

## LAW REVIEW<sup>1</sup> 24004

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**Yes, USERRA Applies all over the World to U.S. Companies. You Meet the USERRA Conditions, and you Are Entitled to Reemployment in the City where you Worked before your most Recent Period of Active Duty, Even if that Means that another Employee Must Be Displaced.**

**By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>**

**1.1.1.5—USERRA applies to U.S. employers outside the United States.**

**1.3.1.2—Character and duration of service.**

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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 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.

<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 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 a recently retired Army National Guard Sergeant Major (E-9) and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I joined ROA as a life member because I want to support this great service that you provide to those of us who serve our country in uniform, especially in the National Guard or Reserve.**

**I served on active duty as an enlisted member for exactly ten years, from June 1995 until June 2005, when I left active duty and affiliated with the Army National Guard (ARNG). Since 2005, I have been recalled to active duty several times, sometimes voluntarily and sometimes involuntarily. As a result, I reached the “sanctuary” point (18 years of active duty) and the Army gave me the opportunity to return to active duty for two years, from 10/1/2021 until 9/30/2023. I am now retired from the Regular Army with 20 years of active duty, effective 10/1/2023. I am seeking reemployment in the civilian job that I left in September 2020, when I was involuntarily called to active duty and deployed to a classified location in Asia.**

**On 10/1/2014, I was hired by a government contracting and consulting company—let us call it Beltway Bandits R Us or BBRU.<sup>4</sup> BBRU has many contracts with the Department of Defense (DOD) and**

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<sup>3</sup> In 2018, ROA members amended the ROA Constitution and made enlisted service members eligible for full membership in our organization. ROA adopted the “doing business as” name of “Reserve Organization of America” to emphasize that we represent and seek to recruit as member all service members, from the most junior enlisted personnel to the most senior officers.

<sup>4</sup> The term “Beltway Bandit” originated in the middle of the 20<sup>th</sup> Century when several consulting firms offering various services to federal agencies sprang up in the vicinity of our nation’s capital. Those companies were typically headquartered in office buildings around the Capital Beltway (I-495). See [https://en.wikipedia.org/wiki/Beltway\\_Bandit](https://en.wikipedia.org/wiki/Beltway_Bandit). A few of those companies, including the company you work for, grew into major corporations offering consulting and other services to federal agencies throughout our country and even overseas.

other federal agencies in the DC metropolitan area, in other locations around the country, and a few contracts outside the United States, including several contracts in Stuttgart, Germany. When a contracted project is completed or terminated, or when BBRU loses the contract to a competitor, the affected BBRU employees are carried on “company overhead” for a few weeks while they search for other BBRU contracts around the world that call for persons with skill sets that they have. If the displaced employee does not find another BBRU position within a few weeks, he or she is laid off. Many BBRU employees work for the company for a full career of 20 years or more, on a series of contracts.

I worked for BBRU in Stuttgart for almost six years, from October 2014 until September 2020, when I left my BBRU job to report to active duty as ordered. I was one of three BBRU employees performing a specific function on a major contract. When I left my job in September 2020 to report to active duty, the company hired Mary Jones to replace me.

Today, three years later, Alex Adams and Brenda Barnes, my two BBRU colleagues performing that function, are still employed by BBRU at the facility in Stuttgart, and Mary Jones is there working with them. I am informed that all three of them are performing very well, and BBRU and the Army (BBRU’s customer) are very resistant to seeing any of them displaced to make room for me.

My BBRU supervisor, at the Stuttgart facility, has gone out of his way to help me find another BBRU position, but I.R. Shyster, BBRU’s General Counsel, has claimed that the company has no obligation to reemploy me. Mr. Shyster has claimed:

- a. The company has no obligation to reemploy me because USERRA does not apply to job positions that are located outside the United States.
- b. Mr. Shyster also said that I am not entitled to reemployment under USERRA because I have been on active duty for more than five years.
- c. Mr. Shyster also asserted that reemploying me in Stuttgart would necessarily mean laying off Alex Adams, Brenda Barnes, or Mary Jones, and all of them are doing great work. Mr. Shyster said that reemploying me would put an “undue hardship” on the company because it would mean having to lay off one of three great employees.

**What do you say about Mr. Shyster’s assertions?**

**Answer, bottom line up front:**

Mr. Shyster is wrong on all three counts. Under section 4319, USERRA applies all over the world to American employers and to foreign employers that are controlled by American employers. You are well within the five-year limit because most of the active duty that you have performed is exempt from the computation of your five-year limit with respect to your employer relationship with BBRU. You also meet the other USERRA conditions for the right to reemployment. BBRU is required to reemploy you in an appropriate position of employment *even if that means that another employee must be laid off.*

## **USERRA applies all over the world.**

On 11/11/1998, Congress enacted and President Bill Clinton signed into law Public Law 105-368, 112 Stat. 3331. Section 212(c) of that Public Law added section 4319 to USERRA, 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.
- (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.
- (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.
- (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.<sup>5</sup>

The legislative history of Public Law 105-368 contains one paragraph about this 1998 amendment, 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 organized in the United States. It would also add a new section 4319 to chapter 43 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.<sup>6</sup>

There is no doubt that USERRA applies to your relationship with BBRU, the same as if you worked at BBRU headquarters near our nation’s capital.<sup>7</sup>

## **Q: What are USERRA’s conditions for the right to reemployment?**

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<sup>5</sup> 38 U.S.C. § 4319.

<sup>6</sup> 1998 Amendments, House Report, March 17, 1998, H.R. Rep. No. 105-448, H.R. Rep. 105-448 (1998), 1998 WL 117158 (Leg. Hist.). This report is reprinted in Appendix E-2 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 848 of the 2023 edition of the *Manual*.

<sup>7</sup> See Law Review 16069 (July 2016).

**A:** As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.<sup>8</sup>
- b. You must have given the employer prior oral or written notice.<sup>9</sup>
- c. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years.<sup>10</sup>
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>11</sup>
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.<sup>12</sup>

**You have not exceeded USERRA’s five-year limit.**

Section 4312(c) of USERRA sets forth the five-year limit and the exemptions, as follows:

Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person’s cumulative period of

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<sup>8</sup> 38 U.S.C. § 4312(a). There is no doubt that you left your BBRU job in 2020 to perform uniformed service.

<sup>9</sup> 38 U.S.C. § 4312(a)(1). You have shown me a copy of the certified-mail letter that you sent to BBRU in 2020.

<sup>10</sup> 38 U.S.C. § 4312(c).

<sup>11</sup> 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offences) and OTH (“other than honorable”) administrative discharges.

<sup>12</sup> After a period of service that lasted more than 180 days, 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 applied for reemployment with BBRU immediately after you left active duty.

service in the uniformed services, *with respect to the employer relationship for which a person seeks reemployment*, does not exceed five years, except that any such period of service shall not include any service—

- (1)** that is required, beyond five years, to complete an initial period of obligated service;
- (2)** during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
- (3)** performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
- (4)** performed by a member of a uniformed service who is—
  - (A)** ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14 [14 USCS § 2127, 2128, 2308, 2309, 2314, or 3713];
  - (B)** ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
  - (C)** ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

- (D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
- (E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or
- (F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.<sup>13</sup>

I have reviewed all of your military orders and all of your DD-214 forms. I find that you have used only two years of your five-year limit. Your two-year period of voluntary active duty, from 10/1/2021 until 9/30/2023, is not exempt from the computation of your five-year limit. All your other active duty periods are exempt.

Your initial ten years of active duty, from 1995 until 2005, does not count toward your five-year limit because you performed that active duty before you began your BBRU job in 2014.<sup>14</sup> The drill weekends and annual training periods that you performed between 2014 and 2020 are exempt from the computation of the five-year limit.<sup>15</sup> Your year of

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<sup>13</sup> <sup>13</sup> 38 U.S.C. § 4312(c) (emphasis supplied).

<sup>14</sup> See 38 U.S.C. § 4312(c). The five-year limit applies “with respect to the employer relationship for which a person seeks reemployment.” Because your initial active duty period ended in 2005 and your employer relationship with BBRU did not begin until nine years later, this initial period of active duty was not related to your BBRU employment.

<sup>15</sup> 38 U.S.C. § 4312(c)(3).

Army training in 2015-16 is also exempt.<sup>16</sup> Your year of involuntary active duty in 2020-21 is also exempt.<sup>17</sup>

**The fact that reemploying you in the appropriate position of employment would necessitate laying off another employee does not excuse the employer's failure to reemploy you as required.**

You are entitled to reemployment in the position that you would have attained, or another position of like seniority, *status*, and pay, *even if that means that another employee must be displaced to make room for you*. The pertinent section in the Department of Labor (DOL) USERRA regulation is as follows:

Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. *The employer may not, however, 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.*<sup>18</sup>

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 the veteran's right to prompt reemployment

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<sup>16</sup> Id.

<sup>17</sup> 38 U.S.C. § 4312(c)(4)(A).

<sup>18</sup> 20 C.F.R. 1002.139(a) (emphasis supplied).

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<sup>19</sup> 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.”<sup>20</sup>

The United States Court of Appeals for the Federal Circuit<sup>21</sup> 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 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.<sup>22</sup>

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<sup>19</sup> The 1<sup>st</sup> 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.

<sup>20</sup> *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1<sup>st</sup> Cir. 2013).

<sup>21</sup> 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.

<sup>22</sup> *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 in the appropriate

**Q: The BBRU personnel office recently found me a position at a United States Army installation in South Korea. That position is very similar to the position that I held in Stuttgart before I was called to active duty in 2020. I am qualified for that position, and the pay of that position is equal to the pay that I should now be receiving in Stuttgart, but I do not want to move across the globe—I want to return to work for BBRU right here in Stuttgart.**

**My wife has a federal civilian job at a U.S. Army command here in Stuttgart, and she plans to remain in that job for another five years before retiring from federal civilian service. If I take the BBRU job in South Korea I will be separated from my wife and children for many months or years. Do I have the right to object to being transferred to South Korea?**

**A:** Yes, because location (commuting area) is part of the *status* to which you are entitled as a returning veteran who meets the USERRA eligibility criteria.

As I have explained in detail in Law Review 15067 (August 2015) and many other articles, 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. USERRA's legislative

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position, I invite the reader's attention to *Cole v. Swint*, 961 F.2d 58 (5<sup>th</sup> Cir. 1992); *Goggin v. Lincoln-St. Louis*, 702 F.2d 698, 704 (8<sup>th</sup> Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.*, 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5<sup>th</sup> Cir. 1981); *Jennings v. Illinois Office of Education*, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7<sup>th</sup> Cir. 1979); and *Musciante v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

history addresses the issue of the *status* of the returning veteran as follows:

Although not the subject of frequent court decisions, courts have construed status to include “opportunities for advancement, general working conditions, *job location*, shift assignment, and rank and responsibility. *Monday v. Adams Packing Association, Inc.*, 85 LRRM 2341, 2343 (M.D. Fla. 1973). See *Hackett v. State of Minnesota*, 120 Labor Cases (CCH) 811,050 (D. Minn. 1991). A *reinstatement offer in another city is particularly violative of like status* (See *Armstrong v. Cleaner Services, Inc.*, 79 L.R.R.M. 2921, 2923 (M.D. Tenn. 1972), as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation.<sup>23</sup>

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

This article is one of 2,000-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. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members),

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<sup>23</sup> House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still (emphasis supplied). The quoted paragraph can be found at page 705 of the 2023 edition of the *Manual*.

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).<sup>24</sup>

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, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, congressional and state legislators and 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.

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<sup>24</sup> See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight<sup>25</sup> 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 <https://www.roa.org/opage/memberoptions/>.

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<sup>26</sup>

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<sup>25</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>26</sup> You can also contribute on-line at [www.roa.org](https://www.roa.org).