

Number 28, September 2001: Applying USERRA To Multi-Employer Situations

By CAPT Samuel F. Wright, JAGC, USNR*

Q: I have enjoyed your "Law Review" articles in The Officer. [All of these articles are available on ROA's Web site: www.roa.org] I am particularly interested in the series about the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4333. [Articles 4-12 and 18 are about USERRA.] I am the commanding officer of a Naval Reserve Seabee unit. Most of the enlisted members in my unit work in the construction trades (electrician, plumber, carpenter, etc.). In the construction industry, it is not unusual for an individual to work a whole career based on a series of short-term assignments through the union "hiring hall." Does USERRA apply to a situation like that?

I am particularly concerned about one particular member of my unit. Last fall, while on a short period of active duty for training (ADT), he was seriously injured in a construction accident while performing his Navy duties. His ADT was extended for several months while he received surgery and rehabilitation at a military hospital. In July 2001, he was finally sufficiently recovered to be released from active duty. He returned to the employer where he was working before going on active duty. Although he gave them notice before he left last October and kept them advised of the several extensions of his active-duty period, the employer contends that he "abandoned" his job in October 2000, when he went on active duty.

He went back to the union hiring hall and was eventually referred back to the same employer, but this time as a "new employee" with no seniority. Just before he left in October 2000, he had qualified for health insurance for himself and his family, based on having worked the requisite number of hours. Now, he is being told that his previous hours worked have all been "wiped clean" and that he must work for about a year before he will qualify for health insurance again. He has a wife and four children, and he cannot afford to be without health insurance. I think that he is being treated unfairly. Are his USERRA rights being violated?

A: Yes. Construction workers, longshoremen, stage hands, and employees in some other industries work primarily through union-operated hiring halls, as you have described. USERRA, enacted in 1994, replaced the 1940 Veterans' Reemployment Rights (VRR) law. The VRR law has been applied to the hiring hall situation. See *Imel v. Laborers' Pension Trust of Northern California*, 904 F.2d 1327 (9th Cir.), cert. denied, 498 U. S. 939 (1990); *Akers v. Arnett*, 597 F. Supp. 557 (S.D. Tex. 1983), aff'd, 748 F.2d 283 (5th Cir. 1984).

USERRA's legislative history mentions *Imel* and *Akers* with approval. See House Report No. 103-65, 1994 United States Code Congressional and Administrative News at page 2454. It is clear that Congress intended that

USERRA would apply to a situation like the one you describe. I think that your unit member is on strong ground in demanding immediate reinstatement of his health insurance coverage.

Q: In this kind of situation, who is the "employer" for USERRA purposes?

A: USERRA defines several of the terms that it uses, including the word "employer." The definition includes more than what we traditionally think of as an employer (i.e., the person or organization that pays salary or wages and has control over the work performed). The broad statutory definition of "employer" also includes "a person, institution, organization, or other entity to whom the employer [in the traditional sense] has delegated the performance of employment-related responsibilities." (38 U.S.C. 4303(4)(A)(i))

In the situation you describe, the traditional employer, the union, its hiring hall, and the health insurance administrator all fall within USERRA's definition of "employer." If necessary, your unit member can file suit against each of these organizations to make them comply with USERRA and to make him whole for any damages (lost wages, extra health-care expenses, etc.) that he has suffered because of their violation of this federal statute.

Q: To whom should I refer this unit member?

A: I have talked to him at length, and I have given him advice as to how to proceed. Normally, I refer Reservists with problems like this to the National Committee for Employer Support of the Guard and Reserve (NCESGR), which is part of the Department of Defense (Reserve Affairs). Because this case is far more complicated than your typical "employer support" case, and because it is most likely beyond the capacity of an "employer support" volunteer, I referred your unit member to the local office (St. Petersburg, Fla.) of the Veterans' Employment and Training Service (VETS), in the United States Department of Labor (DoL). VETS is responsible for enforcing USERRA. (See 38 U.S.C. 4321.) I have arranged for the local VETS agent to get assistance on this complicated case from the national VETS office and from DoL's Office of the Solicitor.

You (or anyone) can reach NCESGR at 1-800-336-4590. NCESGR can give you practical advice and can refer you to one of its trained volunteers. If necessary, NCESGR can refer you to the appropriate VETS office. All of this can be accomplished through the toll-free number. NCESGR also has a complete copy of USERRA and other pertinent materials on its Web site, which is www.esgr.org. -- ROA

*Military title used for purposes of identification only. The views expressed herein should not be attributed to the Department of the Navy or the U.S. government generally.

Captain Wright was employed as an attorney for DoL for ten years. He was largely responsible for drafting USERRA, along with one other DoL attorney. He also helped to write the successful appellate briefs for the veterans in both the Imel and the Akers cases. Most recently, he was on active duty for 71 days (May–July 2001), including 40 days in Bahrain. Please see his July 2001 “Law Review” article.

You may write to Captain Wright at ROA, or you can reach him by e-mail at [samwright50@ yahoo.com](mailto:samwright50@yahoo.com).