

Contractor Employees in Afghanistan Are Not Protected by the SCRA or the USERRA

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[About Sam Wright](#)

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Q: My husband is a retired Air Force Reserve Colonel and a life member of ROA. For several years, he and I have both read with great interest your “Law Review” articles about the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and other laws that are especially pertinent to those who serve our country in uniform.

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 (USERRA), 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 44 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 (USERRA) and the Veterans’ Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 38 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 VRRRA 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 USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA 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 VRRRA and USERRA 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.

My husband was forced to become a “gray area retiree” in the Air Force Reserve in 2009, at the age of 52, 30 years after he was commissioned a Second Lieutenant in 1979. Thus, he lost the drill pay that he had been earning, and he does not get the retired pay until 2017, when he turns 60.

We suffered some major financial reverses in the recession, and then in 2011 my husband was laid off at his civilian job, just as our twins were graduating from high school and going off to college. My husband contacted the Air Force and volunteered to go back on active duty and deploy to Afghanistan, but the Air Force said “no thanks” based on his age and grade.

My husband then signed on with a major defense contractor. He signed a contract to deploy to Afghanistan for two years, from August 2011 to August 2013. My husband notified the company that had laid him off that he was going to Afghanistan to support our military effort there. In Afghanistan, he performs important logistical functions in support of U.S. and Afghan military personnel, and occasionally personnel of Great Britain and other allies who have troops in Afghanistan. He carries a military-issued id card in his wallet and faces much the same dangers that U.S. military personnel in Afghanistan face.

In November of 2012, the company that had laid off my husband sent a “recall notice” to him and to hundreds of other employees who had been laid off. The notice required my husband to report back to work by December 3, 2012 or give up all rights with the company. I contacted the company’s personnel office and told them that my husband wants to return to work but cannot do so until August 2013, when he is scheduled to return from Afghanistan. The personnel office told me that no exception will be made for my husband, and that if he does not return to work by December 3 he has given up all rights with the company. I contacted the union (the same union to which my husband has loyally paid dues for many years), and they told me that they would not get involved in this issue.

As if we did not have enough problems, my husband was sued in November 2012, pertaining to an automobile accident in August 2011, just before he traveled to Afghanistan. I am confident that the facts will show that the other driver (the guy who is suing my husband) was primarily or entirely at fault for the accident, but without my husband present to testify about what happened he could lose the lawsuit, and the damages could greatly exceed the policy limit on our liability insurance.

My husband needs USERRA to protect his right to return to his civilian job in August 2013, when he returns from Afghanistan, and he needs the SCRA to give him the right to a continuance, and to protection against a default judgment, in the civil suit. How do USERRA and the SCRA apply to these facts?

A: Unfortunately, under the facts as you have described them, your husband has no rights under either USERRA or the SCRA. I will discuss these two laws separately.

USERRA

As I explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

1. Must have left a civilian position of employment for the purpose of performing service in the uniformed services.
2. Must have given the employer prior oral or written notice.
3. Must not have exceeded the cumulative five-year limit with respect to periods of uniformed service relating

to the employer relationship for which the individual seeks reemployment.
4. Must have been released from the period of service without having received a punitive (by court martial) or

other-than-honorable discharge.
5. Must have made a timely application for reemployment, after release from the period of service.

An individual must meet *all five* of these conditions in order to have the right to reemployment. Your husband does not meet and cannot meet the first criterion, so the other four criteria are moot. Your husband left his civilian position of employment for the purpose of performing work for another civilian employer, not for the purpose of performing uniformed service. It does not matter that your husband's civilian work is in a war zone and is in support of the war effort—it is not service in a uniformed service. It does not matter that your husband is a retired Air Force Reserve Colonel—he is in Afghanistan in a civilian capacity, not a military capacity. It does not matter that your husband tried to go to Afghanistan in a military capacity, but the Air Force turned down his application for active duty.

If your husband had gone to Afghanistan in a military capacity, USERRA would have protected him in this scenario. For USERRA purposes, an employee who has been laid off is still considered to have an employer- employee relationship with the company that laid him or her off. If your husband had met the five USERRA criteria, he would have had the right to reemployment under USERRA, upon returning from active duty.

Since your husband left his position of employment (in a layoff status) for the purpose of working for another civilian employer, not for the purpose of uniformed service, USERRA does not apply to this situation at all.

SCRA

Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after the United States entered World War I.

The SSCRA, enacted in 1917 and updated in 1940 and 1991, was still largely unchanged as of 2003. The SCRA was enacted to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA, and to update the SSCRA to reflect new developments in American life since 1917. Many of the SSCRA provisions were carried over to the SCRA without significant change. The SCRA is codified in the Appendix of title 50 of the United States Code, at sections 501 through 597b (50 U.S.C. App. 501-597b).

You can find the SCRA definitions in 50 U.S.C. App. 511. "The term 'servicemember' means a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10, United States Code." 50 U.S.C. App. 511(1).

Here are sections 101(a)(4) and (5) of title 10:

(4) The term "armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(5) The term "uniformed services" means-

(A) the armed forces;

(B) the commissioned corps of the National Oceanic and Atmospheric

Administration; and

(C) the commissioned corps of the Public Health Service.

Accordingly, the term "servicemember" is specifically defined in the SCRA, and your husband does not fall within the definition.

I have also considered the following SCRA provision:

"A citizen of the United States who is serving with the forces of a nation with which the United States is allied in the prosecution of a war or military action is entitled to the relief and protections provided under this Act if that service with the allied force is similar to military service as defined in this Act. The relief and protections provided to such citizen shall terminate on the date of discharge or release from such service."

50 U.S.C. App. 514.

This section of the SCRA was carried over essentially unchanged from the SSCRA. The SSCRA provision was drafted with the Lafayette Escadrille in mind. These were the young American

patriots and daredevils who joined the nascent Air Force of France and fought the Red Baron³ and his German colleagues in history's first aerial combat actions, and thereby helped France to hold out until Uncle Sam joined the conflict and turned the tide in 1917-18.

I have searched both *United States Code Annotated* and *United States Code Service* looking for published court decisions applying section 514. I found only two published cases: *Barnsbee v. Barnsbee*, 45 N.Y.S.2d 173, 181 Misc. 76 (1943) and *State ex rel. Buck v. McCabe*, 45 N.E.2d 763, 140 Ohio St. 535 (1942). Both court decisions date from World War II. In the first case, the “correspondent” in a divorce case was an officer in the British Navy, and in the second case the defendant in a civil action was on active duty in the armed forces of Canada, our wartime ally. There is no case, at least not a published case, dealing with a contractor employee performing logistical services for United States and allied military forces in a war zone.

If your husband were on active duty in Afghanistan, section 201 of the SCRA (50 U.S.C. App. 521) would protect him against a default judgment in the civil case, and section 202 (50 U.S.C. App. 522) would give him the right to a continuance. Because your husband is not on active duty in one of the United States uniformed services, the SCRA does not apply to his situation at all.

Update – March 2022⁴

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.⁵ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant sections cited throughout the article can be found as followed:

50 U.S.C. App. § 511 discussing the definition of the term “servicemember” can be found at 50 U.S.C. § 3911.

50 U.S.C. App. § 514 discussing the extension of protection to citizens serving with allied forces can be found at 50 U.S.C. § 3914.

³Manfred Albrecht von Richthofen (the “Red Baron”) was the great German air ace of World War I. He was credited with 80 air combat victories before he was killed in action, possibly by ground fire on April 21, 1918.

⁴Update by Second Lieutenant Lauren Walker, USMC.

⁵*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-skra> (last visited Mar. 10, 2022).

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁶

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This article is one of 2,300-plus “Law Review” articles available at www.roa.org/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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight⁷ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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 Organization of America
1 Constitution Ave. NE

⁶Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

⁷Congress recently established the United States Space Force as the 8th uniformed service.