

# LAW REVIEW 1077

## Enhancing the Protections of USERRA: Progress Made, and What Remains To Be Accomplished

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

### 1.0 -- USERRA Generally

In 2008, ROA and the Reserve Enlisted Association jointly published their "Top Ten Priorities List." Number 7 on the list was: "Enhancing the Protections of USERRA." In this article, I will summarize the progress that has been made and what remains to be done on this priority.

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue recodification of the Veterans' Reemployment Rights Act, which goes back to 1940. Congress has amended USERRA in 1996, 1998, 2000, 2004, 2008, and 2010. USERRA is codified in title 38, United States Code, sections 4301-4335.

In [Law Review 0847](#) (Oct. 2008), I reported that Senator Robert Casey, Senator Edward Kennedy, and Senator Barack Obama had introduced S. 3432, the proposed "Servicemembers Access to Justice Act" or "SAJA." This bill was not enacted during the 110<sup>th</sup> Congress (2007-08). A similar bill was introduced in the 111<sup>th</sup> Congress but not enacted; however, several of the SAJA proposals have since been enacted as part of the Veterans' Benefits Improvement Act of 2008 (VBA-2008), Public Law 110-389, and the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275. Here is a list of the SAJA proposals, with the accomplished items italicized:

- a. Make agreements to submit future USERRA disputes to binding arbitration unenforceable as a matter of law.
- b. Make the states (as employers) waive 11<sup>th</sup> Amendment immunity with respect to USERRA claims, as a condition of receipt of federal assistance.
- c. *Clarifying the definition of "successor in interest."*
- d. *Requiring equitable relief where appropriate.*
- e. Improve USERRA's liquidated damages provision.
- f. Make the award of attorney fees mandatory rather than discretionary.
- g. *Clarify that no statute of limitations applies to USERRA cases.*
- h. *Strengthen the USERRA provision for preventing wage and salary rate discrimination.*

I invite your attention to [Law Review 0847](#) for a detailed discussion of the rationale for each of these provisions. In this article, I will focus on the items that have been accomplished.

#### CLARIFY THE DEFINITION OF "SUCCESSOR IN INTEREST"

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law. Section 4303(4) defines the term "employer." That definition includes the "successor in interest" to the pre-service employer. Until recently, USERRA did not define the term "successor in interest." Section 702 of VBA-2010 added such a definition.

This 2010 USERRA amendment makes clear that there can be a successor employer without a merger or transfer of assets. If a government contractor has lost a contract, and if the new contractor has taken over the function and most or all of the employees that go with it, the new contractor is the successor in interest to the old contractor, although the new contractor has not merged with or bought the old contractor. The recent amendment also makes clear that the new employer's lack of awareness of the potential for a reemployment claim (at the time of the merger, acquisition, or other form of successorship) is not a factor to be considered in determining if the new employer is the successor in interest to the old employer. Please see [Law Review 1075](#) (Nov. 2010) for a detailed discussion of this accomplishment.

### **REQUIRE EQUITABLE RELIEF WHERE APPROPRIATE**

As enacted in 1994, section 4323(e) of USERRA provided: "The court *may* use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter." (Emphasis supplied.) In [Law Review 200](#) (Oct. 2005), I urged Congress to change "may" to "shall."

In VBIA-2008, Congress amended section 4323(e) to read as follows: "The court *shall use, in any case in which it is appropriate*, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter." (Emphasis supplied.) I am pleased with the change of "may" to "shall" but disappointed with the "in any case in which it is appropriate" language. I urge Congress to amend section 4323(e) again and to remove this vague language.

When an employer has violated USERRA, the violation needs to be corrected quickly. The possible availability of back pay at some future date is not a sufficient reason to withhold injunctive relief. Please see [Law Review 1049](#) (Oct. 2010) for a detailed discussion of this issue.

### **CLARIFY THAT NO STATUTE OF LIMITATIONS APPLIES TO USERRA CASES**

Section 311(f)(1) of VBIA-2008 added a new section 4327 to USERRA. Section 4327(b) now provides: "If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA], there shall be no limit on the period for filing the complaint or claim."

President Bush signed VBIA-2008 on Oct. 8, 2008—the date of enactment. There is *no statute of limitations* for USERRA causes of action that accrued on or after Oct. 8, 2008. For causes of action that accrued prior to Oct. 8, 2008, the four-year default statute of limitations under 28 U.S.C. 1658(a) continues to apply. Please see [Law Review 0925](#) and [Law Review 0948](#) for a detailed discussion.

### **STRENGTHEN THE PROTECTION AGAINST DISCRIMINATION WITH RESPECT TO RATE OF PAY**

Section 701 of VBA-2010 amended section 4303(2) of USERRA, the definition of "benefit of employment"—changing "other than wages or salary for work performed" to "including wages or salary for work performed." This welcome amendment is discussed in detail in [Law Review 1076](#) (Nov. 2010).

### **ENSURE TIMELY ACTION BY DOL, DOJ, AND OSC**

VBIA-2008 amended USERRA by adding time limits for the Department of Labor (DOL), the Department of Justice (DOJ), and the Office of Special Counsel (OSC). The most important time limit is the requirement that DOL complete its investigation of a USERRA complaint within 90 days. There has been some improvement in DOL timeliness, but DOL still routinely takes far more than 90 days to investigate even a simple USERRA case. We will continue our efforts to ensure that DOL is sufficiently staffed and that the employees are properly trained and motivated to complete these important investigations in a timely and professional way.

In his famous soliloquy contemplating suicide, Prince Hamlet complained about “the law’s delays” among many other complaints. *Hamlet*, Act III, Scene I, by William Shakespeare. Not much has changed in the intervening 400 years.

#### **CALL TO ACTION**

As we prepare to start the 112<sup>th</sup> Congress, please contact your United States Representative and your two Senators. Ask them to introduce and/or support legislation to accomplish the remaining SAJA proposals:

- a. Make agreements to submit future USERRA disputes to binding arbitration unenforceable as a matter of law.
- b. Make the states (as employers) waive 11<sup>th</sup> Amendment immunity with respect to USERRA claims, as a condition of the receipt of federal assistance.
- c. Improve USERRA’s liquidated damages provision.
- d. Make the award of attorney fees mandatory rather than discretionary.

Please see [Law Review 0847](#) for a detailed discussion of the rationale for each of these proposals.