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2015 New Jersey Military Law Symposium

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On October 24, 2015, the New Jersey State Bar Association conducted its 14th annual Military Law Symposium, a Continuing Legal Education session for lawyers, especially those who have volunteered to represent service members, veterans, and military family members on a *pro*

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

[2] Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

bono (no fee) basis. I served as one of the instructors, and my presentation was about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Here is a copy of my presentation:

I am most pleased to have been offered the opportunity to speak to your excellent Military Law Symposium again this year. I have spoken to this event every year but one since you established it in 2002.

More than 75 years ago, Congress enacted the Veterans' Reemployment Rights Act (VRRA), as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my late father) for World War II. More than 74 years ago, as part of the Service Extension Act of 1941, Congress amended the VRRA to make it apply to those who *volunteered* for military service, as well as those who were drafted. Almost from the very beginning, this law has applied equally to *voluntary as well as involuntary military service.* Of course, in our time all military service is essentially voluntary, as Congress abolished the draft and established the All-Volunteer Military in 1973.

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 (VEVRAA), Congress expanded this law to make it apply to state and local governments as well. Today, 10% of serving Reserve Component (RC) members work for state governments and another 11% work for local governments.

On October 13, 1994, just over 21 years ago, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), as a long-overdue rewrite of the 1940 law. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335). USERRA applies to almost all employers in our country, including the Federal Government, the states, the political subdivisions of states, and private employers, *regardless of size.* Unlike other federal employment laws, the reemployment statute 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 this statute. *See Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992).

USERRA applies to almost all employers in our country and also to the U.S. Government and U.S. companies in their operations outside our country. 38 U.S.C. 4319. Among employers within our country, only religious institutions (on First Amendment grounds), Native American tribes (on residual sovereignty grounds), and foreign embassies and consulates and international organizations (on diplomatic immunity grounds) are exempt from USERRA enforcement.

According to the Department of Defense (DOD), more than 910,000 RC personnel have been called to the colors since the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time. This law is important and relevant, *now more than ever.*

There are seven Reserve Components: the Army National Guard (ARNG), the Army Reserve (USAR), the Air National Guard (ANG), the Air Force Reserve (USAFR), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), and the Coast Guard Reserve (USCGR). The ARNG and ANG have a hybrid federal-state status, while the other five components are purely federal.

If you were to enlist in the New Jersey ARNG or ANG, you would join two overlapping but legally distinct entities. The *New Jersey* ARNG and ANG are the modern-day version of your state militia. New Jersey ANG and ARNG members are subject to call-up by the Governor of New Jersey for *State Active Duty* (SAD)—called by the Governor, under state authority, paid with state funds, for state emergencies like hurricanes, fires, riots, etc. As members of the Army National Guard *of the United States* or Air National Guard *of the United States,* your state's ARNG and ANG members are subject to involuntary call up or they can volunteer for federal active duty under title 10 of the United States Code. To maintain their readiness for that contingency, they perform periodic inactive duty training (drills) and active duty for training (annual training) under title 32 of the United States Code.

ARNG and ANG members of New Jersey or any other state are protected by USERRA when they engage in voluntary or involuntary service or training under title 10 or title 32 of the United States Code, *but USERRA does not apply to State Active Duty.* If ARNG and ANG members are to have the right to reinstatement in their civilian jobs after State Active Duty, it must be by state law.

Like every other state, New Jersey has a state law that protects National Guard members on State Active Duty. Here is a link to our article about New Jersey's law: http://www.servicemembers-lawcenter.org/uploads/NJ-2015-NG.pdf

We (the Reserve Officers Association and the Service Members Law Center) have prepared 55 new articles (50 states, District of Columbia, Guam, Puerto Rico, Virgin Islands, and a summary article) about the state laws that protect the civilian jobs of National Guard members on State Active Duty. These articles are available at www.servicemembers-lawcenter.org. Go to "State Leave Laws" and you will find the states listed in alphabetical order.

We have found a serious deficiency in the New Jersey law and in the laws of 31 other states, including each of your state's neighbors except Delaware. In New Jersey and 31 other states, the state law that protects National Guard members on State Active Duty *only applies to National Guard members of that particular state.* A member of the National Guard of another

state (typically but not necessarily a neighboring state) who works in the state falls through the cracks, and his or her civilian job in unprotected in this scenario.

For example, Alexander Hamilton lives in Weehawken, New Jersey and is a Sergeant in the New Jersey Army National Guard. For his civilian job, he commutes across the Hudson River to Manhattan, where he works for the major law firm Dewey Cheatham & Howe (DCH) as a paralegal. Hamilton is called to State Active Duty by the Governor of New Jersey after a major hurricane devastates several Mid-Atlantic States. After Hamilton completes his State Active duty period, he seeks reinstatement at DCH, but the law firm refuses to reinstate him. Unfortunately, no law gives Hamilton the right to insist that the firm take him back. USERRA does not apply because this is State Active Duty. The New Jersey law does not apply across the state line in New York. The New York law, by its terms, only protects New York National Guard members. Hamilton has fallen through the crack and is unemployed.

For another example, Aaron Burr lives in Manhattan and is a Sergeant in the New York ARNG. For his civilian job, he commutes in the opposite direction. He is a paralegal at McCarter & Spanish, a major law firm in Newark, New Jersey. Burr is called to State Active Duty by the Governor of New York, after the same hurricane that led to the call up of Hamilton. Like Hamilton, Burr has fallen through the cracks and is unemployed. The New Jersey law needs to be amended to make it protect the civilian jobs of National Guard members of *other states* who happen to have civilian jobs in New Jersey.

Working with the Defense State Liaison Office (a DOD organization founded about a decade ago), we have gotten six states to make this fix so far in 2015. Those states are California, Illinois, Kansas, Montana, North Carolina, and South Carolina. We will be working on New Jersey, New York, and 30 other states in 2016 and beyond. This is a big deal, especially in tristate metropolitan areas like New York and Philadelphia.

USERRA accords the right to reemployment to any person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services, as defined by USERRA. Such service includes active duty, active duty or training, inactive duty training, initial active duty training, funeral honors duty, and time required to be away from a civilian job for the purposes of determining fitness to perform any such duty. 38 U.S.C. 4303(13).

To have the right to reemployment under USERRA, you must meet five simple eligibility conditions:

a. You must have left the job for the purpose of performing uniformed service.
b. You must have given the employer prior oral or written *notice.* You do not need the employer's permission, and the employer does not get a veto. *See* 20 C.F.R. 1002.87.

c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. 38 U.S.C. 4312(c). There are nine exemptions—kinds of service that do not count toward exhausting your five-year limit. Please see Law Review 201 for a definitive discussion of USERRA's five-year limit.
d. You must have served honorably and must have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. 4304. Let's have none of this "let's wake up the prisoners and play the naked pyramid game again" stuff—not conducive to getting your job back.
e. After release from the period of service, you must have made a timely application for reemployment. After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

You must meet all five of these conditions to have the right to reemployment. Four out of five is insufficient.

If you meet these five conditions, you are entitled to *prompt* reinstatement, within two weeks after your application. 20 C.F.R. 1002.181.

The fact that there are no vacant positions at the moment the individual applies for reemployment in no way detracts from the employer's obligation to reemploy. There are circumstances wherein reemploying the returning service member requires displacing another employee. *See Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993); *Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992); *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 704 (8th Cir. 1983).

You are entitled to be reemployed in the position that *you would have attained if you had been continuously employed,* or at the employer's option in another position (for which you are qualified) that is of like seniority, status, and pay. 38 U.S.C. 4313(a)(2)(A). The position that you would have attained if you had been continuously employed may be a better position than the one you left, exactly the same position, a similar position, a worse position, or no position at all, depending upon *what would have happened if you had been continuously employed.* 20 C.F.R. 1002.194. In determining what would have happened to you if you had remained continuously employed, we must examine your work history before and after the period of service and what happened to your colleagues at work during the time you were away.

Upon reemployment, you are entitled to be treated *as if you had been continuously employed* for seniority and pension purposes. 38 U.S.C. 4316(a), 4318. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning

veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). In that same case, the Court held that the reemployment statute should be "liberally construed for he who laid aside his civilian pursuits to serve his country in its hour of great need." *Id.,* at 285.

Although *Fishgold* was decided in the context of a formal system of seniority under a collective bargaining agreement, the escalator principle is not limited to "automatic" promotions or pay raises under such agreements. *See Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49 (1st Cir. 2013). I discuss that case in detail in Law Review 13127 (September 2013).

An employer could easily make a mockery of USERRA's protections by firing RC members or denying them hiring in the first place. Accordingly, section 4311 of USERRA makes it unlawful for an employer to discriminate in hiring, in retention of employment, or in promotions and benefits of employment on the basis of a person's membership in a uniformed service, application to join a uniformed service, performance of service, application or obligation to perform service, or having exercised USERRA rights or taken action to enforce USERRA. 38 U.S.C. 4311. It is not necessary to prove that one of these factors was *the sole reason* for the employer having taken an unfavorable personnel action. It is sufficient to prove that the protected activity was *a motivating factor* in the employer's decision. If you prove motivating factor, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer to *prove* (not just say) that it *would have* (not just could have) taken the same unfavorable action in the absence of the protected activity. 38 U.S.C. 4311(c).

Here are links to two very recent "Law Review" articles about two very recent appellate court decisions (the 6th Circuit and the 7th Circuit) that reversed summary judgments for employers in section 4311 cases:
http://www.servicemembers-lawcenter.org/uploads/15086-LR.pdf
http://www.servicemembers-lawcenter.org/uploads/15087-LR.pdf

Under section 4302 of USERRA, this federal law is *a floor and not a ceiling* on the rights of those who leave civilian jobs for voluntary or involuntary military service or training. Under section 4302(a), USERRA does not override a state law, a collective bargaining agreement, a contract, or an employer policy or practice or other matter that gives these folks *greater or additional rights.* Under section 4302(b), USERRA does override all these things to the extent that they purport to limit USERRA rights or to impose additional prerequisites on the exercise of USERRA rights.

Like 44 other states, New Jersey gives state and local government employees the right, under state law, to a limited period of *paid* military leave. This is an example of a state law that provides *greater or additional rights,* because USERRA does not require the civilian employer to pay the person for an hour, day, week, month, or year that he or she is away from the civilian job for military training or service. Here is an article about your New Jersey law on paid military leave for state and local government employees:
http://www.servicemembers-lawcenter.org/uploads/NJ-2013-LV.pdf

There is a problem in your New Jersey law. Section 38:23-1 gives the right to paid military leave to public employees who are members of the Reserve Components of the armed forces, and the section lists those components. *But they forgot to list the Coast Guard Reserve.*

Please contact your state legislators and ask them to add in the Coast Guard Reserve. If your teeth are chattering while you cling to the keel of your overturned fishing boat in the Atlantic Ocean 50 miles east of here, the Coast Guard will be very important to you.

I invite your attention to www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" 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 I am the author or co-author of more than 1200 of the articles. More than 900 of the 1400 articles are about USERRA and related laws.

For six years (June 2009 through May 2015), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of the Reserve Officers Association (ROA). During that period, I received and responded to more than 35,000 e-mail and telephone inquiries from service members, military family members, attorneys, employers, Employer Support of the Guard and Reserve (ESGR) volunteers, Department of Labor (DOL) investigators, congressional staffers, reporters, and others. About half of the inquiries were about USERRA, and the other half were about everything you can think of that has something to do with military service and law. Here is a link to Law Review 15052 (June 2015), concerning the accomplishments of the SMLC:
http://www.servicemembers-lawcenter.org/uploads/15052-LR.pdf

Unfortunately, it was necessary for financial reasons for ROA to wind down the SMLC on May 31, 2015. I have returned to Tully Rinckey PLLC, the firm where I worked before ROA established the SMLC in June 2009. I am available at the firm at (202) 787-1900 or SWright@fedattorney.com. *We love referrals.*

I hope to see you all again next year, and for many years into the future.