

Congress Amends USERRA To Provide Reemployment Rights to Urban Search and Rescue Personnel

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1.1.3.6—USERRA applies to National Disaster Medical System service

1.1.3.6a—USERRA applies to National Urban Search & Rescue service

1.3.1.1—Left job for service and gave prior notice

1.8—Relationship between USERRA and other laws/policies

On December 16, 2016 President Obama signed the National Urban Search and Rescue Response System Act of 2016 (NUSRRSA).⁴ Urban search and rescue, which involves locating, rescuing (extricating), and providing initial medical stabilization to individuals trapped in collapsed buildings and other confined spaces, has been an important function organized by the Federal

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,600 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, 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. Wright is the author of more than 1,400 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for more than 34 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 VRRRA 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 VRRRA 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.

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⁴ Public Law 114-326, 130 Stat. 1968.

Emergency Management Agency (FEMA) for many years. The authorization for this essential lifesaving function has now been codified through this Act.

This Act also extends reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵ to persons who serve in the National Urban Search and Rescue Response System (NUSRRS) when they leave state or local government or private sector jobs in response to a FEMA mobilization of the NUSRRS.

Under NUSRRSA,⁶ an individual can sign up as a “system member” if he or she is not a full-time employee of the Federal Government and if he or she is accepted into a task force or a System management or other technical team. If a member leaves his or her job to participate in exercises, pre-incident staging, major disaster and emergency response activities, or training events that are sponsored or sanctioned by FEMA, he or she can have the right to reemployment under USERRA.

As Wright has explained in Law Review 15116 (December 2015) and other articles, a person has the right to reemployment under USERRA if he or she meets five simple conditions:

- a. Left a civilian job to perform voluntary or involuntary service in the uniformed services.⁷
- b. Gave the employer prior oral or written notice⁸ unless giving such notice was precluded by military necessity (as determined by military authorities) or otherwise impossible or unreasonable (as shown by the facts).⁹
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.¹⁰
- d. Was released from the period of service without having received a disqualifying bad conduct discharge from the uniformed service.¹¹
- e. After release from the period of service, was timely in reporting back to work or applying for reemployment.¹²

⁵ Public Law 103-353, codified as amended at 38 U.S.C. 4301-4335.

⁶ The National Urban Search and Rescue Response System Act creates a new section 327 in the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, et seq. This new section 327 has not yet been codified in the U.S. Code as of the date of publication of this article.

⁷ 38 U.S.C. 4312(a).

⁸ 38 U.S.C. 4312(a)(1).

⁹ 38 U.S.C. 4312(b).

¹⁰ 38 U.S.C. 4312(c). As Wright has explained in detail in Law Review 16043 (May 2016) and other articles, there are nine exemptions—kinds of service that do not count toward exhausting a person’s five-year limit.

¹¹ 38 U.S.C. 4304.

¹² After a period of service of fewer than 31 days, the person is required to report back to work at the start of the first scheduled work period on the first calendar day after release from the period of service and the time reasonably required for safe transportation from the place of service to the person’s residence plus eight hours (for rest). 38 U.S.C. 4312(e)(1)(A)(i). After a period of service of more than 30 days but fewer than 181 days, the person has 14

Now, these same conditions will apply to a person who leaves a civilian job (state, local, or private sector) for service in the NUSRRS in response to a FEMA mobilization. For example, Gloria Bunker Stivic is a bartender at Archie's Bar & Grill in Queens, New York and is a technician for a System task force, properly enrolled and certified. After a group of terrorists crash an airplane into the Empire State Building, FEMA appoints her Task Force to respond. She hangs up her apron and rushes to the site and immediately joins with her colleagues in systematically searching for survivors and rescuing them from the rubble. Her assignment to the site lasts for 40 days, after which she rests for five days and then applies for reemployment at the bar. She has the right to reemployment because she meets the five USERRA conditions and she was appointed into Federal service.

Under section 4312(b) of USERRA,¹³ prior notice to the civilian employer is not required in cases where military authorities have determined, in accordance with Department of Defense regulations, that "military necessity" precludes giving such notice. Now, the FEMA Administrator has the authority to determine that "military necessity" precludes giving prior notice to civilian employers in the case of urban search and rescue personnel.¹⁴ As you can readily appreciate, this is the ultimate "time is of the essence" situation. If Gloria waits even one hour for the end of happy hour at the bar to report to the site of the collapsed building, there will likely be additional fatalities at the site.

As Wright has explained in Law Review 100 (December 2003), in June 2002 Congress enacted Public Law 107-188, and that law provided USERRA rights to Intermittent Disaster Response Appointees of the National Disaster Medical System (NDMS). The 2002 law provided USERRA rights by amending section 300hh-11 of title 42 of the United States Code, not by amending USERRA. This new law amends USERRA. This is a better approach because it means that an employer or employer attorney who reads USERRA will see that these urban search and rescue personnel are now covered by the reemployment statute.

There now needs to be an effort to inform employers of this recent USERRA amendment. We will keep the readers informed of progress.

UPDATE AUGUST 2017

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

In late August 2017, the Federal Emergency Management Agency (FEMA) mobilized 400 National Urban Search and Rescue personnel and has deployed them to Texas to save lives threatened by

days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

¹³ 38 U.S.C. 4312(b).

¹⁴ See § 2 of Pub. L. 114-326 (inserting § 327(j)(2) into the Stafford Act).

Hurricane Harvey. Under the late-2016 amendment to the Uniformed Services Employment and Reemployment Rights Act (USERRA), as described in this article, these urban search and rescue personnel have a legally enforceable right to reemployment in jobs they have left to save lives in Texas.

For example, Gloria Bunker Stivic, an urban search and rescue technician, has left her bartender job at Archie's Bar & Grill in Queens, New York and has deployed to Texas. When she completes her deployment and returns to New York, she has the right to reemployment at the bar, just like a reservist returning from duty in the Army Reserve or any other Reserve Component. *Employers take notice.*

UPDATE JUNE 2020

The article above states at footnote 6 that under NUSRRSA, "an individual can sign up as a 'system member' *if he or she is not a full-time employee of the Federal Government* and if he or she is accepted into a task force or a System management or other technical team" (emphasis added).¹⁵

This is no longer true. Congress enacted a legislative fix in August 2019 to authorize federal employees to be members of a US&R task force.¹⁶ This enactment added a new subsection (p) to Stafford Act § 327 to provide in relevant part: "Nothing in this section shall be construed to mean that a task force may not include Federal employees."¹⁷

This new subsection (p) nullifies for practical purposes the contradictory provision elsewhere in Stafford Act § 327 that excludes federal employees from the definition of "System member."¹⁸

¹⁵ Footnote 6 states that Stafford Act § 327 was not codified in the U.S. Code at the time that this article was first published. Stafford Act § 327 is now codified at 42 U.S.C. 5165f.

¹⁶ Pub. L. 116-48.

¹⁷ Stafford Act § 327(p) is now codified at 42 U.S.C. 5165f(p).

¹⁸ Stafford Act § 327(a)(8) (42 U.S.C. 5165f(a)(8)) ("The term 'System member' means an individual who is not a full-time employee of the Federal Government and who serves on a task force or on a System management or other technical team.").