

## **LAW REVIEW<sup>1</sup> 24053**

**November 2024**

### **Yes, USERRA Applies to the Judicial Branch and the Legislative Branch of the Federal Government.**

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

#### **1.1.1.8—USERRA applies to the Federal Government**

#### **1.4—USERRA enforcement**

**Q: I am a Lieutenant (O-3) in the United States Coast Guard Reserve (USCGR)<sup>3</sup> and a life member of the Reserve Organization of America (ROA).<sup>4</sup> I have read with great interest many of your “Law Review”**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses’ Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

<sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRRA—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 VRRRA 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 VRRRA 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>.

<sup>3</sup> The factual set-up for this article is not based on a recent situation of which I am aware. Over the past four decades, I have heard from a handful of Reserve Component service members in this sort of situation.

<sup>4</sup> The Reserve Officers Association was founded on 10/2/1922, at a meeting in the historic Willard Hotel in our nation’s capital. The meeting was called by General of the Armies John J. Pershing, who had commanded American

**articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.**

**On the civilian side, I am a federal probation officer. In each of the 93 federal judicial districts, there is a probation office, headed by a more senior probation officer who reports directly to the Chief District Judge of that district. The chief probation officer of this district has given me a tough time concerning my absences from work for USCGR training and service, although those absences are clearly protected by USERRA.**

**Recently, I was away from my probation officer job for one year of Coast Guard active duty, from 10/1/2023 until 9/30/2024. I have read and reread your Law Review 15116 (December 2015), and I am certain that I met and have documented that I met the five USERRA conditions for reemployment. I left my civilian job to perform service in the uniformed services, as defined by USERRA.<sup>5</sup> I gave my civilian employer prior notice of my departure.<sup>6</sup> I have not exceeded the cumulative five-year limit on the duration of my periods of active duty relating to my probation officer job. I served honorably and was released from active duty without having received a disqualifying bad discharge from the Coast Guard.<sup>7</sup> I made a proper application for reemployment on 10/4/2024, well within the 90-day deadline to**

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forces in “The Great War” (as World War I was then known). General Pershing and the Reserve officers that he invited to the meeting recognized that calling the recently concluded conflict “the war to end all wars” was a dangerous conceit and that our nation needed to emphasize military readiness. Captain Harry S. Truman was one of the founders of ROA. In 1950, as President, he signed our congressional charter. Under that charter, our mission is to advocate for the development and implementation of policies that will provide adequate national defense. For more than a century, we have advocated for reliance upon the Reserve Components, including the National Guard, as a cost-effective way to provide military readiness.

<sup>5</sup> 38 U.S.C. § 4312(a).

<sup>6</sup> 38 U.S.C. § 4312(a)(1).

<sup>7</sup> 38 U.S.C. § 4304.

**apply for reemployment after a period of service that lasted more than 180 days.<sup>8</sup>**

**Although I have documented that I met the five USERRA conditions for reemployment, the chief probation officer of this district has refused to reinstate me to my probation officer position. He said that the probation office in this district and the other 92 districts is part of the Judicial Branch of the Federal Government and the USERRA does not apply to the Judicial Branch. What do you say about that?**

**Answer, bottom line up front:**

USERRA does apply to the Judicial Branch, just as it applies to the Executive Branch of the Federal Government. The problem is that USERRA's enforcement mechanism does not apply to the Judicial Branch. I hope that the chief probation officer and the Chief District Judge will recognize that they have a legal obligation to obey USERRA and every other federal law and that they will not try to flout USERRA just because they believe that they can get away with it because of a loophole in USERRA's enforcement mechanism.

**USERRA applies to the Judicial Branch.**

Any "employee" of any "employer" "shall be promptly reemployed" by the pre-service employer if the employee meets the five USERRA conditions.<sup>9</sup> USERRA broadly defines the term "employer" as follows:

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<sup>8</sup> 38 U.S.C. § 4312(e)(1)(D).

<sup>9</sup> 38 U.S.C. § 4313(a).

**(A)** Except as provided in subparagraphs (B) and (C), the term “employer” means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—

**(i)** a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities.

**(ii)** *the Federal Government*;

**(iii)** a State;

**(iv)** any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

**(v)** a person, institution, organization, or other entity that has denied initial employment in violation of section 4311 [38 USCS § 4311].

**(B)** In the case of a National Guard technician employed under section 709 of title 32 [32 USCS § 709], the term “employer” means the adjutant general of the State in which the technician is employed.

**(C)** Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318 [38 USCS § 4318].

**(D)**

**(i)** Whether the term “successor in interest” applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:

**(I)** Substantial continuity of business operations.

**(II)** Use of the same or similar facilities.

- (III) Continuity of work force.
- (IV) Similarity of jobs and working conditions.
- (V) Similarity of supervisory personnel.
- (VI) Similarity of machinery, equipment, and production methods.
- (VII) Similarity of products or services.
- (ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i).<sup>10</sup>

USERRA defines the term “Federal Government” as follows: “The term ‘Federal Government’ includes any Federal executive agency, the legislative branch of the United States, *and the judicial branch of the United States.*”<sup>11</sup> Thus, the Judicial Branch, as part of the Federal Government, is an “employer” and has the same obligations as other employers.

**USERRA has no enforcement mechanism for the Judicial Branch or the Legislative Branch of the Federal Government.**

In section 4323,<sup>12</sup> USERRA has an enforcement mechanism for state and local governments and private employers. In section 4324,<sup>13</sup> USERRA has an enforcement mechanism for the Executive Branch of the Federal Government. USERRA has no enforcement mechanism for the Judicial Branch or the Legislative Branch of the Federal Government, but there is a separate law that provides an enforcement mechanism for the Legislative Branch, as discussed below.

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<sup>10</sup> 38 U.S.C. § 4303(4) (emphasis supplied).

<sup>11</sup> 38 U.S.C. § 4303(6) (emphasis supplied).

<sup>12</sup> 38 U.S.C. § 4323.

<sup>13</sup> 38 U.S.C. § 4324. You can find the entire text of section 4324 in Law Review 24052, the immediately preceding article in this “Law Review” series.

I hope that the chief probation officer and the chief judge of your district will recognize that they have an obligation to comply with USERRA and will comply by reemploying you. But if they do not, there is nothing that you can do to enforce your reemployment rights in the Judicial Branch.

Without enforceable USERRA rights, it will be most difficult (impossible) for you to continue your USCGR career. I suggest that you look for a job outside of the Judicial Branch. As a veteran who is recently off active duty, now is a suitable time to find a job in the Executive Branch, and there is a USERRA provision that can help you:

**(a)** Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312 [38 USCS § 4312], such person shall be reemployed in a position of employment as described in section 4313 [38 USCS § 4313].

**(b)**

**(1)** If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall—

**(A)** identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 [38 USCS § 4313] and for which the person is qualified; and

**(B)** ensure that the person is offered such position.

**(2)** The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that—

**(A)** the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or

**(B)** it is impossible or unreasonable for the agency to reemploy the person.

**(c)** *If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).*

**(d)** If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32 [32 USCS § 709], such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).<sup>14</sup>

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<sup>14</sup> 38 U.S.C. § 4314 (emphasis supplied).

You should ask the chief probation officer or the chief judge to sign a “determination” that it is “impossible or unreasonable” to reinstate you to your position as a federal probation officer. Then, you need to take that document to the United States Office of Personnel Management (OPM), and OPM will be responsible for finding you an appropriate position in the Executive Branch and ensuring that you are offered the position.

**Q: My good friend (let us call him Chesty Puller) is a Captain in the Marine Corps Reserve. In 2021, he left his job on the majority (Democrat) staff of a committee in the United States House of Representatives to serve a three-year active-duty tour in the Marine Corps. Chesty left active duty just recently, at the end of the three-year tour, and he clearly meets the five USERRA conditions for reemployment.<sup>15</sup> Is there a way for Chesty to enforce his USERRA rights against a committee of the United States House of Representatives?**

**A:** USERRA has no enforcement mechanism for the Legislative Branch of the Federal Government, but Chesty may be able to enforce his USERRA rights through the Congressional Accountability Act.<sup>16</sup>

**Q: In the United States House of Representatives, the party that has a majority of the House elects the Speaker of the House and that party gets a majority of the members *and the staff* of each committee. In the 2022 election, the Republicans regained the majority in the House**

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<sup>15</sup> Chesty left his civilian job to perform uniformed service. 38 U.S.C. § 4312(a). He gave the employer prior notice. 38 U.S.C. § 4312(a)(1). He has not exceeded the cumulative five-year limit on the duration of his periods of uniformed service relating to this employer relationship. 38 U.S.C. § 4312(c). He served honorably and did not receive a disqualifying bad discharge from the Marine Corps. 38 U.S.C. § 4304. After he was released from active duty, he made a timely application for reemployment, well within the 90-day deadline for doing so. 38 U.S.C. § 4312(e)(1)(D).

<sup>16</sup> 2 U.S.C. §§ 1301 et seq.



**of Representatives, albeit just barely. How does this development affect my friend’s right to reemployment on the committee staff?**

**A:** Your friend should ask the current committee chair to sign a “determination” that it is “impossible or unreasonable” to reemploy Chesty Puller on the committee staff. Then, OPM will be responsible for finding Chesty an appropriate position in a federal executive agency.<sup>17</sup>

**Q: Are there other sources of definitive information about how to enforce USERRA against the Federal Government as an employer?**

**A:** Yes. As I have explained in Law Review 16044 (May 2016) and other articles, *The USERRA Manual*, by Kathryn Piscitelli and Edward Still, is the definitive reference on USERRA. The book is published by a publishing company called Thomson Reuters. The book is not cheap, but it is worth the investment for any lawyer who will be managing one or more USERRA cases on either side. I specifically invite the reader’s attention to section 9:12 of the *Manual*. That section can be found on pages 494-97 of the 2023 edition of the *Manual*.

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

This article is one of 2,200-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the

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<sup>17</sup> 38 U.S.C. § 4314(c) (quoted and italicized above). A friend of mine did this exactly in 2004.

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).<sup>18</sup>

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, 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,

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<sup>18</sup> See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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<sup>19</sup> uniformed services, you are eligible for membership in ROA,<sup>20</sup> and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at <https://www.roa.org/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<sup>21</sup>

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<sup>19</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>20</sup> Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

<sup>21</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).