

# LAW REVIEW 15009<sup>1</sup>

January 2015

## Applicability of USERRA to the Legislative and Judicial Branches

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

1.1.1.7—USERRA applies to state and local governments

1.1.1.8—USERRA applies to Federal Government

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

**Q: I am a Major in the Army Reserve and a life member of the Reserve Officers Association (ROA). When not on active duty, I work as a staff assistant to a United States Senator, and the Senator will be up for reelection in 2016. The Army has offered me the opportunity to go back on active duty for two years, from March 2015 to March 2017. If I take this opportunity, will the Uniformed Services Employment and Reemployment Rights Act (USERRA) give me the right to reemployment when I leave active duty in March 2017?**

**I have read with great interest your “Law Review” articles about USERRA. Does USERRA apply to the Legislative Branch of the Federal Government?**

**A:** Yes.

As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Clinton signed it into law on October 13, 1994. We recently celebrated the 20<sup>th</sup> anniversary of USERRA, but this law is really almost 75 years old. USERRA was a long-overdue rewrite of the Veterans’ Reemployment Rights Act, which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II.

As is explained in Law Review 1281 and other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

---

<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,300 “Law Review” articles about 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

<sup>2</sup> Captain Wright is the Director of ROA’s Service Members Law Center (SMLC). He can be reached at (800) 809-9448, ext. 730. His e-mail is [SWright@roa.org](mailto:SWright@roa.org).

- a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA.
- b. You must have given the employer prior oral or written notice. You do not need the employer's permission, and the employer does not get a veto, but you must give the employer notice, unless doing so is precluded by military necessity or otherwise impossible or unreasonable.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that you have performed, relating to the employer relationship for which you seek reemployment. As is explained in Law Review 201 and other articles, there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting your limit.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer. After a period of service of 181 days or more, you have 90 days to apply for reemployment.<sup>3</sup> Shorter deadlines apply after shorter periods of service.

If you meet these five simple conditions after you leave active duty, you are entitled to reemployment in the position of employment that you would have attained if you had been continuously employed, or another position (for which you are qualified) that is of like seniority, status, and rate of pay. These rules apply in exactly the same way regardless of whether you work for a Legislative Branch employer, an Executive Branch employer, a state government or local government employer, or even a private-sector employer.

USERRA itself provides no enforcement mechanism with respect to Legislative Branch employers (federal). Section 4314(c) of USERRA<sup>4</sup> provides that if a Legislative Branch or Judicial Branch (of the Federal Government) employer finds it "impossible or unreasonable" to reemploy a returning service member who meets the USERRA conditions, the employer is to state in writing that the employer so finds it "impossible or unreasonable" to reemploy the individual. In that case, the Director of the Office of Personnel Management (OPM) is required to identify an appropriate position of like seniority, status, and pay in an Executive Branch agency and to ensure that the individual is offered such a position.<sup>5</sup>

In early 1995, a few months after USERRA was enacted, Congress enacted the Congressional Accountability Act (CAA).<sup>6</sup> This law makes 11 statutes (including USERRA) explicitly applicable to

---

<sup>3</sup> 38 U.S.C. 4312(e)(1)(D).

<sup>4</sup> 38 U.S.C. 4314(c).

<sup>5</sup> 38 U.S.C. 4314(b)(1).

<sup>6</sup> 2 U.S.C. 1316.

the Legislative Branch, and it provides an enforcement mechanism through the Office of Compliance (OOC).<sup>7</sup>

**Q: Let us say that I leave active duty in March 2017 and make a timely application for reemployment with the Senator, and that I meet the five USERRA conditions in March 2017, but the Senator refuses to reemploy me. Working in the Executive Branch is certainly better than being unemployed, but I really want to return to work for the Senator. Will I be forced to choose between enforcing USERRA against the Senator, through the CAA, and exercising my right to an alternative Executive Branch job, through OPM?**

**A:** Probably not. OPM probably will not require you to sign a waiver of your USERRA rights against the Senator, in exchange for finding you an appropriate Executive Branch job. You will probably want to go to the Executive Branch job, in order to get back on the payroll, and then litigate your case against the Senator in the OOC.

**Q: The Senator is up for reelection in 2016. He will probably run for reelection and will probably be reelected, but of course that is not certain. He could choose to retire, or he could run and lose. What happens if I return from active duty in March 2017 and find that the Senator is gone from the Senate?**

**A:** In that case, it really is “impossible or unreasonable” to reemploy you, and the Secretary of the Senate can so certify, and then OPM will be responsible for finding you an equivalent position in the Executive Branch.

**Q: A colleague in my Army Reserve unit is a federal probation officer, and federal probation officers are considered to be part of the Judicial Branch of the Federal Government. How does USERRA apply to the Judicial Branch?**

**A:** USERRA applies to the Judicial Branch, but there is no enforcement mechanism with respect to Judicial Branch employers. If your colleague returns from military service and is denied reemployment, she can go to OPM and get an equivalent position in the Executive Branch.

**Q: I know three Army Reservists who work for the Legislative Branch or Judicial Branch of our state government. How does USERRA apply to them?**

**A:** USERRA applies to the legislative branches and judicial branches of state governments just as it applies to the executive branches of state governments. Please see Law Review 0912 (February 2009) concerning a successful effort by the United States Department of Justice to enforce USERRA against the Judicial Branch of the North Carolina government.

---

<sup>7</sup> I invite the reader’s attention to Law Review 13160 (December 2013), by attorneys Jennifer Zucker, Scott Felder, Adrienne Johnson, and Greg Marchand. The article describes in detail a successful effort to utilize the CAA enforcement mechanism to enforce USERRA against the Government Accountability Office (GAO), which is part of the Legislative Branch of the Federal Government.