

## LAW REVIEW 17029<sup>1</sup>

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### USERRA Applies all over the World to the United States Government and other United States Employers

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Update on Sam Wright

1.1.1.5—USERRA applies to employers outside the United States

1.1.1.8—USERRA applies to the Federal Government

**Q: I am a Major in the Army Reserve, presently on active duty, and I joined the Reserve Officers Association (ROA) recently. I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**On the civilian side, I work for a Department of Defense (DOD) organization in Germany. I live in Germany and have a German wife. I perform my Army Reserve drills and annual training at another DOD facility in Germany, about 100 miles away from where I live and work.**

**Last July (2016), I left my DOD civilian job for one year of voluntary active duty in the Army. I have read your Law Review 15116 (December 2015). I clearly meet or will soon meet the five conditions for reemployment under USERRA. I left my civilian job in July 2016 to perform**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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.

**uniformed service, and I gave the employer prior oral and written notice. I am very familiar with USERRA's five-year limit,<sup>3</sup> and I still have three years of headroom on my five-year limit. I have served honorably, and I will not receive a disqualifying bad discharge from the Army. I have kept my civilian supervisor informed of my location and my plans, and I expect to make a formal application for reemployment on the day after I leave active duty.**

**I recently spoke to a civilian employee of the personnel department of my civilian employer, concerning my upcoming return to work. She said that the employer has no obligation to reemploy me because USERRA does not apply outside the United States? Is she correct?**

**Answer (bottom line up front):**

She is clearly wrong. USERRA applies all over the world to the United States Government and other United States employers.

**Explanation:**

### **USERRA—the basics**

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA<sup>4</sup> in 1994, as 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).<sup>5</sup> The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II.

During the congressional debates on the STSA, Senator Elbert Thomas of Utah conceived of the idea of requiring civilian employers to reemploy those who were called to the colors, and he offered an amendment to require such reemployment. He explained the rationale for his amendment as follows:

It is not unreasonable to require the employers of such men [those who will be drafted under the law we are considering today] to rehire them upon the completion of

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<sup>3</sup> Please see Law Review 16043 (May 2016).

<sup>4</sup> Public Law 103-353, 108 Stat. 3162. The citation means that USERRA was the 353<sup>rd</sup> Public Law enacted during the 103<sup>rd</sup> Congress (1993-94), and you can find this law, in the form that it was enacted in 1994, in Volume 108 of *Statutes at Large*, starting on page 3162. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). USERRA has been amended several times since it was enacted in 1994. As I shall explain further below, a 1998 amendment is especially pertinent to your case.

<sup>5</sup> Public Law 76-783, 54 Stat. 885.

their service, since the lives and property of employers, as well as the lives and property of everyone else in this country, are defended by such service.<sup>6</sup>

Senator Thomas' eloquent argument persuaded his colleagues in the Senate, and later in the House, and the original VRRA was included in the STSA as it was signed into law by President Franklin D. Roosevelt in 1940. As originally enacted, the VRRA only applied to draftees, but just one year later, as part of the Service Extension Act of 1941,<sup>7</sup> Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees.

**USERRA applies to the United States Government and other United States employers outside the United States.**

In 1998, Congress amended USERRA by adding a section that makes clear that USERRA has extraterritorial application. That section reads as follows:

**§ 4319. Employment and reemployment rights in foreign countries**

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- (a) Liability of controlling United States employer of foreign entity. If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.
- (b) Inapplicability to foreign employer. This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by an United States employer.
- (c) Determination of controlling employer. For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.
- (d) Exemption. Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.<sup>8</sup>

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<sup>6</sup> 96 Cong. Rec. 10573. Senator Thomas' eloquent statement is quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8<sup>th</sup> Cir. 1991).

<sup>7</sup> Public Law 77-213, 55 Stat. 626, 627.

<sup>8</sup> 38 U.S.C. 4319.

USERRA applies to a DOD organization in Germany just as much as it applies to the Army War College in Pennsylvania.

**USERRA applies with special force to the Federal Government, especially DOD.**

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."<sup>9</sup> This expectation should apply especially to DOD and the services, because they are the principal beneficiaries of USERRA. I have written:

I think that it is unconscionable that the Air Force, as a civilian employer, flouts USERRA. As I explained in Law Review 16055 (June 2016) and Law Review 16036 (April 2016), Congress has stated its expectation that the Federal Government should be a model employer in carrying out the provisions of USERRA. An armed force, when acting as a civilian employer, should be triply the model employer. How do we get the restaurant owner in Dayton to comply with USERRA when she learns that the Air Force, at nearby Wright-Patterson Air Force Base, flouts this law?<sup>10</sup>

I have also written:

Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).

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<sup>9</sup> 38 U.S.C. 4301(b).

<sup>10</sup> Law Review 16064 (July 2016). In that article, I discussed the case of *Hayden v. Department of the Air Force*, 812 F.3d 1351 (Fed. Cir. 2016).

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is definitely a compelling government interest in the enforcement of USERRA.<sup>11</sup>

### **Obtaining information about USERRA**

I have been dealing with USERRA and the predecessor reemployment statute 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 USERRA and the predecessor 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), 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](mailto:samwright50@yahoo.com).

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<sup>11</sup> Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.

If you have questions about military-legal issues, and especially about USERRA, please check out our Law Review Library at [www.roa.org/lawcenter](http://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.