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USERRA's 30th Birthday.
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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,200 "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.

1.3.2.9—Accommodations for disabled veterans.
1.4—USERRA enforcement.
1.8—Relationship between USERRA and other laws/policies.

This month marks the 30th anniversary of the enactment of the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3] This law is important and relevant, now more than ever. Without a law like USERRA, it would not be possible for the services to recruit and retain a sufficient quality and quantity of persons to defend our country. Do not think of the federal reemployment statute as 30 years old; think of it as 84 years old. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act, which was originally enacted in 1940.

Here are some of the important rights that USERRA confers upon those who are serving or have served our country in the uniformed services.

The right to prompt reemployment after a period of absence from the civilian job necessitated by service in the uniformed services.

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.[4]
b. You must have given the employer prior oral or written notice.[5]

[3] 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). *See* Law Review 15116 for a detailed discussion of USERRA.
[4] 38 U.S.C. § 4312(a).
[5] 38 U.S.C. § 4312(a)(1).

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.[6]
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.[7]
e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.[8]

If you meet these five criteria, you are entitled to *prompt reemployment* in your pre-service position of employment.[9] 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

[6] 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.
[7] 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.
[8] 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.
[9] 20 C.F.R. § 1002.180. " 'Prompt reemployment' means as soon as practicable under the circumstances. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position." 20 C.F.R. § 1002.181.

> 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.*[10]

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 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[11] 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."[12]

The United States Court of Appeals for the Federal Circuit[13] has held:

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[10] 20 C.F.R. § 1002.139(a) (emphasis supplied).

[11] The 1st 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.

[12] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49, 55-56 (1st Cir. 2013).

[13] 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.

> 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.[14]

USERRA's escalator principle

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA[15] and President Bill Clinton signed it into law on 10/13/1994, 30 years ago. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

In its first case construing the 1940 reemployment statute, the Supreme Court enunciated the "escalator principle" when it held: "He

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[14] *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 position, I invite the reader's attention to *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln-St. Louis,* 702 F.2d 698, 704 (8th 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 (5th 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 (7th Cir. 1979); and *Muscianese v. U.S. Steel Corp.,* 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

[15] Public Law 103-353, 108 Stat. 3153.

[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."[16] In that same case, 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.[17]

The escalator principle is codified in USERRA as follows:

> A person who is reemployed under this chapter [USERRA]is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.[18]

[16] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). *See also* Law Review 23058 (October 2023) for a detailed discussion of the *Fishgold* case.
[17] *Fishgold,* 328 U.S. at 285 (emphasis supplied).
[18] 38 U.S.C. § 4316(a). *See generally* Law Review 24033 (June 2024) for a detailed discussion of the escalator principle.

Applying the escalator principle to pension entitlements.

Section 4318 of USERRA governs your right to civilian pension credit for military service time. You are entitled to civilian pension credit for a period of uniformed service if you are "reemployed under this chapter" (USERRA). Here is the entire text of section 4318:

> **(a)**
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> **(1)**
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> **(A)** Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(2), (33)]) 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.
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> **(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.
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> **(2)**
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> **(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 [29 USCS § 1145] 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 [29 USCS § 1002(37)], 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 [29 USCS § 1002(37)], 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.[19]

USERRA's "furlough or leave of absence" clause.

USERRA's "furlough or leave of absence" provision reads as follows:

(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) *entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy,*

[19] 38 U.S.C. § 4318 (emphasis supplied). *See generally* Law Review 21059 (September 2021) for a detailed discussion of the returning veteran's entitlements concerning his or her civilian pension.

practice, or plan in effect at the commencement of such service or established while such person performs such service.[20]

This language, or something very much like it, has been part of the reemployment statute since 1940. When Congress enacted USERRA in 1994, this provision was carried over without significant change. Section 4331 of USERRA[21] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The pertinent subsection of the DOL USERRA Regulation is as follows:

Which non-seniority rights and benefits is the employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of

[20] 38 U.S.C. § 4316(b)(1).
[21] 38 U.S.C. § 4331.

the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[22]

In several of the amicus curiae ("friend of the court") briefs that we have filed, and in several of our "Law Review" articles, we (the Reserve Organization of America) have taken the position that an employer must grant *paid* military leave to an employee who is away from his or her civilian job for a short period of military training or service if and to the extent that the employer grants paid leave for comparable periods of leave for non-military reasons (like jury service).[23] In 2021, the 7th Circuit (Chicago) and the 3rd Circuit (Philadelphia) agreed with our position, and the 9th Circuit (San Francisco) and the 11th Circuit (Atlanta) have joined this chorus.[24] The other nine circuits have not yet addressed the question.[25]

[22] 20 C.F.R. § 1002.150 (bold question in original).
[23] *See generally* Law Review 24036 (July 2024), Law Review 24035 (July 2024), Law Review 23026 (May 2023), Law Review 21067 (October 2021), and Law Review 21014 (March 2021).
[24] *See Myrick v. City of Hoover,* 69 F.4th 1309 (11th Cir. 2023); *Clarkson v. Alaska Airlines, Inc.,* 59 F.4th 424 (9th Cir. 2023); *Travers v. FedEx Corp.,* 8 F.4th 198 (3rd Cir. 2021); and *White v. United Air Lines,* 987 F.3rd 616 (7th Cir. 2021).
[25] When the other circuits address this question, they will likely follow the lead of the 7th Circuit, the 3rd Circuit, the 9th Circuit, and the 11th Circuit. If another circuit reaches the opposite conclusion on this point, that will set up a conflict among the circuits, and it would likely then be necessary for the Supreme Court to grant certiorari to resolve the conflict.

USERRA requires employers to make accommodations for veterans who are returning to work with disabilities incurred during the period of service.

If you meet the five conditions, the employer is required to reemploy you promptly in the position to that you would have attained if you had been continuously employed (maybe a better position than the one you left) or another position, for which you are qualified, that is of like seniority, status, and pay.[26] If you are returning to work with a temporary or permanent disability incurred during your period of uniformed service, the employer must make reasonable efforts to accommodate the disability.[27]

If your disability makes it impossible for you to return to work in the position that you held before you left the job for uniformed service, the employer must reemploy you in "any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform *or would become qualified with reasonable efforts by the employer.*"[28] If there is no position that is fully equivalent, the employer must reemploy you in the "closest approximation" position.[29]

USERRA forbids discrimination.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, a person who was drafted or who

[26] 38 U.S.C. § 4313(a)(2)(A).
[27] 38 U.S.C. § 4313(a)(3).
[28] 38 U.S.C. § 4313(a)(3)(A) (emphasis supplied).
[29] 38 U.S.C. § 4313(a)(3)(B).

voluntarily enlisted in the armed forces was entitled to reemployment in the pre-service civilian job after honorable service. In 1955 and 1960, Congress expanded the VRRA to apply also to initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard members.

When leaving a job for service and returning to the job became a recurring phenomenon rather than a once-in-a-lifetime experience, Congress amended the VRRA in 1968, adding a provision making it unlawful for an employer to fire a Reserve Component service member or to deny such a person promotions or "incidents or advantages of employment" based on "any obligation as a member of a Reserve Component of the Armed Forces." In 1986, Congress amended this provision to forbid discrimination in hiring.

The VRRA only forbade discrimination based on "any obligation as a member of a Reserve Component of the armed forces." USERRA's anti-discrimination provision is much broader. It forbids the denial of initial employment, retention in employment, promotion, or a benefit of employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.[30]

Just prior to the enactment of USERRA in 1994, the pertinent section of the VRRA read as follows:

> Any person who seeks or holds a position described in clause (A) [a position with the United States Government, any territory or possession of the United States or a political subdivision of a

[30] 38 U.S.C. 4311(a).

territory or possession, or the Government of the District of Columbia] or (B) [a state, a political subdivision of a state, or a private employer] of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment *because of any obligation as a member of a Reserve component of the Armed Forces.*[31]

USERRA (enacted in 1994) contains a much broader and stronger anti-discrimination provision, as follows:

> § 4311.Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
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> **(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.
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> **(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

[31] 38 U.S.C. 4321(b)(3) (1988 edition of the United States Code) (emphasis supplied).

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.[32]

[32] 38 U.S.C. 4311 (emphasis supplied).

Section 4321(b)(3) of the VRRA forbade discrimination by employers only if such discrimination was "because of any obligation as a member of a Reserve component of the Armed Forces." Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

a. Membership in a uniformed service.[33]
b. Application to join a uniformed service.
c. Performing uniformed service.
d. Having performed uniformed service in the past.
e. Application to perform uniformed service.
f. Obligation to perform uniformed service.
g. Having taken an action to enforce USERRA protection for any person.
h. Having testified or otherwise made a statement in or in connection with a USERRA proceeding.
i. Having assisted or otherwise participated in a USERRA investigation.
j. Having exercised a USERRA right.

Under section 4311(c) of USERRA,[34] it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It is sufficient to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves motivating factor, the *burden of proof shifts to the*

[33] As defined by USERRA, the uniformed services include the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS). 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is not a uniformed service for USERRA purposes, although it is a uniformed service as defined in 10 U.S.C. 101(a)(5). Please see Law Review 15002 (January 2015) for an explanation of how it came to pass that USERRA applies to the PHS Corps but not the NOAA Corps. Under more recent amendments, Intermittent Disaster Response Appointees of the National Disaster Medical System under the cognizance of the Department of Health and Human Services and persons who serve in the National Urban Search and Rescue Response System under the cognizance of the Federal Emergency Management Agency in the Department of Homeland Security have reemployment rights under USERRA. Please see Law Review 17011 (February 2017).

[34] 38 U.S.C. 4311(c).

employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.

USERRA's legislative history explains section 4311 as follows:

> Current law [the VRRA] 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.[35]

What is the relationship between USERRA and state laws, local ordinances, collective bargaining agreements, and employer policies?

In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act."[36]

USERRA is *a floor and not a ceiling* on the rights of the service member. He or she can have *greater or additional rights* under another federal law, a state law or local ordinance, a collective bargaining agreement between the person's union and the employer, or another agreement, contract, or employer practice. Section 4302 of USERRA provides:

> **(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
>
> **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right

[35] 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 695-96 of the 2023 edition of the *Manual.*

[36] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).

> 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.[37]

USERRA applies to almost all employers.

USERRA applies to private employers, without regard to the size of the enterprise or the number of employees. Other federal employment laws (including the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964) only apply to employers with 15 or more employees. The reemployment statute does not have and has never had such a threshold. You only need one employee to be an employer covered by this law.[38]

USERRA applies to state government agencies, without regard to state law or state claims of sovereign immunity.[39]

Political subdivisions of a state (counties, cities, school districts, and other units of local government) are treated as private employers for USERRA enforcement purposes and can be sued in federal court for violating USERRA.[40]

USERRA applies to agencies in the Executive Branch of the Federal Government, including the Cabinet Departments and independent agencies like the Federal Election Commission and the National Labor Relations Board. The federal Merit Systems Protection Board (MSPB)

[37] 38 U.S.C. § 4302.
[38] *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).
[39] *See Torres v. Texas Department of Public Safety,* 597 U.S. 580 (2022).
[40] *See* 38 U.S.C. § 4323(i).

hears and adjudicates claims that federal executive agencies have violated USERRA.[41]

The Executive Branch also includes federal nonappropriated fund activities, like the Army & Air Force Exchange Service (AAFES), and USERRA can be enforced against nonappropriated fund activities through the MSPB.[42]

What kinds of employers are exempt from USERRA enforcement?

Federal Legislative Branch employers

The Legislative Branch of the Federal Government includes the offices of the 100 United States Senators, the 435 United States Representatives, and the nonvoting delegates from Puerto Rico, Guam, and the United States Virgin Islands. It also includes Senate and House Committees and Legislative Branch agencies like the Library of Congress, the Government Accountability Office, and the United States Capitol Police. Section 4324 of USERRA does not provide an enforcement mechanism for persons claiming USERRA rights against federal Legislative Branch employers, but those persons can enforce their USERRA rights through the Congressional Accountability Act.[43]

If a person leaves a civilian job in the Legislative Branch of the Federal Government to perform uniformed service, and if he or she meets the five USERRA conditions for reemployment, he or she should apply for reemployment with the Legislative Branch employer. If that employer

[41] *See* 38 U.S.C. § 4324. *See generally* Law Review 23024 (May 2023) for a detailed discussion of the enforcement mechanism for USERRA with respect to federal executive agencies.
[42] *See* Law Review 08013 (April 2008).
[43] 2 U.S.C. § 1316. *See generally* Law Review 34 (November 2001).

finds it "impossible or unreasonable" to reemploy the person, the United States Office of Personnel Management (OPM) will then be responsible for identifying an appropriate position for the person in the Executive Branch and ensuring that the person is offered reemployment in that position.[44]

Employers in the Judicial Branch of the Federal Government

The Judicial Branch of the Federal Government includes the United States Supreme Court, the 13 Courts of Appeals, and the 93 United States District Courts. The Judicial Branch also includes United States Probation Officers.

There is no way to enforce USERRA against an employer in the Judicial Branch of the Federal Government. State courts do not share in this immunity.[45]

If a person leaves a civilian job in the Judicial Branch of the Federal Government to perform uniformed service, and if he or she meets the five USERRA conditions for reemployment, he or she should apply for reemployment with the Judicial Branch employer. If that employer finds it "impossible or unreasonable" to reemploy the person, the United States Office of Personnel Management (OPM) will then be responsible for identifying an appropriate position for the person in the Executive Branch and ensuring that the person is offered reemployment in that position.[46]

[44] *See* 38 U.S.C. § 4314(c).
[45] *See* Law Review 09012 (February 2009).
[46] *See* 38 U.S.C. § 4314(c).

Houses of worship and religious schools

Because of Religion Clauses of the First Amendment of the United States Constitution, a federal employment law cannot constitutionally be enforced against a house of worship (church, synagogue, mosque, etc.) or a religious school.[47]

Indian tribes

USERRA does not provide an enforcement mechanism with respect to Indian tribes as employers.[48]

International organizations and foreign embassies and consulates

Because of diplomatic immunity, USERRA cannot be enforced against international organizations (like the United Nations or the World Bank) or foreign embassies and consulates.

Yes, USERRA puts a burden on employers, but this is not too much to ask.

It has now been two generations since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973. 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.

[47] *See Our Lady of Guadalupe School v. Morrissey-Berru,* 591 U.S. 732 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School,* 565 U.S. 171 (2012). *See generally* Law Review 19048 (May 2019).
[48] *See* Law Review 15111 (December 2015).

Relying exclusively on volunteers, our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that it is never necessary for our country to reinstate the draft. Those who advocate for the return of conscription in our country should look to the woeful performance of Russian conscripts in Ukraine.

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 2,200 articles in our "Law Review" series[49] 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[50] and myself. In that article we wrote:

[49] Please see footnote 1.

[50] At the time (summer 2014), Nathan Richardson was a law student at George Washington university and an unpaid summer intern at the Service Members Law Center, of which I was the Director. Nathan is now a lawyer.

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 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 51 years ago, I also think that 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.[51]

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

[51] Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.

drafting young men into military service.[52] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[53]

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 24th 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.

[52] 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. Please see Law Review 15028 (March 2015).
[53] *Arver v. United States,* 245 U.S. 366 (1918).

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 quarter century, 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 2,200-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).[54]

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."

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

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,[55] 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[56] uniformed services, you are eligible for membership in ROA,[57] 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

[55] *See* Law Review 24028 (May 2024) for a definition of "amicus curiae brief" and an explanation of what ROA seeks to accomplish and has accomplished with our amicus curiae briefs.
[56] Congress recently established the United States Space Force as the eighth uniformed service.
[57] Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

you are eligible for ROA membership, please join. You can join on-line at 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[58]

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