

USERRA Applies to Paid Internships

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Update on Sam Wright

1.1.1—USERRA coverage of employers

1.1.2.1—USERRA coverage of part-time, temporary, probationary, and at-will employees

1.7—USERRA regulations

Q: Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) apply to paid internships? What about unpaid internships?

A: Yes. USERRA most definitely applies to persons who hold or apply for paid internship positions. Section 4303 of USERRA defines 16 terms used in this law, including the term “employee” and the term “employer.” “The term ‘employee’ means any person employed by an employer.”³ “Except as provided in subparagraphs (B) and (C) [not pertinent here], the term ‘employer’ means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities ...”⁴

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1400 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1200 of the articles.

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 six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. I invite the reader’s attention to Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have been dealing with USERRA (enacted in 1994) and the predecessor reemployment statute (enacted in 1940) for more than 33 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 new reemployment statute that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Bill Clinton signed on 10/13/1994 (Public Law 103-353) was 85% the same as the Webman-Wright draft. I have also dealt with the reemployment statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called “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. After ROA wound down the SMLC last year, I returned to Tully Rinckey PLLC, this time in an “of counsel” relationship. To arrange a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

³ 38 U.S.C. 4303(3). The citation refers to subsection 3 of section 4303 of title 38 of the United States Code. USERRA is codified in title 38 at sections 4301 through 4335 (38 U.S.C. 4301-4335).

⁴ 38 U.S.C. 4303(4)(A).

Section 4331 of USERRA⁵ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published draft regulations, for notice and comment, in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in December 2005. The USERRA Regulations are published in the Code of Federal Regulations, title 20, Part 1002. The pertinent section is as follows:

USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.⁶

USERRA does not apply to unpaid internships and it does not apply to volunteer positions, like in the Volunteer Fire Department. Many unpaid internships are unlawful under a federal law called the Fair Labor Standards Act (FLSA), the law that requires employers to pay at least the minimum wage and to pay “time and a half” (150% of the regular wage) to non-exempt employees for hours in excess of 40 in a week.

To be lawful under the FLSA, an unpaid internship must be an *educational opportunity, not a job*. Any benefit to the sponsor of the internship must be purely incidental. If the interns are performing work (supplementing or substituting for the paid employees of the employer), they are employees for FLSA purposes and must be paid at least the minimum wage. Especially in Washington, DC, many employers routinely flout the FLSA by putting unpaid interns to work. These employers are risking substantial liability under the FLSA, for back pay, treble damages for willful violations, and attorney fees.

⁵ 38 U.S.C. 4331.

⁶ 20 C.F.R. 1002.34(a).