

LAW REVIEW 15112¹

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Which Employers Are Exempt from USERRA Enforcement?

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

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Q: I am a retired Army Reserve Colonel and a life member of the Reserve Officers Association (ROA). I am also a volunteer ombudsman for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR). For many years, I have read with great interest and have put to good use your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I was particularly interested in your Law Review 15111, about how Indian tribes (as employers) came to be exempt from USERRA enforcement and how Congress can and should

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 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.

fix that by amending USERRA. Are there any other employers or classes of employers that are exempt from USERRA enforcement? Can those exemptions be corrected legislatively?

A: USERRA applies to almost all employers in the United States,³ including the Federal Government (Executive Branch and Legislative Branch), the states, the political subdivisions of states,⁴ and private employers, regardless of size.⁵ Among employers in the United States,⁶ only the following classes of employers are exempt from USERRA enforcement:

- a. Indian tribes (discussed in detail in Law Review 15111).
- b. Religious institutions.
- c. Foreign embassies and consulates.
- d. International organizations.
- e. Judicial Branch of the Federal Government.

I shall discuss each category separately.

Religious institutions

The First Amendment of the United States Constitution provides, in pertinent part, that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Supreme Court has held that a labor-management statute shall be deemed to apply to a religious institution, as an employer, only if there is clear evidence that Congress actively considered that the law would apply to religious institutions and affirmatively decided that it should apply.⁷ There is nothing in USERRA’s text or legislative history that indicates that Congress ever considered such application, so the law cannot be applied to religious institutions.

Congress could amend USERRA to make it apply explicitly to churches and other religious institutions, as employers. Such an amendment would help Reservists and National Guard members who are employed by churches as secretaries, janitors, etc. Such an amendment would not help Reservists and National Guard members who are employed as ordained

³ USERRA also applies outside the United States to the United States Government and to U.S. companies, under section 4319 of USERRA, 38 U.S.C. 4319. Please see Law Review 24 (April 2001).

⁴ Political subdivisions include counties, cities, school districts, and other units of local government.

⁵ You only need one employee to be an employer subject to the reemployment statute. See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

⁶ USERRA most definitely applies to foreign companies operating in our country. The Department of Labor (DOL) USERRA Regulation provides: “USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.” 20 C.F.R. 1002.34(b).

⁷ See *Catholic Bishop of Chicago v. National Labor Relations Board*, 440 U.S. 490 (1979).

ministers. There is simply no way to reach folks like that, without running afoul of the Religion Clauses of the First Amendment.⁸

Foreign embassies and consulates

There are 193 nations that are members of the United Nations (UN), and almost all of them have an embassy in New York City, at the UN headquarters. Most of those nations also have an embassy here in our nation's capital, and many nations have consulates in major cities around the United States. Foreign embassies and consulates have diplomatic immunity. It is simply impossible to apply U.S. criminal and civil laws to foreign embassies and consulates.

Several years ago, I heard from a naturalized U.S. citizen from Spain who worked for Spain's consulate in Chicago. This young man joined the U.S. Army Reserve and needed to leave his job for several months of Army training. Fortunately, Spain's ambassador here in Washington and its Consul General in Chicago agreed to accommodate the young man's Army service. If they had refused to do so, there would have been no remedy.⁹

International organizations

Thousands of Americans work in the United States for international organizations, including the UN (New York City), the World Bank (DC), and the International Monetary Fund (DC). Some of those American employees are Reserve Component (RC) members. Like foreign embassies and consulates, international organizations have diplomatic immunity. There is no way to enforce a U.S. law like USERRA against the UN, the World Bank, or the International Monetary Fund.

Judicial Branch of the Federal Government

USERRA clearly applies to the Executive Branch of the Federal Government, and section 4324 of USERRA¹⁰ provides an enforcement mechanism, through the Merit Systems Protection Board (MSPB), with respect to Executive Branch agencies as employers. USERRA provides no enforcement mechanism with respect to employers in the Legislative Branch of the Federal Government,¹¹ but the Congressional Accountability Act of 1995 provides an enforcement

⁸ See *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. ___, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012). I discuss that United States Supreme Court case in detail in Law Review 1206.

⁹ Thank you to Brigadier General Walter Vartan, USAFR (Ret.), a past National President of ROA, for helping to persuade Spain to make this accommodation.

¹⁰ 38 U.S.C. 4324.

¹¹ The Legislative Branch includes the Government Accountability Office, the Library of Congress, the Capitol Police, the Architect of the Capitol, and several other agencies, as well as individual members of the House and Senate and House and Senate committees.

mechanism for USERRA and several other enumerated federal statutes with respect to Legislative Branch employers.¹²

There is no enforcement mechanism for employers in the Judicial Branch of the Federal Government.¹³ If you work for a Judicial Branch or Legislative Branch employer and leave your job for voluntary or involuntary service in the uniformed services, and if you meet the USERRA conditions for reemployment, and if the Judicial Branch or Legislative Branch employer denies you reemployment for whatever reason, you can go to the Director of the Office of Personnel Management, and the Director is responsible for finding you an equivalent position in the Executive Branch.¹⁴

It would raise separation of powers concerns for the Executive Branch to enforce a law like USERRA against the Judicial Branch, but these concerns only apply to the *federal* Judicial Branch. State court systems are fully subject to USERRA and its enforcement mechanism.¹⁵

¹² Please see Law Review 15009 (January 2015).

¹³ Federal probation officers are part of the Judicial Branch. Over the last three decades, I have heard from several federal probation officers who were RC members and who were hassled about their absences of work for RC training and service. There is no remedy for those folks.

¹⁴ 38 U.S.C. 4314(c).

¹⁵ Please see Law Review 1037 (March 2010) and Law Review 0912 (February 2009).