

LAW REVIEW 712
(February 2007-Web only)

USERRA Applies to Hiring Halls—Continued

By CAPT Samuel F. Wright, JAGC, USNR

CATEGORY: USERRA Coverage

Q: I have read some of your Law Review articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), but I am not sure if this law applies to me as a Marine Corps Reservist and a longshoreman. I don't have any one employer, *per se*. I work through a "hiring hall" operated by my union. There are several stevedoring companies operating in this port. When a ship comes in or is getting ready to depart, the ship's operator contracts with a stevedoring company to load or unload that ship. The stevedoring company contacts the hiring hall and places an order for longshoremen, and the hiring hall refers me and others like me to work for a day or two. When the job of loading or unloading that particular ship is completed, I go back to the hiring hall and wait for another assignment.

I am fairly new at this, but I know some older men who have done this work for a whole career and are now retired. There is a retirement plan—whenever I work I make a contribution and the employer makes a contribution to that plan. The plan rewards work in the whole industry, because longshoremen work for all the stevedoring companies that use the hiring hall to obtain workers.

Does USERRA apply to a situation like this? In such a situation, who is my employer? I have been notified by my Reserve unit that we will be mobilized later this year. To whom should I give notice that I will be leaving work for military service?

A: In Law Reviews 28, 174, and 183 I addressed how USERRA applies to employees in the hiring hall situation. In Law Reviews 154 and 0609 I addressed a related topic, the "joint employer doctrine" under USERRA. USERRA's definition of "employer" is broad. See 38 U.S.C. 4303(3). You can have more than one "employer" with respect to the same employment relationship.

In a situation like yours, the hiring hall itself can be considered your employer or one of your employers. I suggest that you give notice of your impending mobilization, in writing by certified mail, to the hiring hall and also to each of the stevedoring companies that utilize the hiring hall to obtain longshoremen.

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 December 2005, and the regulations are now published in Title 20 of the *Code of Federal Regulations (CFR), Part 1002*. You can also find the regulations on the DOL website at www.dol.gov/vets.

The USERRA regulations specifically address this issue. “Can a hiring hall be an employer? Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns the employees to jobs. In these industries, it may not be unusual for the employee to work his or her entire career in a series of short-term job assignments. The definition of ‘employer’ [in section 4303(3) of USERRA] includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered the employee’s employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. USERRA’s anti-discrimination and anti-retaliation provisions also apply to the hiring hall.” (20 *CFR* 1002.38).

DOL published the proposed USERRA regulations, for notice and comment, on Sept. 20, 2004, and provided a 60-day period for interested persons and organizations to comment. DOL considered the comments filed and published the final regulations in the *Federal Register* on Dec. 19, 2005. Together with the final regulations, DOL published a lengthy preamble, explaining the intent of the regulations and responding to the comments it had received. In that preamble, DOL addressed the hiring hall issue in considerable detail:

“The Department [DOL] received a comment from the Building and Construction Trades Department of the AFL-CIO (BCTD) regarding the Department of Labor’s treatment of hiring halls in proposed section 1002.38, which provides that a hiring hall is an ‘employer’ if ‘the hiring and job assignment functions have been delegated by an employer to the hiring hall.’ The BCTD recommends that this provision be eliminated, arguing that hiring halls in the unionized construction industry represent an ‘arrangement’ between the union and local employers to facilitate referral of available union members for work. According to the BCTD, hiring halls do not perform any hiring or assignment functions beyond referring the number and types of workers requested by the employer. The BCTD suggests that the multi-employer group using the hiring hall to obtain workers should be the ‘employer’ rather than the hiring hall. In order to effectuate this suggestion, the BCTD proposes, in addition to eliminating section 1002.38, that the Department modify the regulatory definition of ‘employer’ (section 1002.5(d)) to state, ‘In industries in which exclusive hiring halls are utilized, all employers who are required to obtain applicants through a given hiring hall arrangement may constitute a single employer under the Act.’ “The Department’s response to the BCTD proposal lies again in the breadth of the statutory definition of ‘employer,’ and in Congress’s unambiguous intent that this definition be read broadly to include entities, such as hiring halls, to whom job referral responsibilities have been delegated. See S. Rep. No. 103-158, at 42 (1993); H.R. Rep. 103-65, Pt. I, at 21 (1993). In addition, the BCTD’s proposed amendment to the definition of employer in section 1002.5, which seeks the permanent application of a ‘single employer’ framework to multiple hiring hall employers, is misplaced. The term ‘single employer’ applies to firms that operate as an integrated enterprise and ‘exert[] significant control over’ the employees in question. *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1530 (7th Cir. 1989). To determine whether firms are sufficiently integrated to constitute a single employer, courts look to (1) common management; (2) centralized control

of labor relations; (3) interrelation of operations; and (4) common ownership or financial control. *See Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S. Ct. 876, 13 L. Ed. 2d 789 (1965); see also *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 752 (7th Cir. 2001), *cert. denied*, 534 U.S. 1040 (2001). While one or more employers utilizing the same hiring hall may or may not operate as an integrated enterprise so that they meet the criteria of the 'single employer' test, such criteria are not essential to determine whether the entity is an employer for purposes of USERRA. Accordingly, the Department rejects the BCTD's suggestions, and will retain the provision regarding hiring halls in unchanged form. See 1002.38."

You can find this quoted language in the 2005 edition of the *Federal Register*, in the right-hand column (most of the column) of page 75252 and the top of the left-hand column of page 75253. I am most pleased that DOL stood its ground and did not bend under pressure from the AFL-CIO on this important point.

The bottom line is that you do have USERRA rights, and you can enforce your rights against the union that operates the hiring hall, but don't expect the union to roll over and play dead. Unfortunately, you can expect the union to fight you tooth and nail.

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.