

# Law Review 1281

August 2012

## **YOUR RIGHTS UNDER USERRA**

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

### **1.0—USERRA Generally**

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, but don't think of this law as 18 years old—think of it as 72 years old. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), which was the law that led to the drafting of millions of young men (including my late father) for World War II.

Although the VRRRA was part of the draft law until 1974, it was amended in 1941 to make it apply to voluntary enlistees as well as draftees. Almost from the very beginning, the reemployment statute has applied to voluntary as well as involuntary service, in peacetime as well as wartime, within our country and overseas. This law is part of the fabric of our society, but all too many employers violate it, out of ignorance and sometimes willfully.

### **Law Review Library and the Service Members Law Center**

I invite your attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 781 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

If you don't find an article on the specific issue that concerns you, contact me by e-mail at [SWright@roa.org](mailto:SWright@roa.org) or by telephone at 800-809-9448, extension 730. I am here responding to calls and e-mails during regular business hours and until 10 p.m. Eastern Time on Monday and Thursday evenings. The purpose of the evening availability is to enable National Guard and Reserve (NG&R) personnel to call me from the privacy of their own homes, outside their civilian work hours.

### **What employers are covered by USERRA?**

USERRA applies to almost all employers in the United States, including the Federal Government, the states and their political subdivisions (counties, cities, school districts, etc.), and private employers, regardless of size. You only need one employee to be an employer for purposes of USERRA. Among employers in the United States, only religious institutions (on First Amendment grounds), Indian tribes (on residual sovereignty grounds), and foreign embassies and consulates and international organizations (on diplomatic immunity grounds) are immune from USERRA enforcement. USERRA also applies all over the world to the United States Government, to U.S. companies, and to foreign companies that are controlled by U.S. companies.

### **What employees are covered by USERRA?**

USERRA applies to all employees, including part-time, temporary, probationary, and at-will employees. You do not have rights under USERRA if you are a partner or an independent contractor, but labeling you a partner or independent contractor does not make you one. USERRA is to be liberally construed in finding coverage.

USERRA does not apply to the relationship between a student and a college or university, but another federal law (enacted in 2008) gives essentially the same protections to students whose educational careers are interrupted by voluntary or involuntary service. Please see Law Review 1032, by CDR Wayne L. Johnson, JAGC, USN (Ret.).

### **What kind of service gives rise to reemployment rights under USERRA?**

To have the right to reemployment under USERRA, you must have left a position of civilian employment in order to perform voluntary or involuntary service in the uniformed services. For USERRA purposes, the uniformed services are the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service. The commissioned corps of the National Oceanic & Atmospheric Administration is a uniformed service as defined by section 101(a)(5) of title 10, United States Code, but it is not a uniformed service for purposes of USERRA. Please see Law Review 50.

USERRA defines the term “service in the uniformed services” broadly, to include active duty, active duty for training, initial active duty training, and inactive duty training (drills), as well as time away from a position of employment for the purposes of an examination to determine fitness to perform any such duty and time away from a position of employment in order to perform funeral honors duty as a member of the NG&R.

USERRA is not limited to NG&R service. It applies equally to service in the Regular Component of the armed forces. Please see Law Review 0719.

### **What conditions must I meet to have the right to reemployment under USERRA?**

1. You must have left a position of employment for the purpose of performing service in the uniformed services.
2. You must have given the employer prior oral or written notice.
3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have made a timely application for reemployment with the pre-service employer, after release from the period of service. After a period of service of 181 days or more, you have 90 days to apply for reemployment. Shorter deadlines apply after shorter periods of service.

I invite your attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org), and specifically to the Subject Index. You will find dozens of articles about each of these five conditions.

### **If I meet these conditions, what does that get me?**

If you meet the five eligibility conditions, the employer is required to reemploy you *promptly* (generally, within two weeks after your application) in the position of employment that you *would have attained* if you had been continuously employed, or in another position for which you are qualified that is of like seniority, status, and pay. Please understand that the position that you *would have attained* is not always equal to or better than the position you left, especially during an economic downturn. USERRA does not protect you from a bad thing (like a layoff or reduction in force) that *clearly would have happened anyway* even if you had not been away from work for service at the time.

If you meet the conditions and are reemployed, the employer must treat you *as if you had been continuously employed* in the civilian job for purposes of determining your seniority and pension status in the civilian job. Moreover, you are entitled to immediate reinstatement of health insurance coverage through your civilian

job. There must be no waiting period and no exclusion of “pre-existing conditions” except for conditions that the United States Department of Veterans Affairs has determined to be service-connected.

For detailed information about the entitlements of the returning service member, please see our website at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org).

### **Does USERRA apply to wounded warriors?**

Most definitely, yes. If the person leaving a period of service in the uniformed services is hospitalized or convalescing from an injury or illness incurred or aggravated during the period of service, the deadline to apply for reemployment can be extended during the period of hospitalization or convalescence, for up to two years.

If a person who meets the USERRA eligibility criteria returns to work with a disability (permanent or temporary) incurred or aggravated during the period of service, the employer must make reasonable efforts to accommodate the disability in the position that the person is entitled to under USERRA.

Of course, some disabilities cannot be reasonably accommodated in certain positions of employment. The blinded veteran cannot return to the cockpit of an airliner. If the disability cannot be accommodated in that position, the employer must reemploy the individual in some other position for which the individual is qualified, *or can become qualified with reasonable employer efforts*, and that provides like seniority, status, and pay, or the closest approximation feasible under the circumstances of the returning disabled veteran’s case.

### **Does USERRA forbid discrimination?**

Yes. Section 4311 of USERRA provides as follows:

“(a)A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b)An employer may not discriminate in employment against or take any adverse employment action against any person because such person

(1) has taken an action to enforce a protection afforded any person under this chapter,

(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

(3) has assisted or otherwise participated in an investigation under this chapter, or

(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c)An employer shall be considered to have engaged in actions prohibited—

(1)under subsection (a), if the person’s membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer’s action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2)under subsection (b), if the person’s

- (A) action to enforce a protection afforded any person under this chapter,
  - (B) testimony or making of a statement in or in connection with any proceeding under this chapter,
  - (C) assistance or other participation in an investigation under this chapter, or
  - (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
- (d)The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section [4312\(d\)\(1\)\(C\)](#) of this title.”

***Title 38, United States Code, section 4311.***

Section 4311 was included in USERRA because Congress recognized that without such a section an employer could easily circumvent USERRA by firing employees who were NG&R members or by denying them hiring in the first place. To win a section 4311(a) case, you need to prove that your membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service was *a motivating factor* in the employer's decision to deny you initial employment, to fire you, or to deny you a promotion or benefit of employment. To win a section 4311(b) case, you need to prove that your exercise of section 4311(b) rights (exercising your USERRA rights, filing a claim, participating in an investigation, etc.) was *a motivating factor* in the employer's decision.

You need not prove that your membership in a uniformed service or other protected factor was *the reason* for the employer's unfavorable decision. If you prove that a protected factor or activity was *a motivating factor* in the employer's decision, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer to prove that the employer would have made the unfavorable decision anyway even in the absence of the protected factor.

**Is section 4311 limited to NG&R service? I served in the Marine Corps, on active duty, from 1965 to 1999, and I served two tours in Vietnam. I applied for a job in 2012 and did not get it. I think that the employer does not like me because I served in the Marine Corps. Can I file a section 4311 claim?**

Yes, you can certainly file such a claim, but please do not waste everyone's time by filing a claim that you cannot possibly prove. To prevail on such a claim, you need to prove that your military service more than 40 years ago was *a motivating factor* in the employer's decision not to hire you.

If you are currently serving in the NG&R, the employer may have a motive to discriminate against you, because your military training and service may be inconvenient for the employer to accommodate. If you completed your military service decades ago, your military service in no way impinges on the employer. Thus, it would seem unlikely that your military service motivated the employer's decision not to hire you.

There are probably a few employers in this country who have an ideological objection to military service, even service decades ago. Perhaps the employer said "if you served in the Marine Corps in Vietnam you must be a baby-killer" or words to that effect. If you have evidence of that kind, pursuing a section 4311 claim may be worthwhile. In the absence of such evidence, it would be a waste of everyone's time for a person in your situation to file a section 4311 claim.

**How do I enforce my USERRA rights?**

If you are a member of the NG&R and you are having difficulty with your civilian employer about your military training and service, I suggest that your first call should be to Employer Support of the Guard & Reserve (ESGR), a

Department of Defense organization established in 1972. ESGR's mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the NG&R. You can call ESGR toll-free at 800-336-4590. I also invite your attention to the ESGR website, [www.esgr.mil](http://www.esgr.mil).

ESGR will refer you to an ESGR volunteer ombudsman in your state. Upon your request, the ombudsman will contact the employer on your behalf and try to work out the problem. The ESGR process is non-confrontational and quick. ESGR will normally resolve the matter within two weeks or tell you that it cannot resolve it and that you should consider your next step.

If you want free legal help from the U.S. Government in asserting your USERRA claim, you must file a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency will investigate your complaint and try to persuade the employer to come into compliance, if the DOL-VETS investigation suggests that your claim has merit. If the DOL-VETS investigation does not result in a satisfactory resolution, you can request (essentially insist) that DOL-VETS refer your case to the United States Department of Justice (DOJ), if the employer is a state, a political subdivision of a state, or a private employer. If your employer is a federal agency, DOL-VETS will refer the case to the United States Office of Special Counsel (OSC).

If DOJ believes your case to have merit, DOJ will file suit on your behalf, at no cost to you, in the appropriate United States District Court and will represent you in your case. Similarly, if OSC finds your case to have merit, it will initiate a case on your behalf in the Merit Systems Protection Board (MSPB) and will represent you. In a typical year, DOJ initiates 15-25 cases in federal court against state and local governments and private employers, and OSC initiates a somewhat larger number of USERRA cases against federal agencies, as employers.

A much larger number of cases are brought privately, by attorneys retained by USERRA plaintiffs, against federal agencies (in the MSPB) and against private employers and local governments (in federal district courts). Unlike other federal employment laws, USERRA has no "exhaustion of remedies" rule and you don't need a "right to sue letter" before you file suit in federal court or in the MSPB.

You can file suit in federal court or the MSPB without ever having contacted DOL-VETS. If you file with DOL-VETS and get tired of waiting on them to complete their investigation, you can direct DOL-VETS to close its case, and then you can file suit. If the DOL-VETS investigation does not result in resolution, you can file suit instead of requesting that DOL-VETS refer the case to DOJ or the OSC. Finally, if the case is referred and DOJ or the OSC turns down your request for representation, you can then file suit in your own name with your own lawyer.

You can also bring the suit yourself and represent yourself—we call this a *pro se* case. *I do not recommend this course of action.* Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law today is so much more complex than it was when Abraham Lincoln was practicing law.

If you proceed with private counsel and prevail, the court or the MSPB can award you attorney fees, in addition to other relief. Contact me if you are having difficulty finding a qualified lawyer to take your case. I know several well qualified USERRA attorneys and I can refer you.

Regardless of who represents you, the federal district court can award significant relief if you prevail. First, the court will order the employer to come into compliance. If you were fired unlawfully, or if you were unlawfully denied reemployment, the court will order the employer to reinstate you and to pay you back pay and other relief to make you whole for the violation. If the court finds that the employer violated USERRA willfully, the court will order the employer to pay you an amount equal to the actual damages, and in addition to those damages, as *liquidated damages*. This effectively doubles the award if the court finds that the violation was willful. The MSPB will order similar relief, except that there is no provision for ordering a federal agency to pay liquidated (double) damages for willful violations.

Generally speaking, I think that you are better off with private counsel, if you can find a qualified attorney who is willing to represent you on a contingent fee basis. A private attorney will approach the case as your *advocate*, not as

a neutral third-party investigator. A private attorney will consider other statutes and legal theories, in addition to USERRA. A private attorney will act much more expeditiously than DOL-VETS, DOJ, and OSC.

There is generally nothing fast about litigation in federal district court, but the MSPB process works much more quickly. The long time it takes to complete the discovery process and set the case for trial does not even start until you file your case. If you retain private counsel, you can probably expect the lawyer to file suit within a few weeks and possibly sooner. If you rely on DOL-VETS and DOJ, there will likely be a delay of more than a year before the case is filed.

Complaints about the slowness of the legal system are not new. I invite your attention to Act III, Scene 1 of *Hamlet*, written by William Shakespeare in 1602. This is the famous “to be or not to be” soliloquy. While contemplating offing himself, Prince Hamlet spouts off a litany of all that is wrong with human life. “The law’s delays” is one item in a very long list. That situation has only gotten worse in the intervening 410 years.

There is one situation where I think that you are better off relying on DOL-VETS and DOJ, rather than retaining private counsel to sue on your behalf. The exception is when your employer is a state agency. Because of the 11<sup>th</sup> Amendment of the United States Constitution, you cannot sue a state in federal court, as an individual. If you have a USERRA claim against a state agency as employer, you can sue the state in state court, *but only if the state law permits such suits*. Many states still have sovereign immunity and do not permit suits against the state in state court.

If DOJ is bringing a suit on your behalf against a state government agency, as employer, the named plaintiff is the United States of America. This gets around the 11<sup>th</sup> Amendment problem, but it means that you must wait on DOL-VETS and DOJ, and their processes can be very time-consuming.

You can sue a political subdivision of a state in federal court, in your own name and with your own attorney. Political subdivisions include counties, cities, school districts, etc. The Supreme Court has held that political subdivisions do not have 11<sup>th</sup> Amendment immunity. Please see Law Review 1029.