

LAW REVIEW 1050

USERRA Applies to Managerial and Executive Jobs

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

1.3.2.2—Continuous Accumulation of Seniority—Escalator Principle

Q: I have enjoyed reading your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does the “escalator principle” apply to National Guard and Reserve members who hold professional and managerial jobs in the private sector? Or does that principle only apply to government jobs and unionized jobs in the private sector?

A: USERRA applies to virtually all employers in this country, including the Federal Government, the states and their political subdivisions, and private employers, regardless of size. Among employers in this country, only religious institutions (with respect to the employment of ordained personnel), Indian tribes, foreign embassies, and international organizations (United Nations, World Bank, etc.) are exempt from USERRA enforcement.

Within a company or organization, USERRA applies to all employees, from the president of the company down to the most junior employee. I invite your attention to Law Review 0704 (Jan. 2007), titled “The President of the Company Has Rights under USERRA.” Please go to www.roa.org/law_review. You will find more than 700 articles about USERRA and other laws that are particularly pertinent to those who serve our nation in uniform, and you will find a detailed Subject Index, to facilitate finding articles about very specific topics.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which can be traced back to 1940. In its first case construing the VRRA, the Supreme Court enunciated the “escalator principle” when it 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). The escalator principle is codified in section 4316(a) of USERRA, 38 U.S.C. 4316(a).

To claim a promotion or pay raise upon your reemployment, based on the escalator principle, you must establish that it is *reasonably certain* that you would have received the promotion or pay raise if you had remained continuously employed, instead of going away for a time for uniformed service. It need not be absolutely certain that you would have received the benefit, but it must have been more than a possibility.

In a unionized situation, where promotions and layoffs are determined by seniority, it is usually easy to determine what would have happened to the veteran’s job if he or she had remained continuously employed. For example, let us assume that Joe Smith’s hire date at the unionized XYZ Corp. is Feb. 1, 2006. Mary Jones (hired Jan. 31, 2006) is right above him on the seniority list, and Bob Williams (hired Feb. 2, 2006) is right below him. Smith was called to active duty from Jan. 1 to Dec. 31, 2009 and returns to work under USERRA in Jan. 2010. What would have happened to Smith’s job if he had remained continuously employed at XYZ during calendar year 2009? We can probably answer that question by looking at what happened to Mary Jones and Bob Williams.

In the absence of a union and a formal system of seniority, the returning veteran can still establish that he or she would have been promoted, with reasonable certainty, if he or she had remained continuously employed, but this will be more difficult. For example, let us say that Roberta Jones has worked for the ABC Company (a non-union concern) for ten years, before she was called to the colors for 12 months in 2009. Roberta has ten years of ABC performance evaluations. In determining the proper position in which to reemploy Roberta in Jan. 2010, upon her return to work after service, the company should look to what happened to other employees at Roberta’s level of responsibility and performance during the year that Roberta was away. At a minimum, Roberta should receive, upon reemployment, a pay raise that is commensurate with the raises received by her peers during the year she was away.

It should be emphasized that the seniority escalator can descend as well as ascend, especially during a recession, and sometimes the lack of a formal system of seniority, governing layoffs, can be good news for

the returning veteran. Let us take the hypothetical but realistic David Wright, an employee of Daddy Warbucks Industries (DWI), a large non-union company. When David was called to the colors in Jan. 2009, the company had 100,000 employees. When David completed his military service and returned to work a year later, the company has only 75,000 employees.

Although DWI laid off 25% of its workforce during the time that David was away for service, the company cannot show that David *would have been* laid off if he had been there during that time. It is not sufficient for the company to show that David *could have been* laid off. Thus, David is entitled to return to an active job, although 25% of his colleagues lost their jobs during the time that David was away.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Service Members Law Center) at swright@roa.org or 800-809-9448, ext. 730.