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Relocation Bonus Contract Does Not Override USERRA

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Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.1.3.1—USERRA applies to voluntary military service
1.3.2.10—Furlough or leave of absence clause
1.8—Relationship between USERRA and other laws/policies

Q: I am a Major in the Regular Army Judge Advocate General's Corps, and I have read with interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am not a legal assistance attorney, and I do not advise or assist individual service members with civilian legal issues under USERRA and other laws. I am the Assistant Staff Judge Advocate of a major Army command, commanded by a Major

[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.

General (O-8). I report directly to the Staff Judge Advocate, who is a full Colonel in the Army Judge Advocate General's Corps.

Our command has almost as many civilian employees as soldiers assigned, and when USERRA has come up (several times in the year that I have been here) it has been in the context of the command's responsibilities to civilian Department of the Army (DA) employees who also happen to be reservists in the Army or another service. The Major General and the Colonel have several times expressed the opinion that USERRA is a "damned nuisance" that limits their flexibility in dealing with civilian DA employees. I have urged them, more than once, to look at the big picture—that the Army (with the other services) is the principal beneficiary of this law because without a law like USERRA the Army would never be able to recruit and retain a sufficient quality and quantity of service members to defend our country. The Major General and the Colonel have explicitly directed me not to raise that point again, and they have made clear that they are not willing to reconsider their negative view of USERRA.

Our command has a civilian DA employee—let's call her Mary Jones. She was already a civilian DA employee, at a distant base, when she was hired here and reported for work on 10/1/2014, almost four years ago. When Jones was hired for a position here, she was promoted from GS-11 to GS-12, and the DA paid the substantial cost of moving her furniture and personal property from her former base to this base.

In accordance with standard federal civilian personnel policy, established by the United States Office of Personnel Management (OPM), Jones was required to sign and did sign a standard federal contract related to the relocation assistance when she was reassigned to this command from a distant base. Jones did not have any opportunity to negotiate the terms of that agreement. The agreement was a standard form promulgated by OPM, and she was required to sign the standard form contract.

The standard form relocation assistance contract provides that if the assisted employee leaves federal civilian employment by resignation within one year after receiving the relocation assistance he or she must repay the relocation assistance cost. The standard form contract does not address the possibility that the assisted employee might leave federal civilian employment for voluntary or involuntary military service during the initial year of civilian employment after receiving the relocation assistance.

Mary Jones is a junior officer in the Marine Corps Reserve, and in February 2015, just four months after she started her job here, she left her DA civilian job to report to active duty in the Marine Corps. I am not sure, but I think that her original seven-month call-up in 2015 was

involuntary, but she has voluntarily extended and is still on active duty.[3] Each September she sends us new orders for the fiscal year that is about to start. Each order ends on September 30, and each new order starts on October 1, the first day of the new fiscal year. There has been no break in her continuous period of active duty.

Jones recently sent us new orders for the period of 10/1/2018 until 9/30/2019. I showed the order and accompanying letter to the Major General, and he said: "I have had it up to here with this GD Gyrene." Against my strenuous contrary advice, he directed us to send a formal written demand that she repay the relocation assistance that she received in 2014. She has retained a civilian lawyer and has sent us a letter threatening us with legal action and asserting that our demand that she repay the relocation assistance is contrary to USERRA. What do you think?

A: First, I think that the Major General's attitude is downright unpatriotic and that he should be relieved for cause and sent home in disgrace. The relief should be publicized to deter other senior officers with similar attitudes.

Second, I want to emphasize that it is irrelevant that Jones serves in the Marine Corps Reserve, not the Army Reserve or Army National Guard. USERRA applies equally to all five of the armed forces and all seven Reserve Components, including the Marine Corps Reserve.

Third, I want to make clear that the relocation assistance contract does not and cannot override Jones' rights under USERRA. USERRA's second section provides:

> This chapter [USERRA] supersedes any State law (including a 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 additional prerequisites to the exercise of any such right or the enjoyment of any such benefit.[4]

USERRA's legislative history definitively states: "An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void."[5]

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[3] USERRA applies equally to voluntary as well as involuntary service. USERRA's definition of "service in the uniformed services" includes "the performance of duty *on a voluntary or involuntary basis."* 38 U.S.C. 4303(13) (emphasis supplied).

[4] 38 U.S.C. 4302(b) (emphasis supplied).

[5] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part I), 1994 U.S.C.C.A.N. 2449, 1993 WL 235763. This report of the House Veterans' Affairs Committee is reprinted in its entirety in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted sentence can be found on page 685 of the 2017 edition of the *Manual.*

Fourth, I want to emphasize that neither Jones' departure from her DA civilian job to report to active duty in 2015 nor her remaining on active duty since then amount to a "resignation" from her DA civilian job, and her continued absence from her DA civilian job for active Marine Corps service does not invoke any obligation to repay the 2014 relocation assistance cost.[6]

Fifth, I want to emphasize that any ambiguity in the relocation assistance contract must be construed against the Federal Government, because the Federal Government (OPM) drafted this contract and Jones had no opportunity to bargain about the specific language.

> *Contra proferentem,* also known as "interpretation against the draftsman," is a doctrine of contractual interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.[7]

I argue that while Jones has been away from her civilian DA job for active duty the one-year work requirement has been fulfilled. When she returns from active duty and is reemployed by the DA, however briefly, she will then be free to resign her DA job without having to repay the cost of the 2014 relocation assistance.

Sixth, and most important, I insist that USERRA and the relocation contract, and the relationship between the two, should be liberally construed for the benefit of Jones and other service members, because the employer is a federal agency, and especially since the employer is a military service.[8]

Section 4301(b) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides: "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[9]

This "model employer" expectation should apply especially to the Department of Defense (DOD) and the services, because they are the principal beneficiaries of USERRA. I have written:

> I think that it is unconscionable that the Air Force, as a civilian employer, flouts USERRA. As I explained in Law Review 16055 (June 2016) and Law Review 16036 (April 2016),

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[6] *See* 20 C.F.R. 1002.149.

[7] https://www.bing.com/search?q=contra+proferentem&filters=ufn%3a%22contra+proferentem%22+sid%3a%228f716db5-d6b2-a385-a05c-6d960a4619bc%22&FORM=SNAPST.

[8] In its first case construing the 1940 reemployment statute, the Supreme Court held that this law should be "liberally construed for the benefit of he who laid aside his civilian pursuits to serve his country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).

[9] 38 U.S.C. 4301(b).

> Congress has stated its expectation that the Federal Government should be a model employer in carrying out the provisions of USERRA. An armed force, when acting as a civilian employer, should be triply the model employer. How do we get the restaurant owner in Dayton to comply with USERRA when she learns that the Air Force, at nearby Wright-Patterson Air Force Base, flouts this law?[10]

I have also written:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
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> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).
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> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is definitely a compelling government interest in the enforcement of USERRA.[11]

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[10] Law Review 16064 (July 2016). In that article, I discussed the case of *Hayden v. Department of the Air Force,* 812 F.3d 1351 (Fed. Cir. 2016).

[11] Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.