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# DOL-VETS Has Subpoena Power for USERRA Investigations

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.1.2.3—USERRA applies to employees who have been laid off
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**Q: I am a Master Sergeant (E-7) in the Air Force Reserve and a member of the Reserve Officers Association (ROA).[3] On the civilian side, I work for a large unionized company—let's call it Coors Heineken & Schlitz, Incorporated or CHSI. Under the collective bargaining agreement (CBA) between my union and CHSI, layoffs and recalls from layoff are based on seniority. If an employee is laid off when a specific job is abolished, he or she can remain actively employed**

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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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (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.

[3] In 2013, ROA members amended the ROA Constitution and made non-commissioned officers eligible for full membership, including voting and running for office.

**in another job by "bumping" another employee who has less seniority. I have worked for CHSI for more than 20 years, so I have a lot of seniority.**

**I recently completed two years of active duty, from April 2016 to April 2018. I have read and reread your Law Review 15116 (December 2015), and I am confident that I meet the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I left my job in April 2016 to go on active duty. I gave prior oral notice to my direct supervisor and prior written notice (by certified mail) to the CHSI personnel office. I have retained a copy of my letter and of the green United States Postal Service postcard showing that my letter was received. This two-year period does not put me over the cumulative five-year limit on active duty relating to my job at CHSI. I served honorably and was released from active duty without a disqualifying bad discharge from the Air Force. I applied for reemployment at CHSI immediately after I left active duty in April, well within the 90-day deadline.**

**The CHSI personnel office reinstated me to the employee rolls at the company, but in an unpaid layoff status. The company went through some hard times during the two years that I was away for military service, and 10% of the employees were laid off. The specific 20-employee CHSI unit where I worked when I left for military service in 2016 was abolished in February 2017. CHSI claims that I would have been laid off even if I had not gone on active duty in April 2016.**

**Of the 20 CHSI employees in the abolished unit, I believe that at least ten of them are still working at the company—they exercised their bumping rights to take over active jobs from employees who had less company seniority. I think that if I had not gone on active duty in 2016 I would have had the opportunity to remain actively employed by bumping a more junior employee in another job that was not abolished, and I certainly would have used that opportunity. I don't know for sure because when I have contacted fellow employees in the abolished unit they have refused to provide me information about their seniority dates and bumping rights.**

**I contacted Joe Jones, the president of our local union, and asked him for help, but he turned me down cold. He said that under the CBA only employees who are *actively working* can exercise bumping rights. He said that an employee on a leave of absence, including military leave, cannot bump a more junior employee. He was very irritated with me. He said: "You have a lot of nerve to think that you can go off and play soldier for two years and then come back and bump another union member."**

**I contacted four local attorneys, trying to find an attorney to represent me in suing CHSI. All four seemed interested, but when the company insisted to them that I would have been laid**

**off anyway they were unwilling to file suit and test that company assertion through the discovery process. What do you think about this situation?**

**Answer, bottom line up front**

1. Because you met the five USERRA conditions, you are entitled to reemployment in the position that you *would have attained if you had been continuously employed,* or another position (for which you are qualified) that is of like seniority, status, and pay. The position that you would have attained if continuously employed may be better than the position you left, the same position, a worse position, or no position, depending upon what would have happened.
2. In determining what would have happened to you if you had been continuously employed, the court will need to look at all the employees who were laid off during the two years you were on active duty and all those who exercised bumping rights to remain actively employed. If you can show that you had enough seniority to remain actively employed by exercising your bumping rights, you are entitled to reemployment in an active job, not on the layoff list.
3. The CBA rule that employees on military leave are not permitted to bump is contrary to USERRA and void.
4. If you file a complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), that agency can use its subpoena power to obtain CHSI records and interview CHSI officials to determine what would have happened to you if you had been continuously employed.

**Explanation**

**USERRA's escalator principle**

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[4] The escalator principle is codified in two sections of USERRA, as follows. Under section 4313(a)(2)(A), the returning service member or veteran who meets the five USERRA conditions must be reemployed:

[4] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The citation means that you can find this case in Volume 328 of *United States Reports,* starting on page 275. The quoted language can be found at the bottom of page 284 and the top of page 285.

> in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such [uniformed] service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform.[5]
>
> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.[6]

It has always been the case that the escalator can descend as well as ascend. The returning veteran is not exempted from a bad thing, like a layoff or downgrade of position, that clearly would have happened anyway, even if the person had not been away from his or her civilian job for uniformed service. The Department of Labor (DOL) USERRA Regulation provides:

> **Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**
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> **Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.[7]

In determining what would have happened to you if you had been continuously employed, the employer, and if necessary the court, will need to look at the possibility or likelihood that you

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[5] 38 U.S.C. 4313(a)(2)(A).
[6] 38 U.S.C. 4316(a).
[7] 20 C.F.R. 1002.194 (bold question and bold "Yes" in original). The citation is to Title 20 of the Code of Federal Regulations, section 1002.194.

would have exercised your seniority in bumping a more junior employee whose position had not been abolished.[8]

**Relationship between USERRA and the CBA**

In *Fishgold,* its first case construing the VRRA, the Supreme Court held: "No practice of employers *or agreements between employers and unions* can cut down the benefits that Congress has secured the veteran under the Act."[9] The CBA can give you greater or additional rights, over and above USERRA, but it cannot take away your statutory rights under this federal law. I invite your attention to section 4302 of USERRA:

> **(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
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> **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[10]

It is neither surprising nor unusual that your local union president is hostile to you and to your exercise of your USERRA rights. The local union president is elected by the members, in a secret ballot election, for a three-year term, and he will probably seek reelection at the end of his current term. To get reelected, he needs to curry the favor of most union members, not the one member who serves our country in the National Guard or Reserve. The union officer's focus is on the interests of the great majority of union members who do not serve, and who may be displaced from active employment by the one member returning from a period of active duty. But USERRA's focus is on the rights and interests of the one member who leaves his job to serve our country in uniform, not the 999 who remain at home, enjoying the protection of the one volunteer.

**You were not required to exercise your bumping rights while you were on active duty.**

**Q: The local union president has pointed out that under the CBA an employee who is facing layoff must exercise his or her bumping rights within ten days after he or she is notified that his or her position is being abolished. The CHSI unit where I worked was abolished in February 2017, and at that time I was deployed to Afghanistan. I had my hands full at the**

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[8] Please see Law Review 13032 (February 2013).
[9] *Fishgold,* 328 U.S. at 275 (emphasis supplied).
[10] 38 U.S.C. 4302.

**time, trying to keep myself and my colleagues alive. I did not have time to monitor what was going on at CHSI, and I did not try. If I had tried, I probably would not have been able to do so because our Internet access in Afghanistan was intermittent and the CHSI website did not always show detailed information about which positions were set to be abolished.**

**The local union president insists that I cannot bump another employee now because I failed to act within ten days after my CHSI position was abolished. What do you think?**

**A:** The issue is not whether you had the right to bump in February 2017, when your position was abolished. The issue is that you *would have had the right to bump* in February 2017 if you had been at work at the time, instead of on active duty in Afghanistan. It seems clear that you would have had the right to bump, and you would have exercised that right, so you are entitled to reemployment in an active position based on what *would have happened if you had been continuously employed.*

The whole point of USERRA, as well as the Servicemembers Civil Relief Act (SCRA), is to relieve the service member of civilian concerns, to the maximum extent possible, so that he or she can devote full attention to his or her military duties while on active duty. This is a safety concern for the service member and for his or her colleagues in arms. If I am in the foxhole next to Bob Smith, I should not have to worry that he is not paying full attention to his sector of the perimeter because he cannot put out of his mind his concern about his civilian job back home.

**Subpoena authority under USERRA**

Determining what would have happened to your civilian job if you had been there, instead of on active duty in Afghanistan, in February 2017 will require access to CHSI and union records about many employees, not just you. If you file a formal USERRA complaint against CHSI with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), that agency has subpoena power to obtain those records, and I hope that DOL-VETS will not be too shy to exercise the power they have. I invite your attention to section 4326 of USERRA:

> **(a)** In carrying out any investigation under this chapter, the Secretary's [Secretary of Labor] duly authorized representatives shall, at all reasonable times, have reasonable access to and the right to interview persons with information relevant to the investigation and shall have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or employer that the Secretary considers relevant to the investigation.
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> **(b)** In carrying out any investigation under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or

contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

**(c)** Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.
**(d)** Subsections (b) and (c) shall not apply to the legislative branch or the judicial branch of the United States.[11]

[11] 38 U.S.C. 4326.