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The SCRA and USERRA—Protecting the Civil Rights of Service Members in the 21st Century

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[1]I invite the reader's attention to www.roa.org/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 very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 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 43 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 (VRRA—the 1940 version of the federal reemployment statute) for 36 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 VRRA 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 VRRA 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.

This article is adapted from a speech that Captain Wright delivered in San Antonio, at a Continuing Legal Education program sponsored by the Military & Veterans Law Section of the State Bar of Texas, on October 26, 2013.

April 1917—The United States entered World War I. Millions of "doughboys" (and a few thousand "doughgirls") entered active military service, by draft, by voluntary enlistment, or by call-up from the nascent Army National Guard, Army Reserve, Naval Reserve, and Marine Corps Reserve. While in boot camp and then on the front lines in France, they could not attend to civilian legal matters back home.

In 1917, John Henry Wigmore was the Dean of the Northwestern University School of Law and already a distinguished legal scholar—the first edition of Wigmore on Evidence was published in 1905. He volunteered to come on active duty as a Major in the Army's Judge Advocate Department. In a matter of days, he drafted the Soldiers' and Sailors' Civil Relief Act (SSCRA), and Congress quickly enacted his handiwork into law.

The original SSCRA applied during the period of national emergency that began when the United States entered World War I and ended in 1919. In 1940, as the United States contemplated the possibility of entering World War II, Congress enacted a new SSCRA that was almost identical to the first one. After World War II, when it became clear that our country would need a large military establishment in peacetime as well as wartime, Congress made the SSCRA permanent.

On August 2, 1990, Saddam Hussein's Iraq invaded and occupied Kuwait and threatened Saudi Arabia. President George H.W. Bush drew "a line in the sand" and announced that he would protect Saudi Arabia and liberate Kuwait. As part of his forceful military response, he called up Reserve and National Guard units, in the first significant Reserve Component (RC) call-up since the Korean War. Only a handful of units were mobilized for the Vietnam War.

The RC call-up of 1990-91 showed some deficiencies in the SSCRA, and Congress made piecemeal amendments (dealing with health insurance and medical malpractice insurance) in 1991, backdating their effective date to August 1, 1990. Judge advocates from all five armed forces began a systematic study of the SSCRA and drafted a replacement law. Finally, in December 2003, Congress enacted their handiwork as the Servicemembers Civil Relief Act (SCRA), a long-overdue rewrite of the SSCRA. The SCRA is codified at sections 501 through 597b of the Appendix to title 50 of the United States Code. (50 U.S.C. App. 501-597b).

In the early 1920s, Congress enacted legislation promising "Great War" veterans a modest bonus, to be paid in 1945. The choice of date is interesting. Congress had no way of knowing that there would be a second world war, much less that it would end in 1945. In 1929, the stock market crashed and the economy spiraled downward into the Great Depression. In the summer

of 1932, thousands of unemployed veterans came to Washington to demand the immediate payment of the promised bonus.

General Douglas MacArthur (Chief of Staff of the Army) sent Captain George S. Patton and other cavalry soldiers to Washington, to drive away the bonus marchers. There was bloodshed, and General MacArthur probably exceeded the instructions that he had received from President Herbert Hoover. The resulting uproar guaranteed that Hoover would lose to Franklin D. Roosevelt in November 1932.

On September 1, 1939, Adolf Hitler's Germany invaded Poland, and Great Britain and France finally stopped trying to appease Hitler—World War II was on. Charles Lindbergh and the "America Firsters" strenuously objected to President Roosevelt's attempts to aid Great Britain, but Congress cautiously expanded our country's then tiny military, just in case. In August 1940, Congress enacted the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men (including my late father) for World War II.

As a Senate amendment to the STSA, Congress enacted the law that came to be known as the Veterans' Reemployment Rights Act (VRRA). As originally enacted in 1940, the VRRA gave reemployment rights to those who left civilian jobs for involuntary military service, under the draft. In 1941, as part of the Service Extension Act, Congress expanded the VRRA to include voluntary enlistees as well as draftees.

The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress expanded the VRRA to make it apply to state and local governments as well. Unlike other federal employment laws, the VRRA has never had a threshold based on the size of the enterprise or the number of employees. You only need one employee to be an "employer" for purposes of the federal reemployment statute. *See Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992).

The VRRA served our country well for more than half a century, but by the 1980s numerous piecemeal amendments had made the law confusing and cumbersome. As an attorney for the United States Department of Labor (DOL) from 1982 to 1992, I volunteered to serve on the interagency task force that studied the VRRA with a view toward improving and updating it. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991.

On October 13, 1994, President William Clinton signed into law Public Law 103-353, USERRA, a long-overdue rewrite of the VRRA. What Congress enacted in 1994 was about 85% the same as the Webman-Wright draft. USERRA is codified at sections 4301-4335 of title 38 of the United States Code (38 U.S.C. 4301-4335).

I invite your attention to www.servicemembers-lawcenter.org. You will find almost 1,000 articles about laws that are especially pertinent to those who serve our country in uniform,

including more than 700 articles about USERRA and the VRRA and more than 100 articles about the SCRA and SSCRA. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific subjects. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 144 so far in 2013.

As the Director of the Service Members Law Center (SMLC), I receive and respond to about 800 inquiries per month, by e-mail and telephone, from service members, military family members, attorneys, employers, congressional staffers, reporters, and others. About half of the inquiries are about USERRA, and the other half are about everything you can think of that has something to do with military service and the law. I also draft and file *amicus curiae* briefs in the Supreme Court and other courts.

I am at my post answering calls and e-mails during regular business hours and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to enable RC personnel to call me from the privacy of their own homes, outside their civilian work hours. You have no justifiable expectation of privacy when you use the employer's telephone or computer on employer-paid time. Moreover, if the employer is annoyed with you because you have been called to the colors five times since September 2001 and expect to be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking. I think that having RC personnel call me from home rather than work is so important that I am willing to give up two evenings per week to make it possible. Neither DOL nor ESGR (Employer Support of the Guard and Reserve) gives RC personnel the opportunity to speak to a live human (to say nothing of an expert attorney) after 5 pm local time.

Under the SCRA, like the SSCRA, the absent service member has the right to a continuance and to protection from default judgments in federal and state judicial proceedings. In 2003, with the enactment of the SCRA, Congress expanded this protection to include administrative proceedings as well.

Before you can get a default judgment in any judicial or administrative proceeding, you must aver under oath that the defaulting defendant is or is not a member of the armed forces on active duty. If the defendant is on active duty, several steps must be taken to ensure that he or she is aware of the lawsuit and has had an opportunity to file an answer. Falsely claiming that the defendant is not on active duty is a federal misdemeanor, punishable by up to a year in jail and a substantial fine [50 U.S.C. App. 521(c)], and the default judgment can be set aside.

The Department of Defense (DOD) offers a *free* service whereby you can determine (normally in seconds) that a specific person is or is not a member of the armed forces on active duty. Please see Law Review 13141 (October 2013).

A person entering active duty voluntarily or involuntarily is entitled to terminate a lease on premises (apartment, house, office, farm, etc.), and this has been the case since 1917. (Under certain circumstances, an active duty service member who is transferred to a new duty station

or who is deployed can terminate a premises lease as well.) The enactment of the SCRA in 2003 expanded this right to include vehicle leases as well. A more recent amendment gives the individual entering active duty the right to terminate a cell phone contract.

The SCRA preserves the service member's right to vote, in non-federal as well as federal elections. Absence from one's place of domicile, even for many years, and without regard to one's intent about where to live after leaving active duty by retirement or otherwise, does not cause one to lose one's domicile and the right to vote, if the absence was because of military orders. 50 U.S.C. App. 595.

The SCRA protects the service member from double taxation on income and personal property. The active duty service member does not automatically become a domiciliary of the state where he or she physically resides, pursuant to military orders. For example, if the service member physically resides in Virginia (because he or she is serving at the Pentagon), but is domiciled in Texas, Virginia is precluded from taxing the service member's military income and his or her personal property (like a vehicle). 50 U.S.C. App. 571.

Texas has several major military bases and no state income tax. Many active duty service members have the opportunity to become and choose to become Texas domiciliaries. More military personnel are domiciled in Texas than in any other state.

When a person not on active duty moves from State A to State B, he or she immediately becomes a domiciliary of State B, unless the move was for a temporary purpose, like a three-month job assignment. Active duty service members are exempted from this consequence, and it is entirely appropriate that they be exempted. Unlike civilians, military personnel do not choose where to live and work—they must go where assigned, and must rent apartments or buy houses near their assigned duty stations. A civilian could be transferred by his or her employer, but the civilian has the legal right to resign from his or her job. The service member does not have the option to resign, at least not immediately, and cannot refuse orders. Failure to go to appointed place of duty is a crime (unauthorized absence) under the Uniform Code of Military Justice (UCMJ).

Under USERRA, an individual is entitled to reemployment after a period of voluntary or involuntary service, provided he or she meets five simple eligibility criteria:

a. Must have left the job for the purpose of performing voluntary or involuntary service in the uniformed services—active duty, active duty for training, inactive duty training (drills), initial active duty training, funeral honors duty, etc.
b. Must have given the employer prior oral or written *notice.* The individual does not need the employer's permission, and the employer does not get a veto.
c. The individual's cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 (August 2005).

d. The individual must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. The individual must have made a timely application for reemployment, after release from the period of service. After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

A person who meets these five conditions is entitled to reemployment, as a matter of federal law, in the position that the person *would have attained if continuously employed,* or in another position, for which the person is qualified, that is of like seniority, status, and pay. Upon reemployment, the person must be treated *as if he or she had been continuously employed* for seniority and pension purposes.

An employer could make a mockery of this law by the simple expedient of firing the person who is subject to being called to the colors, or not hiring such a person in the first place. Accordingly, section 4311 of USERRA (38 U.S.C. 4311) makes it unlawful for an employer to deny a person initial employment, retention in employment, promotion, or a benefit of employment on the basis of membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.

If the person proves that the protected activity was *a motivating factor* (not necessarily the sole reason) for the employer's unfavorable personnel action, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer, to prove that it *would have* (not just could have) taken the same action in the absence of the protected activity. 38 U.S.C. 4311(c).

I can literally talk all day about USERRA, and I have on several occasions. I can talk almost that long about the SCRA. Of course, we don't have all day, and I am just one of many speakers at this program. So let me end by reminding you of our website, www.servicemembers-lawcenter.org. Using the Subject Index and the search function, you should be able to find several articles related to your specific question. If not, we will write a new article—we add four or more new articles each week.

I think we have a few minutes, so I will take one or two questions now.