

# Law Review 12120

December 2012

## Make the States Waive Sovereign Immunity Concerning USERRA Lawsuits or Lose Federal Funding—No, that Won’t Work

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- 1.1.1.7—USERRA applies to state and local governments
- 1.4—USERRA enforcement
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a Major in the Army National Guard and a member of ROA. I work for a state government agency, and I am currently on active duty in Afghanistan. I have read with interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), especially Law Review 12115 (November 2012) about the difficulty of enforcing USERRA against a state government employer, because of the 11<sup>th</sup> Amendment to the United States Constitution.**

**This issue is of great interest to me, because my state government employer acts like USERRA does not apply to it. If push comes to shove and my employer refuses to reemploy me when I return from active duty in a few months, I think that I should be able to sue the state in my own name and with my own lawyer.**

**I think that Congress should make it clear to the states—if you hide behind the 11<sup>th</sup> Amendment and refuse to permit USERRA lawsuits against the state as an employer you should lose all of your federal funding. No state can afford to be without federal funding, so this would bring them into line in a hurry. What do you think of this approach?**

**A:** In Law Review 0754<sup>[1]</sup> (October 2007), I discussed the proposed Reservist Access to Justice Act (RAJA), introduced in the 110<sup>th</sup> Congress (2007-08) by Representative Artur Davis of Alabama. Section 2 of that bill would have provided that a state’s receipt or use of federal financial assistance amounted to a waiver of 11<sup>th</sup> Amendment sovereign immunity. RAJA has not been enacted, but several pieces of it have been enacted as separate USERRA amendments, but not this proposal.

In Law Review 0754, I endorsed the proposal to make states waive 11<sup>th</sup> Amendment immunity as a condition for receiving federal funding, but a recent decision of the United States Supreme Court causes me to question the constitutionality of this approach. On June 28, 2012, the Supreme Court upheld in part and struck down in part the Patient Protection and Affordable Care Act (PPACA).

PPACA greatly expanded the scope of the Medicaid program, which is run through the states. This Act provided that if a state refused to go along with this Medicaid expansion it lost not only the new Medicaid funding but its existing Medicaid funding as well. The Supreme Court struck down this PPACA provision, holding: “The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has ‘crossed the line distinguishing encouragement from coercion,’ ... in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress’s authority to condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the ‘general Welfare.’ Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for

example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”

*National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2603-04 (2012) (internal citation omitted).

It seems to me that this Supreme Court precedent is right on point and that legislation depriving states of existing federal funding if they refuse to waive 11<sup>th</sup> Amendment immunity and permit USERRA lawsuits against the state in federal court would not pass constitutional muster. We need to find other ways to enforce USERRA against state government employers.

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[1] I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 820 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997 and we add new articles each week.