

DC Government Is Treated as a State for USERRA Purposes

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Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

2.0—Paid leave for government employees who are Reserve Component members

Q: I am a Master Chief Petty Officer (E-9) in the Navy Reserve and a member of the Reserve Officers Association (ROA).³ 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 the District of Columbia (DC) Government. My DC Government supervisor gives me a hard time about my Navy Reserve service and the absences from work that are necessitated by that service. I believe that the DC Government has violated USERRA.

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 (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. 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 by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

³ In 2013, ROA members amended the ROA Constitution. Noncommissioned officers and petty officers are now eligible for full membership in ROA.

Is the DC Government treated as a State for USERRA enforcement purposes? Or is the DC Government treated as part of the Federal Government?

A: The District of Columbia is treated as a State for USERRA purposes. Section 4303 of USERRA defines 16 terms used in this law. The term “State” is defined as follows:

The term “State” means each of the several States of the United States, *the District of Columbia*, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).⁴

This means that USERRA is enforced against the DC Government, as an employer, by means of a lawsuit in Federal District Court, under section 4323 of USERRA,⁵ rather than by an action in the Merit Systems Protection Board (MSPB), under section 4324.⁶

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in 1940.

Under the VRRRA, the DC Government was treated as part of the Federal Government. That system did not work well, and a conscious decision was made to treat DC as a State.⁷

Although the DC Government is treated as a State for USERRA enforcement purposes, employees of the DC Government have the right to *paid* military leave under section 6323 of title 5 of the United States Code, like federal employees. The right to paid military leave under that section applies to “an employee as defined in section 2105 of this title [5 U.S.C. 2105] *or an individual employed by the government of the District of Columbia, permanent or temporary indefinite.*”⁸

⁴ 38 U.S.C. 4303(14) (emphasis supplied).

⁵ 38 U.S.C. 4323.

⁶ 38 U.S.C. 4324.

⁷ As I have explained in footnote 2, I was intimately involved in the drafting of USERRA, when I was an attorney for the United States Department of Labor. I recall discussions of the status of DC.

⁸ 5 U.S.C. 6323(a)(1) (emphasis supplied).