

LAW REVIEW 1075

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Congress Clarifies the Application of USERRA to Successors in Interest

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

1.1.1.9—Application of USERRA to Successors in Interest

On October 13, 2010, President Obama signed into law the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275. This important new law makes several welcome amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA). We shall address each of these amendments in the "Law Review" column.

Section 702 of VBA-2010 is titled "Clarification of the Definition of 'Successor in Interest.'" I have addressed the application of USERRA to successors in interest in Law Reviews 79, 0634, 0723, 0738, and 0847. You can find more than 750 articles about USERRA and other military-relevant laws at www.roa.org/law_review. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. In the Subject Index, I invite the reader's attention to Category 1.1.1.9, on the application of USERRA to successors in interest.

If you are called to the colors for many months, you may find that much has changed by the time you return. The company that employed you may have merged with or been acquired by another company. If you worked for a government contractor, you may find that the contractor that employed you lost the contract to another government contractor. You may find that most of your former colleagues at the old contractor are now working for the new contractor, doing essentially the same jobs that they had been doing before you were called to the colors.

As I explained in Law Review 0766 and other articles, you must meet five eligibility criteria to have the right to reemployment under USERRA. You must have left a civilian 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 uniformed 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. Please see Law Review 201.) You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge, and you must have made a timely application for reemployment.

If you meet these simple requirements, the employer has the legal obligation to reemploy you in the position of employment that you would have attained if you had been continuously employed or another position for which you are qualified that is of like seniority, status, and pay, even if that means displacing another employee. If the new company is the successor in interest to the company that you worked for before your service, the successor company inherits the obligation to reemploy you.

Let us say that you worked for Northwest Airlines from 1998 to 2007, when you left your job for voluntary or involuntary military service. You completed your active duty and applied for reemployment in 2011 and met the USERRA eligibility criteria. While you were on active duty, Northwest merged with Delta, and the combined airline is called Delta. Delta is clearly the successor in interest to Northwest and has inherited the obligation to reemploy you. This application is not controversial. Delta would almost certainly not deny that it is the successor in interest to Northwest.

For a more controversial application of the successor in interest principles, I invite your attention to *Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231 (11th Circuit 2005). I discuss *Coffman* in detail in Law Reviews 79, 0634, and 0847.

Charles S. Coffman, an Air Force Reservist, worked for Del-Jen, Inc. (DJI), the company that had the Base Operating Support (BOS) contract with the Air Force for Tyndall Air Force Base in Florida. Coffman was called to active duty for a year, and he gave proper notice to DJI, his civilian employer. DJI hired a woman for the job that Coffman had temporarily vacated and informed her that her position was temporary and that when Coffman returned from active duty he would most likely be returning to his pre-service job and displacing her.

While Coffman was on active duty, the Air Force contract with DJI expired, and the service awarded the new BOS contract to Chugach Support Services (CSS). Of the 100 DJI employees on the Tyndall AFB BOS contract, CSS hired 98 of them. This included the woman that DJI had hired to replace Coffman on a temporary basis, but it did not include Coffman.

When Coffman returned from active duty, he made a timely application for reemployment with CSS, and he met the USERRA eligibility criteria. CSS denied that it was the successor in interest to DJI and refused to reemploy Coffman. Coffman sued CSS in the United States District Court for the Northern District of Florida, which granted summary judgment for CSS. Coffman appealed to the United States Court of Appeals for the Eleventh Circuit (11th Circuit), which affirmed the summary judgment. The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from federal district courts in Alabama, Florida, and Georgia.

The District Court and the 11th Circuit held that there can be no finding of successor in interest in the absence of a merger or transfer of assets. These courts rejected the argument that a “functional successor” can be a successor in interest for purposes of USERRA and other employment laws. The 6th Circuit (Kentucky, Michigan, Ohio, and Tennessee) has accepted the “functional successor” theory in a similar context. *See Cobb v. Contract Transport, Inc.*, 452 F.3d 543 (6th Cir. 2006). *See also Murphree v. Communications Technologies, Inc.*, 2006 WL 3103208 (E.D. La. 2006). Despite the apparent conflict among the circuits, this issue has not yet made its way to the Supreme Court for resolution.

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this statute, including the term “employer.” Section 4303(4) defines the term “employer.” The statutory definition includes “any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph.” 38 U.S.C. 4303(4)(A)(iv). Until now, USERRA has not defined the term “successor in interest.”

Section 702 of VBA-2010 amends section 4303(4) of USERRA by adding a new subsection (D), as follows: “(D)(i) Whether the term ‘successor in interest’ applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors: (I) Substantial continuity of business operations. (II) Use of the same or similar facilities. (III) Continuity of work force. (IV) Similarity of jobs and working conditions. (V) Similarity of supervisory personnel. (VI) Similarity of machinery, equipment, and production methods. (VII) Similarity of products or services.

(ii) The entity’s lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, *or other form of succession* shall not be considered when applying the multi-factor test under clause (i).” 38 U.S.C. 4303(4)(D) (emphasis supplied).

There does not appear to be any legislative history (committee reports, floor debates, etc.) on section 702 of VBA-2010, but the inclusion of the “or other form of succession” means that there can be a finding of successor in interest without a merger or acquisition. It is clear that the intent of section 702 was to overrule *Coffman*. This clarification is important, because there have been other cases like Mr. Coffman’s case. We will keep the readers informed of developments on this important issue.