**August 2026**

### **Under USERRA, the Right to Reemployment Is Absolute.**

**By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>**

#### **1.0—USERRA generally.**

In November 2005, the Reserve Officers Association (now doing business as the Reserve Organization of America) published Law Review 203. Today, we are republishing that article because almost 21 years have passed since we published it: your right to reemployment is absolute.

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<sup>1</sup> I invite the reader's attention to [Law Center | ROA](#). 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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

<sup>2</sup> 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. As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. You can reach me by e-mail at [samuel@maherlegalservices.com](mailto:samuel@maherlegalservices.com) or by telephone at (708) 468-8155.

**Law Review 203**

**November 2005**

**Is the Right to Reemployment Absolute?**

**By Captain Samuel F. Wright, JAGC, USNR\***

*\*Military title shown for purposes of identification only. The views expressed are the personal views of the author and not necessarily the views of the Department of the Navy or the Department of Defense.*

**Q: I found Captain Wright's Law Review 77 ("I Am Being Demobilized—What About My Civilian Job?") while doing research on the Internet. Like Captain Wright, I am a captain in the Navy Reserve Judge Advocate General's (JAG) Corps. I also am a partner in the employment law section of a major law firm. I represent employers in cases brought by employees, under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws.**

**In Law Review 77, Captain Wright states that a person who meets the USERRA eligibility criteria has an unqualified right to reemployment in the civilian job. I think that Captain Wright is, in his zeal for service members, overstating what USERRA provides. The right to reemployment is not unqualified—read the law. The employer is not required to reemploy the returning servicemember if doing so is "impossible or unreasonable" or creates an "undue hardship." I think that ROA needs to tone down Captain Wright in this respect.**

**This is a summary of an e-mail sent to the ROA Executive Director, Lieutenant General Dennis McCarthy, USMC (Ret.).**

**A:** If you are accusing me of trying to “push the envelope” for the brave young men and women who serve in the armed forces, I plead guilty. For the last 29 years, since I graduated from law school and joined the Navy JAG Corps, my principal focus has been on protecting the legal rights of servicemembers, Active Component and Reserve Component.

I stand by my statement, in Law Review 77 and several of my articles, that the right to reemployment is unqualified, subject only to the very narrow affirmative defenses for which the employer bears a heavy burden of proof. My conclusion is buttressed by USERRA’s legislative history.

Section 4312(a) would provide an **unqualified** right to reemployment to persons who leave other than temporary positions to serve on any type of military duty, whether voluntary or involuntary, if the notice requirement of subsection (a)(1) is met, the cumulative length of military service found in subsection (a)(2) is not exceeded and the reporting or application requirement of subsection (e) is complied with. This section applies with equal force to employers of private employees, state and local governments and the Federal Government.

House Report No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2457 (emphasis supplied).

I also invite your attention to Section 4312(h) of USERRA:

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) [five year limit] and the notice requirements established in subsection (a)(1) and the notification requirements [applying for reemployment after service] established in subsection (e) are met."

38 U.S.C. 4312(h).

I discuss the implications of Section 4312(h), including the legislative history and case law, in detail in Law Review 30. It is clear that Congress explicitly precluded the application of any "balancing test" or "rule of reason."

Yes, this law imposes a burden on civilian employers, and sometimes on fellow employees who are not called to the colors. When Congress originally enacted the right to reemployment in 1940, as part of the Selective Training and Service Act, Senator Thomas of Utah (principal proponent of the right to reemployment) acknowledged the burden but asserted that it was justified "because the lives and property of employers, as well as everybody else in this country, are protected by such military service." His colleagues accepted the argument and enacted the legislation.

Here is USERRA's legislative history about the limited extent of the "impossible or unreasonable" affirmative defense:

An employer is not required to reemploy a person under this chapter if – the employer’s circumstances have so changed as to make such reemployment impossible or unreasonable.” 38 U.S.C. 4312(d)(1)(A). Essentially the same language has appeared in the reemployment law since the beginning, in 1940. This has always been seen as a very narrow affirmative defense for which the employer bears a heavy burden of proof.

The very limited exception of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof [*see Watkins Motor Lines, Inc. v. deGalliford*, 167 F.2d 274, 275 (5th Cir. 1948); *Davis v. Halifax Cty. Sch. System*, 508 F. Supp. 966, 969 (E.D.N.C. 1981)], is only applicable ‘where reinstatement would require the creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran.’ (*Davis*, *supra*, 508 F. Supp. at 968.)

‘It is also not sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application.’ [*Davis*, *supra*. *See also Fitz v. Bd. Of Education of Port Huron*, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), affirmed, 802 F.2d 457 (6th Cir. 1986); *Anthony v. Basic American Foods*, 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 709 (8th Cir. 1983).”]

House Report No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2458.

In your e-mail to General McCarthy, you also referred to the “undue hardship” affirmative defense. Please note that this defense “applies only where a person is not qualified for a position due to a disability or other bona fide reason after reasonable efforts have been undertaken to qualify the person.” Id.

Saying that the right to reemployment is essentially absolute and unqualified does not mean that I countenance RC members who abuse their civilian employers. USERRA is a very valuable shield to protect your civilian job rights when you are called to the colors. Congress did not intend that you use USERRA and your RC affiliation against your employer. As in other contexts, abusers can poison the waters for legitimate users.

For two decades, ROA has sought to persuade Congress to enact tax breaks or other benefits for employers of RC personnel, but no such legislation has been enacted. We really thought that something would be enacted during the “lame duck” session at the end of 2004, but that expectation was dashed. Our effort continues.

### **End of reprint of Law Review 203.**

For a much more recent “Law Review” article about the absolute and unqualified nature of the right to reemployment, please see Law Review 25007 (February 2025).

I have made it my life’s work to educate members of the armed forces and veterans about their legal rights under USERRA and other laws and to assist them in exercising and enforcing their rights. I invite your attention to [Law Center | ROA](#). You will find more than 2,000 articles

about USERRA and other military-relevant laws, along with a detailed subject index.

I am the author of more than 80% of those articles, but I am now 75 and will not be around forever to author and update these articles. To ensure that the Law Review Library and the Service Members Law Center will continue, we need to recruit new lawyers who are much younger than I am. We also need to ensure that ROA itself will continue.

**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 Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those 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>.

**Join the Organization That Fights for You.**

This article is one of more than 2,000 "Law Review" articles available at [Law Center | ROA](#)— 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 and spouses, widows, and widowers of past or present service members, so families can stand with those who serve. Join online at [Reserve Organization of America - ROA](#) 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:

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1 Constitution Ave. NE  
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