

LAW REVIEW 18049¹

June 2018

You Can Have the Right to Reemployment in more than one Job

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[Update on Sam Wright](#)

1.1.2.1—USERRA applies to part-time, temporary, probationary and at-will employment

1.3.1.1—Left job for service and gave prior notice

Q: I am a Captain in the Army National Guard and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On the civilian side, I have two jobs. I have a full-time job as a teacher for our local school district, and I have a part-time job as the night manager of a local store. The schedule is most difficult, especially when you add in my National Guard responsibilities, but I am making real progress in paying off my substantial student loan debt.

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.

The Army has offered me the opportunity to return to active duty (voluntarily) for two years, and I am seriously considering that opportunity. Will USERRA give me the right to reemployment in both civilian jobs when I am released from active duty two years later?

A: Yes, if you meet the five USERRA conditions with respect to both jobs. As I have explained in detail in Law Review 15116 (December 2015), you (or any returning service member or veteran) have the right to reemployment under USERRA if you meet five simple conditions:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services (as defined by USERRA).
- b. You must have given the employer prior oral or written notice.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that you have performed with respect to the employer relationship for which you seek reemployment.³
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the Army.⁴
- e. After release from the period of service, you must have made a timely application for reemployment.⁵

If you decide to avail yourself of the opportunity to return to active duty for two years, you should give notice both to the local school district and to the company that operates the store. If you meet the five conditions with respect to both employers, you will have the right to reemployment at both jobs.

The part-time nature of your store manager job does not defeat your right to reemployment. The Department of Labor (DOL) USERRA Regulation provides (in pertinent part) as follows: “USERRA rights are not diminished because an employee holds a temporary, *part-time*, probationary, or seasonal employment position.”⁶

Q: I am not certain that I want to return to both jobs, or even one of them, after I leave active duty in 2020. When I give notice to the school district and the company that operates the store, am I required to assure these employers that I will be returning to work after leaving active duty?

³ As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit—that is, there are nine kinds of service (including all involuntary service and some voluntary service) that do not count toward exhausting your five-year limit. You have a five-year limit with respect to your employer relationship with the local school district and another limit (perhaps different) with the company that operates the store.

⁴ Please see Law Review 18039 (May 2018).

⁵ After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁶ 20 C.F.R. 1002.41 (emphasis supplied).

A: No. The DOL USERRA Regulation provides:

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.⁷

The principal point of USERRA is to keep your civilian jobs behind you as an unburned bridge, while you are away from civilian life serving our country in uniform. I suggest that you maintain maximum flexibility by giving notice to both employers before you leave and applying for reemployment with both employers after you return. If you find a better opportunity after you return from service, you can always say “thanks but no thanks” to one or both employers when they respond to your reemployment applications.

⁷ 20 C.F.R. 1002.88 (bold question in original).