

To Get Pay Raises that you Would Have Received if Continuously Employed you Must Return to the Pre-Service Employer

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

[Update on Sam Wright](#)

1.2—USERRA forbids discrimination

1.3.1.3—Timely application for reemployment

1.3.2.2—Continuous accumulation of seniority-escalator principle

Q: I am a Lieutenant Commander in the Navy Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.

I recently completed a two-year voluntary recall to active duty, from March 2016 to March 2018. I left my job at the ABC Corporation in Washington, DC to enter active duty, and I gave more than a month of notice to the company. I am well within USERRA’s five-year cumulative limit on the duration of my periods of active duty relating to my employer relationship with ABC. I served honorably and was released from active duty without having received a disqualifying bad discharge from the Navy.

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 (VRRRA—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 VRRRA 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 VRRRA 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.

I served my two-year active duty period in San Diego, and during that time I met the love of my life. We married recently. My new wife has an excellent job in San Diego, as well as an elderly mother for whom she has responsibilities. I cannot in good conscience ask my new wife to move to DC with me, nor can I contemplate being separated from my new wife. Accordingly, I did not return to DC after I left active duty, and I did not apply for reemployment with ABC.

I was unemployed for two months after I left active duty. Finally, I found a job at the XYZ Company in San Diego, a company in the same business as ABC. My salary at XYZ is only 2/3 of the salary I was earning at ABC when I left the job in March 2016 to report to active duty. If I had remained continuously employed at ABC I would now be earning almost twice my current salary at XYZ.

I have read in more than one of your articles that the returning veteran is entitled to be treated, for seniority, pay, and pension purposes as if he or she had been continuously employed. It seems to me that my USERRA rights have been violated by XYZ. What do you think?

A: As I have explained in Law Review 15116 (December 2015) and many other articles, a returning veteran or service member *who meets the five USERRA conditions* is entitled to be treated as if he or she had been continuously employed. You meet the first four conditions, but you fail to meet the final condition. XYZ has no USERRA obligation to pay you twice the salary that you were willing to accept.

You left your ABC job to perform uniformed service, and you gave ABC notice. You are not disqualified by having exceeded the five-year limit or having received a disqualifying bad discharge from the Navy. But you failed to make a timely application for reemployment at ABC, so you do not have reemployment rights at either ABC or XYZ.

Q: I think that XYZ has discriminated against me. What do you think?

A: Section 4311 of USERRA³ makes it unlawful for an employer (federal, state, local, or private sector) to deny a person hiring, retention in employment, promotion, or a benefit of employment because of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service. But the fact that your XYZ salary is only half of what you could be earning at ABC does not mean that XYZ has discriminated against you.

³ 38 U.S.C. 4311.