

LAW REVIEW 17025¹

March 2017

Don't Expect the Employer To Help You Exercise your USERRA Rights

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

Update on Sam Wright

1.0—USERRA generally

Q: I am the same retired Army Reserve noncommissioned officer who asked the questions in Law Review 17024, the immediately preceding article in this series. After I was finally released from active duty, with a disability retirement, on December 31, 2016, I contacted my direct supervisor at the federal law enforcement agency where I worked from July 2007 (when I was hired) until July 2011 (when I was called to active duty in the Army Reserve). I also contacted the agency's personnel office and its legal office. I asked for information, advice, and assistance about my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The folks that I talked to, starting with my direct supervisor, seemed to be only vaguely aware of USERRA, if they had heard of the law at all. Does USERRA require my employer to give me information about this law and to assist me in exercising my USERRA rights?

A: No. USERRA's only requirement that employers inform employees of their USERRA rights is as follows:

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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 the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—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 VRRA 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 VRRA 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me at (800) 809-9448, extension 730, or by e-mail at SWright@roa.org. Please understand that I am a volunteer, so I may not be able to respond to you the same day.

- **(a)** Requirement to provide notice. Each employer shall provide to persons entitled to rights and benefits under this chapter [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. *The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.*
- **(b)** Content of notice. The Secretary shall provide to employers the text of the notice to be provided under this section.³

The place “where employers customarily place notices for employees” is often the employee break room or dressing room. At that place, you can find more than two dozen notices about laws that include such notice-posting requirements, including the Fair Labor Standards Act, the Occupational Safety and Health Act, the Employee Polygraph Protection Act, etc. These notices are usually posted on large laminated plastic sheets that are sold by office supply companies. Very few employees read these notices, and of those who read them very few understand them.

The required USERRA notice is necessarily cursory. Reading the notice would not help you much with your present issue. The notice does not mention USERRA’s provisions for returning disabled veterans or the provision for delaying the deadline for applying for reemployment while one is hospitalized or convalescing from an injury or illness incurred while away from the job for military service.

Attorneys in the agency’s legal office represent the agency, not individual employees of the agency. It would be clearly improper for an attorney in the agency’s legal office to advise you about your legal rights with respect to the agency, as your employer.

The personnel office should be familiar with USERRA and should apply it in good faith, just as it applies other federal laws that govern the relationship between employers and employees. But federal personnel officials are often woefully ignorant of USERRA. Moreover, the personnel office works for the agency—it does not work for you.

In 2008, Congress amended USERRA by adding a new final section requiring that federal human resources personnel have periodic training on USERRA. That section provides:

- **(a)** Training required. The head of each Federal executive agency shall provide training for the human resources personnel of such agency on the following:
 - **(1)** The rights, benefits, and obligations of members of the uniformed services under this chapter.

³ 38 U.S.C. 4334 (emphasis supplied).

- **(2)** The application and administration of the requirements of this chapter by such agency with respect to such members.
- **(b)** Consultation. The training provided under subsection (a) shall be developed and provided in consultation with the Director of the Office of Personnel Management.
- **(c)** Frequency. The training under subsection (a) shall be provided with such frequency as the Director of the Office of Personnel Management shall specify in order to ensure that the human resources personnel of Federal executive agencies are kept fully and currently informed of the matters covered by the training.
- **(d)** Human resources personnel defined. In this section, the term "human resources personnel", in the case of a Federal executive agency, means any personnel of the agency who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter [USERRA] with respect to employees of the agency.⁴

This USERRA training requirement is not taken seriously in most federal executive agencies. USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."⁵ But most federal agencies routinely flout this congressional expectation. The Federal Government is among the worst employers with respect to USERRA compliance.

Q: Where can I go or who can I contact to obtain timely and competent USERRA advice?

A: Here are some sources, with the strengths and weaknesses of each:

ESGR

In 1972, when Congress abolished the draft and created the All-Volunteer Military, DOD established the organization called Employer Support of the Guard and Reserve (ESGR). The organization'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 National Guard and Reserve. ESGR volunteers ask employers to sign "Statements of Support" pledging to support employees and potential employees who serve in the Reserve Components (RC) of the armed forces.⁶ ESGR

⁴ 38 U.S.C. 4335.

⁵ 38 U.S.C. 4301(b).

⁶ Our nation has seven Reserve Components. In order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The Army National Guard and Air National Guard are hybrid federal-state institutions, while the other five components are purely federal. RC service is no longer limited to "one weekend per month and two weeks in the summer." Almost one million RC personnel have been called to the colors since the terrorist attacks of 9/11/2001.

also honors employers who go above and beyond USERRA in supporting RC service. ESGR has a series of awards, culminating in the prestigious national “Freedom Award” given annually to about 15 employers at a black-tie banquet in DC. Through a force of several hundred volunteer ombudsmen, ESGR works with RC members and their civilian employers to resolve disputes about RC service and absences from work necessitated by that service. You can reach ESGR toll-free at 800-336-4590. You can find the organization’s website at www.esgr.mil.

Strengths

First, ESGR is free—both to the RC member and to the civilian employer. The ESGR service is informal and nonconfrontational. It is also quick. Normally, ESGR will either resolve the dispute within two weeks or advise the RC member and the employer that it is unable to resolve the dispute.

Limitations

Most ESGR ombudsmen are not attorneys, and those who are attorneys are told by ESGR headquarters that they must not act as attorneys when serving as ombudsmen. If you have a detailed legal question or need legal representation, the ESGR ombudsman is not the place to go.

For example, if you need to know what kinds of service count toward your five-year limit with your current employer and what periods are exempt, don’t ask the ombudsman or the person who answers the telephone at ESGR headquarters. For detailed information about the five-year limit, see Law Review 16043 (May 2016), Law Review 16075 (August 2016), and Law Review 17002 (January 2017).

Under ESGR policy, the ombudsmen are not to act as advocates for the RC member and are not to tell employers that their conduct violates USERRA. ESGR headquarters stresses that the ombudsmen are to be neutral mediators, not advocates.

DOL-VETS, DOJ, and OSC

A person claiming that an employer or potential employer has violated USERRA can make a formal written complaint to the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). The service member or veteran can file such a complaint through the DOL-VETS website, which is www.dol.gov.vets. The agency will investigate the complaint, and it has subpoena authority.

Upon completing the investigation, DOL-VETS will advise the complainant and the employer of the results of the investigation and of the complainant’s options for enforcing his or her rights.

If the employer is a state, a political subdivision of a state (local government), or a private employer, DOL-VETS will refer the case file to the United States Department of Justice (DOJ), upon request of the complainant. If the employer is a federal agency, DOL-VETS refers the case file to the United States Office of Special Counsel (OSC).

If DOJ agrees that the case has merit, it may bring an action on behalf of the complainant in the appropriate federal district court. If OSC agrees that a federal employee case has merit, it may bring an action for the complainant in the Merit Systems Protection Board (MSPB).

In the absence of a formal written complaint, DOL-VETS can and does provide technical assistance to RC members and their civilian employers about their rights and obligations under USERRA.

Strengths

The services of DOL-VETS, DOJ, and the OSC are free to the complainant. Unlike ESGR, DOL-VETS has clout, in that it can credibly threaten the employer with litigation for non-compliance.

Limitations

Some DOL-VETS investigators have a bad habit of accepting as gospel the factual and legal assertions of attorneys representing employers and closing as “no merit” cases that really do have merit. Recently, there has been improvement in the performance of DOL-VETS. Please see Law Review 16099 (September 2016).

DOL-VETS, DOJ, and OSC can only examine and consider your USERRA rights. If you were fired or denied a promotion, you may have other possible legal theories available to you. You can claim that the firing violated your contractual rights or a state law, or that you were fired because of your age, in violation of the federal Age Discrimination in Employment Act (ADEA). If you have other legal theories to advance, you will need private counsel.

DOL-VETS investigators are not lawyers.⁷ They can certainly provide general information about USERRA, but they are not necessarily qualified to answer complicated USERRA questions, like questions about the five-year limit.

MILITARY LEGAL ASSISTANCE ATTORNEYS

⁷ A few of them are law school graduates and bar members, but under DOL policy they are not permitted to act as attorneys in their DOL employment.

There are military legal assistance offices at major military bases. Go to legalassistance.law.af.mil/content/legal_activities.php. This website is run by the Air Force, but it shows legal assistance offices for all five services. If you are eligible for military legal assistance, you can get it at a legal assistance office for any service. You are not limited to your own service.

On this website, you put in your zip code, and the service will show you the location and telephone number for nearby legal assistance offices. For example, I input my home zip code (76704 in Waco), and the closest office is 45 miles away at Fort Hood.

Under longstanding policy, military legal assistance attorneys are not permitted to give legal advice by telephone. You must call and make an appointment and then show up in person.

Strengths

This service is free to eligible beneficiaries.

Limitations

RC members are not generally eligible for military legal assistance, except when they are on active duty or immediately before or immediately after an active duty period. Because military legal assistance attorneys will not provide advice and information by telephone or e-mail, you may have to travel hundreds of miles for an appointment in person.

A military legal assistance attorney can give you advice and information and can write a letter to an employer or other party that may have violated your rights. A military legal assistance attorney is not authorized to initiate a legal proceeding or to appear in court for a service member, as plaintiff or defendant, in a civil legal proceeding. Moreover, military legal assistance attorneys are not necessarily well informed about USERRA.

ABA MILITARY PRO BONO PROJECT

The American Bar Association (ABA) operates a free service for junior enlisted active duty service members and for military judge advocates advising service member clients. You can access the service at militaryprobono.org. The site includes the following explanation:

The ABA Military Pro Bono Project accepts case referrals from military attorneys on behalf of junior-enlisted, active-duty military personnel and their families with civil legal problems, and it places these cases with pro bono [free] attorneys where the legal

assistance is need. The Project is also the platform for Operation Stand-By, through which military attorneys may seek attorney-to-attorney guidance.⁸

Strengths

This service is free. The pro bono attorneys who represent service members through this project are almost always highly qualified and diligent.

Limitations

The referral needs to come through a military legal assistance office. The Project is not set up to advise and assist service members directly. If you are not on active duty, or if you are not a junior enlisted service member, you are not eligible for this free service.

HIRING A LAWYER

If you file a complaint with DOL-VETS, you can choose to retain private counsel and initiate a proceeding in federal district court or in the MSPB, instead of requesting referral to DOJ or OSC. If you request referral and you are turned down by DOJ or OSC, you can then retain private counsel and bring your own proceeding.⁹

You can also bypass DOL-VETS altogether. You can retain private counsel and bring your action in federal district court or the MSPB. You do not need a “right to sue” letter from DOL-VETS. You can also hire a lawyer to advise you about complex USERRA issues.

Strengths

If you hire a lawyer, he or she will be your advocate, not a neutral investigator. Moreover, the lawyer will not be limited to USERRA. He or she can consider other federal and state statutes and legal theories and come up with the best strategy to protect your interests.

Limitations

The cost of paying the attorney will likely be quite substantial. If you have a strong case and the possibility of recovering substantial monetary damages, the attorney may be willing to

⁸ Emphasis supplied.

⁹ You can also represent yourself, but I do not recommend that course of action. Abraham Lincoln said, “A man who represents himself has a fool for a client.” And the law is much more complex today than it was in Lincoln’s time.

represent you on a contingent fee basis. In such an arrangement, the attorney's fee is a percentage of the recovery. If you do not recover money damages, you do not owe the attorney anything for his or her services.

Even if the attorney is representing you on a contingent fee basis, you will likely be responsible for paying court costs (like the cost of hiring a court reporter to record the questions and answers at a deposition) as those costs are incurred. Please see Law Review 16099 (September 2016).

The attorney will prepare a retainer agreement and ask you to sign it, and will not initiate the representation until you have signed it. As with any contract, it is important that you read the agreement carefully and understand it fully before you sign.

Service Members Law Center

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I have been dealing with the VRRA and USERRA for almost 35 years, and I have made protecting the rights of service members (especially reemployment rights and voting rights) the focus of my military career and my legal career. 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 work product of an interagency task force that studied the VRRA with a view toward suggesting improvements. President George H.W. Bush presented our draft to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft.

I have also dealt with the VRRA and USERRA 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), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC).

I was the SMLC Director, as a full-time employee of ROA, for exactly six years, from June 2009 through May 2015. During that time, I received and responded to approximately 35,000 e-mail and telephone inquiries from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. About half of

the inquiries were about USERRA, and the other half were about other military-legal issues. Please see Law Review 15052 (June 2015) for a detailed discussion of the accomplishments of the SMLC.

My ROA employment ended May 31, 2015, but I have continued the work of the SMLC as a volunteer. I am still available by telephone or e-mail, but I am no longer in the DC metro area. You can reach me by telephone at (202) 210-4194 (cell phone) or by e-mail at samwright50@yahoo.com.

If you have questions about military-legal issues, and especially about USERRA, please check out our Law Review Library at www.roa.org/lawcenter. If you do not find the answer to your specific question, please contact me by e-mail or telephone. I will discuss the matter with you free of charge for up to one hour. If you need more than that, I will charge a very reasonable fee. If you need legal representation, I know several attorneys that I can refer you to, attorneys who are well qualified to represent plaintiffs in USERRA cases or other military-related cases.

If you already have an attorney, please inform the attorney of our Law Review Library and invite him or her to contact me by e-mail or telephone. The same offer applies to attorneys—up to one hour free and a reasonable fee beyond that.