

## LAW REVIEW 18048<sup>1</sup>

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### Section 4319 of USERRA- USERRA Applies all over the World to American Employers

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[Update on Sam Wright](#)

1.1.1.5—USERRA applies to employers outside the U.S.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on 10/13/1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

Congress has amended USERRA several times since enacting it almost 24 years ago. In 1998, Congress amended USERRA's definition of "employee"<sup>3</sup> and added a new section 4319, which reads as follows:

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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](mailto:SWright@roa.org).

<sup>3</sup> 38 U.S.C. 4303(3).

- (a) Liability of controlling United States employer of foreign entity. If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.
- (b) Inapplicability to foreign employer. This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by a United States employer.
- (c) Determination of controlling employer. For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.
- (d) Exemption. Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.<sup>4</sup>

The 1998 legislative history includes one paragraph about the amendment of section 4303(3) and the addition of section 4319. That paragraph reads as follows:

Section 2 of the bill would revise the definition of “employee” presently found in section 4303(3) of title 38, United States Code, to clarify that it includes persons employed in a foreign country by an employer that is incorporated or otherwise organized in the United States or that is controlled by an entity that is organized in the United States. It would also add a new section 4319 to chapter 43 [USERRA] to clarify the liability of the controlling U.S. employer for violations of the law, to set out when an employer shall be considered to be covered by the law, and to exempt employers when compliance would cause the employer to violate the law of the foreign country in which the workplace is located.<sup>5</sup>

As I have explained in Law Review 17068 (June 2017), the definitive reference on USERRA is *The USERRA Manual*, by Katherine Piscitelli and Edward Still. In their book, they address the application of USERRA to employers outside our country as follows:

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<sup>4</sup> 38 U.S.C. 4319.

<sup>5</sup> H.R. Rep. 105-448 (1998), 1998 WL 117158 (Legislative History). This legislative history is reprinted in Appendix B-5 of *The USERRA Manual*, by Katherine Piscitelli and Edward Still. The quoted paragraph can be found on page 866 of the 2017 edition of the *Manual*.

The statute [USERRA] also covers businesses outside the United States that are owned or controlled by United States employers, unless compliance would violate the law of the country where a workplace is located. A person working for such an employer in a foreign country is a covered “employee” under USERRA if the person is a citizen, national, or permanent resident alien of the United States.

USERRA sets forth several factors that are to be considered in determining whether a United States employer controls a foreign entity. They are as follows:

- a. Interrelation of operations
- b. Common management
- c. Centralized control of labor relations
- d. Common ownership or financial control.<sup>6</sup>

Expanding USERRA to make it apply to U.S. employers outside the United States is an important improvement made 20 years ago. I recently heard from a Navy Reserve officer who was employed by a major American university at its campus in Southwest Asia and who left that job when called to active duty in the Navy. Under section 4319 of USERRA, that officer will have the right to reemployment when he is released from active duty, assuming of course that he meets the five USERRA conditions.

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<sup>6</sup> *The USERRA Manual*, section 2:10, page 45 of the 2017 edition of the *Manual* (footnotes omitted).