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Section 4303(4) of USERRA—Definition of "Employer"

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Update on Sam Wright

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Section 4303 of the Uniformed Services Employment and Reemployment Rights Act (USERRA) defines 16 terms used in this law. Subsection (4) of the section defines the term "employer" as follows:

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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.

(A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

(ii) the Federal Government;

(iii) a State;

(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

(B) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.

(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.

(D) (i) Whether the term "successor in interest" applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:

(I) Substantial continuity of business operations.

(II) Use of the same or similar facilities.

(III) Continuity of work force.

(IV) Similarity of jobs and working conditions.

(V) Similarity of supervisory personnel.

(VI) Similarity of machinery, equipment, and production methods.

(VII) Similarity of products or services.

(ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i).[3]

Legislative history

The report of the Senate Committee on Veterans' Affairs elaborated on the definition of "employer" as follows:

> New section 4303(4)(A) would define "employer" broadly as any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including the Federal Government, a State (which would include its political subdivisions), and any successor to the employer's interests.

[3] 38 U.S.C. 4303(4).

This definition would also include potential employers in cases in which there is an allegation of a failure to hire an applicant in violation of the VRR law as well as entities to which certain employment-related responsibilities have been delegated, such as pension funds. The definition is intended to apply to insurance companies that administer employers' life, long-term disability, or health plans, so that such entities cannot refuse to modify their policies in order for employers to comply with requirements under new section 4316 [now section 4317].

In addition to the traditional interpretations of the term, the Committee intends a broad construction of "employer" to include relationships in which an employee works for multiple employers within an industry or is referred to employment in such industries as construction or longshoring. The leading case for the Committee's position is *Imel v. Laborers Pension Trust Fund of Northern California,* 904 F.2d 1327 (9th Cir. 1990), *cert. denied,* 111 S. Ct. 343 (1990).

This chapter would apply, as does current law, to all employers, regardless of the size of the employer or the number of employees and would include Native American tribes and their business enterprises.

As under current law, the concept of "successor in interest" would include circumstances in which there is a substantial continuity of the operations and essentially the same facilities and workforce are used, as in *Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Cir. 1991); *Chaltry v. Ollie's Idea, Inc.,* 546 F. Supp. 44 (W.D. Mich. 1982). The successor need not have notice or be aware of a potential reemployment claim at the time or merger, acquisition, or other forms of succession.

New section 4303(4)(B) would clarify that National Guard technicians are considered State employees for purposes of chapter 43 [USERRA] so that the enforcement procedures available to State employees generally would be available to these technicians.

New section 4303(4)(C) would provide that, except as an actual employer of employees, an employee pension benefit plan (described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) will be considered to be an employer only with respect to the obligation to provide employee pension benefits described in new section 4317 [now 4318].[4]

[4] 1993 Senate Committee Report, October 18, 1993 (S. Rep. 103-158), 1993 WL 432576 (Legislative History), reprinted in Appendix B-2 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on page 765-66 of the 2017 edition of the *Manual.*

The report of the House Committee on Veterans' Affairs elaborates on the statutory definition of "employer" as follows:

> Section 4303(4) would define "employer" and is to be broadly construed. It includes not only what may be considered a "traditional" single employer relationship, but also (1) those under which a servicemember works for several employers such as construction, longshoring, etc., where the employees are referred to employment, and (2) those where more than one entity may exercise control over different aspects of the employment relationship. *See, e.g., Adams v. Mobile County Personnel Board,* 115 LRRM 2936 (S.D. Ala. 1982); *Magnuson v. Peak Technical Services, Inc.,* 808 F. Supp. 500, 507-11 (E.D. Va. 1992).
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> This definition would also include potential employers in the case of a failure to hire an applicant as well as entities to which certain employment-related responsibilities have been delegated, such as pension funds. *See Imel v. Laborers Pension Trust Fund,* 904 F.2d 1327 (9th Cir.), *cert. denied,* 111 S. Ct. 343 (1990); *Akers v. Arnett,* 597 F. Supp. 557 (S.D. Tex. 1983), *affirmed,* 748 F.2d 283 (5th Cir. 1984).
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> This chapter would also apply, as does current law, to all employers regardless of the size of the employer or the number of employees. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).
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> This provision would also have the effect of placing liability on a successor-in-interest, as is true under current law. The Committee intends that the multi-factor analysis utilized by the court in *Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Cir 1991) is to be the model for successor-in-interest issues, except that the successor's notice or awareness of a reemployment rights claim should not be a factor in this analysis. In actual practice, it is possible that the successor would not have notice that one or more employees are absent from employment because of military responsibilities and a returning serviceperson should not be penalized because of that lack of notice.
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> Section 4303(4)(B) would provide that the employer of a National Guard technician shall be the Adjutant General of the State where the technician is employed. Because of the mix of State and Federal attributes of National Guard technicians, these persons have had difficulty enforcing their rights under the existing reemployment statute. The purpose of this provision is to clarify that National Guard technicians are to be considered State employees for purposes of chapter 43 [USERRA], but not necessarily for other purposes, except as otherwise provided by law.

> Section 4303(4)(C) would provide that an employee pension benefit plan is to be considered an employer only in specified circumstances.[5]

Under the VRRA, prior to the enactment of USERRA in 1994, the obligation to reemploy the returning service member or veteran fell upon the pre-service employer or the successor in interest to the pre-service employer, but the VRRA did not define the term "successor in interest" or set forth explicitly the considerations that courts should apply when determining whether the new employer should be held responsible for reemploying the individual. Similarly, USERRA, in the form that it was enacted in 1994, included successors in interest in the definition of "employer" but did not define the term "successor in interest."

On October 13, 2010, President Obama signed into law the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275, 124 Stat. 2864. Section 702 of VBA-2010 added section 4303(4)(D), the lengthy recitation of the factors that courts should apply in successorship cases. The legislative history of this 2010 amendment is as follows:

> Section 4303 of title 38, U.S.C., uses a broad definition of the term "employer" and includes in subsection (4)(A)(iv) of the definition a "successor in interest." In regulations, the Department of Labor has provided that an employer is a "successor in interest" where there is a substantial continuity in operations, facilities and workforce from the former employer. It further stipulates that the determination of whether an employer is a successor in interest must be made on a case-by-case basis using a multifactor test (20 C.F.R. 1002.35). One Federal court, however, in a decision made prior to the promulgation of the regulation, held that an employer could not be a successor in interest unless there was a merger or transfer of assets from the first employer to the second. (*See Coffman v. Chugach Support Services, Inc.,* 411 F.3d 1231 (11th Cir. 2005); *but see Murphree v. Communications Technologies, Inc.,* 460 F. Supp. 2d 702 (E.D. La. 2006) applying 20 C.F.R. 1002.35 and rejecting the *Coffman* merger or transfer of assets requirement.)
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> Senate Bill
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> Section 402 of H.R. 1037, as amended, would amend section 4303 of title 38, U.S.C., to clarify the definition of "successor in interest" by incorporating language that mirrors the regulatory definition adopted by the Department of Labor.
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> House Bill

[5] House Committee Report, April 28, 1993, H.R. Rep. 103-65, Part 1, 1994 *United States Code Congressional & Administrative News* 2449, 1993 WL 235763 (Legislative History), reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 686-87 of the 2017 edition of the *Manual.*

The House Bills contain no comparable provision.

Compromise Agreement

Section 702 of the Compromise Agreement follows the Senate bill.[6]

USERRA regulations

Section 4331 of USERRA[7] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, DOL published proposed regulations in the *Federal Register,* for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. Six sections of the regulations address the statutory definition of "employer" as follows:

Which employers are covered by USERRA?

(a) USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.
(b) USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.
(c) An American company operating either directly or through an entity under its control in a foreign country must also comply with USERRA for all its foreign operations, unless compliance would violate the law of the foreign country in which the workplace is located.[8]

Is a successor in interest an employer covered by

USERRA?

USERRA's definition of "employer" includes a successor in interest. In general, an employer is a successor in interest where there is a substantial continuity in operations, facilities, and workforce from the former employer. The determination whether an employer is a

[6] 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 881-82 of the 2017 edition of the *Manual.*
[7] 38 U.S.C. 4331.
[8] 20 C.F.R. 1002.34 (bold question in original).

successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following:

(a) Whether there has been a substantial continuity of business operations from the former to the current employer;

(b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;

(c) Whether there has been a substantial continuity of employees;

(d) Whether there is a similarity of jobs and working conditions;

(e) Whether there is a similarity of supervisors or managers; and,

(f) Whether there is a similarity of products or services.[9]

Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?

Yes. In order to be a successor in interest, it is not necessary for an employer to have notice of a potential reemployment claim at the time of merger, acquisition, or other form of succession.[10]

Can one employee be employed in one job by more than one employer?

Yes. Under USERRA, an employer includes not only the person or entity that pays an employee's salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. If the security company declines to assign the employee to a job because of a uniformed service obligation (for example, National Guard duties), then the security company could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA. Similarly, if the employer at the work site causes the employee's removal from the job position because of his or her uniformed service obligations, then the work site employer could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA.[11]

Can a hiring hall be an employer?

Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns the employee to the

[9] 20 C.F.R. 1002.35 (bold question in original).
[10] 20 C.F.R. 1002.36 (bold question in original, yes in bold in the original).
[11] 20 C.F.R. 1002.37 (bold question in original, bold yes in original).

jobs. In these industries, it may not be unusual for the employee to work his or her entire career in a series of short-term job assignments. The definition of "employer" includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered the employee's employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.[12]

Are States (and their political subdivisions), the District of Columbia, the Commonwealth of Puerto Rico, and United States territories, considered employers?

Yes. States and their political subdivisions, such as counties, parishes, cities, towns, villages, and school districts, are considered employers under USERRA. The District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and territories of the United States, are also considered employers under the Act.[13]

Law Review articles

I discussed the application of USERRA to hiring halls and multi-employer situations in Law Reviews 28 (September 2001), 174 (June 2005), 183 (July 2005), 07012 (February 2007), and 16096 (September 2016). I discussed the joint employer doctrine under USERRA in Law Reviews 154 (January 2005), 07006 (January 2007), 09053 (October 2009), and 15080 (September 2015). I discussed the application of USERRA to small employers in Law Reviews 10019 (March 2010), 15093 (October 2015), 17093 (September 2017), and 17127 (December 2017). I discussed the application of USERRA to Indian tribes in Law Review 15111 (December 2015). I discussed the application of USERRA to United States employers outside the United States in Law Review 17029 (April 2017). I discussed the application of USERRA to foreign employers in the United States in Law Review 15100 (November 2015). I discussed the application of USERRA to state and local governments in Law Review 17086 (September 2017). I discussed the application of USERRA to successors in interest in Law Reviews 79 (June 2003), 06034 (October 2006), 07023 (May 2007), 07038 (July 2007), 10016 (March 2010), 10039 (June 2010), 10041 (June 2010), 10042 (June 2010), 10067 (October 2010), 10075 (November 2010), and 15045 (May 2015). I discussed USERRA and National Guard technicians in Law Review 15050 (June 2015).

[12] 20 C.F.R. 1002.38 (bold question in original, bold yes in original).
[13] 20 C.F.R. 1002.39 (bold question in original, bold yes in original).