

## LAW REVIEW<sup>1</sup> 18074

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### DOJ Proposals To Improve USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

[Update on Sam Wright](#)

#### 1.0—USERRA generally

##### 1.1.1.2—USERRA applies to small employers

In 2015, the United States Department of Justice (DOJ) proposed amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Military Lending Act (MLA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). I have copied below the entire text of DOJ’s proposals for USERRA.

I support these proposed amendments, with one exception. I do not agree that the *sum of the compensatory and punitive damages* should be limited by a formula based on the size of the employer (number of employees). I believe that even the smallest employer should be required

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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. 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](mailto:SWright@roa.org).

to compensate the plaintiff for the full amount of compensatory damages, but I can support limiting the amount of punitive damages, based on the size of the enterprise.

It should also be noted that you only need one employee to be an employer for purposes of the federal reemployment statute. *See Cole v. Swint*, 961 F.2d 58, 60 (5<sup>th</sup> Cir. 1992).

Later this year, there will be a meeting (possibly at ROA headquarters) involving DOJ, the Department of Labor (DOL), ROA, and other interested parties to come up with proposed USERRA amendments for the 116<sup>th</sup> Congress (which starts in January 2019) and to develop a legislative strategy and implementation plan to get those proposals enacted. We will keep the readers informed of developments on this important issue.

Here is the DOJ proposal. I supplied the emphasis by italics.

SEC. \_\_\_\_\_. ENFORCEMENT OF RIGHTS UNDER CHAPTER 43 OF TITLE 38, UNITED STATES CODE, WITH RESPECT TO A STATE OR PRIVATE EMPLOYER. (a) ACTION FOR RELIEF.— (1) INITIATION OF ACTIONS.—Paragraph (1) of subsection (a) of section 4323 of 6 title 38, United States Code, is amended by striking the third sentence and inserting the following new sentences: “If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may commence an action for relief under this chapter. The person on whose behalf the complaint is referred may, upon timely application, intervene in such action and may obtain such appropriate relief as provided in subsections (d) and (e).”. (2) ATTORNEY GENERAL NOTICE TO SERVICEMEMBER OF DECISION.—Paragraph 13 (2) of such subsection is amended to read as follows: “(2)(A) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall transmit, in writing, to the person on whose behalf the complaint is submitted— “(i) if the Attorney General has made a decision about whether the United States will commence an action for relief under paragraph (1) relating to the complaint of the person, notice of the decision; and “(ii) if the Attorney General has not made such a decision, notice of when the Attorney General expects to make such a decision. “(B) If the Attorney General notifies a person of when the Attorney General expects to make a decision under subparagraph (A)(ii), the Attorney General shall, not later than 30 days after the date on which the Attorney General makes such decision, notify, in writing, the person of such decision.”. (3) PATTERN OR PRACTICE CASES.—Such subsection is further amended— (A) by redesignating paragraph (3) as paragraph (4); and (B) by inserting after paragraph (2) (as amended by paragraph (2) of this subsection) the following new paragraph (3): “(3) Whenever the Attorney General has reasonable cause to believe that a State (as an employer) or a private employer is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights or benefits secured by this chapter, the Attorney General may commence an action under this chapter.”. (4) ACTIONS BY PRIVATE PERSONS.—Subparagraph (C) of paragraph (4) of such subsection, as redesignated by paragraph (3)(A), is amended by striking “refused” and all that follows and inserting “notified by the Department of Justice that the Attorney General does not intend to bring a civil action.”. (b) SOVEREIGN IMMUNITY. —Paragraph (2) of subsection (b) of

section 4323 of such title is amended to read as follows: “(2)(A) In the case of an action against a State (as an employer), any instrumentality of a State, or any officer or employee of a State or instrumentality of a State acting in that officer or employee’s official capacity, by any person, the action may be brought in the appropriate district court of the United States or in a State court of competent jurisdiction, and the State, instrumentality of the State, or officer or employee of the State or instrumentality acting in that officer or employee’s official capacity shall not be immune under the Eleventh Amendment of the Constitution, or under any other doctrine of sovereign immunity, from such action. *“(B)(i) No State, instrumentality of such State, or officer or employee of such State or instrumentality of such State, acting in that officer or employee’s official capacity, that receives or uses Federal financial assistance for a program or activity shall be immune, under the Eleventh Amendment of the Constitution or under any other doctrine of sovereign immunity, from suit in Federal or State court by any person for any violation under this chapter related to such program or activity.* “(ii) In an action against a State brought pursuant to subsection (a), a court may award the remedies (including remedies both at law and in equity) that are available under subsections (d) and (e).”. (c) VENUE FOR CASES AGAINST PRIVATE EMPLOYERS.—Subsection (c)(2) of such section is amended by striking “United States district court for any district in which the private employer of the person maintains a place of business.” and inserting “United States district court for— “(A) any district in which the employer maintains a place of business; “(B) any district in which a substantial part of the events or omissions giving rise to the claim occurred; or “(C) if there is no district in which an action may otherwise be brought as provided in subparagraph(A) or (B), any district in which the employer is subject to the court’s personal jurisdiction with respect to such action.”. (d) COMPENSATORY AND PUNITIVE DAMAGES. —Subsection (d)(1) and d(2) of such section is amended by striking subparagraph (d)(1)(C) and d(2) and inserting the following new subparagraphs: “(C) The court may require the employer to pay the person compensatory damages suffered by reason of such employer’s failure to comply with the provisions of this chapter. “(D) The court may require the employer (other than a government, government agency, or political subdivision) to pay the person punitive damages if the court determines that the employer failed to comply with the provisions of this chapter with reckless indifference to the federally protected rights of the person. *“(E) The sum of the amount of compensatory damages awarded under subparagraph C of this section and the amount of punitive damages awarded under subparagraph D of this section, may not exceed, for each person the following:* “(i) *In the case of an employer who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000.* “(ii) *In the case of an employer who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000.* “(iii) *In the case of an employer who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000.* “(iv) *In the case of an employer who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.*”. (d)(1) CONFORMING AMENDMENTS.—Subsection (2) of such section is amended to read as follows: “(2)(A) Any compensation

awarded under subparagraph (B) or (C) or (D) of 2 paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter. "(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) or (D) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts." (e) STANDING.—Subsection (f) of such section is amended— (1) by inserting "by the United States or" after "may be initiated only"; and (2) by striking "or by the United States under subsection (a)(1)". (f) ATTORNEY FEES AND OTHER LITIGATION EXPENSES.—Subsection (h)(2) of such section is amended striking "subsection (a)(2)" and inserting "subsection (a)(1) or subsection (a)(4)". (g) PENSION CONTRIBUTION CALCULATIONS.—Subsection (b) of section 4318 of such title is amended— (1) in paragraph (3)(B), by striking "on the basis of" and all the follows and inserting "on the basis specified in paragraph (4)."; and (2) by adding at the end the following new paragraph: "(4) The basis for a computation under paragraph (3) to which subparagraph (B) of that 22 paragraph applies is as follows:

"(A) If the period of service described in subsection (a)(2)(B) is one year or less, the computation shall be made on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period or, if shorter, the period of employment immediately preceding such period. "(B) If the period of such service is more than one year, the computation shall be made on the basis of the average rate of compensation during such period of service of employees of that employer who are similarly situated to the servicemember in terms of having similar seniority, status, and pay."

(h) DISABILITY DISCOVERED AFTER EMPLOYEE RESUMES EMPLOYMENT.—Subsection (a)(3) of section 4313 of such title is amended by inserting "including a disability that is brought to the employer's attention within five years after the person resumes employment," after "during, such service.". (i) BURDEN OF IDENTIFYING PROPER REEMPLOYMENT POSITIONS.—Section 4313 of such title is amended by adding at the end the following new subsection: "(c) For purposes of this section, the employer shall have the burden of identifying the appropriate reemployment positions.". (j) CIVIL INVESTIGATIVE DEMANDS.—Section 4323 of such is amended by adding at the end the following new subsection: "(j) ISSUANCE AND SERVICE OF CIVIL INVESTIGATIVE DEMANDS BY ATTORNEY GENERAL.—(1) Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material relevant to an investigation under this chapter, the Attorney General may, before commencing a civil action under subsection (a), issue in writing and cause to be served upon such person, a civil investigative demand requiring— "(A) the production of such documentary material for inspection and copying; "(B) that the custodian of such documentary material answer in writing written questions with respect to such documentary material; or "(C) the production of any combination of such documentary material or answers. "(2) The

provisions governing the authority to issue, use, and enforce civil investigative demands under section 3733 of title 31 (known as the ‘False Claims Act’) shall govern the authority to issue, use, and enforce civil investigative demands under paragraph (1), except that for purposes of that paragraph—“(A) a reference in that section to false claims law investigators or investigations shall be applied as referring to investigators or investigations under this chapter; (B) a reference to interrogatories shall be applied as referring to written questions, and answers to such need not be under oath; (C) the statutory definitions for purposes of that section relating to ‘false claims law’ shall not apply; and (D) provisions of that section relating to qui tam relators shall not apply.”

### **Section-by-Section Analysis**

This proposal would amend chapter 43 of title 38, United States Code, to improve the enforcement of reemployment rights under that chapter with respect to a State or private employer. That chapter is popularly known as the Uniformed Services Employment and Reemployment Rights Act (USERRA). Subsection (a) strengthens enforcement of USERRA rights by allowing the United States to serve as a plaintiff in all suits filed by the Attorney General, as opposed to only suits filed against State employers. The amendment preserves the right of the aggrieved persons to intervene in such suits, or to bring their own suits where the Attorney General has declined to file suit. This section also strengthens enforcement by granting independent authority to the Attorney General to investigate and file suit to challenge a pattern or practice in violation of USERRA. The pattern or practice language is modeled after Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-6(a)). Subsection (b) explicitly abrogates sovereign immunity so that servicemembers can bring an action against a State employer in State court or Federal district court. Subsection (c) amends USERRA’s venue provision to allow servicemembers to file actions against private employers in district courts with jurisdictional requirements that are similar to the general venue statute, 28 U.S.C. 1391(b). Subsection (d) adds compensatory and punitive damages provisions that are similar to the damages provisions in title VII of the Civil Rights Act of 1964. Subsection (e) authorizes either the United States or the aggrieved individual to serve as a plaintiff in all USERRA suits. Subsection (f) makes conforming amendments to the amendments made by subsection (a). Subsection (g) would revise the pension contribution calculations for servicemembers in service over one year so that the servicemember’s pension contribution is comparable to a similarly situated employee. Subsection (h) modifies USERRA to include disabilities discovered within five years after a servicemember resumes work for purposes of reemployment determinations. Subsection (i) clarifies that the employer has the burden of identifying proper reemployment positions. Subsection (j) grants authority to the Attorney General to issue civil investigative demands in its USERRA investigations. The authority is similar to that provided under the False Claims Act (31 U.S.C. 3733), except that it does not include the authority to compel oral testimony or sworn answers to interrogatories.