# LAW REVIEW[1] 24014
# February 2024
# DOJ Sues the State of Nevada Again for Flouting USERRA.
# By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

## 1.1.1.7—USERRA applies to state and local governments.
## 1.3.2.3—Pension credit for service time.
## 1.4—USERRA enforcement.
## 1.8—Relationship between USERRA and other laws/policies.

In its issue of 1/18/2024, the *Reno Gazette-Journal* published an article by reporter Mark Robison, reporting that the United States Department of Justice (DOJ) has sued the State of Nevada to force the State to comply with its obligations under the Uniformed Services Employment

[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.

and Reemployment Rights Act (USERRA). Bravo Zulu to DOJ and to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) for investigating this claim and initiating this lawsuit. At the end of this article, I have placed a link to the *Reno Gazette-Journal* article. This is not the first time that DOJ has found it necessary to sue Nevada to force the State to comply with USERRA.[3]

**Q: What is USERRA?**

**A:** As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA[4] as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of more than nine million young men (including my late father) for World War II. As originally enacted in 1940, the VRRA only applied to draftees, but one year later, as part of the Service Extension Act of 1941, Congress amended the VRRA to make it apply also to those who enlisted voluntarily. Almost from the beginning, the federal reemployment statute has applied equally to voluntary as well as involuntary military service.

In June 1973, more than half a century ago, Congress abolished the draft and established the All-Volunteer Military. Especially in the last three years, the services have had great difficulties meeting their recruiting quotas by persuading enough qualified young men and women to enlist. The effective enforcement of USERRA is important,

[3] *See* Law Review 09030 (September 2009) and Law Review 13031 (February 2013).
[4] Public Law 103-353, 108 Stat. 3162. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. §§ 4301-35).

now more than ever, to making it possible for our country to defend itself without reinstating the draft.[5]

**Q: What is the escalator principle?**

**A:** In 1946, in its first case construing the 1940 reemployment statute, the Supreme Court enunciated the "escalator principle" when it held: "Thus he [the returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point that he would have occupied had he kept his position continuously during the war."[6]

In *Fishgold,* the Supreme Court also held:

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. *See Boone v. Lightner,* 319 U.S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate parts of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.[7]

**Q: How does the escalator principle apply to civilian pension benefits?**

[5] *See* Law Review 23001 (January 2023) and Law Review 14080 (July 2014).
[6] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). *See generally* Law Review 23058 (October 2023) for a detailed discussion of *Fishgold.*
[7] Id. at 285.+

**A:** In 1977, the Supreme Court applied the escalator principle to pension benefits under a defined benefit pension plan.[8] Raymond E. Davis was employed by the Alabama Power Company for almost 35 years, from August 1936, when he was hired, until June 1971, when he retired. His career with the company was interrupted by military service in World War II, from March 1943 until September 1945. On 7/1/1944, while Davis was away from his job for military service, the company established a defined benefit pension plan that credited company service both before and after that date.

When Davis retired in 1971, the company refused to credit him for company service for the 29 months (March 1943 until September 1945) when he was away from his civilian job for military service, and the loss of that 29 months of credit meant that Davis was shorted $18 per month in his civilian pension credit. The Supreme Court unanimously held that civilian pension credit for military service time was a "perquisite of seniority" to which Davis was entitled under the VRRA's escalator principle.

*Alabama Power Co. v. Davis* deals with pension benefits under a defined benefit plan, but section 4318 of USERRA (enacted 10/13/1994) applies to both defined benefit plans and defined contribution plans. Here is the entire text of section 4318:

> **(a)**
>
> **(1)**
>
> **(A)** Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including

[8] *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). *See generally* Law Review 09015(April 2009), for a detailed discussion of this case.

those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

**(B)** In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

**(2)**

**(A)** A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

**(B)** Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

**(b)**

**(1)** An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any

employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—

**(A)** by the plan in such manner as the sponsor maintaining the plan shall provide; or

**(B)** if the sponsor does not provide—

**(i)** to the last employer employing the person before the period served by the person in the uniformed services, or

**(ii)** if such last employer is no longer functional, to the plan.

**(2)** A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person

would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

**(3)** For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—

**(A)** at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

**(B)** in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

**(c)** Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.[9]

[9] 38 U.S.C. § 4318.

If you meet the five USERRA conditions for reemployment, you are entitled to prompt reinstatement into the position that you would have attained if you had been continuously employed and to be treated, for seniority and pension purposes, as if you had remained continuously employed in the civilian job.

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

**A:** As I have explained in Law Review 15116 (December 2015) and many other articles, you (or any returning service member or veteran) 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.[10]
b. You must have given the employer prior oral or written notice.[11]
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.[12]
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.[13]
e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.[14]

[10] 38 U.S.C. § 4312(a).
[11] 38 U.S.C. § 4312(a)(1).
[12] 38 U.S.C. § 4312(c). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit.
[13] 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.
[14] After a period of service that lasted more than 180 days, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

**Q: Who are the individuals who initiated this lawsuit by complaining to the Department of Labor (DOL)?**

**A:** Charles Lehman and Jeff Hoppe made formal, written USERRA complaints to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), asserting that the State of Nevada had violated their USERRA rights. Both Lehman and Hoppe are members of the Nevada National Guard, and both left their civilian jobs when they were called to federal active duty. Both Lehman and Hoppe met the five USERRA conditions for reemployment, and both returned to their civilian jobs after completing their military service periods. Both were entitled to be treated *as if they had remained continuously in their civilian jobs* in computing their civilian pension entitlements. Lehman is employed by the Nevada Attorney General's Office, and Hoppe is employed by the Washoe County District Attorney's Office.

After receiving the Lehman-Hoppe complaints, DOL-VETS investigated the circumstances and determined that both Lehman and Hoppe met the five USERRA conditions and that they were entitled to be treated as if they had remained continuously employed for purposes of their civilian pensions. DOL-VETS patiently explained section 4318 of USERRA to Nevada State officials, but those officials adamantly refused to comply. Lehman and Hoppe requested that DOL-VETS refer their complaints to DOJ, and DOL-VETS complied with that request. After reviewing the case file, DOJ agreed that Lehman and Hoppe were entitled to the pension benefits that they sought, and DOJ filed this lawsuit against the State of Nevada.

**Q: The State of Nevada apparently contends that Lehman and Hoppe are not entitled to State pension credit for their military time because State law does not provide for such credit. What is the relationship between USERRA and State law with respect to employees of the State and its political subdivisions?**

**A:** USERRA is a floor and not a ceiling on the employment rights of those who are serving or have served our country in uniform. USERRA does not supersede or override a State law that provides *greater or additional rights, over and above USERRA.* USERRA does supersede and override a State law that purports to limit USERRA rights or that imposes additional prerequisites upon the enjoyment of USERRA benefits. Section 4302 of USERRA provides:

> (a) Nothing in this chapter [USERRA] 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 under 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.[15]

The United States Constitution provides:

[15] 38 U.S.C. § 4302.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.[16]

Two centuries ago, the Supreme Court held that the Supremacy Clause means exactly what it says and that a federal statute trumps a conflicting State statute.[17] In the 1860s, our national fought a bloody civil war about the supremacy of federal authority over state authority, in the context of an unconstitutional attempt to break up the Union to preserve the terrible institution of slavery, and the federal side won. State authorities sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

**Q: Will this lawsuit affect only Charles Lehman and Jeff Hoppe? Or will the lawsuit affect all others similarly situated?**

**A:** Because DOJ brought this suit on behalf of the United States, as the plaintiff in the lawsuit, DOJ has the authority to pursue and will pursue remedies not just for Lehman and Hoppe but also for all other Nevada service members and veterans who have served our nation in uniform and those who are serving today and those who will serve in the future. This includes children now in kindergarten and those who have not yet been born.

[16] United States Constitution, Article VI, Clause 2. This provision is known as the "Supremacy Clause." Yes, it is capitalized just that way, in the style of the late 18th Century.
[17] *Gibbons v. Ogden,* 22 U.S. 1 (1824).

**Q: What role will the Reserve Organization of America (ROA) play in this lawsuit?**

**A:** I have sent a letter to Nevada Governor Joe Lombardo, calling upon him to order all State agencies to comply with USERRA and to do exactly what DOJ and DOL-VETS have asked the State to do. I have placed the text of this letter at the end of this article.

If Nevada fights this lawsuit, we (ROA) will file an amicus curiae ("friend of the court") brief supporting the DOJ position.

**Please join or support ROA**

This article is one of 2,100-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 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), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[18]

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

[18] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

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, federal 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.

If you are now serving or have ever served in any one of our nation's eight[19] 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

[19] Congress recently established the United States Space Force as the eighth uniformed service.

https://www.roa.org/page/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[20]

Here is the link to the article by reporter Mark Robison, published in the *Reno Gazette-Journal* on 1/18/2024:

https://www.rgj.com/story/news/2024/01/18/the-u-s-justice-department-filed-suit-wednesday-against-the-state-of-nevada-for-denying-guard-member/72271021007/

Here is a copy of the letter that I sent to Nevada Governor Joe Lombardo:

**Samuel F. Wright**
**Captain, JAGC, USN (Ret.)**

Samwright50@yahoo.com

February 1, 2024

Governor Joe Lombardo
101 N. Carson St.
Carson City, NV 89701

Re: Please direct all Nevada state agencies to comply with the Uniformed Services Employment and Reemployment Rights Act

[20] You can also contribute on-line at www.roa.org.

Dear Governor Lombardo:

The United States Department of Justice (DOJ) recently sued the State of Nevada for flouting the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am writing to urge you to settle the lawsuit and to direct all State departments and agencies to comply with USERRA and to go above and beyond USERRA in supporting that tiny fraction of the youth population who are eligible for military service and willing to enlist.

This is not the first time that DOJ has found it necessary to sue the State of Nevada for flouting USERRA. I invite your attention to our Law Review 13031 (February 2013). For your convenience, I am enclosing a copy of that article.

Two generations ago, in June 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). In the last three years, all the services, and especially the Army, have fallen far short of their recruiting quotas. The effective enforcement of USERRA is essential to making it possible for our country to defend itself without reinstating the draft. Only 24% of Americans in the 17-24 age group are eligible for military service, and only 1% are both eligible and willing to consider enlisting. The services need to recruit more than half of that 1%. I invite your attention to our Law Review 23001 (January 2023), and I am enclosing a copy of that article.

USERRA applies to almost all employers in this country, including the Federal Government, the States, the political subdivisions of States, and private employers, regardless of size. Without effective enforcement of USERRA, the services will not be able to recruit a sufficient quality and quantity of young men and women to defend our country.

On 6/29/2022, at the end of the 2021-22 term, the Supreme Court held that the State of Texas and the other 49 States can no longer hide behind the hoary doctrine of sovereign immunity to avoid complying with USERRA. *Torres v. Texas Department of Public Safety*, 142 S. Ct. 2455, 2460 (2022).This result is

exceedingly important because 10% of National Guard and Reserve part-timers have civilian jobs for State government agencies.

Thank you for your kind attention to protecting the rights of the sons and daughters of Nevada who serve our country in uniform.

Very respectfully,

Samuel F. Wright

Enclosures (as stated)

Copy to: Major General Ondra Berry, ANG
Adjutant General of Nevada