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USERRA Applies to Hiring Halls

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About Sam Wright

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1.7—USERRA regulations

In several early "Law Review" articles,[3] I discussed the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to the hiring hall situation. Because I have received an inquiry about this subject recently, and because it has been more than 14 years since I last addressed this topic in February 2007, I have decided to address the topic again now. This article is essentially a reprint of Law Review 0712 (February 2007), with some reformatting and much additional material added.

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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 44 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 38 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] Please see Law Reviews 28, 174, 183, and 0712.

The National Labor Relations Act (NLRA) governs the relationship among employees, labor unions, and employers in most of private industry, except for the railroad and airline industries.[4] The National Labor Relations Board (NLRB) administers and enforces the NLRA. On its website, the NLRB explains the term "hiring hall" as follows:

> In some industries, most jobs are filled through referrals from union hiring halls. Employers in the construction and maritime industries often choose to hire exclusively from referrals from union hiring halls. Unions that operate exclusive hiring halls must notify workers how the referral system works (and any changes in that system) and maintain non-discriminatory standards and procedures in making job referrals from the hiring hall. You don't have to be a union member to use a hiring hall and a union may not discriminate in making referrals based on whether or not you are a union member. It may, however, charge nonmembers a reasonable fee to use the hiring hall's services.[5]

Q: I am a Second-Class Petty Officer (E-5) in the Navy Reserve and a member of the Reserve Organization of America (ROA).[6] I have read several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am uncertain as to how that law applies to me as a longshoreman.

I do not have any one employer per se. I work through a "hiring hall" operated by my union. There are several stevedoring companies operating in this port. When a cargo ship comes in or is getting ready to depart, the ship's owner contracts with the stevedoring company to load or unload that ship. The stevedoring company contacts the hiring hall and places an order for longshoremen. Then, the hiring hall refers a group of longshoremen, sometimes including me. I work for a short time loading or unloading a specific ship. When that work is completed, I return to the hiring hall and wait for the next referral.

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[4] A separate law called the Railway Labor Act governs labor relations in the railroad and airline industries. The National Mediation Board (NMB) is responsible for administering and enforcing that law.

[5] https://www.nlrb.gov/rights-we-protect/the-law/employees/hiring-halls.

[6] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and 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 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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

I am new at this, but I know some older men who did this work for a whole career and are now retired. There is a retirement plan. When I work, I contribute, and the employer contributes. The plan rewards work in the entire industry. A longshoreman who works for a career works for all the stevedoring companies that use the hiring hall to obtain workers.

Does USERRA apply to a situation like this? In this situation, who is my "employer?" I have been notified that my Navy Reserve unit will be mobilized later this year. To whom should I give notice that I will be leaving work for service?

A: I discussed the application of USERRA to hiring halls in Law Reviews 28, 174, 183, and 0712. Section 4303 of USERRA defines 16 terms, including the term "employer." That term is defined as follows:

> **(A)** Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—
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> **(i)** *a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;*
>
> **(ii)** the Federal Government;
>
> **(iii)** a State;
>
> **(iv)** any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and
>
> **(v)** a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.
>
> **(B)** In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.
>
> **(C)** Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.
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> **(D)**
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> **(i)** Whether the term "successor in interest" applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:
>
> **(I)** Substantial continuity of business operations.

(II) Use of the same or similar facilities.

(III) Continuity of work force.

(IV) Similarity of jobs and working conditions.

(V) Similarity of supervisory personnel.

(VI) Similarity of machinery, equipment, and production methods.

(VII) Similarity of products or services.

(ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i).[7]

USERRA's broad definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities."[8] In a hiring hall situation, the employer or group of employers have delegated the hiring function to the hiring hall and the union that operates the hiring hall. Thus, the union and the hiring hall are "employers" as defined by USERRA.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's legislative history addresses the broad definition of "employer" as follows:

> Section 4303(4) would define "employer" *and is to be broadly construed. It includes not only what may be considered a "traditional" single-employer relationship, but also (1) those under which a servicemember works for several employers in industries such as construction, longshoring, etc. where the employees are referred to employment,* and (2) those where more than one entity may exercise control over different aspects of the employment relationship. *See, e.g., Adams v. Mobile County Personnel Board,* 115 LRRM 2936 (S.D. Ala. 1982); *Magnuson v. Peak Technical Services, Inc.,* 808 F. Supp. 500, 507-511 (E.D. Va. 1992). This definition would also include potential employers in the case of the failure to hire an applicant *as well as entities to which certain employment-related responsibilities have been delegated, such as pension funds. See Imel v. Laborers Pension Trust Fund,* 904 F.2d 1327 (9th Cir.), *cert. denied,* 111 S. Ct. 343 (1990); *Akers v. Arnett,* 597 F. Supp. 557 (S.D. Tex. 1983), *affirmed* 748 F.2d 283 (5th Cir. 1984). This chapter

[7] 38 U.S.C. 4303(4) (emphasis supplied).
[8] 38 U.S.C. 4303(4)(A)(i).

> would apply, as does current law [the VRRA] to all employers regardless of the size of the employer or the number of employees. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).[9]

Section 4331 of USERRA[10] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The pertinent section of the DOL regulations is as follows:

Can a hiring hall be an employer?

Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns the employee to the jobs. In these industries, it may not be unusual for the employee to work his or her entire career in a series of short-term job assignments. The definition of "employer" includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered the employee's employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.[11]

DOL published draft USERRA regulations, for notice and comment, on 9/20/2004. After considering the comments received and making a few changes, DOL published the final USERRA regulations in the *Federal Register* on 12/19/2005. Together with the final regulations, DOL published a lengthy and scholarly preamble, addressing in detail the purpose and effect of each section and addressing the comments that had been received. In the preamble, DOL addressed the hiring hall issue in some detail, as follows:

> The Department [DOL] received a comment from the Building and Construction Trades Department of the AFL-CIO (BCTD) regarding the Department of Labor's treatment of hiring halls in proposed section 1002.38, which provides that the hiring hall is an "employer" if "the hiring and job assignment functions have been delegated by an employer to the hiring hall." The BCTD recommends that this provision be eliminated, arguing that hiring halls in the unionized construction industry represent an "arrangement" between the union and the local employers to facilitate referral of

[9] Report of the Committee on Veterans Affairs, House of Representatives, House Report No. 103-65, Part 1, April 28, 1993. You can find this report in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. You can find the quoted paragraph on pages 798-99 of the 2020 edition of the *Manual.* The report of the Senate Committee on Veterans Affairs is similar on this point. *See* 1993 Senate Committee Report, October 18, 1993, S. Rep. No. 103-158. The Senate report can be found in Appendix D-2 of *The USERRA Manual.* The pertinent paragraph can be found on page 878 of the 2020 edition of the *Manual.*

[10] 38 U.S.C. 4331.

[11] 20 C.F.R. 1002.38 (bold question and bold **Yes** in original).

available union members for work. According to the BCTD, hiring halls do not perform any hiring or assignment functions beyond referring the number and types of workers requested by the employer. The BCTD suggests that the multi-employer group using the hiring hall to obtain workers should be the "employer" rather than the hiring hall. In order to effectuate this suggestion, the BCTD proposes, in addition to eliminating section 1002.38, that the Department modify the regulatory definition of "employer" (section 1002.5(d)) to state, "In industries in which exclusive hiring halls are utilized, all employers who are required to obtain applicants through a given hiring hall arrangement may constitute a single employer under the Act." The Department's response to the BCTD proposal lies again in the breadth of the statutory definition of "employer," and in Congress's unambiguous intent that this definition be read broadly to include entities, such as hiring halls, to whom job referral responsibilities have been delegated. *See* S. Rep. No. 103-158, at 42 (1993); H.R. Rep. No. 103-65, Part 1, at 21 (1993). In addition, the BCTD's proposed amendment to the definition of "employer" in section 1002.5, which seeks the permanent application of a "single employer" framework to multiple hiring hall employers, is misplaced. The term "single employer" applies to firms that operate as an integrated enterprise and "exert[] significant control over" the employees in question. *G. Heileman Brewing Co. v. NLRB,* 879 F.2d 1526, 1530 (7th Cir. 1989). To determine whether firms are sufficiently integrated to constitute a single employer, courts look to (1) common management; (2) centralized control of labor relations; (3) interrelation of operations; and (4) common ownership or financial control. *See Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255 (1965); *see also Naperville Ready Mix, Inc. v. NLRB,* 242 F.3d 744, 752 (7th Cir. 2001), *cert. denied,* 534 U.S. 1040 (2001). While one or more employers using the same hiring hall may or may not operate as an integrated enterprise so that they meet the criteria of the "single employer" test, such criteria are not essential to determine whether the entity is an employer for purposes of USERRA. Accordingly, the Department rejects the BCTD's suggestions and will retain the provision regarding hiring halls in unchanged form. *See* 1002.38.[12]

Bottom line: USERRA applies to hiring hall situations just as it applies to traditional single-employer situations. In your situation, you should notify the hiring hall of your impending mobilization and notify the stevedoring company that most recently employed you before you depart your job to report to active duty.

[12] 2005 *Federal Register* page 75252 and the top left-hand column of page 75253. I am most pleased that DOL stood its ground and did not bend under the pressure of the powerful federation of American labor unions.

Please join or support ROA

This article is one of 2000-plus "Law Review" articles available at http://www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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