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Section 4303(3) of USERRA: "Employee" Defined

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Update on Sam Wright

1.1.2.2—Independent contractors and partners
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

Section 4303(3) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) defines the term "employee" as follows:

> The term "employee" means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319(c) of this title.[3]

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[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 (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.

[3] 38 U.S.C. 4303(3).

USERRA's legislative history elaborates on the definition of "employee" as follows:

> New section 4303(3)(A) would define "employee" as any person employed by an employer. The Committee [Senate Committee on Veterans' Affairs] intends the term "employee", including temporary employees (see discussion of new section 4312), to be considered in the same expansive manner as under the Fair Labor Standards Act, 29 U.S.C. 203(e). The Committee intends that the term "employee" would include former employees of an employer as the Court of Appeals for the 11th Circuit held in *Bailey v. USX Corp.,* 850 F.2d 1506, 1509 (11th Cir. 1988). The Committee expects that in cases in which the issue of whether an individual is an independent contractor or employee would be resolved in the same manner as under the Fair Labor Standards Act.[4]

Q: Can an independent contractor have the right to reemployment under USERRA?

A: No. To have the right to reemployment under USERRA, an individual must be an employee, must have had an employee-employer relationship with the subject employer, must have left that relationship to perform uniformed service, and must have met the other conditions for reemployment under USERRA.[5] If the individual is an independent contractor, he or she is not an employee.

That does not mean that the employer can destroy the person's reemployment rights simply by labeling the person an "independent contractor." The issue of whether a person is to be characterized as an employee or an independent contractor is litigated often, not just under USERRA but under many other laws and in many other legal contexts as well. There is a very substantial body of case law on the factors that courts consider in making that distinction.

One section of the Department of Labor (DOL) USERRA Regulation succinctly addresses this issue as follows:

> **Does USERRA cover an independent contractor?**
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> **(a)** No. USERRA does not provide protections for an independent contractor.
> **(b)** In deciding whether an individual is an independent contractor, the following factors need to be considered:
> **(1)** The extent of the employer's right to control the manner in which the individual's work is to be performed;
> **(2)** The opportunity for profit or loss that depends upon the individual's managerial skill;

[4] 1993 Senate Committee Report, October 18, 1993 (S. Rep. 103-158), reprinted in Appendix B-2 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 765 of the 2017 edition of the *Manual.*

[5] Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

(3) Any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers;
(4) Whether the service the individual performs requires a special skill;
(5) The degree of permanence of the individual's working relationship; and,
(6) Whether the service the individual performs is an integral part of the employer's business.

(c) No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor.[6]

The distinction between an employee and an independent contractor arises in many discrete legal contexts, and the courts have developed different tests and legal standards, depending upon the context in which the issue arises. Some of the tests make it easier to find "independent contractor" and some make it easier to find "employee." The test that is the furthest toward the "employee" side of the spectrum is the test that has developed under the Fair Labor Standards Act (FLSA).[7]

Brock v. Mr. W Fireworks, Inc.

USERRA's legislative history states: "… the issue of independent contractor versus employee should be treated in the same manner as under the Fair Labor Standards Act. *See Brock v. Mr. W Fireworks, Inc.,* 814 F.2d 1042 (5th Cir. 1987)."[8]

Mr. W Fireworks is a 1987 decision of the United States Court of Appeals for the 5th Circuit.[9] The fireworks company was a closely-held, family-owned business. It owned 100 fireworks stands spread across the southern part of Texas. Under Texas law, as of the time the case was decided, fireworks stands were only permitted to operate during a 13-day season culminating on January 1 and an 11-day season culminating on July 4.

The company's business model was to recruit "independent entrepreneurs" to operate the fireworks stands. The company delivered fireworks to the stands before and during the short seasons and then collected them back (those that had not been sold) immediately after the end of the season. Each stand operator earned commissions based on the fireworks that he or she sold.

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[6] 20 C.F.R. 1002.44 (bold question in original). The citation refers to section 1002.44 of title 20 of the Code of Federal Regulations.

[7] The FLSA is the statute that requires employers to pay at least the minimum wage and to pay "time and a half" (150% of the regular rate) for hours worked by non-exempt employees beyond 40 hours per week.

[8] House Committee Report, April 28, 1993, H.R. Rep. 103-65, part 1, reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted language can be found on page 686 of the 2017 edition of the *Manual.*

[9] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

DOL sued the company for violating the FLSA. In response, the company argued that the stand operators were independent contractors and that the FLSA did not apply. The district court agreed with that argument and dismissed the case against the company. DOL appealed to the 5th Circuit and prevailed.

The appellate court held that under the expansive FLSA definition of "employee" the fireworks stand operators were employees and not independent contractors. According to the appellate court, what counts is the "economic reality" that the stand operators were "dependent" on the company. Thus, for FLSA purposes the stand operators were employees and not independent contractors and the company was required to pay them at least the federal minimum wage and to pay them overtime.

Evans v. MassMutual Financial Group

Andrae Evans was a Major in the New York Army National Guard when MassMutual brought him on board as a life insurance agent in Rochester, NY. Some months later, he was called to the colors by the Army and deployed to Afghanistan. When Evans was released from active duty and applied to MassMutual for reinstatement, the company refused to reinstate him.

As I have explained in Law Review 15116 (December 2015) and many other articles, a person must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a *position of employment* (federal, state, local, or private sector) to perform uniformed service.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. Must have made a timely application for reemployment, after release from the period of service.

It is necessary to meet all five of these conditions to have the right to reemployment. MassMutual did not deny that Evans met conditions (b) through (e), in that he gave prior notice, did not exceed the five-year limit, did not receive a bad discharge, and made a timely application for reemployment after release from the period of service. The entire dispute was about condition (a).

MassMutual claimed that Evans did not leave a *position of employment* to perform uniformed service because he did not hold a position of employment before he left Rochester to report to active duty. The company claimed that Evans was an independent contractor and not an employee and that he never held a position of employment, so he could not leave a position of employment for service.

The company pointed out that the agreement that Evans had signed with the company when he began his relationship identified the relationship as an independent contractor relationship, not an employer-employee relationship.[10] The company also pointed out that the New York Court of Appeals (the state's high court) had held that MassMutual insurance agents were independent contractors for state law purposes and that the federal Equal Employment Opportunity Commission had agreed that MassMutual insurance agents were independent contractors, not employees, for purposes of Title VII of the Civil Rights Act of 1964.[11] Through his lawyers, Evans asserted that he was an employee *for USERRA purposes* regardless of how the defendants may characterize his status or how the status of MassMutual insurance agents may have been characterized for other legal purposes.

When Evans filed his lawsuit in the United States District Court for the Western District of New York, MassMutual responded with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). The company contended that Evans was not entitled to any relief that the court could award *even if all his factual assertions were truthful.* The District Court accepted Evans' argument that he could be an employee *for USERRA purposes* even though other MassMutual insurance agents had been determined to be independent contractors for other legal purposes, and the court denied the defendants' motion to dismiss.[12]

After the court denied the defendants' motion to dismiss, the parties engaged in discovery. At the end of the discovery period, MassMutual filed a motion for summary judgment under Rule 56 of the FRCP. The company contended that there was no evidence to support Evans' claim that he was an employee rather than an independent contractor. The court denied the motion for summary judgment and set the case for trial.[13] The parties then settled.[14]

***Murphy v. Tuality Healthcare*[15]**

[10] The agreement that Evans was required to sign to join MassMutual cannot act as a waiver of his right to reemployment under USERRA because section 4302(b) of USERRA, 38 U.S.C. 4302(b), provides that USERRA overrides an agreement that limits or destroys USERRA rights. USERRA's legislative history provides: "An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee will and would be void." House Committee Report, April 28, 1993, H.R. Rep. 103-65, Part 1, reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted sentence can be found on page 685 of the 2017 edition of the *Manual.*

[11] Title VII makes it unlawful for employers to discriminate in employment because of race, color, sex, religion, or national origin.

[12] *Evans v. MassMutual Financial Group,* 2009 U.S. Dist. LEXIS 99428 (W.D.N.Y. October 23, 2009). I discuss this decision in detail in Law Review 1053 (June 2010).

[13] *Evans v. MassMutual Financial Group,* 856 F. Supp. 2d 606 (W.D.N.Y. 2012). I discuss this decision in detail in Law Review 12039 (April 2012).

[14] The terms of the settlement are confidential, and I do not know the terms.

[15] 157 F. Supp. 3d 921 (D. Ore. 2016).

Dr. Murphy was an anesthesiologist (physician) for an Oregon hospital system and a National Guard member. His work as a civilian anesthesiologist was interrupted by a call to the colors. When he returned from active duty, his application for reinstatement was denied. As in *Evans,* the principal issue was whether he was an employee or an independent contractor. The issue was joined on cross motions for summary judgment. The court granted partial summary judgment for the plaintiff, Dr. Murphy, holding that he was an employee for USERRA purposes. There is no subsequent appellate history, and the case has not been cited in any later case.

Q: Can a partner, like in a law firm, have the right to reemployment under USERRA?

A: No. A bona fide partner is not an employee and is not protected by USERRA and other laws that govern the relationship between employers and employees. A partner is a person who has an ownership interest in the firm, along with the other partners.

In a typical law firm of intermediate size or larger, the more junior attorneys are called "associates" and are paid a salary by the firm. These attorneys are clearly employees and are protected by USERRA and other laws.

These junior attorneys usually work as associates for a period of seven years or more and then are evaluated for partnership offers. It is usually only the top performers who are offered the opportunity to become partners in the firm.

Some law firms have a hybrid position called "non-equity partner." I consider that term an oxymoron. If the person does not have an ownership interest in the firm, he or she is not a partner, just an associate with a little more experience and status and a higher rate of pay. I believe that a non-equity partner would have reemployment rights under USERRA if he or she left the firm to perform uniformed service and met the five USERRA conditions for reemployment.

The issue of distinguishing partners from employees is not limited to law firms. In Law Review 99 (December 2003), I discussed the situation of a physician who was a reservist and who was a partner with other physicians (who were not reservists) in a medical partnership. The reservist was called to active duty and was away from the partnership for some months. When he returned from active duty and applied for reinstatement, his partners balked. I expressed the opinion that he was not protected by USERRA because he had not been an employee of the organization.

Q: What about interns?

A: William J. Pfunk was an undergraduate at Hunter College in New York City and was an enlisted member of the Army Reserve (USAR). He also worked about 29 hours per week for Cohere Communications, and he was fired by the company owner, who was annoyed with him concerning a short-notice USAR drill that took him away from work at a critical time. He complained to the Veterans' Employment and Training Service of the United States Department

of Labor (DOL-VETS), which investigated and found to have merit Pfunk's claim that the firing violated section 4311(a) of USERRA because it was motivated by his performance of uniformed service. DOL-VETS referred the case file to the United States Department of Justice (DOJ). DOJ agreed that Pfunk's claim had merit and filed suit on his behalf in the United States District Court for the Southern District of New York.

Cohere Communications defended by claiming that Pfunk was an intern and not an employee. The judge applied a DOL Wage & Hour Division fact sheet about the application of the FLSA to "interns" at for-profit companies and concluded that Pfunk was an employee and not an intern.[16]

Q: What about volunteers?

A: When I worked as an attorney for the Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR), I recall the issue arising about possible USERRA rights for volunteers. I recall specifically that there were Boy Scout adult leaders and volunteer firefighters who were displaced from their volunteer positions when called to the colors in the aftermath of the terrorist attacks of 9/11/2001 and who were complaining when they were not reinstated to those positions upon returning from service. I expressed the opinion that USERRA applies to the relationship between an employer and employees and that it does not apply to the relationship between volunteers and a voluntary agency they support. I adhere to that opinion today.

If the "volunteer" receives money compensation for his or her services, beyond reimbursement for out-of-pocket expenses, then he or she is not a volunteer but rather an employee.

[16] *Pfunk v. Cohere Communications LLC,* 73 F. Supp. 3d 175 (S.D.N.Y. 2014). I discuss this case in detail in Law Review 16050 (June 2016). I also invite the reader's attention to the discussion of the "intern v. employee" issue and the *Pfunk* case in section 2:12 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. You can find this discussion on pages 48-49 of the 2017 edition of the *Manual.*