

LAW REVIEW¹ 10037

USERA and Veterans' Preference Laws Apply to California Court System

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

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Q: I am a volunteer attorney for an organization that assists veterans returning home after service in Iraq and Afghanistan. I have read your Law Review articles about the Uniformed Services Employment and Reemployment Rights Act (USERA), and I have found them to be most useful in my work. Until recently, the state courts that sit in our county were served by the county's personnel office, but the state courts recently split off from the county's personnel office and established their own personnel office. The state court system now insists that it is exempt from USERA and from veterans' preference laws. Is that assertion correct?

¹I invite the reader's attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERA, Public Law 103-353, 108 Stat. 3162. The version of USERA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

A: No. Let us deal with USERRA first. Congress enacted USERRA in 1994, as a comprehensive rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. The federal reemployment statute has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the VRRA to make it apply to state and local governments as well. USERRA applies to essentially all employers in the United States, including the Federal Government, the states and their political subdivisions, and private employers, regardless of size.

When it enacted USERRA in 1994, Congress exempted the legislative branch and the judicial branch of the federal government from USERRA enforcement through the Merit Systems Protection Board (MSPB), because of separation of powers concerns within the Federal Government. In 1995, Congress enacted the Congressional Accountability Act (CAA), which makes 11 federal statutes (including USERRA) explicitly applicable to the Legislative Branch of the Federal Government. The CAA provides an enforcement mechanism through the Congressional Accountability Office. Please see Law Review 34, available at <https://www.roa.org/page/lawcenter>

Let us assume that Joe Smith worked for the Supreme Court Law Library when he joined the Army in 2005. He was released from active duty in early 2010. He meets the USERRA eligibility criteria for reemployment (prior notice to the civilian employer, the five-year limit, release from active duty under honorable conditions, and timely application for reemployment). For whatever reason, the Supreme Court does not wish to reemploy Joe. Under these circumstances, the Office of Personnel Management (OPM) is responsible for finding Joe an equivalent position in the executive branch and for ensuring that Joe is offered that position by that federal agency. In this way, Joe gets his reemployment rights, but we avoid the constitutional tension of bringing an enforcement action against the Supreme Court.

The separation of powers concerns that apply with respect to the judicial branch of the federal government do not apply to the judicial branch of a state government. State judicial branches are subject to USERRA and to the USERRA enforcement mechanism just like other branches of state governments.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Secretary published proposed USERRA regulations in 2004 and final USERRA regulations in the *Federal Register* on Dec. 19, 2005. The regulations are published in Title 20, Code of Federal Regulations, Part 1002.

Together with the final regulations, the Department of Labor (DOL) published a scholarly preamble, responding to the comments that were submitted after the proposed regulations were published. One paragraph of the preamble makes clear that USERRA applies to state governments as employers, including legislative and judicial branches of state governments: "Proposed section 1002.39 covers states and other political subdivisions of the United States as employers, and the Department received one comment regarding this provision. The

commenter noted USERRA's specific treatment for reemployment of employees of the federal legislative and judicial branches and, seeing no similar provision for employees of state legislative and judicial branches, asked whether USERRA's protections applied to the latter group. In response, the Department again notes USERRA's broad applicability to all employers, explicitly including the states, 38 U.S.C. 4303(4), without regard to whether the state employer is in the state's judicial or legislative branch. 2005 *Federal Register*, page 75253, left column.

I also invite the reader's attention to [Law Review 0912](#) (Feb. 2009) and [Law Review 0912 Update](#). The Department of Justice sued the North Carolina Administrative Office of Courts and North Carolina Superior Court Judge Jerry Braswell. Judge Braswell appointed Army Reservist James Myles a magistrate but refused to reappoint Myles at the end of his initial term of appointment. In making the decision not to reappoint Myles, Judge Braswell unlawfully considered Myles' Army Reserve service and the occasional inconveniences to the civilian employer caused by that service. The case was resolved, favorably to Myles.

The question of whether the veterans' preference law applies to the California court system, as an employer, is a state law question, not a federal law question. The federal statute on veterans' preference applies to federal agencies as employers, not to state and local governments. California and more than 40 other states have their own laws on veterans' preference, governing employment by the states and their political subdivisions. The California veterans' preference law can be found at sections 18971 through 18979 of the *Government Code*. I see nothing in this law that would exempt California's judicial branch from the law's application.

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This article is one of 1800-plus "Law Review" articles available at www.roa.org/page/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their

dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002