

## **Calling you an Independent Contractor Does Not Make you one.**

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

- 1.1.2.2—Independent contractors and partners
- 1.2—USERRA forbids discrimination
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a Major in the Marine Corps Reserve (USMCR) and a member of the Reserve Officers Association (ROA). I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I graduated from college in 1995 and was commissioned a Second Lieutenant, via the Naval Reserve Officers Training Corps. I left active duty in May 2000, thinking that my military career was over. I found a job in my home town as a real estate broker, and I have worked there for 15 years. I am paid solely by commission, but I work only for this company and work regular hours, often far more than 40 hours per week. In 2014, I earned more than \$150,000 in commissions.**

**When 19 terrorists hijacked four airplanes on September 11, 2001, I was a member of the Individual Ready Reserve with no ongoing training requirements. I expected to resign my commission in 2003, when I completed my eight-year obligation to the Marine Corps, but**

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<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,350 “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.

<sup>2</sup> Captain Wright was the Director of ROA’s Service Members Law Center (SMLC), as a full-time employee of ROA, from June 2009 through May 2015. During that six-year period, he received and responded to more than 35,000 e-mail and telephone inquiries. He is also the author or co-author of more than 1,200 of the 1,350 published “Law Review” articles. Although he is no longer employed by ROA, he is continuing the SMLC on a part-time, volunteer basis, as a member of ROA. He is available by e-mail at [SWright@roa.org](mailto:SWright@roa.org). Samuel F. Wright received his BA from Northwestern University in 1973, his JD (law degree) from the University of Houston in 1976, and his LLM (advanced law degree) from Georgetown University in 1980. He has been dealing with the reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress as his proposal in February 1991. The version of USERRA that President Bill Clinton signed on October 13, 1994 (Public Law 103-353) was 85% the same as the Webman-Wright draft. USERRA is the long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in September 1940. Samuel F. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. He has recently (June 2015) returned to Tully Rinckey PLLC, this time in an “of counsel” relationship.

after the terrorist attacks I reconsidered and became an active member of the USMCR. I did not consult with my civilian employer before signing up as an active reservist.<sup>3</sup>

In the last 14 years, my civilian career has been interrupted twice by extended periods of involuntary active duty, the first one for Iraq and the second one for Afghanistan. I have also had drill weekends and annual training. I have had a difficult relationship with the old man who owns and operates the real estate brokerage firm, concerning my participation in the USMCR. At every meeting that I have had with him about career development, job performance, and the like, he has mocked and disparaged the Marine Corps and has pressured me to resign my commission. Each time that I inform him that I will be away from work for a time for military training or service, he angrily tells me to “stop playing soldier.” I contacted the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), but the owner of the firm refused to meet with the ESGR volunteer.

Recently, I was selected to attend a year-long professional military education residential course that I need to complete to be promoted to Lieutenant Colonel, and I gave my employer four months of advance notice prior to the start date. Just one week later, the owner of the firm abruptly informed me that I was terminated, effective immediately, and ordered me to gather my personal belongings and had a security guard escort me off the property. The guard collected my entry fob and keys to the company office.

I protested by means of a letter to the owner of the company, asserting that the abrupt termination just a week after I gave notice of an upcoming period of military leave violated USERRA. The owner had his lawyer respond to me by means of certified mail. Together with her letter, the lawyer sent me a copy of the contract that I signed with the company in 2000, and she highlighted the portion of the contract that states that the company and I agree that I am to be an “independent contractor” and not an “employee.” In her letter, she stated that I am an independent contractor and that I have no rights under USERRA or other employment laws and that under the contract the company has the right to terminate its relationship with me at any time, for any reason or no reason.

**What is an “independent contractor?” Does the contract that I signed 15 years ago preclude me from challenging the termination?**

**A:** A legal dictionary defines “independent contractor” as follows:

A person or firm engaged to do a particular job of work, as opposed to a person under a “contract of employment. An independent contractor is his own master, bound to do

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<sup>3</sup> You had no legal or moral obligation to inform the employer that you were considering enlisting or in transitioning to a more active reserve status, and if you had asked me at the time I would have advised you to keep to yourself your thoughts about the Marine Corps. Please see Law Review 13083 (June 2013). Under USERRA, your only obligation concerning notice is to give the employer prior oral or written notice before missing work for uniformed service, and you are only required to give notice. You do not need the employer’s permission, and the employer does not get a veto. See 20 C.F.R. 1002.87 (Department of Labor USERRA Regulations).

the job he has contracted to do but having discretion as to how to do it.” ... A taxi driver, for example, is the independent contractor of the passenger who hires him. A person who uses an independent contractor is not generally vicariously liable for torts committed by the contractor but may be in exceptional cases. ...<sup>4</sup>

The distinction between an “employee” and an “independent contractor” is important in many legal contexts. Perhaps the most important context is vicarious liability for torts, under the doctrine of *respondeat superior*.<sup>5</sup>

For example, let us say that you are driving from Point A to Point B in the course of your employment with the real estate firm and you are involved in an accident for which you are found to be responsible. If you are an employee of the firm, the firm is responsible for paying any judgment against you for wrongful death, personal injury, property damage, etc.<sup>6</sup> If you are an independent contractor, the firm is not responsible for your torts.

There are many reasons why the firm would prefer that you be classified as an independent contractor rather than an employee. Saying that you are an independent contractor is a legal conclusion, not just a matter of label. Even if you agreed to the independent contractor label in a contract that you signed 15 years ago, the label is not dispositive. If you really are an independent contractor and not an employee, you are not protected by USERRA and other employment laws, but the courts routinely look behind employer-imposed labels even when employees have agreed to them.

In a USERRA case involving an Army National Guard officer who left his employment as a commission-only life insurance broker, Judge David G. Larimer of the United States District Court for the Western District of New York wrote:

Defendants assert that this argument [that Evans was an employee and not an independent contractor and therefore had USERRA rights] is foreclosed by the agreements signed by the plaintiff in November 2003 and May 2006, in which he expressly agreed that he would be an independent contractor and not an employee of MassMutual.

While the parties’ signed agreements have some bearing on this issue, they are not dispositive. The case law is clear that the parties’ use of particular labels or terms such as “independent contractor” is simply one factor that the court can consider in determining whether a plaintiff was an “employee” for purposes of USERRA.

In determining whether a plaintiff was an employee or an independent contractor, courts apply the “economic realities” test.<sup>7</sup>

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<sup>4</sup> *Oxford Dictionary of Law*, Seventh Edition (2013), page 279 (internal citation omitted).

<sup>5</sup> The same legal dictionary defines “*respondeat superior*” as “The doctrine by which the employer is responsible for certain wrongs committed by his employee in the course of his employment.” Page 476.

<sup>6</sup> You are not off the hook, but the firm will likely be a “deeper pocket” if the damages exceed the policy limit under your automotive liability policy.

<sup>7</sup> *Evans v. MassMutual Financial Group*, 856 F. Supp. 2d 606, 608-09 (W.D.N.Y. 2012). I discuss the *Evans* case in detail in Law Review 15021 (February 2015).

As is explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. USERRA's 1994 legislative history addresses the employee-independent contractor distinction as follows:

Section 4303 would define "employee" in the same expansive way as under the Fair Labor Standards Act [minimum wage and overtime rules], 29 U.S.C. 203(e) ... and the issue of independent contractor versus employee should be treated in the same manner as under the Fair Labor Standards Act. *See Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5<sup>th</sup> Cir. 1987).<sup>8</sup>

*Mr. W Fireworks* is an interesting and important Fair Labor Standards Act (FLSA) case. The fireworks company sold its products through fireworks stands operated by "independent contractors." Secretary of Labor William Brock sued the company to enforce the FLSA rules about minimum hourly wages and overtime. The district court agreed with the defendant fireworks company that the individuals who operated the fireworks stands were independent contractors and that the FLSA did not apply. Secretary Brock appealed to the United States Court of Appeals for the Fifth Circuit<sup>9</sup> and prevailed. The appellate court held that the "economic realities" test should be applied under the FLSA, in making the distinction between employees and independent contractors. The economic reality was that the individuals who operated the fireworks stands were dependent upon the fireworks company for their livelihood and they qualified as employees under the liberal test applicable under the FLSA.

The distinction between employees and independent contractors is important in many legal contexts, and different tests have been applied in different contexts. The "economic realities" test is the most liberal<sup>10</sup> test that has been applied, and it is clear that Congress intended that this most liberal test would apply in FLSA and USERRA cases. In cases like *Mr. W Fireworks* and *Evans*, it is possible for an individual to be an employee for FLSA and USERRA purposes even if he or she has been found to be an independent contractor for other legal purposes. Applying the "economic realities" test to your situation, I think that it is very reasonable to argue that you were an employee and not an independent contractor for USERRA purposes.<sup>11</sup>

**Q: Let us say that I sue the company and get over the "independent contractor" hurdle. What do I have to prove to prevail under USERRA?**

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<sup>8</sup> House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2454.

<sup>9</sup> The 5<sup>th</sup> Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

<sup>10</sup> By "most liberal" I mean the test that is most likely to result in a finding of employee status.

<sup>11</sup> *See also* 20 C.F.R. 1002.44 (Department of Labor USERRA Regulations). These regulations are entitled to "Chevron deference" in the courts. Please see Law Review 15058 (July 2015).

**A:** Your argument is that your USMCR service was *a motivating factor* in the employer's decision to terminate your relationship with the company and that the termination violated section 4311 of USERRA, which provides as follows:

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

(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.<sup>12</sup>

I discuss section 4311 of USERRA (forbidding discrimination against Reserve Component members in employment) in scores of published "Law Review" articles that you can find in Category 1.2 in our Subject Index. I invite the reader's attention especially to Law Reviews 0731

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<sup>12</sup> 38 U.S.C. 4311 (emphasis supplied).

(June 2007), 0739 (July 2007), 0753 (October 2007), 0841 (September 2008), 0856 (October 2008), 0902 (January 2009), 0904 (January 2009), 0906 (February 2009), 0909 (February 2009), 0936 (August 2009), 1011 (February 2010), 1012 (February 2010), 1019 (February 2010), 1106 (January 2011), 1122 (March 2011), 1143 (June 2011), 1173 (September 2011), 11105 (December 2011), 1240 (April 2012), 1282 (August 2012), 12108 (November 2012), 12109 (November 2012), 12118 (December 2012), 13036 (March 2013), 13041 (March 2013), 13042 (March 2013), 13099 (July 2013), 13106 (August 2013), 13131 (October 2013), 14002 (January 2014), 14046 (April 2014), and 15053 (June 2015).

In your case, I think that the owner's history of disparaging your USMCR service and pressuring you to "stop playing soldier" plus the proximity in time between when you notified the owner of your upcoming military obligation and your termination one week later is certainly sufficient to establish that your USMCR service was at least *a motivating factor* in the employer's decision. Unless the employer can *prove* (not just say) that you would have been fired anyway for lawful reasons unrelated to your USMCR service, you should prevail.