

Major League Baseball Network Apprenticeship Program Requires USAR Soldiers To Certify that they Won't Volunteer for Deployment To Be Considered for the Opportunity—Does that Violate USERRA?

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1.1.2.1—USERRA applies to persons holding or applying for part-time, temporary, probationary or at-will jobs

1.2—USERRA forbids discrimination

1.3.1.4—USERRA's affirmative defenses

1.8—Relationship between USERRA and other laws/policies

Q: I am a retired Colonel of the Army Reserve Judge Advocate General's Corps and a member of the Reserve Organization of America.³ I have read with great interest many of your "Law

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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 (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.

³ At its September 2018 annual convention, the Reserve Officers Association adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers

Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have also heard you speak about USERRA on more than one occasion.

The Major League Baseball Network and the Army Reserve have announced the formation of a Private Public Partnership to provide an apprenticeship program for would-be sports journalists who are Army Reservists. The program will last about nine months, from February to November 2019 and will be conducted in Secaucus, NJ. The program will pay participants \$25 per hour for 36-40 hours per week.

My concern is about one sentence in the announcement and one sentence in the application form. The announcement states: “Volunteering for deployment (if applicable) during the Apprenticeship will be prohibited.” The “Soldier’s Statement” asks the applicant for the program to certify that: “I understand that during the 9-10 month program I will not volunteer for any operation or mission beyond my regular reserve obligation (i.e. battle assembly and annual training).”

I have heard you say on more than one occasion and I have read in more than one of your articles that the protections of USERRA are not limited to the traditional pattern of “one weekend per month and two weeks in the summer” and that most Reserve Component personnel are now expected to do much more than the minimum as the “Strategic Reserve” has metamorphosized into the “Operational Reserve” in the 17 years since the terrorist attacks of 9/11/2001. Do you think that the apprenticeship program, the announcement of it, and the application form are inconsistent with USERRA?

A: Yes, and I call upon the Network and the Chief of Army Reserve to withdraw, correct, and reissue the announcement and application form immediately. Section 4302(b) of USERRA makes it clear that USERRA supersedes and overrides an agreement that a prospective employee makes with his or her prospective employer as a condition of employment if the agreement purports to limit USERRA rights or to impose an additional prerequisite upon the exercise of USERRA rights. Section 4302(b) provides:

This chapter [USERRA] 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

Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.⁴

USERRA's legislative history clarifies the purpose and effect of section 4302(b) as follows:

The Committee [House Committee on Veterans' Affairs] wishes to stress that rights under this chapter belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43 [USERRA], any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights which are already in existence may be waived. See *Leonard v. United Airlines, Inc.*, 972 F.2d 155, 159 (7th Cir. 1992). *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

Making an applicant for the apprenticeship program promise not to apply for military orders as a condition of being considered for the program is fundamentally inconsistent with USERRA. Section 4311(a) of USERRA makes it unlawful for an employer to deny a person initial employment on the basis of his or her application for service or obligation to perform service.⁶

USERRA gives the individual Army Reservist the right to apply to the Army for active duty orders or other military orders, but USERRA does not guarantee that the individual's application will be granted by the Army. USERRA governs the soldier's relationship with his or her civilian employer. USERRA does not govern the soldier's relationship with the Army. If the Chief of Army Reserve wants to ensure that the apprenticeship program is not interrupted by active duty orders, the Chief of Army Reserve can decide and announce that if a participant applies for active duty orders during the term of the program the application will be denied, except perhaps in the most extraordinary circumstances (like World War III). Making the applicant promise not to apply for active duty orders is unnecessary.

Q: Let us assume that Josephine Smith is selected for and begins the Program and then, one month into the nine-month Program, she leaves (voluntarily or involuntarily) for a one-year period of military service or training. Will Josephine have the right to reemployment under USERRA after she completes her year of military service?

A: No. USERRA has three affirmative defenses,⁷ and one of them reads as follows:

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

⁵ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part I). This committee report is reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 703 of the 2018 edition of the *Manual*.

⁶ 38 U.S.C. 4311(a).

⁷ An affirmative defense is a matter that the defendant can raise to avoid liability. The defendant must plead the affirmative defense in answer to the complaint and must prove (by a preponderance of the evidence) the existence of the factual basis for the defense.

An employer is not required to reemploy a person under this chapter [USERRA] if-- ... the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation will continue indefinitely or for a significant period.⁸

If Josephine's year of active duty interrupts the nine-month apprenticeship program, and if she applies for reemployment in the program after release from active duty, the program (even assuming it is still in existence at that time) will be justified in denying her application for reemployment under section 4312(d)(1)(C). But that does not mean that it is lawful for the program to deny Josephine's application based on the possibility that her participation might be interrupted by a voluntary or involuntary call to the colors. Section 4311(d) of USERRA provides: "The prohibitions in subsections (a) and (b) [of section 4311] shall apply to any position of employment, *including a position that is described in section 4312(d)(1)(C) of this title.*"⁹

⁸ 38 U.S.C. 4312(d)(1)(C).

⁹ 38 U.S.C. 4311(d) (emphasis supplied).