

## LAW REVIEW<sup>1</sup> 21030

May 2021

### Applying the Escalator Principle to the Hiring Hall

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[About Sam Wright](#)

- 1.1.1.1—USERRA applies to hiring halls and joint employers
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a third-class petty officer (E-4) in the Navy Reserve and a member of a Construction Battalion (“Seabee”) unit. I am also a member of the Reserve Organization of America (ROA).<sup>3</sup>**

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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 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.

<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 45 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](mailto:SWright@roa.org).

<sup>3</sup> 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

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

**On the civilian side, I am a member of a construction trade union, and I work on construction projects, through a hiring hall operated by my union. I do not have one single employer, per se. Rather, I work for 30 different construction companies that have a multi-employer collective bargaining agreement (CBA) with my union. My local union has 5,000 members, and all of them work through the hiring hall. Assignment to work projects is strictly by seniority. The most senior members, who have been working through the hiring hall for a decade or more, get first dibs on the most desirable work opportunities, and the junior members like me get what is left.**

**Nine months ago, I left town to go on active duty for one year, and I will be leaving active duty soon and returning (I hope) to the hiring hall. When I left my employment situation to go on active duty, I gave prior oral and written notice to the union steward who operates the hiring hall and also to the construction company that I was working for at the time.**

**I am currently deployed to a classified location in Asia. I sent an e-mail to the union steward who operates the hiring hall, and I also got my father to visit the steward, to inquire about my reemployment rights and to inform him that I will be leaving active duty and returning to my hometown on or about 4/1/2021 and that I want to return to work for the hiring hall. The steward said that USERRA does not apply to hiring halls and that it will be necessary for me to rejoin the union and start all over again in accumulating seniority to obtain favorable work assignments. Is the steward correct?**

**A:** No, the steward is wrong. As I explained in detail in Law Review 21029, the immediately preceding article in this series, USERRA applies to multi-employer hiring-hall situations just as it applies to traditional single-employer situations.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the 1940 reemployment statute, the Supreme Court enunciated the “escalator principle” when it held: “[The returning veteran] does not step back on the seniority escalator at the point he stepped

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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.

off. He steps back on at the precise point that he would have occupied had he kept his position continuously during the war.”<sup>4</sup>

The escalator principle is codified in section 4313(a)(2)(A) and section 4316(a) of the 1994 reemployment statute, USERRA. Section 4313(a)(2)(A) provides:

Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—[the returning veteran must be reinstated] in *the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service*, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.<sup>5</sup>

Section 4316(a) provides:

A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services *plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.*<sup>6</sup>

If you meet the five USERRA conditions for reemployment,<sup>7</sup> you are entitled to reemployment *in the position that you would have attained if you had been continuously employed*, almost certainly a better position than the position that you left, and upon reemployment you are entitled to the seniority credit that you had when you left to go on active duty and the additional seniority that you would have attained if you had remained continuously employed in the hiring hall.

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<sup>4</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). The citation means that you can find this case in Volume 328 of *United States Reports*, starting on page 275. The specific language quoted can be found at the bottom on page 284 and the top of page 285. I discuss *Fishgold* in detail in Law Review 0803 (January 2008).

<sup>5</sup> 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

<sup>6</sup> 38 U.S.C. 4316(a) (emphasis supplied).

<sup>7</sup> As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you must have left the job to perform uniformed service, and you must have given the employer prior oral or written notice. In your situation, giving notice to the union steward who operates the hiring hall amounted to giving notice to the employer. You must have been released from active duty without having exceeded the cumulative five-year limit on the duration of your periods of uniformed service that relate to your current employer relationship with your current employer (the hiring hall) and without having received a disqualifying bad discharge from the military. After release from a period of service lasting 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. You already meet the first two conditions for reemployment, and you will almost certainly meet the other three when you are released from active duty in June.

**Q: How can I determine the employment position that I would have attained if I had remained continuously employed instead of leaving for one year of active duty?**

**A:** In a unionized situation like your situation, with a system of seniority governing job assignments and other important matters, determining what would have happened to your employment situation is relatively easy. You have a number on the seniority roster, depending upon your first hire date and when you signed up for the hiring hall. Let us say that you were first hired on 4/15/2018, and when you left your job for military service in June 2019 your seniority roster number was 4901, among the 5000 employees on the roster. Mary Jones, who was first hired on 4/14/2018, was number 4900 on the roster, and Bob Smith, who was first hired on 4/16/2018, was number 4902.

When you return to work on 4/15/2021, after your year of active duty, Mary Jones' number is 4798 and Bob Smith's number is 4799.<sup>8</sup> You are entitled to reinstatement on the seniority roster with number 4799, one spot below Mary Jones and one spot above Bob Smith. Your absence from work for a little more than a year must not be allowed to cause you to fall behind your work colleagues who stayed behind, enjoying the protection of you and your comrades in arms in our nation's armed forces. The employment situation of Mary Jones and Bob Smith in April 2021, when you are reemployed, is strong proof of where you would have been if you had been continuously employed.

**Q: Larry Williams, the union steward who runs the hiring hall, and Alexander Adams, the president of the local union, have insisted that I must not be reinstated above the 201 union members who were hired after I was hired on 4/15/2018, including the 99 new members who were hired during the year that I was away from work for military service. Williams and Adams insist that giving "special privileges" to those who "play soldier" instead of working through the hiring hall violates the CBA between the union and 30 construction companies that use the hiring hall to obtain workers. What do you say about that?**

**A:** The union is wrong again. In its first case construing the reemployment statute, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the act."<sup>9</sup> Under section 4302 of USERRA, the reemployment statute is a floor and not a ceiling on your rights as a returning veteran. Section 4302 provides:

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<sup>8</sup> As older members retired or otherwise left the hiring hall and younger members were hired, Mary Jones and Bob Smith moved up the seniority roster.

<sup>9</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

**(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.

**(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.<sup>10</sup>

The CBA can give you greater or additional rights, over and above USERRA, but the CBA cannot take away rights that Congress gave you by statute.

Captain Spock once said: “The needs of the many outweigh the needs of the few, or the one.”<sup>11</sup> But under the reemployment statute the needs of the one (you) outweigh the needs of your 4999 colleagues who remained at home, enjoying your protection, while you served our country at a dangerous and classified place in Asia. Someone must defend this country, and Congress abolished the draft in 1973, almost two generations ago. Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country.<sup>12</sup> Ensuring that the few who leave civilian jobs to serve our country in uniform do not fall behind the many who remain at home is not too much to ask, and that is exactly what USERRA commands.

Adams, the local president, is more interested in serving the interests of the 201 union members who were first hired after you were initially hired than he is in serving the interests of one union member who laid aside his or her civilian pursuits to serve our country. Making one member happy and annoying 201 other members is not a formula for Adams to be reelected as president of the local. The commands of the statute (USERRA) must always override the commands of the union and the CBA.

### **Please join or support ROA**

This article is one of 2000-plus “Law Review” articles available at [www.roa.org/lawcenter](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.

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<sup>10</sup> 38 U.S.C. 4302.

<sup>11</sup> *Star Trek: The Wrath of Khan* (1982).

<sup>12</sup> See Law Review 14080 (July 2014).

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](http://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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