

LAW REVIEW 17070¹

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USERRA and Noncompete Agreements

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Update on Sam Wright

1.3.1.3—Timely application for reemployment

1.8—Relationship between USERRA and other laws/policies

Q: I am a Major in the Army Reserve and a member of the Reserve Officers Association.³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have been on active duty since October 1, 2016, and I expect to leave active duty on September 30, 2017, when my one-year voluntary active duty orders expire.

I have a master’s degree in computer engineering, and I have a considerable amount of military and civilian experience in software design, information technology, and cyber warfare. I live and work in Boise, Idaho. In October 2013, I began a new job with a computer

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1500 “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 1300 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 35 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 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 This factual set-up is hypothetical but realistic.

company in Boise—let's call it Computers R Us (CRU). I worked for CRU for almost three years, until I left for this current active duty opportunity on October 1, 2016.

While I worked for CRU, I was continually harassed by Benedict Arnold, the company's owner-operator, about my Army Reserve duty and the absences from work that my duty necessitated, although those absences were clearly protected by USERRA. I contacted the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), and a local ESGR ombudsman contacted Mr. Arnold to discuss my USERRA rights, but Mr. Arnold refused to meet with the ombudsman and refused to acknowledge that federal law gives me the right to be away from my civilian job for military training and service. My having contacted ESGR only seemed to make Mr. Arnold more annoyed with me.

I chose to avail myself of this current active duty opportunity because the work sounded interesting and right up my alley and because I wanted to get away from Mr. Arnold's harassment. I gave Mr. Arnold notice of my active duty in mid-August 2016, 45 days before I left. As I expected, he reacted very negatively, threatening to fire me. I told him that firing me would violate USERRA and that I would file suit if necessary, and he dropped the threat to fire me. As you can imagine, my last 45 days at work were very difficult and contentious. I trained my own replacement during that time.

Mr. Arnold demanded to know when my orders would expire and when I would be returning to work. I told him that my orders were for one year, through September 30, 2017. I refused to make any commitment as to whether my active duty would be extended or whether I would return to work at CRU after leaving active duty. I cited your Law Review 0967 and provided Mr. Arnold a copy of that article.

I have essentially completed the project for which I was recalled to active duty, and the Army has notified me that my orders will not be extended past September 30, 2017. I dreaded returning to work for Mr. Arnold and having to put up with his harassment, so I contacted other Idaho companies in the same business. I have received and have accepted an offer from another Idaho computer company, and I expect to start there in early October, just a few days after I leave active duty. The new job pays substantially more than I was earning at CRU and the owner-operator of the new company has promised to honor and support my Army Reserve commitment.

Just recently, I heard from Mr. Arnold, demanding to know when I would be leaving active duty and when I would be returning to CRU. I told him that I will be leaving active duty on September 30 but that I will not be returning to CRU because I have accepted a job offer with another company. I thought that Mr. Arnold would be relieved to learn that I will not be demanding my USERRA rights at CRU, but he got mad about the idea that I will be working for a competitor. He told me that I am a "key employee" of CRU and that I am precluded by law from working for a competitor company for five years after leaving CRU employment. He sent me a copy of an "agreement" that I signed back in 2013, before I was hired by CRU.

I recall that before I was hired at CRU I was required to sign several lengthy documents filled with impenetrable legalese that I did not understand. If I had refused to sign these documents, I would not have been hired by CRU. I signed because I needed a job at the time. Is this “noncompete agreement” legally enforceable? Is the enforcement of that agreement lawful under USERRA?

Answer, bottom line up front:

USERRA gives you the right to reemployment after a period of military service, if you meet the five USERRA conditions.⁴ USERRA also makes it unlawful for an employer to discriminate against you in initial employment (hiring), retention in employment (firing), promotions, or benefits of employment because of your membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.⁵

USERRA says nothing about noncompete agreements. The enforceability of the noncompete agreement that you signed when CRU hired you in 2013 is a question of Idaho law, not federal law, and USERRA has no relevance to answering that question.

Explanation

The states are all over the map on the question of whether and under what circumstances a noncompete agreement can be judicially enforced, but your state (Idaho) enacted an amendment recently (March 2016) that makes it considerably easier for employers to enforce noncompete agreements. *The New York Times* recently reported:

Idaho achieved a notable distinction last year. It became one of the hardest places in America for someone to quit a job for a better one.

The state did this by making it easier for employers to enforce noncompete agreements, which prevent employees from leaving their company for a competitor.

⁴ To have the right to reemployment under USERRA, you must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services, as defined by USERRA, and you must have given the employer prior oral or written notice. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years, but there are nine exemptions—kinds of service that do not count toward exhausting your five-year limit. You must have been released from the period of service without having received a disqualifying bad discharge from the military, like a dishonorable, bad conduct, or other-than-honorable discharge. After release, you must have made a timely application for reemployment with the pre-service employer. After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. Please see Law Review 15116 (December 2015) for a detailed discussion of the five eligibility criteria.

⁵ 38 U.S.C. 4311(a).

While its economy is known for agriculture—potatoes are among the state’s biggest exports—Idaho has a long history as a technology hub. And the new law landed in the middle of the tech world, causing a clash between hungry start-ups looking to poach employees and more established companies that want to lock their employees in place.

“We’re trying to build the tech ecosystem in Boise,” said George Mulhern, chief executive of Cradlepoint, a company here that makes routers and other networking equipment. “And anything that would make somebody not want to move here or start a company here is going to slow down our progress.”

Alex LaBeau, president of the Idaho Association of Commerce and Industry, a trade group that represents many of the state’s biggest employers, countered, “This is about companies protecting their assets in a competitive marketplace.”

Versions of this clash have played out nationwide, as state lawmakers consider whether to make it easier or harder for companies to block workers from jumping to competitors. Both sides in the debate, which bridges party lines, say they are trying to create an environment in which local businesses can thrive.

For the most part, states have been moving toward making it easier for people to switch teams, but Idaho went the other direction with legislation that was friendlier to employers. The resulting law was particularly strict because it put the onus on employees to prove that they would not harm their former employers by taking the new jobs.⁶

You urgently need to retain an Idaho attorney with expertise in employment law and specifically in the enforcement of noncompete agreements.

Q: If I wait 90 days after leaving active duty and then start the job with CRU’s competitor, am I off the hook?

A: No. Failing to make a timely application for reemployment at CRU, after you leave active duty on September 30, is essentially equivalent to quitting your CRU job. If you quit your CRU job to take a job with a competitor, the noncompete agreement comes into play. If the noncompete agreement is enforceable under Idaho law, and it probably is, CRU can sue you and get a court order that you not go to work for the competitor and that the competitor not hire you. That court order is enforceable through the court’s contempt powers—meaning that you go to jail for contempt if you violate the court’s order. If you are not careful, you could end up with no job at CRU and no job at the competitor and no opportunity to work in your chosen profession anywhere in Idaho, or at least anywhere in the Boise metropolitan area. Good luck.

⁶ Conor Dougherty, “Hope to Work for a Rival? Avoid Idaho.” *New York Times*, July 15, 2017, page A-1. See also <https://www.hollandhart.com/idahos-non-compete-law-set-to-enhance-employer-enforcement>.

UPDATE AND ELABORATION

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For a recent comprehensive article on the enforcement of non-compete agreements, please see J. Gregory Grisham, *Beyond the Red-Blue Divide: An Overview of Current Trends in State Non-Compete Law*, 18 Fed. Soc'y Rev. 42 (2017), available at www.fed-soc.org/publications/detail/beyond-the-red-blue-divide-an-overview-of-current-trends-in-state-non-compete-law.