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1.0: USERRA

USERRA: A Primer
(Summary of servicemembers' reemployment rights under federal law.)

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

Since 1940, federal law has given members of the Armed Forces the right to return to the civilian jobs they left in order to perform *voluntary or involuntary* military service or training. Congress largely rewrote this law in 1994 as the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I have been speaking and writing about reemployment rights for more than 25 years, and in 1997 I began the Law Review column in THE OFFICER. What follows is a summary of USERRA drawing on the more than 300 Law Reviews written for ROA. You can find all of these on ROA's website at www.roa.org/law_review.

To Which Employers Does USERRA Apply?
USERRA applies to almost all employers in the United States, including the federal government (as a civilian employer), the states, counties, cities, school districts, and other local government organizations, as well as private employers, *regardless of size*. Other federal laws only cover employers with a specific minimum number of employees (often 15), but the reemployment statute has never had such a requirement. *You only need one employee to be an "employer" for purposes of this law*. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).

The only employers within the United States that are exempt from USERRA are religious institutions (Law Review 185), Indian tribes (Law Review 186), embassies and consulates in the United States for foreign governments, and international organizations (such as the United Nations and World Bank). USERRA even applies outside the United States to U.S. employers and to foreign employers that are owned and controlled by U.S. companies (Law Review 24). Foreign-owned companies are subject to USERRA with respect to their operations in the United States. See Law Review 0715.

I don't have any one employer—I work as a longshoreman through a hiring hall operated by my union. I work for many different employers, as assigned by the hiring hall. Does USERRA apply to a situation like this? In this sort of situation, who is my "employer"?
USERRA *does* apply to the hiring hall situation. The hiring hall is your employer. People who work as longshoremen, construction workers, stagehands, or in other kinds of work where a hiring hall assigns workers most definitely have USERRA rights, just like workers in more traditional jobs. Please see Law Reviews 28, 174, 183, and 0712.

What conditions must I meet to have the legal right to return to my civilian job?
Under USERRA, you must meet five simple conditions to have the right to reemployment in your civilian job:
1. You must have left the job for the purpose of performing voluntary or involuntary service in the uniformed services.
2. You must have given the employer prior oral or written notice.
3. Your period of service (the most recent period plus any prior periods while employed by that same employer) must not have exceeded five years. *All* involuntary service and *some* voluntary service do not count toward your five-year limit.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must be timely in reporting back to work or applying for reemployment.

You must meet all five of these conditions—four out of five is not good enough. I suggest that you carefully "dot the I's and cross the T's." Keep in mind that you may be called upon to prove that you meet each condition.
Now that I have mentioned the five conditions, let me go into greater detail on each one.

Leaving Civilian Job for the Purpose of Service

The uniformed services are the U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the U.S. Public Health Service (Law Review 46). The commissioned corps of the National Oceanic and Atmospheric Administration is *not* a uniformed service for USERRA purposes, although it is a uniformed service for other legal purposes. See Law Review 52.

A period of service in the uniformed services can be anything from five hours (one "drill" period for a member of the National Guard or Reserve) to five years of full-time, voluntary active duty. Contrary to popular misconception, USERRA applies to *voluntary as well as involuntary* military training or service. See Law Reviews 30, 161, 203, and 205. Because Congress abolished the draft in 1973, all military service today is essentially voluntary—you may be mobilized involuntarily, but only if you originally volunteered.

USERRA is not limited to the National Guard and Reserve; it also applies to individuals who leave civilian jobs to join the regular military. Anyone who meets the five conditions set forth previously has the right to reemployment under USERRA. See Law Review 0719.

USERRA's definition of "service in the uniformed services" also includes time away from work for purposes of an examination to determine fitness for military service. For example, let us say that you visit an Army recruiter, who schedules you for an examination (including a physical examination, as well as the Armed Forces Qualifying Test) at a Military Examination and Processing Station (MEPS). If you notify your civilian employer, you have the right, under federal law, to a day or two off from work to get to the MEPS, take the examinations, and return to your home and then back to work. You can have the right to return to your job even if you were found unfit for military service. See Law Review 50.

Prior Notice to the Civilian Employer

Regardless of what kind of service you will be performing, you must give prior notice to the employer, orally or in writing. I strongly recommend you give the notice in writing and retain a copy of the notice, because you may be required to prove that you had given notice.

The law does not specify the amount of advance notice, just that the notice must be in advance. If your work day starts at 8 a.m. and you call in at 7:30 to say you are performing military service that day, that is advance notice, but if you call in at 8:30 a.m. that is not advance notice. I strongly recommend that you give as much advance notice as possible. If you have many weeks of advance notice from the military and withhold it from your civilian employer until the last moment, and if the lateness of the notice disrupts the employer's operations, that will be "viewed unfavorably."

If you receive late notice from the military, the lateness of the notice to your civilian employer is not to be held against you. If giving the employer advance notice is precluded by military necessity or otherwise impossible or unreasonable, you will not lose the right to return to your job for having failed to give notice.

If you are a member of the National Guard or Reserve, you will probably have a drill weekend, generally the same weekend each month. In that situation I recommend that you give the employer notice, in writing, for the whole fiscal or calendar year and then reiterate the notice orally as each drill weekend approaches.

I recommend that you give the employer the *actual dates* of your scheduled drills; don't just say "first weekend" or "third weekend." If there is a federal holiday on the Monday after the first weekend of the month, the "first weekend" is the following weekend, as far as your Reserve unit is concerned. Don't expect your employer to figure this out; give the employer the actual calendar dates you expect to be away from work for military training or service.

If you leave a job to enlist in the regular military service, *give the employer notice,* even if you think that it is unlikely that you will want to return to that job. Giving notice costs you nothing, and you should be giving the employer such notice in any case, just as a matter of simple courtesy.

I suggest you avoid using words like "quit" or "resign" when giving the employer notice that you will be away from work for military training or service, but using such words does *not* cause you to lose the right to return to the job after service. See Law Review 63. For other articles about notice, I invite your attention to Law Reviews 5, 29, 77, 84, 91, and 117.

Five-Year Limit on the Duration of the Period or Periods of Service

If you enlist in the regular military, you will have the right to return to your pre-service civilian job, so long as you do not go over the five-year limit through a voluntary reenlistment. Your active duty period could be longer than five years if that is your initial period of obligated service. For example, persons who enlist in the Navy and choose nuclear power must commit to remain on active duty for at least six years. If you leave active duty at the end of six years, and if that was your initial period of obligated active duty, you will have the right to reemployment. Of course, you must meet the law's other requirements.

If you are in the National Guard or Reserve, your training duty (weekend drills, annual training, etc.) does not count toward your five-year limit, and any involuntary service (in a mobilization, for example) also does not count toward your five-year limit. Even some voluntary emergency active duty is exempted from the computation of your five-year limit. Moreover, when you start a new job for a new employer, you get a fresh five-year limit with the new employer. Please see Law Reviews 201 and 0714 for a comprehensive discussion of what counts and what does not count toward using up your five-year limit with your current employer.

Release from Service under Honorable Conditions

If you receive a punitive discharge by court martial as part of the punishment for a serious offense, that would disqualify you from the right to return to your civilian job. Such a discharge would be called a "bad conduct discharge" or a "dishonorable discharge" or a "dismissal" for a commissioned officer. An "other than honorable" administrative discharge would also preclude you from the right to return to your pre-service civilian job. A "general discharge under honorable conditions" or an "entry-level separation" would not disqualify you from reemployment rights. Please see Law Review 6.

Returning to Work in a Timely Manner

If your period of service was less than 31 days (such as a drill weekend or two-week annual training period for a member of the National Guard or Reserve), you must report for work at the start of the first full work period (like a shift) on the first day you are scheduled to work, after the completion of the period of service, the time reasonably required for safe transportation from the place of service to your residence, plus eight hours for rest after you get home. If your return to work is delayed by factors beyond your control, like an automobile accident while driving home from your drill weekend, you must report back to work as soon as reasonably possible. Generally, you must be back at work the next work day after one of these short military tours, or by the second day if you have a long return trip.

If your period of service was more than 30 days but less than 181 days, you must apply for reemployment within 14 days after the date of release from the period of service. If your period of service was 181 days or more, you may wait up to 90 days after the date of release from service to apply for reemployment.

There is no particular form required for an application for reemployment, but see the attachment to Law Review 77 for a sample letter of application for reemployment. You need to make it clear to the employer that you have returned and are seeking *reemployment—you are not an applicant for new employment, and the employer should not treat you as one*. For more information about applying for reemployment, please see Law Reviews 7, 60, 77, 86, 91, 154, 156, 174, 178, 0622, and 0710.

Entitlements of the Returning Veteran

If you meet the five conditions discussed above, the employer has a legal obligation to reemploy you *promptly*. After a period of less than 31 days of service, such as a drill weekend or a standard two-week annual training tour, you must report back to work immediately, and the employer is required to put you back on the payroll immediately, as soon as you report back to work. After a longer period of military training or service, the employer is required to act on your application for reemployment and have you back on the payroll within 14 days after you submit your application.

If you have been away from work for military service for a significant time, it is entirely possible that the employer has filled your position in your absence—the work must go on whether you are there or not. *The fact that there is no current vacancy does not preclude your right to reemployment*. In some cases, the employer is required to lay off the replacement in order to reemploy the returning veteran. Moreover, you can have reemployment rights under USERRA even if your pre-service job was considered "temporary," "probationary," or "at will." Please see Law Reviews 8, 73, 77, 87, 94, 95, 130, 203, 206, 0616, 0621, 0642, and 0701.

Continuous Accumulation of Seniority

The reemployment statute dates back to 1940, when Congress enacted it as part of the Selective Training and Service Act. For a comprehensive discussion of the history of this law, please see Law Review 104.
In 1946, the year after the end of World War II, the first case under this statute made its way to the U.S. Supreme Court. In that case, the Supreme Court held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).

Several later Supreme Court cases elaborated on this "escalator principle," and section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies it in the current law. The escalator principle does not apply to everything you *might have*

received in your civilian job if you had remained continuously employed instead of going away for service; the escalator principle applies to *perquisites of seniority*. You are entitled to a benefit as a perquisite of seniority, upon returning from a period of uniformed service, if the benefit meets a two-part test.
1. The benefit must be a *reward for length of service* rather than a form of compensation for services rendered.
2. It must be *reasonably certain* (not necessarily *absolutely* certain) that you would have received the benefit if you had been continuously employed.

The employer is not required to give you the vacation days you would have earned if you had been continuously employed. More than 30 years ago, the Supreme Court determined that vacation days fail under the first part of this two-part test; they are not a reward for length of service. *See Foster v. Dravo Corp.,* 420 U.S. 92 (1975).

On the other hand, the *rate at which you earn vacation* is a reward for length of service and a perquisite of seniority that the returning veteran is entitled to claim upon reemployment. For example, let us take Joe Smith, an Army Reservist and an employee of the XYZ Corporation. At XYZ, employees with 0-5 years of seniority earn one week of vacation per year, and employees with more than five years of seniority earn two weeks of vacation per year. Joe has worked for XYZ for four years, before he is called to active duty for 18 months. When Joe returns to work, he starts immediately earning two weeks of vacation per year; if he had not been called to active duty he clearly would have gone over the five-year point in XYZ employment. But Joe is not entitled to the vacation days he would have earned during that 18-month period. For more information about USERRA and vacation benefits, see Law Reviews 26 and 59.

Upon returning to work, you are entitled to the rate of pay that, with reasonable certainty, you would have attained if you had been continuously employed. After a lengthy period of service, your proper rate of pay on reemployment will probably be significantly higher than your rate of pay before you left work for service. If most of your colleagues at work received pay raises, you are also entitled to a pay raise, *as if you had been continuously employed*.

"Merit pay" systems are common today in the private sector, and even in some government agencies. In such a system, each employee gets evaluated, and the evaluation determines the individual's pay raise for the next year. A handful of employees are rated "superior" and receive pay raises well in excess of inflation. Most employees are rated "satisfactory" and receive pay raises roughly equal to inflation. A handful of employees are rated "unsatisfactory" and receive no pay raises.

Let us say Joe Smith received pay raises from XYZ for each of the four years he worked there, before he was called to active duty for 18 months. Based on his record of satisfactory work performance at XYZ before his military service, Joe is entitled upon reemployment to the pay raise he probably would have received if he had been continuously employed. Denying him that pay raise based on the mere possibility that his performance might have "tanked" to an unsatisfactory level is a violation of the law. Please see Law Reviews 120, 169, and 0604.

More than 30 years ago, the Supreme Court applied the escalator principle to pension benefits. *See Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). The Court held that Mr. Davis was entitled to his company pension as if he had been continuously employed from 1936, when hired by the company, until 1971, when he retired, including the 30 months he was on active duty during World War II. Please see Law Review 139 for more information about pension credit for military service prior to 1994, when Congress enacted USERRA to replace the 1940 law.

Section 4318 of USERRA [38 U.S.C. 4318] applies the escalator principle to pensions, including both defined contribution plans and defined benefit plans. I invite your attention to Law Reviews 4, 9, 40, 74, 75, 76, 82, 107, 119, 138, 167, 177, 183, 0607, and 0703 for detailed information about how USERRA applies to pension benefits. *Please recognize that the escalator can go down as well as up*. USERRA does not protect you from a layoff or reduction in force (RIF) that *clearly would have happened anyway* even if you had not been away from work for military service at the time. If you are part of a collective bargaining unit represented by a labor union, the collective bargaining agreement between the union and the employer probably determines how employees are laid off, such as by seniority order. In a unionized situation, it is generally easy to determine what *would have happened* to your job if you had not left the job for military service.

In non-unionized companies, layoffs and RIFs are generally not based on seniority. In that case, determining what *would have happened* to your job is much more difficult. The employer may tell you that your job would have gone away anyway, but you should ask for proof.

Status of the Returning Veteran

Upon your application for reemployment, and assuming you meet the five conditions, the employer is required to reemploy you in the position of employment you would have attained if you had been continuously employed (usually but not always the position you left). If your period of service was 91 days or more, the employer does have some additional flexibility. In such a situation, the employer has the option of reemploying you in another position,

for which you are qualified, that provides like seniority, *status,* and pay.

The word *status* is an important word, full of meaning. Location (commuting area) is an aspect of status. You are not required to accept the employer's offer of a similar job in a distant city, unless there is evidence that the job itself moved during the time you were away from work for military service. If the store where you worked closed during the time you were on active duty, and all of your colleagues moved to a new store in a distant city or left the employ of the company, then the evidence shows that you would have been affected by that move even if you had not been on active duty at the time, and USERRA does not exempt you from changes that would have happened anyway.

If the job you had still exists in the same metropolitan commuting area where you worked before your military service, then the employer must reemploy you in that commuting area, even if it means displacing another employee. See Law Review 206. Of course, the employer may "sweeten the deal" by offering you relocation benefits and other incentives to take the job in a distant city. You can take that offer if you wish to, but if you decline the offer the employer must reemploy you in a job of like status (including location) to the position you would have attained if you had been continuously employed. Other aspects of status include hours of employment (most people prefer daytime to nighttime work) and being the supervisor instead of the supervisee. Please see Law Reviews 8, 79, 129, 153, 170, and 191 for a detailed discussion of status.

Reinstatement of Your Civilian Health Insurance Coverage

Upon your reemployment, you are entitled to immediate reinstatement of your health insurance coverage (including coverage for family members). There must be no waiting period and no exclusion of "pre-existing conditions" other than conditions that the U.S. Department of Veterans Affairs has determined to be service-connected. Please see Law Reviews 10, 69, 85, 118, 142, and 176.

Protection from Discharge after Reemployment

If your period of service was 181 days or more, it is unlawful for the employer to discharge you, except for cause, within one year. If your period of service was 31-180 days, it is unlawful for the employer to discharge you, except for cause, within 180 days. This period of special protection begins on the date that you are *properly* reinstated. If you were reinstated in a position inferior to the position to which you were entitled under USERRA, the period of special protection never started running and therefore has not been exhausted. Thus, in some circumstances the special protection period would remain in effect for more than a year after you return to work.

The purpose of this special protection period is to protect the returning veteran from a bad-faith reinstatement. Please see Law Reviews 184 and 0701 for more information on this provision**.**

Accommodations for Returning Disabled Veterans

If you return from service with a service-connected disability, the employer is required to make reasonable efforts to enable you to return to the position of employment that you would have attained if you had been continuously employed. Of course, not all disabilities can be accommodated in the same position of employment; a blinded veteran cannot return to the cockpit of an airliner. If your disability cannot be reasonably accommodated in that particular position, the employer must reemploy you in some other position for which you are qualified, or can become qualified with reasonable employer efforts, and that provides like seniority, status, and pay, or the closest approximation consistent with the circumstances of your case. Please see Law Reviews 8, 77, 121, 130, 136, 155, 174, 183, 199, and 0640.

Discrimination Prohibited

Section 4311 of USERRA provides as follows:

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation. (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services. (c) An employer shall be considered to have engaged in actions prohibited— (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer

can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right. (d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

Proving a section 4311 violation (discrimination) is more difficult than proving a section 4312 violation (reinstatement). If you are fired after the special protection period has expired, or if you are denied initial hiring or denied a promotion or benefit, that would be a section 4311 case. You are required to prove that your membership in a uniformed service, performance of uniformed service, application or obligation to perform service, or one of the other protected factors mentioned in section 4311(a) or 4311(b) was *a motivating factor* (not necessarily the sole factor) in the employer's decision. You need not prove that your service was *the reason; it is sufficient to prove that it was a reason*. You can prove "motivating factor" by circumstantial as well as direct evidence; there need not be a "smoking gun." Please see Law Reviews 11, 35, 36, 64, 122, 135, 150, 162, 198, 205, 0609, 1616, 0631, 0701, 0702, 0706, 0707, 0713, 0717, and 0731 for a detailed discussion of section 4311 of USERRA.

Assistance and Enforcement

If you have questions or need assistance, as a person claiming USERRA rights with respect to civilian employment, I suggest you contact the National Committee for Employer Support of the Guard and Reserve (ESGR) at 1-800-336-4590 or DSN 426-1386. I also invite your attention to the ESGR website, www.esgr.mil.

ESGR is a Department of Defense organization, established in 1972. ESGR's mission is to gain and maintain the support of public and private sector employers for the men and women of the National Guard and Reserve. ESGR has a network of more than 900 trained volunteers called "ombudsmen." An ESGR ombudsman will contact the employer on your behalf to explain the law and try to work things out in a non-confrontational manner. If the ombudsman's efforts are not successful, the ombudsman will advise you to contact the U.S. Department of Labor, the U.S. Office of Special Counsel, or to retain a private lawyer to assist you in enforcing your rights.

I suggest that you *not* call from work ESGR or anyone else to complain about your civilian employer, and that you *not* use your civilian employer's e-mail system when seeking advice or making a complaint about your employer. You probably have no privacy when using the employer's telephone or e-mail system, and your employer probably has a rule against non-work activities on work time or with the employer's equipment. If your employer is annoyed with you for the time you are away from work for military training and service and is looking for an excuse to fire you, the last thing you should do is give the employer such an excuse. Please see Law Reviews 150 and 0702.

ESGR's toll-free line is only answered during regular business hours Eastern Time, but ESGR is expanding its hours in order to make it possible for National Guard and Reserve personnel to contact ESGR from the privacy of their own homes outside ESGR's business hours. ESGR also recently established a way for individuals to seek ESGR assistance through the ESGR website. Go to www.esgr.mil and select the link "USERRA Complaint Request" on the right side of the page. Provide contact information for yourself and your employer, as well as a brief explanation of the problem or issue. This information is stored on a secure server, and ESGR will assign your request to one of its 900 ombudsmen.

A detailed discussion of USERRA's somewhat complicated enforcement mechanism is beyond the scope of this article. For detailed information about USERRA enforcement, please see Law Reviews 12, 24, 34, 65, 67, 89, 93, 108, 115, 123, 148, 149, 159, 172, 189, 197, 200, 203, 205, 206, 0605, 0610, 0611, 0616, 0619, 0623, 0634, 0637, 0639, 0701, 0706, 0707, 0711, 0712, 0715, and 0717.

CAPT Wright recently retired from the Navy Reserve, with more than 37 years of Active and Reserve service, including more than 10 years of full-time active duty. His military decorations include two Meritorious Service Medals, a Joint Service Commendation Medal, and two Navy Commendation Medals. He worked for the U.S. Department of Labor (DOL) as an attorney for 10 years, and during that time he and another DOL attorney, Susan M. Webman, largely drafted USERRA.