

## **Federal Employee Is Exempted from the Descending Escalator**

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

Update on Sam Wright

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**Q: I am a Colonel in the Army Reserve, not presently on active duty, and I joined the Reserve Officers Association (ROA) recently. I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I have been a civilian employee of the Federal Government (Executive Branch) since 1999. In July 2014, I left my civilian job for a three-year voluntary active duty tour. I will leave active duty on June 30, 2017, and I have contacted my federal civilian employer to let them know that I will be returning to work soon. An employee in the personnel office told me that there**

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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 1700 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

<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. I have 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 more than 34 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.

has been a major reorganization and reduction-in-force at our agency since I left in 2014. She said that if I had not been on active duty I would have been laid off anyway, so the agency has no obligation to reemploy me—at best I could be placed on a “priority placement list” for other federal agencies. How does USERRA apply to this sort of situation?

**Answer (bottom line up front):**

Under the Office of Personnel Management (OPM) USERRA Regulations, you are exempted from a “descending escalator.” Even if the agency can prove that you would have lost your job anyway, even if you had not been on active duty, the agency is required to reemploy you in an active position that is equal in seniority, status, and pay to the position you left in 2014. This assumes, of course, that you meet the five USERRA conditions for reemployment after you leave active duty on June 30.

**Explanation:**

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA<sup>3</sup> in 1994, as 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).<sup>4</sup> The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II.

During the congressional debates on the STSA, Senator Elbert Thomas of Utah conceived of the idea of requiring civilian employers to reemploy those who were called to the colors, and he offered an amendment to require such reemployment. He explained the rationale for his amendment as follows:

It is not unreasonable to require the employers of such men [those who will be drafted under the law we are considering today] to rehire them upon the completion of their service, since the lives and property of employers, as well as the lives and property of everyone else in this country, are defended by such service.<sup>5</sup>

Senator Thomas’ eloquent argument persuaded his colleagues in the Senate, and later in the House, and the original VRRRA was included in the STSA as it was signed into law by President

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<sup>3</sup> Public Law 103-353, 108 Stat. 3162. The citation means that USERRA was the 353<sup>rd</sup> Public Law enacted during the 103<sup>rd</sup> Congress (1993-94), and you can find this law, in the form that it was enacted in 1994, in Volume 108 of *Statutes at Large*, starting on page 3162. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). USERRA has been amended several times since it was enacted in 1994. As I shall explain further below, a 1998 amendment is especially pertinent to your case.

<sup>4</sup> Public Law 76-783, 54 Stat. 885.

<sup>5</sup> 96 Cong. Rec. 10573. Senator Thomas’ eloquent statement is quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8<sup>th</sup> Cir. 1991).

Franklin D. Roosevelt in 1940. As originally enacted, the VRRRA only applied to draftees, but just one year later, as part of the Service Extension Act of 1941,<sup>6</sup> Congress expanded the VRRRA to make it apply to voluntary enlistees as well as draftees.

The federal reemployment statute has been on the books for 77 years and is part of the fabric of our society. There have been 16 Supreme Court decisions under the VRRRA and one (so far) under USERRA.<sup>7</sup> In its first VRRRA case, the Supreme Court established the principle of liberal construction of this vital law. In the majority opinion, written by Justice William O. Douglas, the Court held: “This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”<sup>8</sup> Justice Douglas’ eloquent words about the members of my father’s generation (the so-called “Greatest Generation”) who fought World War II apply equally to their children, grandchildren, and great-grandchildren who are fighting the Global War on Terrorism today, in the aftermath of the terrorist attacks of September 11, 2001, the “date which will live in infamy” for our time.

USERRA’s first section expresses the “sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.”<sup>9</sup>

### **USERRA’s eligibility criteria**

As I have explained in Law Review 15116 (December 2015) and many other articles, you (or any service member or veteran) must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services. It is clear beyond question that you did this in 2014.
- b. You must have given the employer prior oral or written notice. You have showed me a copy of the letter that you sent to the personnel office in 2014, before you left your job to report to active duty.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which you seek reemployment.<sup>10</sup>

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<sup>6</sup> Public Law 77-213, 55 Stat. 626, 627.

<sup>7</sup> Please see Category 10.1 in our Law Review Subject Index. You will find a case note about each of these 17 Supreme Court decisions.

<sup>8</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

<sup>9</sup> 38 U.S.C. 4301(b).

<sup>10</sup> Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. This current three-year active duty tour probably counts toward the five-year limit. We must look back to 1999, when you began your career as a federal civilian employee, to determine if you have used more than two years of the five-year limit between 1999 and 2014. Your drill weekends and annual training periods do not count toward exhausting your five-year limit with respect to the Federal Government as your employer. If you were called to active duty

- d. You must have been released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA.<sup>11</sup> Unless you have done something incredibly stupid in the last three years, you will meet that condition on June 30.
- e. After release from the period of service, you must have made a timely application for reemployment.<sup>12</sup> You need to apply for reemployment at the federal agency within 90 days after June 30.

**Under USERRA and the OPM USERRA Regulations, you will be entitled, upon your return to work in 2017, to a job that is at least equal to the job you left in 2014, when you were called to the colors.**

In its first case construing the VRRRA, in 1946, the Supreme Court enunciated the “escalator principle” when it held: “[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.”<sup>13</sup> The escalator principle is codified in sections 4313(a)(2)(A) and 4316(a) of USERRA.<sup>14</sup>

As applied to employees of state or local governments or private employers, the “escalator” can descend as well as ascend, and the “escalated reinstatement position” of the returning service member or veteran can be a position that is inferior to the position that he or she left to enter military service.<sup>15</sup> *As applied to employees of the Federal Government, the escalator can only ascend or remain in place. Federal employees who meet the five USERRA conditions are exempted from the application of a descending escalator.*

Section 4331(a) of USERRA<sup>16</sup> gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. Section 4331(b) gives the Director of the Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to federal executive agencies, including DOD.

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involuntarily, as in a mobilization, that period does not count toward the five-year limit. For purposes of this article, I am assuming that your current three-year voluntary active duty tour does not put you over the five-year limit.

<sup>11</sup> 38 U.S.C. 4304. The enumerated disqualifying discharges include a dishonorable discharge, a bad conduct discharge, a dismissal, an administrative discharge characterized as “other than honorable,” or being “dropped from the rolls” of a uniformed service.

<sup>12</sup> After release from a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>13</sup> *Fishgold*, 328 U.S. at 285.

<sup>14</sup> 38 U.S.C. 4313(a)(2)(A), 4316(a).

<sup>15</sup> See 20 C.F.R. 1002.194.

<sup>16</sup> 38 U.S.C. 4331(a).

The OPM USERRA Regulations are codified in Part 353 of title 5 of the Code of Federal Regulations (C.F.R.). The pertinent language is as follows:

*During uniformed service. An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered “for cause” under this subpart.) He or she is not a “competing employee” under section 351.404 of this chapter. If the employee’s position is abolished during such absence, the agency must reassign the employee to another position of like status and pay.<sup>17</sup>*

Even if the agency can establish that your job status would have been downgraded anyway, even if you had not been away from your civilian job for military service from July 2014 to July 2017, you are entitled to reemployment in a position that is at least as good as the position you left in July 2011. This is the clear meaning and effect of section 353.209(a).

**The agency is required to reemploy you in an appropriate position even if that means displacing an incumbent employee in such a position.**

When you return to work in July 2017, the agency is required to reemploy you in an appropriate position even if that means displacing another employee who is doing a good job. USERRA would be of little value if it only applied to positions that happen to be vacant when the service member or veteran returns to work after a period of service.

There is a Federal Circuit<sup>18</sup> case that is directly on point here. Nichols was a GS-13 chaplain for the United States Department of Veterans Affairs (DVA) and was the supervisor of other DVA chaplains at a specific DVA medical center when he left his job for three years of active military service. He met the eligibility criteria for reemployment. The DVA reemployed him as a GS-13 chaplain at the same medical center, but it refused to return him to the position of supervisor of the other DVA chaplains, because that position was held by a man named Walsh. The DVA argued and the Merit Systems Protection Board (MSPB) agreed that the DVA was not required to displace Walsh to return Nichols to a supervisory position. Nichols appealed, and the Federal Circuit firmly rejected this argument, as follows:

The department [DVA] first argues that, in this case, Nichols’ former position was “unavailable” because it was held by another and thus it was within the department’s discretion to place Nichols in an equivalent position. This is incorrect. Nichols’ former

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<sup>17</sup> 5 C.F.R. 353.209(a) (emphasis supplied).

<sup>18</sup> The Federal Circuit is the federal appellate court that sits in Washington, DC and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB).

position is not unavailable because it still exists, even if occupied by another. ... Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.<sup>19</sup>

USERRA's legislative history makes clear that Congress intended that the lack of a present vacancy would not excuse the pre-service employer from the obligation to reemploy the returning veteran:

It is also not a sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application [for reemployment]. *Davis v. Halifax County School System*, 508 F. Supp. 966, 969 (E.D.N.C. 1981). *See also Fitz v. Board of Education of Port Huron*, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *affirmed*, 802 F.2d 457 (6<sup>th</sup> Cir. 1986); *Anthony v. Basic American Foods*, 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 709 (8<sup>th</sup> Cir. 1983).<sup>20</sup>

USERRA also overrides President Trump's hiring freeze.<sup>21</sup> When you meet the five USERRA conditions in July, after you leave active duty and apply for reemployment, the agency will be required to reemploy you in a position that is at least equal (in seniority, status, and pay) to the position you left in 2014.

### **Obtaining information about USERRA**

I have been dealing with USERRA and the predecessor reemployment statute for almost 35 years, and I have made protecting the rights of service members (especially reemployment rights and voting rights) the focus of my military career and my legal career. 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 work product of an interagency task force that studied the VRRRA with a view toward suggesting improvements. President George H.W. Bush presented our draft to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft.

I have also dealt with USERRA and the predecessor statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special

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<sup>19</sup> *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed Cir 1993) (citations omitted).

<sup>20</sup> House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 667 of the 2016 edition of the *Manual*.

<sup>21</sup> Please see Law Review 94 (October 2003).

Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC).

I was the SMLC Director, as a full-time employee of ROA, for exactly six years, from June 2009 through May 2015. During that time, I received and responded to approximately 35,000 e-mail and telephone inquiries from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. About half of the inquiries were about USERRA, and the other half were about other military-legal issues. Please see Law Review 15052 (June 2015) for a detailed discussion of the accomplishments of the SMLC.

My ROA employment ended May 31, 2015, but I have continued the work of the SMLC as a volunteer. I am still available by telephone or e-mail, but I am no longer in the DC metro area. You can reach me by telephone at (202) 210-4194 (cell phone) or by e-mail at [samwright50@yahoo.com](mailto:samwright50@yahoo.com).

If you have questions about military-legal issues, and especially about USERRA, please check out our Law Review Library at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). If you do not find the answer to your specific question, please contact me by e-mail or telephone. I will discuss the matter with you free of charge for up to one hour. If you need more than that, I will charge a very reasonable fee. If you need legal representation, I know several attorneys that I can refer you to, attorneys who are well qualified to represent plaintiffs in USERRA cases or other military-related cases.

If you already have an attorney, please inform the attorney of our Law Review Library and invite him or her to contact me by e-mail or telephone. The same offer applies to attorneys—up to one hour free and a reasonable fee beyond that.