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New USERRA Primer

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

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "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 1,100 of the more than 1,300 "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.

1.4—USERRA enforcement

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, but don't think of this law as 18 years old—think of it as 75 years old.[3] USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), which was the law that led to the drafting of more than ten million young men (including my late father) for World War II.

Although the VRRA was part of the draft law until 1974, it was amended in 1941 to make it apply to voluntary enlistees as well as draftees. Almost from the very beginning, the reemployment statute has applied to voluntary as well as involuntary service, in peacetime as well as wartime, within our country and overseas.[4] This law is part of the fabric of our society, but all too many employers violate it, out of ignorance and sometimes willfully.

Law Review Library and the Service Members Law Center

I invite your attention to www.servicemembers-lawcenter.org. You will find more than 1,300 articles about USERRA and other 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. I initiated this column in 1997, and we have been adding new articles each week.

Freedom is not free. The greatest costs are borne by those who serve in our nation's armed forces, especially those in the Reserve Components who leave higher-paying jobs when called up. A small fraction of our country's population bears the lion's share of the cost of freedom. The entire U.S. military establishment, including the National Guard and reserve, amounts to less than three-quarters of 1 percent of the nation's population. It is those service members who have stood between U.S. citizens and a repetition of the terrorist attacks of September 11.

On August 20, 1940, during the Battle of Britain, Prime Minister Winston Churchill said of the Royal Air Force:

> *The gratitude of every home in our island, in our empire, and indeed, throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few.*

Those eloquent words apply equally to those who serve in the U.S. military today. So, the reemployment statute aims to guarantee that those who remain at home—enjoying the protection of those few who serve—do not pass those who serve on the escalator of success at work. While civilian employers and civilian coworkers of those who serve in the National Guard or Reserve (NG&R) do bear some costs,

[3] Please see Law Review 15067 (August 2015) for a detailed discussion of the history of the reemployment statute.
[4] Please see Law Review 15075 (September 2015) concerning the application of USERRA to voluntary military service.

those costs are small in comparison to the costs—sometimes the ultimate sacrifice—borne by those who volunteer to serve our nation in uniform.

What employers are covered by USERRA?

USERRA applies to almost all employers in the United States, including the Executive Branch[5] and Legislative Branch[6] of the Federal Government, the states[7] and their political subdivisions[8] (counties, cities, school districts, etc.), and private employers, regardless of size. You only need one employee to be an employer for purposes of USERRA.[9] Among employers in the United States, only religious institutions,[10] Indian tribes,[11] foreign embassies and consulates and international organizations,[12] and the Judicial Branch of the Federal Government[13] are immune from USERRA enforcement. USERRA also applies all over the world to the United States Government, to U.S. companies, and to foreign companies that are controlled by U.S. companies.[14]

What employees are covered by USERRA?

USERRA applies to all employees, including part-time, temporary, probationary, and at-will employees.[15] You do not have rights under USERRA if you are a partner or an independent contractor, but labeling you a partner or independent contractor does not make you one.[16] USERRA is to be liberally construed in finding coverage.

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[5] Please see Law Review 15067 (July 2015) concerning USERRA enforcement against federal executive agencies through the Merit Systems Protection Board (MSPB).

[6] Please see Law Review 15009 (January 2015) for a discussion of the application of USERRA to the Legislative Branch of the Federal Government. USERRA's enforcement mechanism does not apply to the Judicial Branch of the Federal Government. Please see Law Review 15112 (December 2015).

[7] USERRA most definitely applies to states, as employers, but the 11th Amendment of the United States Constitution greatly complicates the process of enforcing USERRA against a state government employer. Please see Law Review 14047 (April 2014).

[8] Political subdivisions of states do not have 11th Amendment immunity. *See Weaver v. Madison City Board of Education,* 771 F.3d 748 (11th Cir. 2014). I discuss the implications of *Weaver* in detail in Law Review 15011 (January 2015). For purposes of USERRA enforcement, a political subdivision is treated as a private employer. *See* 38 U.S.C. 4323(i).

[9] *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992). *Cole* was a VRRA case, decided two years before Congress enacted USERRA in 1994. *Cole* is cited with approval in USERRA's legislative history. *See* House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2454. It is clear that Congress intended that USERRA, like the VRRA, would apply to very small employers that are exempted from most other employment statutes.

[10] Please see Law Review 15112.

[11] Please see Law Review 15111 (December 2015).

[12] Please see Law Review 15112 (December 2015).

[13] Please see Law Review 15112 (December 2015).

[14] Please see Law Review 24 (April 2001).

[15] Please see Law Review 15094 (October 2015).

[16] As to asserted independent contractors, please see Law Review 15066 (August 2015). As to asserted partners, please see Law Review 99 (December 2003).

USERRA does not apply to the relationship between a student and a college or university, but another federal law (enacted in 2008) gives essentially the same protections to students whose educational careers are interrupted by voluntary or involuntary service.[17]

What kind of service gives rise to reemployment rights under USERRA?

To have the right to reemployment under USERRA, you must have left a position of civilian employment in order to perform voluntary or involuntary service in the uniformed services. For USERRA purposes, the uniformed services are the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS).[18] The commissioned corps of the National Oceanic & Atmospheric Administration is a uniformed service as defined by section 101(a)(5) of title 10, United States Code, but it is not a uniformed service for purposes of USERRA.[19]

USERRA defines the term "service in the uniformed services" broadly, to include active duty, active duty for training, initial active duty training, and inactive duty training (drills), as well as time away from a position of employment for the purposes of an examination to determine fitness to perform any such duty[20] and time away from a position of employment in order to perform funeral honors duty as a member of the NG&R.[21]

USERRA is not limited to NG&R service. It applies equally to service in the Regular Component of the armed forces.[22]

What conditions must I meet to have the right to reemployment under USERRA?

1. You must have left a position of employment for the purpose of performing service in the uniformed services.[23]
2. You must have given the employer prior oral or written *notice.*[24]
3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.[25]
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.[26]

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[17] Please see Law Review 15038 (May 2015). This article is by Commander Wayne L. Johnson, JAGC, USN (Ret.).
[18] Please see Law Review 15041 (May 2015) concerning the application of USERRA to the PHS commissioned corps.
[19] Please see Law Review 15002 (January 2015).
[20] Please see Law Review 0913 (April 2009) and Law Review 1272 (July 2012) concerning the application of USERRA to fitness examinations.
[21] Please see Law Review 51 (September 2002) with respect to the application of USERRA to funeral honors duty.
[22] Please see Law Review 0719 (May 2007),
[23] If you are an independent contractor or a partner, you do not hold a position of employment, but labeling you a partner or independent contractor does not make you one. This concept is discussed above.
[24] You are only required to give notice. You do not need the employer's permission, and the employer does not get a veto. *See* 20 C.F.R. 1002.87. This citation refers to section 1002.87 of title 20 of the Code of Federal Regulations.
[25] There are nine exemptions—kinds of service that do not count toward exhausting your five-year limit. Please see Law Review 201 (August 2005).
[26] *See* 20 C.F.R. 1002.135.

5. You must have made a timely application for reemployment with the pre-service employer, after release from the period of service.[27]

What does it mean to apply for reemployment?

I invite your attention to the pertinent section of the Department of Labor (DOL) USERRA Regulations:

> § 1002.118 **Is an application for reemployment required to be in any particular form?**
>
> An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.[28]

If I meet these conditions, what does that get me?

If you meet the five eligibility conditions, the employer is required to reemploy you *promptly*[29] in the position of employment that you *would have attained* if you had been continuously employed, or in another position for which you are qualified that is of like seniority, status, and pay. Please understand that the position that you *would have attained* is not always equal to or better than the position you left, especially during an economic downturn. USERRA does not protect you from a bad thing (like a layoff or reduction in force) that *clearly would have happened anyway* even if you had not been away from work for service at the time.

If you meet the conditions and are reemployed, the employer must treat you *as if you had been continuously employed* in the civilian job for purposes of determining your seniority[30] and pension[31] status in the civilian job. Moreover, you are entitled to immediate reinstatement of health insurance

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[27] 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). After a period of service of 31-180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service of less than 31 days, you are required to report for work at the start of the first full regularly scheduled work period on the first calendar day after completion of the period of service, the time reasonably required for safe travel from the place of service to your residence, and eight hours for rest. 38 U.S.C. 4312(e)(1)(A). If upon release from the period of service you are hospitalized or convalescing from an injury or illness incurred or aggravated during the period of service, the deadline for you to report to work or apply for reemployment can be extended by the period of hospitalization or convalescence, up to two years. 38 U.S.C. 4312(e)(2).

[28] 20 C.F.R. 1002.118 (bold question in original). Please see Law Review 14045 (March 2014) for a sample application for reemployment letter.

[29] Except in unusual circumstances, the employer must reemploy you within two weeks after you apply for reemployment. *See* 20 C.F.R. 1002.181.

[30] 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). Please see Law Review 15102 (November 2015) for a detailed discussion of the escalator principle under USERRA.

[31] Please see Law Review 14022 (February 2014) and Law Review 13137 (October 2013) concerning section 4318 of USERRA (pension benefits).

coverage through your civilian job. There must be no waiting period and no exclusion of "pre-existing conditions" except for conditions that the United States Department of Veterans Affairs has determined to be service-connected.[32]

What is to keep the employer from reinstating me after I return from service and then firing me shortly thereafter?

Section 4316(c) of USERRA protects you from a bad faith or *pro forma* reinstatement and gives you the opportunity to get back "up to speed" in the civilian job after you have been away from the job for military service. Here is the text of that subsection:

> A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—
> (1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
> (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.[33]

I also invite your attention to the two pertinent sections of the DOL USERRA Regulations:

> § 1002.247 **Does USERRA provide the employee with protection against discharge?**
>
> Yes. If the employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause --
>
> (a) For 180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,
>
> (b) For one year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days.[34]
>
> § 1002.248 **What constitutes cause for discharge under USERRA?**
>
> The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.
>
> (a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for

[32] Please see Law Review 14044 (March 2014) and Law Review 13061 (May 2013) with respect to reinstatement of your civilian health insurance coverage upon returning to work after a period of uniformed service.
[33] 38 U.S.C. 4316(c).
[34] 20 C.F.R. 1002.247 (bold question in original).

discharge.

(b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.[35]

Am I entitled to any benefits from my employer during the time that I am away from work performing uniformed service?

Yes, under USERRA's "furlough or leave of absence" clause. Here is the text of that provision:

(b) (1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2) (A) Subject to subparagraph (B), a person who--

(i) is absent from a position of employment by reason of service in the uniformed services, and

(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,

is not entitled to rights and benefits under paragraph (1)(B).

(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.[36]

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[35] 20 C.F.R. 1002.248 (bold question in original). Also, please see Law Review 13110 (August 2013) with respect to USERRA's "special protection against discharge" provision.

[36] 38 U.S.C. 4316(b).

I also invite your attention to four pertinent sections of the DOL USERRA Regulations:

> § 1002.149 **What is the employee's status with his or her civilian employer while performing service in the uniformed services?**
>
> During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.[37]
>
> § 1002.150 **Which non-seniority rights and benefits is the employee entitled to during a period of service?**
>
> (a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.
>
> (b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.
>
> (c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the

[37] 20 C.F.R. 1002.149 (bold question in original).

employer provides that benefit to similarly situated employees on comparable leaves of absence.[38]

§ 1002.151 **If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?**

Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.[39]

§ 1002.152 **If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?**

If employment is interrupted by a period of service in the uniformed services and the employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.[40]

I recently left my job with the state government for a three-year Active Guard and Reserve (AGR) tour. When this three-year AGR tour ends, I will likely sign up for another such tour, which would put me over USERRA's five-year limit. When I left my state job for this AGR tour, I had 45 days of annual leave in the bank. I think that it is unlikely although not impossible that I will be returning to the state job. Do I have the right to "sell back" the 45 days of annual leave to the state while I am on active duty?

Yes, under section 4316(d) of USERRA. That subsection provides:

> Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.[41]

I also invite your attention to the pertinent section of the DOL USERRA Regulations:

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[38] 20 C.F.R. 1002.150 (bold question in original). Also, please see Law Review 41 (April 2002) concerning the "furlough or leave of absence" clause.
[39] 20 C.F.R. 1002.151 (bold question in original).
[40] 20 C.F.R. 1002.152 (bold question in original).
[41] 38 U.S.C. 4316(d).

§ 1002.153 **If employment is interrupted by a period of service in the uniformed services, is the employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employer require the employee to use accrued leave during a period of service?**

(a) If employment is interrupted by a period of service, the employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the employee is not entitled to use sick leave that accrued with the civilian employer during a period of service in the uniformed services, unless the employer allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employer may not require the employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.[42]

Does USERRA apply to wounded warriors?

Most definitely, yes. If the person leaving a period of service in the uniformed services is hospitalized or convalescing from an injury or illness incurred or aggravated during the period of service, the deadline to apply for reemployment can be extended during the period of hospitalization or convalescence, for up to two years.[43]

If a person who meets the USERRA eligibility criteria returns to work with a disability (permanent or temporary) incurred or aggravated during the period of service, the employer must make reasonable efforts to accommodate the disability in the position that the person is entitled to under USERRA.[44]

Of course, some disabilities cannot be reasonably accommodated in certain positions of employment. The blinded veteran cannot return to the cockpit of an airliner. If the disability cannot be accommodated in that position, the employer must reemploy the individual in some other position for which the individual is qualified, *or can become qualified with reasonable employer efforts,* and that provides like seniority, status, and pay, or the closest approximation feasible under the circumstances of the returning disabled veteran's case.[45]

Does USERRA forbid discrimination?

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[42] 20 C.F.R. 1002.153 (bold question in original).
[43] *See* 38 U.S.C. 4312(e)(2).
[44] *See* 38 U.S.C. 4313(a)(3).
[45] *See* 38 U.S.C. 4313(a)(4). Also, please see Law Review 0854 (November 2008) and Law Review 0640 (December 2006) with respect to the employer's USERRA obligations to the returning disabled veteran. Law Review 0640 is by Lisa C. Cassilly, Esq. and Matthew J. Gilligan, Esq.

Yes. Section 4311 of USERRA provides as follows:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person
> (1) has taken an action to enforce a protection afforded any person under this chapter,
> (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,
> (3) has assisted or otherwise participated in an investigation under this chapter, or
> (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
> (c) An employer shall be considered to have engaged in actions prohibited—
> (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
> (2)under subsection (b), if the person's
> (A) action to enforce a protection afforded any person under this chapter,
> (B) testimony or making of a statement in or in connection with any proceeding under this chapter,
> (C) assistance or other participation in an investigation under this chapter, or
> (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
> (d)The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)1)(C) of this title.[46]

Section 4311 was included in USERRA because Congress recognized that without such a section an employer could easily circumvent USERRA by firing employees who were NG&R members or by denying them hiring in the first place. To win a section 4311(a) case, you need to prove that your membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service was *a motivating factor* in the employer's decision to deny you initial employment, to fire you, or to deny you a promotion or benefit of employment. To win a section 4311(b) case, you need to prove that your exercise of section 4311(b) rights (exercising your

[46] 38 U.S.C. 4311. Also, please see Law Review 15106 (November 2015) for a detailed discussion of section 4311.

USERRA rights, filing a claim, participating in an investigation, etc.) was *a motivating factor* in the employer's decision.

You need not prove that your membership in a uniformed service or other protected factor was *the reason* for the employer's unfavorable decision. If you prove that a protected factor or activity was *a motivating factor* in the employer's decision, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer to prove that the employer would have made the unfavorable decision anyway even in the absence of the protected factor.

Is section 4311 limited to NG&R service? I served in the Marine Corps, on active duty, from 1965 to 1969, and I served two tours in Vietnam. I applied for a job in 2012 and did not get it. I think that the employer does not like me because I served in the Marine Corps. Can I file a section 4311 claim?
Yes, you can certainly file such a claim, but please do not waste everyone's time by filing a claim that you cannot possibly prove. To prevail on such a claim, you need to prove that your military service more than 40 years ago was *a motivating factor* in the employer's decision not to hire you.
If you are currently serving in the NG&R, the employer may have a motive to discriminate against you, because your military training and service may be inconvenient for the employer to accommodate. If you completed your military service decades ago, your military service in no way impinges on the employer. Thus, it would seem unlikely that your military service motivated the employer's decision not to hire you.

There are probably a few employers in this country who have an ideological objection to military service, even service decades ago. Perhaps the employer said "if you served in the Marine Corps in Vietnam you must be a baby-killer" or words to that effect. If you have evidence of that kind, pursuing a section 4311 claim may be worthwhile. In the absence of such evidence, it would be a waste of everyone's time for a person in your situation to file a section 4311 claim.

How do I enforce my USERRA rights?

If you are a member of the NG&R and you are having difficulty with your civilian employer about your military training and service, I suggest that your first call should be to Employer Support of the Guard & Reserve (ESGR), a Department of Defense organization established in 1972. ESGR's mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the NG&R. You can call ESGR toll-free at 800-336-4590. I also invite your attention to the ESGR website, www.esgr.mil.

ESGR will refer you to an ESGR volunteer ombudsman in your state. Upon your request, the ombudsman will contact the employer on your behalf and try to work out the problem. The ESGR process is non-confrontational and quick. ESGR will normally resolve the matter within two weeks or tell you that it cannot resolve it and that you should consider your next step.

If you want free legal help from the U.S. Government in asserting your USERRA claim, you must file a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency will investigate your complaint and try to persuade the employer to come into compliance, if the DOL-VETS investigation suggests that your claim has merit. If the DOL-VETS investigation does not result in a satisfactory resolution, you can request (essentially insist) that DOL-VETS refer your case to the United States Department of Justice (DOJ), if the employer is a state, a political subdivision of a state, or a private employer. If your employer is a federal agency, DOL-VETS will refer the case to the United States Office of Special Counsel (OSC).

If DOJ believes your case to have merit, DOJ will file suit on your behalf, at no cost to you, in the appropriate United States District Court and will represent you in your case. Similarly, if OSC finds your case to have merit, it will initiate a case on your behalf in the Merit Systems Protection Board (MSPB) and will represent you. In a typical year, DOJ initiates 15-25 cases in federal court against state and local governments and private employers, and OSC initiates a somewhat larger number of USERRA cases against federal agencies, as employers.

A much larger number of cases are brought privately, by attorneys retained by USERRA plaintiffs, against federal agencies (in the MSPB) and against private employers and local governments (in federal district courts). Unlike other federal employment laws, USERRA has no "exhaustion of remedies" rule and you don't need a "right to sue letter" before you file suit in federal court or in the MSPB.

You can file suit in federal court or the MSPB without ever having contacted DOL-VETS. If you file with DOL-VETS and get tired of waiting on them to complete their investigation, you can direct DOL-VETS to close its case, and then you can file suit. If the DOL-VETS investigation does not result in resolution, you can file suit instead of requesting that DOL-VETS refer the case to DOJ or the OSC. Finally, if the case is referred and DOJ or the OSC turns down your request for representation, you can then file suit in your own name with your own lawyer.

You can also bring the suit yourself and represent yourself—we call this a *pro se* case. *I do not recommend this course of action.* Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law today is so much more complex than it was when Abraham Lincoln was practicing law.

If you proceed with private counsel and prevail, the court or the MSPB can award you attorney fees, in addition to other relief.[47]

Regardless of who represents you, the federal district court can award significant relief if you prevail. First, the court will order the employer to come into compliance.[48] If you were fired unlawfully, or if you were unlawfully denied reemployment, the court will order the employer to reinstate you and to pay you back pay and other relief to make you whole for the violation. If the court finds that the

[47] 38 U.S.C. 4323(h)(2) (court) and 4324(c)(4) (MSPB).
[48] 38 U.S.C. 4323(d)(1)(A).

employer violated USERRA willfully, the court will order the employer to pay you an amount equal to the actual damages, and in addition to those damages, as *liquidated damages.*[49] This effectively doubles the award if the court finds that the violation was willful. The MSPB will order similar relief, except that there is no provision for ordering a federal agency to pay liquidated (double) damages for willful violations.[50]

Generally speaking, I think that you are better off with private counsel, if you can find a qualified attorney who is willing to represent you on a contingent fee basis. A private attorney will approach the case as your *advocate,* not as a neutral third-party investigator. A private attorney will consider other statutes and legal theories, in addition to USERRA. A private attorney will act much more expeditiously than DOL-VETS, DOJ, and OSC.

There is generally nothing fast about litigation in federal district court, but the MSPB process works much more quickly. The long time it takes to complete the discovery process and set the case for trial does not even start until you file your case. If you retain private counsel, you can probably expect the lawyer to file suit within a few weeks and possibly sooner. If you rely on DOL-VETS and DOJ, there will likely be a delay of more than a year before the case is filed.

Complaints about the slowness of the legal system are not new. I invite your attention to Act III, Scene 1 of *Hamlet,* written by William Shakespeare in 1602. This is the famous "to be or not to be" soliloquy. While contemplating offing himself, Prince Hamlet spouts off a litany of all that is wrong with human life. "The law's delays" is one item in a very long list. That situation has only gotten worse in the intervening 413 years.

There is one situation where I think that you are better off relying on DOL-VETS and DOJ, rather than retaining private counsel to sue on your behalf. The exception is when your employer is a state agency. Because of the 11th Amendment of the United States Constitution, you cannot sue a state in federal court, as an individual. You can sue a state government employer in state court.[51]

If DOJ is bringing a suit on your behalf against a state government agency, as employer, the named plaintiff is the United States of America. This gets around the 11th Amendment problem, but it means that you must wait on DOL-VETS and DOJ, and their processes can be very time-consuming.

Summary

Our "Law Review" articles at www.servicemembers-lawvcenter.org have a wealth of information about USERRA, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

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[49] 38 U.S.C. 4323(d)(1)(C).
[50] 38 U.S.C. 4324(c).
[51] 38 U.S.C. 4323(b)(2).