LAW REVIEW 905

(January 2009)
CATEGORY: 1.1.2.2—Coverage of Independent Contractors and Partners

Do Life Insurance Salespersons Have USERRA Rights?

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

Q: I am a lieutenant colonel in the Army Reserve. When not on active duty, I make a good living selling life insurance, annuities, and similar products for a major insurance company. I am paid solely by commission. In fall 2006, I left one insurance company and affiliated with another, as a manager trainee. I completed most of the training program before I was called to active duty in April 2007. I left active duty in November 2008 and promptly applied for my job back.

On Jan. 1, 2008, while I was on active duty, the insurance company's general agent for this metropolitan area retired, and the company brought in a new general agent from another state. The new general agent kept on 45 of the 50 salesmen and managers that he inherited from the former general agent; five chose to retire or leave. I was in Iraq in January 2008, and I was only vaguely aware of what was going on at the insurance agency back home.

When I applied for reemployment in November 2008, the new general agent told me that he had no vacancies. I told him that I have the right to reemployment under a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA), even if that means displacing another employee. I provided for him a copy of your Law Review 0829, available at www.roa.org/law_review.

The general agent checked with the legal department at the company headquarters, and the legal department said I do not have reemployment rights under USERRA because I was an "independent contractor" and not an "employee." What do you think?

A: I think you have the right to reemployment under USERRA, but your situation is a good example of a recurring important issue—are commission salespersons employees for purposes of USERRA? I invite the reader's attention to *Serricchio v. Wachovia Securities LLC,* 556 F. Supp. 2d 99 (D. Ct. 2008), a case upholding USERRA rights for a stockbroker on commission. I discuss the case in detail in Law Review 0863.

As I explained in Law Review 0766, and other articles, you must meet five eligibility criteria to have the right to reemployment. You must have left a *position of employment* for the purpose of performing service in the uniformed services, and you must have given the employer prior oral or written notice. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. (*All* involuntary service and some voluntary service are excluded from the computation of the five-year limit.) You must have been released from the period of service without having received a punitive or other than honorable discharge that would disqualify you under section 4304 of USERRA, 38 U.S.C. 4304. Finally, you must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

In your situation, it appears that there is no doubt that you meet conditions two through five. The big question in your case is whether your relationship with the insurance company was an *employment* relationship, or that of an *independent contractor*. If you were an independent contractor, you do not have rights under USERRA, but the company cannot make you an independent contractor just by labeling you such. The distinction between employees and independent contractors is an important distinction, in many legal contexts. There is a great volume of case law (published court decisions) on this distinction.

As I explained in Law Review 104, and other articles, Congress enacted USERRA in 1994, as a long-overdue recodification of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. Shortly after World War II, the Supreme Court decided the first of its 16 (so far) cases on the reemployment statute. The Court held that this statute should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Applying this liberal construction of the law to your situation, I think it is fair to say that you were an employee of the insurance company, not an independent contractor, and that you have reemployment rights under USERRA.

Section 4303 of USERRA defines 16 terms used in this law, including the term "employee" and the term "employer." "The term 'employee' means any person employed by an employer." 38 U.S.C. 4303(3). "Except as provided in subparagraphs (b) or (c) [not pertinent to this issue], the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities." 38 U.S.C. 4303(4).

USERRA's legislative history (showing the intent of Congress) addresses directly and succinctly the broad and expansive interpretation of the term "employee": "Section 4303(3) would define 'employee' in the same expansive manner as under the Fair Labor Standards Act, 29 U.S.C. 203(e), … and the issue of independent contractor versus employee should be treated in the same manner as under the Fair Labor Standards Act. *See Brock v. Mr. W Fireworks Inc.,* 814 F.2d 1042 (5th Cir. 1987)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.

In the *Brock* case, the secretary of labor (William Brock) sued a fireworks company to enforce the Fair Labor Standards Act (minimum wage and overtime rules) with respect to the individuals who operated the company's fireworks stands. The District Court dismissed the lawsuit, holding that the operators were independent contractors and not employees. The secretary of labor appealed, and the Court of Appeals reversed the District Court, noting that the fireworks company controlled almost all aspects of the businesses and that the operators were economically dependent upon the fireworks company. It is clear that Congress intended that this liberal interpretation of employee should also apply under USERRA.

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 secretary did promulgate such regulations and published them in the *Federal Register* on Dec. 19, 2005. The regulations are published in Title 20, Code of Federal Regulations, Part 1002.

"*Does USERRA cover an independent contractor?* (a) No. USERRA does not provide protections for an independent contractor. (b) In deciding whether an individual is an independent contractor, the following factors must be considered: (1) the extent of the employer's right to control the manner in which the individual's work is to be performed; (2) the opportunity for profit or loss that depends upon the individual's managerial skill; (3) any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers; (4) whether the service the individual performs requires a special skill; (5) the degree of permanence of the individual's working relationship; and, (6) whether the service the individual performs is an integral part of the employer's business. (c) No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor." 20 C.F.R. 1002.44.

When the secretary of labor published the USERRA Regulations on Dec. 19, 2005, she also published a lengthy and scholarly preamble, addressing in detail the intent behind these regulations and addressing the comments that were received after the secretary had published proposed USERRA Regulations in the *Federal Register* in September 2004. The preamble can be found in the 2005 edition of the *Federal Register* (pp. 7524675292). I invite the reader's attention to a lengthy and scholarly discussion of the distinction between employees and independent contractors, for USERRA purposes (pp. 75253 75254). The discussion includes many case citations, including Supreme Court cases, and it strongly supports the liberal interpretation of USERRA coverage for folks like you.

The VRRA did not confer rulemaking authority on the secretary of labor, but the Department of Labor published its *Veterans' Reemployment Rights Handbook* in 1957, 1970, and 1988. Several courts have given some weight to the interpretations expressed in the *Handbook* in determining the meaning and intent of the reemployment statute. *See, e.g., Leonard v. United Air Lines Inc.,* 972 F.2d 155, 159 (7th Cir. 1992). I discuss *Leonard* in detail in Law Review

0857.

“In order to be protected by the reemployment statute, an employee must leave a position in the employ of an employer with the intent to perform military training or service, or to be examined for such training or service. An employer-employee relationship must exist, as distinguished from the relationship between partners in a business and from the relationship between an independent contractor and the firms for which he performs work. Although there is no specific definition in the statute, Congress intended that the statute should be liberally construed in determining whether an employer-employee relationship exists. An employer-employee relationship generally exists when one party hires, supervises, commends and disciplines, exercises management discretion, generally controls the work environment, or pays wages or salaries in exchange for labor or services of another party.” *Veterans' Reemployment Rights Handbook,* 1988 edition, page 3-1. The *Handbook* also contains multiple examples in each chapter, illustrating the meaning and operation of the reemployment statute. I invite the reader’s attention to Example 2 in Chapter 3 of the 1988 *Handbook:*

“Mr. B operates a small insurance agency with the aid of a secretary hired and paid by him. His only compensation is in the form of commissions on various kinds of insurance policies he sells for the Q Group of insurance companies. By agreement with Q, he sells no other insurance, uses Q’s name in his advertising, and is required to follow detailed business procedures prescribed by Q. He is a commissioned officer in the Coast Guard Reserve, and he is recalled to active duty during the Mariel Boat Lift Crisis of 1980.

B is an employee within the meaning of the statute, and not a true independent contractor. The result would be different if he also sells substantial amounts of insurance for other companies and generally exercises a greater degree of independence in operating the agency. All the surrounding facts must be considered in determining whether a person is an employee or an independent contractor.” *Handbook,* page 3-5.

Applying the reemployment statute liberally for those who serve our country in the Armed Forces, as Congress has intended and the Supreme Court has commanded, you were an *employee* of the insurance company before you were called to the colors and you have reemployment rights under USERRA.