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Yes, USERRA Applies to Seasonal Jobs.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.2—USERRA applies to small employers.
1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees.
1.2—USERRA forbids discrimination.
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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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 Spouses' 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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[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 45 years, I have collaborated 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 mailto:swright@roa.org.

Q: I am the owner-operator of a small store in a tourist town.[3] Our busy time is between Memorial Day and Labor Day. We never have more than 14 employees at a time, but between Labor Day and Memorial Day my wife and I run the store by ourselves.

There is a young man in this town (let us call him "Joe Smith") who has worked in our store during the last three summers (2020, 2021, and 2022), while he was in high school. He graduated from high school in May 2023. Back in February 2023, I contacted him to ask him if he wanted to work again in the summer of 2023 and he responded "yes, sir." I was counting on Joe to be one of my employees this summer.

On 5/1/2023, I contacted Joe and asked him to report for work at 8 am on 5/22/2023, one week before Memorial Day. That is when he told me that he had joined the Army National Guard and that he would be at Fort Sill, Oklahoma for basic training and advanced infantry training from 7/10/2023 until 2/15/2024. I told him that I could not afford to put him on the payroll unless he could commit to working through Labor Day (9/4/2023). He protested that it was unfair and possibly illegal to deny him the job based on his military obligations and that he really needed to work to bring in some money before he started his Army service in July. I insisted that I could not and would not put him on the payroll for just seven weeks.

Joe then contacted the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), complaining that I have violated a law called the Uniformed Services Employment and Reemployment Rights Act (USERRA). What gives?

[3] The factual set-up for this article is hypothetical but realistic.

Answer, bottom line up front

USERRA is the federal law that gives persons who leave civilian jobs for service in the uniformed services the right to reemployment in those jobs upon release from service and that protects service members from discrimination in employment.[4] You violated section 4311 of USERRA[5] when you dismissed Joe Smith based on his obligation to report to Army basic training on 7/10/2023. It does not matter whether we call this a denial of initial employment or a termination from a seasonal position of employment—section 4311 applies in either case. Neither the "temporary" or "seasonal" nature of Joe's employment nor the small size of your enterprise (fewer than 15 employees even during the summer) exempts you from the obligation to comply with USERRA or from being subject to a federal court order that you comply with USERRA and that you compensate Joe for the pay and benefits that he lost because of your USERRA violation.

Explanation

USERRA makes it unlawful for an employer (federal, state, local, or private sector) to fire an employee based on his or her uniformed service or to discriminate in initial employment, promotions, or benefits of employment based on an individual's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform future service.

Section 4311 of USERRA provides:

[4] *See* Law Review 15116 (December 2015) for a primer on USERRA.
[5] 38 U.S.C. § 4311.

(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.*[6]

Section 4331(a) of USERRA[7] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. Two sections of the DOL USERRA Regulations address section 4311:

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity

[6] 38 U.S.C. § 4311 (emphasis supplied). *See generally* Law Review *See generally* Law Review 17016 (March 2017) for a detailed discussion of the text and legislative history of section 4311 and the Supreme Court and Court of Appeals caselaw under this section.
[7] 38 U.S.C. § 4331(a).

protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.[8]

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

- **(a)** In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
    - **(1)** Membership or application for membership in a uniformed service;
    - **(2)** Performance of service, application for service, or obligation for service in a uniformed service;
    - **(3)** Action taken to enforce a protection afforded any person under USERRA;
    - **(4)** Testimony or statement made in or in connection with a USERRA proceeding;
    - **(5)** Assistance or participation in a USERRA investigation; or,
    - **(6)** Exercise of a right provided for by USERRA.

- **(b)** If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.[9]

[8] 20 C.F.R. § 1002.22 (bold question in original).
[9] 20 C.F.R. § 1002.23 (bold question in original).

USERRA's legislative history explains section 4311 as follows:

> Current law [the 1940 reemployment statute] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.
>
> If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.

Section 4311(b) [now 4311(c), as amended in 1996] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) [later renumbered 4321(b)(3)] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Session at 5320 (February 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions have

misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[10]

To prevail under section 4311, Joe Smith is not required to establish that you fired him or denied him initial employment *solely based on his National Guard obligations.* He must prove that his National Guard obligations were *a motivating factor* in your decision to terminate him. But, in this case, it is clear that you fired Joe *solely because* of his military obligations. You were pleased with his work in 2020, 2021, and 2022. You offered him the opportunity to return to work for you in the summer of 2023, and he accepted your offer. You changed your mind and rescinded the offer only after you learned that Joe had enlisted in the Army National Guard and that he was required to report for training in July 2023.

Q: Time out! I did not fire Joe because of his Army service—I love the Army and I served in the Army myself decades ago. I fired Joe because I found out that he was not planning to work in my store for the entire summer of 2023.

A: Some employers argue: We did not fire Joe Smith because of his military service. We fired him because he was *absent from work* while performing that service. In an important USERRA case, the United States Postal Service made that argument, and the Merit Systems Protection Board (MSPB) accepted it. On appeal, the Federal Circuit[11] firmly rejected this argument, holding:

[10] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 805-07 of the 2021 edition of the *Manual.*

[11] The United States Court of Appeals for 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 MSPB decisions.

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating on the basis of absence when the absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.[12]

Q: My sister is a lawyer. She told me that the federal employment laws only apply to employers with 15 or more employees, so that if I never hire a 15th employee I don't have to worry about those laws. For that reason, I have never had more than 14 employees in my store. What gives?

A: It is true that other federal employment laws do not apply to employers with fewer than 15 employees, but USERRA and the predecessor reemployment statute have never had such a threshold. You only need one employee to be subject to the reemployment statute.

USERRA's legislative history includes the following: "This chapter [USERRA] would apply, as does current law, 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)."[13]

Q: Will Joe Smith have the right to reemployment in my store when he returns from his Army training in February 2024?

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[12] *Erickson v. United States Postal Service,* 571 F.3d 1364, 1368 (Fed. Cir 2009).

[13] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted sentences can be found on page 803 of the 2021 edition of the *Manual.*

A: Yes. As I have explained in detail in Law Review 15116 (December 2015) and many other articles, Smith (or any service member or veteran) will have the right to reemployment if he meets the five USERRA conditions for reemployment:

a. He must have left a civilian job (federal, state, local, or private sector) to perform "service in the uniformed service" as defined by USERRA.[14]
b. He must have given the civilian employer prior oral or written notice, or an "appropriate officer" of the uniformed service in which he serves must have given the employer notice on his behalf.[15]
c. He must not have exceeded the five-year limit on the duration of the period or periods of uniformed service that he has performed with respect to the employer relationship for which he seeks reemployment.[16]
d. He must not have received a disqualifying bad discharge from the military.[17]
e. After release from the period of service, he must have made a timely application for reemployment.[18]

As I have explained in footnote 2 and in Law Review 15067 (August 2015), among other articles, Congress enacted USERRA and President

[14] 38 U.S.C. § 4312(a). The term "service in the uniformed services" is defined in section 4303(13) of USERRA, 38 U.S.C. § 4303(13). I have quoted that subsection, in its entirety, at the top of this article. The definition, by its terms, explicitly includes service in the Active Component of the armed forces, as well as the National Guard and Reserve.
[15] 38 U.S.C. § 4312(a)(1).
[16] 38 U.S.C. § 4312(c).
[17] 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious offenses, and OTH (other-than-honorable) administrative discharges.
[18] After a period of service of 181 days or more, Smith has 90 days to apply for reemployment. 38 U.S.C. § 4312(c). Shorter deadlines apply after shorter periods of service.

Bill Clinton signed it on 10/13/1994. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

Under the VRRA, it was necessary for the returning veteran to establish, as an eligibility criterion for reemployment, that his or her pre-service civilian employer relationship was "other than temporary." Under USERRA, it is no longer necessary to prove that one's pre-service employer relationship was "other than temporary." Under USERRA, "temporary" is a very narrow affirmative defense for which the employer bears a heavy burden of proof. Section 4312(d) of USERRA provides:

> **(1)** An employer is not required to reemploy a person under this chapter if—
>
> **(A)** the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
>
> **(B)** in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or
>
> **(C)** *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 that such employment will continue indefinitely or for a significant period.*
>
> **(2)** In any proceeding involving an issue of whether—

> **(A)** any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,
>
> **(B)** any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or
>
> **(C)** *the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,*
>
> *The employer shall have the burden of proving the* impossibility or unreasonableness, undue hardship, or *the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.*[19]

The pertinent section of the DOL USERRA regulation is as follows:

> **Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**
>
> USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have

[19] 38 U.S.C. § 4312(d) (emphasis supplied).

> continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.[20]

It is unlikely that you will be able to establish that Smith's pre-service employment was both brief and nonrecurrent—it recurs every summer. But even if you can establish this affirmative defense to defeat Smith's right to reemployment next February, that doesn't mean that it is lawful for you to discriminate against Smith now. I invite your attention to the final subsection of section 4311:

> **(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.*[21]

At this point, in July 2023, discussing Joe's right to reemployment in February 2024, when he returns from the seven months of initial Army training, is premature and hypothetical. If Joe applies for reemployment in February 2024 and meets the five USERRA conditions for reemployment, and if you deny him reemployment, that will be a whole new USERRA violation.

Q: What is likely to happen with the DOL-VETS investigation of Joe Smith's complaint that I violated USERRA?

A: The investigator will complete the investigation and then notify Joe Smith (the complainant) of the results of the investigation and of Joe's right to request referral to the United States Department of Justice

[20] 20 C.F.R. § 1002.41 (bold question in original).
[21] 38 U.S.C. § 4311(d) (emphasis supplied).

(DOJ).[22] If Joe requests referral, the case file will be promptly referred to DOJ.[23] If DOJ agrees that Joe's claim has merit, it may file the suit on Joe's behalf and represent Joe in the litigation, at no cost to Joe.[24]

If DOJ turns down Joe's request for representation, or if Joe chooses not to request referral to DOJ, Joe can file suit with an attorney that he retains.[25] If Joe proceeds with private counsel and prevails, the court may order the employer (you) to pay Joe's attorney fees.[26] In some cases, the attorney fee that the employer is required to pay may be far in excess of the back pay that the employer is required to pay to the plaintiff-employee.[27]

Q: If Joe sues me in federal court, represented by DOJ or by an attorney that Joe retains, and if Joe prevails in that lawsuit, what sort of relief is the court authorized to award?

A: USERRA provides:

> **(d) Remedies.**
>
> **(1)** In any action under this section, the court may award relief as follows:
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> **(A)** The court may require the employer to comply with the provisions of this chapter.

[22] 38 U.S.C. § 4322(e).
[23] 38 U.S.C. § 4323(a)(1).
[24] Id.
[25] 38 U.S.C. § 4323(a)(3).
[26] 38 U.S.C. § 4323(h)(2).
[27] *See* Law Review 15099 (November 2015). Un that case, the successful plaintiff was awarded $64,656 in damages an $27,431 in liquidated damages plus $471,050 in attorney fees.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.] was willful.

(2)

(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity powers. The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining

orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.[28]

This is not a case involving a huge dollar amount of lost pay. By firing Joe Smith just before the start of the 2023 summer season, you deprived him of seven weeks of pay, from that point to the point in early July when he would have had to leave to report to basic training. If the court finds that you violated USERRA willfully, the damages will be doubled,[29] but this is still not a large amount of money. I suggest that you come into compliance now by compensating Joe for the pay he lost and by pledging to comply with USERRA going forward.

Q: I do not like this law, USERRA. I am a patriotic American, and I served in the Army myself when I was Joe's age, but I have a business to run, and I cannot afford to hire seasonal workers who are unable or unwilling to work for the entire season. What gives?

A: It has now been two generations since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973.[30] Those who are considering enlistment today have never faced the prospect of being drafted, and neither have their parents. No one has been drafted by our country since the grandparents or great-grandparents of today's service members were of military age.

Relying exclusively on volunteers, our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and

[28] 38 U.S.C. § 4323(d) and (e). *See also* Law Review 22033 (June 2022) and Law Review 206 (December 2005) for a detailed discussion of the computation of damages in a USERRA case.

[29] 38 U.S.C. § 4323(d)(1)(C).

[30] The last involuntary inductee reported to basic training in June 1973.

perhaps in the history of the world. I hope that it is never necessary for our country to reinstate the draft.

Defending our country in a dangerous world, without relying on compulsion to fill the ranks, means that our nation must maximize the incentives and minimize the disincentives to military service in the Active Component, the Reserve, and the National Guard.

Most of the 2,000 articles in our "Law Review" series[31] address laws that seek to minimize the disincentives to service. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the concerns of the service member or potential service member that he or she will lose out on civilian job opportunities because of service to our country in uniform. The Servicemembers Civil Relief Act (SCRA) addresses the concerns of the service member that he or she will lose the opportunity to be heard in a civil or administrative proceeding back home because he or she is serving in uniform hundreds or thousands of miles away or that he or she will have to continue paying rent for an apartment that is no longer needed because he or she has enlisted or has been called to active duty.

I invite the reader's attention to Law Review 14080 (July 2014), by Nathan Richardson[32] and myself. In that article we wrote:

> 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 in the armed forces. In the All-Volunteer Military recruiting is a constant

[31] Please see footnote 1.

[32] At the time (summer 2014), Nathan Richardson was an unpaid summer intern at the Service Members Law Center, of which I was the Director. Nathan is now a lawyer in New York City.

challenge. Despite our country's current [2014] economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicines for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There definitely is a compelling interest in the enforcement of USERRA.

As Nathan Richardson and I predicted in 2014, the services (and especially the Army) have suffered from recruiting shortfalls and this year is the most challenging year for military recruiting since the draft was abolished in 1973.

While I am very glad that Congress abolished the draft 50 years ago, conscription is constitutional, justified, and necessary when our nation is unable to recruit enough volunteers. In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

> It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.[33]

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20th Century) and by drafting young men into military service.[34] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[35]

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[33] Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.
[34] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. *See* Law Review 15028 (March 2015).
[35] *Arver v. United States,* 245 U.S. 366 (1918).

No one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 22nd anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, Active Component (AC) and Reserve Component (RC), have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over

> 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 22 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 50 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and

when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor.

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren.

You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

Please join or support ROA

This article is one of 2,000-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members 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 eight[36] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002[37]

[36] Congress recently established the United States Space Force as the eighth uniformed service.
[37] You can also contribute on-line at www.roa.org.