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Right to Reemployment in a Term-Limited Federal Job

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Update on Sam Wright

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Q: I am a Major in the Army Reserve and a member of the Reserve Organization of America.[3] On the civilian side, I am a civilian employee of the Department of the Army (DA), in Germany.

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[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 (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] 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 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

I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In January 2013, I was hired by DA for a civilian job in Germany. I was hired for a two-year term, and in January 2015 I was selected for a second two-year term. In January 2017, I was selected for a third two-year term. That term was interrupted by my return to active duty on 10/1/2017. I volunteered for a two-year active duty period, to expire 9/30/2019. In September of next year, I expect to leave active duty and apply for reemployment in my civilian DA job in Germany.

Recently, the personnel office of the DA organization where I have my civilian job contacted me and informed me that I must leave active duty and return to my civilian DA job by 1/1/2019, or I will not be considered for another two-year appointment and I will not be offered reemployment when I leave active duty in September 2019, at the end of my current military orders. When I asserted that treating me this way violates USERRA, the personnel officer made a series of assertions about USERRA, as follows:

a. **USERRA does not apply to me because my civilian job is outside the United States.**
b. **USERRA does not apply to the Army as a civilian employer.**
c. **USERRA does not apply to me because I volunteered for this two-year active duty period.**
d. **USERRA will not apply to me in September 2019 because by that time my two-year term in my civilian job will have expired and I will not have been renewed.**
e. **USERRA will not entitle me to reemployment if there is no vacancy for which I am qualified in September 2019. USERRA does not require the civilian employer to displace another employee to make room for the returning veteran.**
f. **The DA civilian employer cannot displace another employee to make room for me because that would violate the collective bargaining agreement between DA and the union that represents civilian DA employees.**

These assertions about USERRA seem to be fundamentally inconsistent with what you have written in your "Law Review" articles. What do you say about the personnel director's assertions?

Answer, bottom line up front

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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 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.

If you meet the five USERRA conditions[4] next fall, the employer (DA) will be required to reemploy you even if there is no vacancy and reemploying you requires the employer to displace another employee. USERRA applies all over the world to the United States Government and other United States employers. USERRA applies to the Federal Government, as a civilian employer, and especially to the Army and the other services. USERRA applies to voluntary as well as involuntary uniformed service. USERRA overrides the CBA insofar as the CBA purports to limit USERRA rights or to impose additional prerequisites upon the exercise of USERRA rights.

Explanation

USERRA applies all over the world to the United States Government and other United States employers.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on 10/13/1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

Congress has amended USERRA several times since enacting it almost 24 years ago. In 1998, Congress amended USERRA's definition of "employee"[5] and added a new section 4319, which reads as follows:

> **(a)** Liability of controlling United States employer of foreign entity. If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.
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> **(b)** Inapplicability to foreign employer. This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by a United States employer.

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[4] As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you (or any returning service member) have the right to reemployment if you left a civilian job (federal, state, local, or private sector) to perform uniformed service and gave the employer prior oral or written notice. It appears that you already meet these two conditions. You must have been released from the period of service without having received a disqualifying bad discharge from the military. You will meet that condition next fall unless you have done something stupid while on active duty. You must have been released from the period of service without having exceeded the cumulative five-year limit on the duration of your period or periods of uniformed service, relating to your employer relationship with the Federal Government. As I have explained in Law Review 16043 (May 2016), there are nine exemptions from the five-year limit. That means that there are nine kinds of service that do not count toward exhausting your five-year limit with a specific employer. Because your current two-year active duty period is voluntary, it likely counts toward your five-year limit, unless your orders contain "magic words" exempting this period from your limit. After release from a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[5] 38 U.S.C. 4303(3).

> **(c)** Determination of controlling employer. For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.
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> **(d)** Exemption. Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.[6]

The 1998 legislative history includes one paragraph about the amendment of section 4303(3) and the addition of section 4319. That paragraph reads as follows:

> Section 2 of the bill would revise the definition of "employee" presently found in section 4303(3) of title 38, United States Code, to clarify that it includes persons employed in a foreign country by an employer that is incorporated or otherwise organized in the United States or that is controlled by an entity that is organized in the United States. It would also add a new section 4319 to chapter 43 [USERRA] to clarify the liability of the controlling U.S. employer for violations of the law, to set out when an employer shall be considered to be covered by the law, and to exempt employers when compliance would cause the employer to violate the law of the foreign country in which the workplace is located.[7]

As I have explained in Law Review 17068 (June 2017), the definitive reference on USERRA is *The USERRA Manual,* by Katherine Piscitelli and Edward Still. In their book, they address the application of USERRA to employers outside our country as follows:

> The statute [USERRA] also covers businesses outside the United States that are owned or controlled by United States employers, unless compliance would violate the law of the country where a workplace is located. A person working for such an employer in a foreign country is a covered "employee" under USERRA if the person is a citizen, national, or permanent resident alien of the United States.
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> USERRA sets forth several factors that are to be considered in determining whether a United States employer controls a foreign entity. They are as follows:
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> a. Interrelation of operations
> b. Common management

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[6] 38 U.S.C. 4319.

[7] H.R. Rep. 105-448 (1998), 1998 WL 117158 (Legislative History). This legislative history is reprinted in Appendix B-5 of *The USERRA Manual,* by Katherine Piscitelli and Edward Still. The quoted paragraph can be found on page 866 of the 2017 edition of the *Manual.*

c. Centralized control of labor relations
d. Common ownership or financial control.[8]

Expanding USERRA to make it apply to U.S. employers outside the United States is an important improvement made 20 years ago. I recently heard from a Navy Reserve officer who was employed by a major American university at its campus in Southwest Asia and who left that job when called to active duty in the Navy. Under section 4319 of USERRA, that officer will have the right to reemployment when he is released from active duty, assuming of course that he meets the five USERRA conditions.

USERRA probably applied to the Federal Government all over the world even before the 1998 amendment. If there was any question on that issue, the 1998 amendment answered that question.

USERRA applies to the Federal Government as a civilian employer, and especially to the Army and the other services.

USERRA's definition of "employer" expressly includes "the Federal Government."[9] Section 4324 of USERRA[10] provides an enforcement mechanism, through the Merit Systems Protection Board, for enforcing USERRA against federal executive agencies, including DA. USERRA's final section requires each federal executive agency to train its human relations personnel about the rights of service members and the obligations of employers under USERRA.[11]
USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[12] If the Federal Government is expected to be a model employer, the Army (as the principal beneficiary of USERRA) must be triply the model employer. "Do as I say and not as I do" has always been a losing argument. If the Army, when acting as a civilian employer, routinely flouts USERRA, we can never expect other employers to comply.[13] Without a law like USERRA, the Army and the other services would not be able to recruit and retain enough service members to defend our country.[14]

USERRA applies to voluntary as well as involuntary military service.

Section 4303 of USERRA defines 16 terms used in this law. The term "service in the uniformed services" is defined as follows:

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[8] *The USERRA Manual,* section 2:10, page 45 of the 2017 edition of the *Manual* (footnotes omitted).
[9] 38 U.S.C. 4303(4)(A)(ii).
[10] 38 U.S.C. 4324.
[11] 38 U.S.C. 4335. Please see Law Review 18063 (July 2018) for a detailed discussion of this section.
[12] 38 U.S.C. 4301(b).
[13] Please see Law Review 18014 (February 2018).
[14] Please see Law Review 14080 (July 2014).

> The term "service in the uniformed services" means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, *inactive duty training*, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.[15]

Of course, in a larger sense all military service is voluntary in our country. In 1973, almost two generations ago, Congress abolished the draft and established the all-volunteer military.

A federal employee away from his or her civilian job for military service is exempted from the "descending escalator." The federal agency is required to reemploy the returning employee in a position of employment that is at least as favorable as the position the employee left, even if the position would have been downgraded or eliminated if the employee had remained continuously employed in the civilian job.

As I have explained in Law Review 17028 (April 2017), the federal civilian employee who leaves his or her job for military service and who meets the five USERRA conditions is entitled to reemployment, even if the job would have been eliminated anyway if the employee had remained in the job. The pertinent section of the Office of Personnel Management (OPM) USERRA regulations is as follows:

> **(a)** During uniformed service. *An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered "for cause" under this subpart.)* He or she is not a "competing employee" under § 351.404 of this chapter*. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status and pay.*
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> **(b)** Upon reemployment. *Except in the case of an employee under time-limited appointment who finishes out the unexpired portion of his or her appointment upon reemployment*, an employee reemployed under this subpart may not be discharged, except for cause --
> **(1)** If the period of uniformed service was more than 180 days, within 1 year; and

[15] 38 U.S.C. 4303(13) (emphasis supplied).

> **(2)** If the period of uniformed service was more than 30 days, but less than 181 days, within 6 months.[16]

Section 353.209(b) clearly implies that when a federal employee in a term-limited job leaves that job for military service, the term does not continue running while the employee is away from work for service. When you are released from active duty and make a timely application for reemployment, you are entitled to return to work at least for the nine months remaining on your most recent two-year appointment.

The lack of a current vacancy at the time the returning veteran applies for reemployment is not a defense to the employer's explicit obligation to reemploy. The employer must reemploy the returning veteran even if that requires displacing another employee.

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that your right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit[17] has held:

> Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that "the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.[18]

The United States Court of Appeals for the Federal Circuit[19] has held:

> The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols' [Nichols was the returning veteran and plaintiff] former position was "unavailable" because it was occupied by another and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because

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[16] 5 C.F.R. 353.209 (emphasis supplied). The citation refers to section 353.209 of title 5 of the Code of Federal Regulations (C.F.R.). Many federal statutes give federal executive agencies the authority to promulgate regulations to fill in the details of statutes, and those regulations are codified in the C.F.R. Section 4331(b) of USERRA, 38 U.S.C. 4331(b), gives the Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to federal executive agencies as employers. This section is part of the OPM USERRA regulations. In the private sector and in state and local government employment, the "escalator" can descend as well as ascend, and the returning veteran is not exempted from a bad thing, like a downgrade or reduction in force, that clearly would have happened anyway. Please see Law Review 17097 (October 2017).

[17] The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[18] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49, 55-56 (1st Cir. 2013).

[19] The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

> the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[20]

The collective bargaining agreement between DA and the union representing DA civilian employees does not over USERRA's obligation that DA reemploy you even if that means displacing another employee.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress originally enacted the Veterans' Reemployment Rights Act (VRRA), as part of the Selective Training and Service Act (STSA), in 1940. In its first case construing the VRRA the Supreme Court held: "No practice of employers or agreements between employers and unions can cut back the service adjustment benefits that Congress has secured the veteran under the Act."[21] That principle has been codified in section 4302 of USERRA, as follows:

> **(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.[22]

The collective bargaining agreement between the DA and your union can give you greater or additional rights, but it cannot reduce your USERRA rights or impose additional prerequisites upon your exercise of those rights. Thus, the agreement does not and cannot override the employer's obligation to displace another employee if that is what is needed to accord you your USERRA rights.

USERRA forbids discrimination in employment on the basis of your performance of uniformed service or obligation to perform service.

Q: There are 25 employees in the work group to which I belonged from January 2013 (when I was hired) until September 2017 (when I left my job to go on active duty). When I left, Mary Jones was hired to take my place for the remainder of the two-year term (from January 2017

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[20] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite the reader's attention to *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981).

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

[22] 38 U.S.C. 4302 (emphasis supplied).

until January 2019). I am informed that she has done a fine job and will almost certainly be selected for another two-year term in January 2019.

In recent years, the great majority of those employees who have sought to remain have been selected for new two-year terms. For example, in January 2017 22 of the 25 were selected for new two-year terms, and two did not seek reemployment. Only one employee sought reappointment but was not selected, and no one was surprised that he was not selected because he had not been an effective employee.

Am I entitled to a new two-year term when I return to work in the fall of 2019?

A: Based on the statistics you have cited, it seems that you would have an excellent argument that not selecting you for a new two-year term in January 2019 (although you are not present and are still on active duty at the time) violates section 4311 of USERRA, which provides:

> **§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited**

- **(a)** A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

  (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

- **(c)** An employer shall be considered to have engaged in actions prohibited--
  - **(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
  - **(2)** under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right

provided for in this chapter, is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

- **(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[23]

You can also argue, based on these statistics, that it is "reasonably certain" that you would have been selected for a new two-year term in January 2019 if you had been present at work, instead of away on active duty, at the time.[24]

[23] 38 U.S.C. 4311 (emphasis supplied). *See also Carroll v. Delaware River Port Authority,* 843 F.3d 129 (3d Cir. 2016). Attorney Thomas Jarrard and I discuss *Carroll* in Law Review 17016 (March 2017).

[24] Please see Law Review 18081 (September 2018).