

Congress Should Amend USERRA To Provide for Enforcement Against Indian Tribes as Employers

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.1.4—Indian tribes as employers under USERRA

1.8—Relationship between USERRA and other laws/policies

Q: I am a Sergeant in the Army Reserve, and I have been called to active duty and deployed. I left my civilian job as a croupier at a casino owned and operated by the tribe, and I have carefully met the eligibility conditions for reemployment under the Uniformed Services Employment Rights Act (USERRA). I left my job for this involuntary active duty period, and I gave the tribe (my employer) both oral and written notice as soon as my reserve unit commanding officer told me of the likelihood that we would be called up. Since the call-up was involuntary, this year of active duty does not count toward my five-year limit under USERRA, I am informed, and even if this year does count I am not close to exceeding the limit. I have served honorably, and I expect to be released from active duty at the end of February, and I plan to apply for reemployment as soon as I arrive back home.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,400 "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.

² Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal 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. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. 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, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

Recently, I sent an e-mail to the casino manager, and my wife visited him, to remind him that I will be home by early March and expect to return to work as soon as possible. The manager told me by e-mail and told my wife in person that my job has been filled and that the casino will not bring me back on board when I complete my year of active duty.

I told the manager that I have the right to reemployment under USERRA, and I referred to some of your “Law Review” articles. The manager said that the tribe itself is the employer and the tribe is an “independent nation” within the United States and is exempt from the enforcement of laws like USERRA. Is the manager correct?

A: It is not correct to say that an Indian tribe is an “independent nation”—at most it is a “dependent nation” with some very limited vestiges of sovereignty—the “West was won” before the end of the 19th Century. When a tribe operates a commercial enterprise³ like a casino or a farm, federal laws of general applicability (like the Occupational Safety & Health Act and the National Labor Relations Act) can be and are routinely enforced against the tribe. See *Soaring Eagle Casino & Resort v. National Labor Relations Board*, 791 F.3d 648 (6th Cir. 2015); *National Labor Relations Board v. Little River Tribe of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015); *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669 (7th Cir. 2010); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996); *Donovan v. Couer D’Alene Farm*, 751 F.2d 1113 (9th Cir. 1985).

The problem is not that Indian tribes are exempt from the enforcement of federal statutes like USERRA. The problem is that USERRA, as currently written, provides no enforcement mechanism for tribes as employers. This problem can be and should be fixed by Congress, by amending USERRA.

Section 4324 of USERRA⁴ provides an enforcement mechanism with respect to federal executive agencies as employers.⁵ Section 4323 of USERRA⁶ provides an enforcement mechanism with respect to states, political subdivisions of states,⁷ and private employers. An Indian tribe is not a private employer. It is not a state or a political subdivision of a state. It is not part of the Federal Government. Unfortunately, USERRA does not provide for enforcement of this law against tribes as employers.

³ Applying federal laws to tribal employees who are intimately involved with the tribe’s governmental functions (e.g., tribal police officers) is a closer and more difficult question.

⁴ 38 U.S.C. 4324.

⁵ Please see Law Review 15064 (July 2015) for a detailed description of USERRA’s enforcement mechanism with respect to federal Executive Branch agencies as employers. Please see Law Review 15009 (January 2015) for a detailed description of the application of USERRA to the Legislative Branch and the Judicial Branch of the Federal Government.

⁶ 38 U.S.C. 4323.

⁷ Political subdivisions include counties, cities, school districts, and other local government entities.

As one of the two principal drafters of USERRA, I can say that excluding tribes from USERRA's enforcement provisions was *not* based on a policy decision to "respect the sovereignty" of the tribes. Rather, this was simply an oversight on our part. We provided an enforcement mechanism for the Federal Government, for states, for political subdivisions of states, and for private employers. We thought that included all possible employers. Frankly, I never thought about Indian tribes during the drafting of USERRA. If I had grown up in a state like New Mexico (with major Indian reservations) I likely would have thought to include an enforcement mechanism for tribes as employers.

There is no good constitutional or policy argument for excluding Indian tribes (as employers) from USERRA enforcement. Those who leave civilian jobs with tribes for voluntary or involuntary uniformed service need and deserve reemployment rights, just as much as employees of other employers. I propose that Congress amend USERRA to provide for enforcement of this law against tribes.

Section 4303 of USERRA defines 16 terms used in this law. The term "employer" is defined as follows:

(4)

(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.

(B) In the case of a National Guard technician employed under section 709 of title 32, 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.

(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).⁸

I propose that Congress amend section 4303(4)(A) to read as follows: "Except as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, *Indian tribe*, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including ...".

The final subsection of section 4323 reads as follows: "In this section [relating to USERRA enforcement], the term 'private employer' includes a political subdivision of a State."⁹ I propose that Congress amend this subsection to read as follows: "In this section, the term 'private employer' includes a political subdivision of a State *or an Indian tribe, whether or not such tribe is recognized by the Federal Government.*"

⁸ 38 U.S.C. 4303(4).

⁹ 38 U.S.C. 4323(i).