

LAW REVIEW 704
(Web only - January 2007)

The President of the Company Has Rights under USERRA

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

CATEGORY: USERRA—Entitlements

Q: I am a captain in the Army Reserve, in the Individual Ready Reserve (IRR). I thought that my military days were behind me, but recently I was notified that I am being recalled to active duty and deployed to Iraq.

I am the president of a medium-sized company, with about 100 employees. The chairman of the board and principal owner is Joe Smith (not his real name), who founded the company 45 years ago and made it profitable for more than three decades. Mr. Smith largely retired and turned the company over to his son about a decade ago, and the son managed to run the company into the ground. Mr. Smith hired me as president in 2004. I managed to stop the bleeding in 2005 and turn a tidy profit for the company in 2006, but now I am concerned about the company in 2007 and 2008, because I will probably be on active duty for a year or more.

I notified Mr. Smith as soon as I learned from the Army of my impending mobilization. He was very concerned, to say the least. I suggested that I want to return to the company, as president, after I complete my active duty. Mr. Smith hired a lawyer, and the lawyer has stated, in writing, that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to corporate executives. Is that correct?

A: No. Unlike other federal employment laws, like the National Labor Relations Act, the federal reemployment statute (which can be traced back to 1940) has never excluded executive, managerial, or professional employees from its coverage. USERRA applies to all employees of an employer, from the president to the janitor.

As I explained in Law Review 0604, section 4331 of USERRA (38 U.S.C. 4331) gives the secretary of labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The Department of Labor (DOL) published the final USERRA regulations in the *Federal Register* on Dec. 19, 2005, and the regulations went into effect 30 days later. The regulations are now published in Title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. You can also find the regulations and a lengthy and well-written preamble on the DOL website, at www.dol.gov/vets/.

The USERRA regulations address this issue head-on. "USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees." 20 C.F.R. 1002.43. There is

no question that you will have the right to reemployment under USERRA upon completion of your active duty, assuming that you meet the eligibility criteria, as described in Law Review 77.

Q: Mr. Smith said he plans to find something for me to do when I am released from active duty, but not as president of the company. He said he needs to act quickly to find a new president to run the company, and that he doubts he can find a qualified person to come in just for a year or two, until I return. Am I entitled to return to the company as president?

A: Yes. If (as is likely) your period of active duty is more than 90 days, the employer does have some flexibility—the employer must reemploy the returning veteran in the position that he or she would have attained if continuously employed or another position, for which the returning veteran is qualified, that provides like seniority, status, and pay. See 38 U.S.C. 4313(a)(2) and 20 C.F.R. 1002.197.

In this situation, this flexibility for the employer does not apply. There is no other position, within the company, that is of like status and pay to the position of president of the company, so the employer must reemploy you in that position. I invite your attention to Law Review 129 with respect to the issue of “status” under USERRA.

Case law under USERRA and the predecessor reemployment statute makes it clear that you will be entitled to return to the company as president even if that position has been filled during your absence. For example, I offer a lengthy quotation from *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993): “The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols’ [Nichols was the returning veteran and the plaintiff] former position was ‘unavailable’ because it was occupied by another, and thus it was within the department’s discretion to place Nichols in an equivalent position. This is incorrect. Nichols’ former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ‘Employers must tailor their workforces to accommodate returning veterans’ statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who “left private life to serve their country.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).’ *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols’ former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.”

For other cases holding that the lack of a current vacancy does not excuse the employer’s failure to reemploy the returning veteran, I invite your attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981).

Q: I have heard about a Department of Defense (DoD) program called the “key employee” program. I think that Mr. Smith can probably make a good case that his company is unlikely

to survive my being recalled to active duty. If my recall causes the company to go under, 100 people will lose their jobs. Is it possible that I could be exempted from the recall as a “key” employee?

A: No. Fred Denson, Esq. described DoD’s “key employee” program (DoD Instruction 1200.7) in some detail in Law Reviews 90 and 181. To be exempted from participation in a Reserve Component as a “key” employee, it must be shown that the *urgent needs of the nation* would be seriously harmed by calling you to active duty—the welfare or even the survival of a single corporate entity is not a sufficient basis to exclude you under DoD Instruction 1200.7. Moreover, the “key employee” determination is to be made as to the individual’s membership in a Reserve Component. When the individual is notified of imminent mobilization, it is too late to raise the “key employee” issue.

I suggest that you and Mr. Smith call the National Committee for Employer Support of the Guard and Reserve (ESGR), a DoD organization founded in 1972. ESGR’s toll-free number is 800-336-4590. The ESGR mission is to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. Perhaps an ESGR volunteer in your community can help you and the company find a win-win solution here. If Mr. Smith’s age and health status preclude him from running the company in your absence, maybe the company can find a recently retired corporate executive who would be willing to come out of retirement for a year or so, to run the company while you are serving our country at the tip of the spear. Good luck.

Military title shown for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.