

LAW REVIEW 18047¹

June 2018

Sections 4314 and 4315 of USERRA-OPM's Responsibilities under USERRA

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.3.2.1—Prompt reinstatement

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Two sections of the Uniformed Services Employment and Reemployment Rights Act (USERRA) assign important responsibilities to the United States Office of Personnel Management (OPM). Those sections are as follows:

(a) Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.

(b) *(1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall--*

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 36 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) identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and

(B) ensure that the person is offered such position.

(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that--

(A) the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or

(B) it is impossible or unreasonable for the agency to reemploy the person.

(c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, *such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).*

(d) If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, *such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).*³

(a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.⁴

(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

(c)

(1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.

(2) *Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall*

³ 38 U.S.C. 4314 (emphasis supplied). The citation refers to section 4314 of title 38 of the United States Code.

⁴ The agencies enumerated in section 2302(a)(2)(C)(ii) are the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, the National Reconnaissance Office, and, as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action.

notify the person and the Director of the Office of Personnel Management of such determination.

- (3)** A determination pursuant to this subsection shall not be subject to judicial review.
- (4)** The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.

(d)

(1) Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.

(2) This section may not be construed--

(A) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, alternative employment in the Federal Government under this chapter, or information relating to the rights and obligations of employee and Federal agencies under this chapter; or

(B) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

(e) *The Director of the Office of Personnel Management shall ensure the offer of employment to a person in a position in a Federal executive agency on the basis described in subsection (b) if--*

(1) *the person was an employee of an agency referred to in section 2302(a)(2)(C)(ii) of title 5 at the time the person entered the service from which the person seeks reemployment under this section;*

(2) *the appropriate officer of the agency determines under subsection (c) that reemployment of the person by the agency is impossible or unreasonable; and*

(3) *the person submits an application to the Director for an offer of employment under this subsection.*⁵

In four enumerated circumstances, OPM is responsible for identifying an appropriate position in the Executive Branch of the Federal Government, outside the intelligence community, and for ensuring that the person who has applied for and has been denied reemployment and who meets the five USERRA conditions for reemployment⁶ is offered that position. To illustrate the

⁵ 38 U.S.C. 4315.

⁶ As I have explained in detail in Law Review 15116 (December 2015) and many other articles, a person must have left a civilian job (federal, state, local, or private sector) to perform uniformed service and must have given the employer prior oral or written notice. The person must not have exceeded USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service related to the employer relationship for which he or she seeks reemployment. There are nine exemptions—kinds of service that do not count in computing the five-year limit. Please see Law Review 16043 (May 2016). The person must have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. 4304. After a period of service of

four circumstances, let us discuss four hypothetical but realistic examples. Each of these four returning service members meets the five USERRA conditions but was denied reemployment.

Alice Adams worked for a small federal executive agency. She left that agency to serve on active duty for four years, and while she was on active duty that agency was disestablished. In this circumstance, Alice is to make her application for reemployment to OPM.⁷

Barry Barnes worked for an employer in the Judicial Branch or Legislative Branch of the Federal Government when he left his job to perform uniformed service. When he returned from the period of service and applied for reemployment, the Judicial Branch or Legislative Branch employer found it “impossible or unreasonable” to reemploy Barry. In this circumstance, Barry asks for that determination in writing, and he takes the written determination to OPM.⁸

Connie Cox was employed as a National Guard technician in State X when she left that job to perform uniformed service. Upon release from the period of service, she applied for reemployment with the Adjutant General⁹ of State X, but the Adjutant General determined that it was “impossible or unreasonable” to reemploy Connie. In this circumstance, Connie asks for the determination in writing and takes the written determination to OPM.¹⁰

David Davis worked for the Central Intelligence Agency or one of the other intelligence agencies enumerated in 5 U.S.C. 2302(a)(2)(C)(ii). He left that job to perform uniformed service. Upon release, he applied for reemployment, but the head of the intelligence agency employer determined that it was “impossible or unreasonable” to reemploy David. In this circumstance, it is the responsibility of the intelligence agency to notify OPM and David of the determination, and OPM is then responsible for identifying an appropriate and equivalent position for David in the Executive Branch of the Federal Government and for ensuring that David is offered that position.¹¹

I decided to write this article because I am aware of many cases over the years, including some recent cases, where OPM failed to do that which USERRA explicitly requires. Congress enacted USERRA almost a quarter century ago. It is high time for OPM and federal agency personnel officials and employers generally to get with the program and comply with this important law.

¹⁸¹ days or more, the person must have applied for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁷ 38 U.S.C. 4314(b)(1). This subsection also applies to the circumstance where the pre-service agency employer still exists, but the agency has determined that it is impossible or unreasonable to reemploy the returning service member or veteran and OPM agrees with that determination.

⁸ 38 U.S.C. 4314(c). Please see Law Review 34 (November 2001) concerning the application of USERRA to the Legislative Branch and Judicial Branch of the Federal Government.

⁹ The Adjutant General is the head of the National Guard of a specific state.

¹⁰ 38 U.S.C. 4314(d). Please see Law Review 16009 (February 2016) for a detailed discussion of the application of USERRA to this scenario.

¹¹ 38 U.S.C. 4315(c)(2). Please see Law Review 08052 (November 2008) concerning the application of USERRA to intelligence agencies.