

Is the Federal Government a Single Employer for Purposes of USERRA's Five-Year Limit?—I Have Reconsidered.

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.3.1.2—Character and duration of service

1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

Q: I am a Colonel in the Army Reserve and a life 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 am a GS-14 federal employee for a small, independent federal agency. I have been a federal employee since 1995, and during that time I have been promoted from GS-5 to GS-14. I have worked for four different federal agencies.

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 began my current job in 2012. At the time, I was a GS-12 for the Department of Commerce (DOC). I used “USA Jobs”³ to apply for my current GS-14 position, and I was hired, starting on 10/1/2012. Two years later, I applied for and was accepted for the opportunity to return to active duty for one year.

I have been on active duty continuously since 10/1/2014, on a series of one-year orders. Each year, I have notified the federal agency that my orders have been extended for an additional year, and I have sent the agency a copy of my new orders.

My current orders expire 9/30/2018, and this time the orders will not be extended. I am approaching my mandatory retirement date in the Army Reserve.

On August 1, 2018, I sent a certified letter to the personnel office of the independent federal agency where I work, informing her that I will be leaving active duty on 9/30/2018 and applying for reemployment at the agency shortly thereafter. I think that I meet the five USERRA conditions for reemployment, as you have described in detail in Law Review 15116 (December 2015) and many other articles. I left my civilian job in 2014 to go on active duty, and I gave the federal agency employer prior oral and written notice. I have also kept the agency informed of the active duty extensions in 2015, 2016, and 2017. I have served honorably, and I will not receive a disqualifying bad discharge when I am released from active duty at the end of September. I plan to apply for reemployment immediately after I leave active duty. Indeed, I think that I have already applied for reemployment, in that I have given the federal agency my active duty release date and have explicitly applied for reemployment immediately after that date.

As to the five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship for which I seek reemployment, I believe that I began my current employer relationship with the small, independent federal agency on 10/1/2012. I think that active duty periods that I performed prior to that date are irrelevant for purposes of computing my five-year limit.

In her letter, the personnel officer insisted that the Federal Government is a single employer and that all my active duty periods going back to 1995 count, except periods that are exempt from the five-year limit under one of the subsections of section 4312(c) of USERRA.⁴ The

³ USA Jobs is a website operated by the United States Office of Personnel Management (OPM). This website is the usual way that folks apply for and get federal civilian jobs. This includes current federal employees looking to move up as well as folks outside the federal workforce seeking to join it.

⁴ 38 U.S.C. 4312(c). As I have explained in detail in Law Review 16043 (May 2016) and many other articles, there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your limit. For purposes of this article, we shall assume that if we must look back to 1995 you are beyond the five-year limit even after the exempt periods are excluded from the computation.

personnel officer insists that my 2014-18 active duty period puts me over the five-year limit and that I am not entitled to reemployment under USERRA.

After I received the personnel officer's letter, I went back and reread several of your published articles about the five-year limit. In Law Review 09068 (December 2009) you wrote:

For this purpose [computing the five-year limit], the Federal Government should be considered to be a single employer. When you go from the Department of Labor to the Department of the Interior and then to the Environmental Protection Agency, and take your federal civilian seniority with you, you have not started a new "employer relationship" [and you don't get a fresh five-year limit with the new agency].

You have not cited any case law or other authority for the proposition that the Federal Government is a single employer for purposes of the five-year limit. Please reconsider your position. I am stuck with what I have done, because I cannot turn back the hands of time. If the single-employer theory is valid, I am beyond the five-year limit and I will lose my federal civilian job.

A: Based on this e-mail, I have reconsidered the position that I took in 2009. I researched the issue again, and I am reasonably certain that this specific issue is not addressed in any published decision of the Merit Systems Protection Board (MSPB) or the United States Court of Appeals for the Federal Circuit.⁵ The OPM USERRA regulations also do not address this specific question.⁶

As I have explained in Law Review 15067 (August 2015) and many other articles, as well as footnote 2 of this article, Congress enacted USERRA in 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 held that this law should be "liberally construed for he who has laid aside his civilian pursuits to serve his country in its hour of great need."⁷

USERRA's legislative history explains that VRRA case law is still relevant in interpreting USERRA:

The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related

⁵ Under section 4324 of USERRA, 38 U.S.C. 4324, USERRA cases involving federal agencies as employers are adjudicated by the MSPB, not federal courts, and the person claiming reemployment rights with respect to a federal agency can appeal from the MSPB to the Federal Circuit.

⁶ USERRA gives OPM the authority to promulgate regulations about the application of this law to federal executive agencies as employers. 38 U.S.C. 4331(b)(1). The OPM USERRA regulations are codified in title 5 of the Code of Federal Regulations (C.F.R.) at part 353.

⁷ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. *This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed."* See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977).⁸

Applying the "liberal construction" commandment to the question before us, I think that a more-than-reasonable argument can be made that the start date for the computation of your five-year limit came in 2012, not in 1995. I am informed that you have retained an attorney to represent you in this matter, and I know and recommend that attorney. We will keep the readers informed of developments on this interesting and important issue.

For other federal employees, I strongly advise you to continue using the "Federal Government is a single employer" rule in computing your five-year limit and remaining under that limit, to protect your right to reemployment by the Federal Government after you leave active duty. If you can avoid it, you don't want to bet your job on an interpretation that the MSPB and the Federal Circuit may or may not accept.

⁸ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part I) (emphasis supplied). This report is reprinted in its entirety in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on pages 701-02 of the 2018 edition of the *Manual*.