

Section 4303(2) of USERRA Definition of “Benefit” of Employment

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[Update on CAPT Sam Wright](#)

1.2—USERRA discrimination

1.8—Relationship between USERRA and other laws/policies

Section 4303(2) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) reads as follows:

The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 1400 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 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 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.

pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.³

As enacted in 1994, section 4303(2) of USERRA read as follows:

The term "benefit", "benefit of employment", or "rights and benefits" means any aspect of the employment relationship, *other than wages or salary for work performed*, provided by contract or employer practice or custom, that offers advantage, profit, privilege, gain, status, account, or interest and includes, but is not limited to, pension plans and payments, insurance coverage and awards, employee stock ownership plans, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.⁴

USERRA's legislative history explains section 4303(2) as follows:

Section 4303(2) would define "benefit," "benefit of employment," and employment related "rights and benefits." These are the rights, incident to employment, which are protected under chapter 43 [USERRA]. These rights are broadly defined to include all attributes of the employment relationship which are affected by the absence of a member of the uniformed services because of military service. The list of benefits is illustrative and not intended to be all inclusive.⁵

In 2010, Congress amended section 4303(2) by striking "other than" and adding "including."⁶ Prior to the amendment, the list of items included in the definition of "benefit of employment" was modified by the clause "other than salary or wages for work performed." After the amendment, the list is modified by the clause "including salary or wages for work performed."

The legislative history of the 2010 amendment explains the purpose and effect of the amendment as follows:

Under current law, section 4311(a) of title 38, U.S.C., employers may not deny any "benefit of employment" to employees or applicants on the basis of membership in the uniformed services, application for service, performance of service, or service obligation. However, the U.S. Court of Appeals for the Eighth Circuit held in 2002 that USERRA does not prohibit wage discrimination because "wages or salary for work

³ 38 U.S.C. 4303(2).

⁴ House Committee Report, April 28, 1993, H.R. Rep. No. 103-65, Part 1, reprinted in Appendix B-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. At the start of the Report of the House Committee on Veterans' Affairs, you will find the text of USERRA as it was being considered at the time. The quoted language can be found on page 651 of the 2017 edition of the *Manual*. Emphasis supplied.

⁵ *Id.* at page 686 of the 2017 edition.

⁶ Section 701, Veterans Benefits Act of 2010, Public Law 111-275, 124 Stat. 2864, 2887.

performed” are specifically excluded from the law’s definition of “benefit of employment.” *Gagnon v. Sprint Corp.*, 284 F.3d 839, 853 (8th Cir. 2002). ...

Section 403 of H.R. 1037, as amended, would amend section 4303(2) of title 38, U.S.C., to make it clear that wage discrimination is not permitted under USERRA.⁷

Section 4303(2) was most recently amended in 2011. That amendment will be discussed in Law Review 18013, the next article in this series.

⁷ 2010 Amendments, Joint Explanatory Statement, September 28, 2010, 156 Cong. Rec. S7656-02, 2010 WL 3767475, reprinted in Appendix B-8 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 880-81 of the 2017 edition of the *Manual*.