

## Under Section 4302, USERRA Is a Floor Not a Ceiling

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[Update on Sam Wright](#)

### 1.8—Relationship between USERRA and other laws/policies

Section 4302 of the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides:

**(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

**(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.<sup>3</sup>

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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 1600 "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 Spouse 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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 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 USERRA and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 35 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 [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup> 38 U.S.C. 4302.

USERRA's legislative history explains section 4302 as follows:

Section 4302(a) would reaffirm that, to the extent that a Federal or state law or employer plan or practice provides greater rights than those provided under the Committee [House Committee on Veterans' Affairs] bill, those greater rights would not be preempted by chapter 43 [USERRA].

Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provided fewer rights or put additional conditions on those rights. See *Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5<sup>th</sup> Cir. 1979); *Cronin v. Police Department of the City of New York*, 675 F. Supp. 847 (S.D.N.Y. 1987) and *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), which provide that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43 [USERRA, or the predecessor reemployment statute]. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. See *McKinney v. Missouri-K-T R. Co.*, 357 U.S. 265, 270 (1958); *Beckley v. Lipe-Rollway Corp.*, 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's [House Committee on Veterans' Affairs] that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. See *Kidder v. Eastern Airlines, Inc.*, 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).

The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights which are already in existence may be waived. See *Leonard v. United Airlines, Inc.*, 972 F.2d 155, 159 (7<sup>th</sup> Cir. 1992). An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void.<sup>4</sup>

The Department of Labor (DOL) USERRA regulation provides as follows about section 4302:

### **How does USERRA relate to other laws, public and private contracts, and employer practices?**

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<sup>4</sup> House Committee Report, April 28, 1993, H.R. Rep. 103-65, Part 1, reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 684-85 of the 2017 edition of the *Manual*.

**(a)** USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

**(b)** USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

**(c)** USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

**(d)** If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.<sup>5</sup>

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<sup>5</sup> 20 C.F.R. 1002.7 (bold question in original).