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Yes, USERRA Applies to "Temporary" Jobs.

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

1.1.1.1—USERRA applies to hiring halls and joint employers.
1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees.
1.2—USERRA forbids discrimination.
1.3.2.1—Prompt reinstatement upon return from service
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

Q: I am a retired Army Reserve Colonel and a life member of the Reserve Organization of America (ROA).[3] I am a volunteer ombudsman for the Department of Defense organization

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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 Spouses' 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[2] 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. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 38 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 VRRA 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 VRRA 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 mailto:swright@roa.org.

[3] In 2018, Reserve Officers Association members amended the organization's constitution to make enlisted service members, as well as officers, eligible for full membership, including voting and running for office. The organization

called "Employer Support of the Guard and Reserve" (ESGR).[4] I have read many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I use your articles in my ESGR work.

I am working on a complicated USERRA case now, and I need your help understanding the rights of the individual reservist and the obligations of the two employers who seem to be involved. Let us call the individual reservist Josephine Smith, an enlisted Marine Corps Reservist. Josephine had civilian job working for a "staffing company" called Temps-R-Us or TRU.[5]

Josephine works at a large industrial facility that belongs to a huge company—let us call it Daddy Warbucks Industries or DWI. She works directly with DWI employees and takes instruction from DWI supervisors. DWI pays an hourly fee to TRU for Josephine and many other TRU employees at the facility. The fee covers the compensation that Josephine receives from TRU, plus an additional 20% to cover TRU's overhead and profit. Whenever the DWI facility manager is displeased with the services of a TRU employee assigned to the facility, DWI notifies TRU, which then dismisses the individual with only two weeks of notice, and without any explanation.

Recently, Josephine was away from her job for two weeks, for her required annual training period in the Marine Corps Reserve. She gave two months of advance notice, orally and in writing, to both TRU and DWI. She reported back to work at the DWI facility at 8 am on Monday, after her annual training, only to be told that she did not have a job and to be required to turn in the DWI badge that she needed to enter the facility.

She called ESGR (800-336-4590), and the case was assigned to me. I contacted the owner-operator of TRU and the DWI facility manager. Both told me that "we have no obligation to Josephine."

The DWI manager said, "DWI is not her employer, and USERRA does not apply to us." The TRU owner-operator said: "I can only pay employees that DWI has called for. DWI told me, in no uncertain terms, that Josephine is no longer welcome at their facility. He also said: 'Don't send me any more employees who carry this 'G.D. military baggage.' We only want employees that we can rely on, not employees who want to go off and play soldier.'"

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adopted the doing-business-as name of Reserve Organization of America to emphasize that the organization represents all service members, without regard to rank.

[4] *See* Law Review 13001 (January 2013) for a description of the role of ESGR in persuading employers to support military service by employees and by mediating disputes between employers and employees, but not by providing specific information to employees or employers about the legal requirements of USERRA and case law.

[5] The company called "Kelly Services" (formerly "Kelly Girls") is an example of a staffing company. *See* https://www.kellyservices.com. But Kelly Services is not the company involved here.

The TRU owner-operator also said: "I want to support people who serve in the National Guard or Reserve, but I have a business to run. DWI is by far my best customer, accounting for 60% of our firm's revenue. I cannot stay in business without accommodating DWI's demands, so going forward I will not send any currently serving National Guard or Reserve personnel to DWI."

Both DWI and TRU then hired separate lawyers, and the lawyers insisted:

a. **It is "impossible or unreasonable" to reemploy Josephine Smith because that would necessarily mean laying off Bob Jones, who was hired immediately after Josephine left for her military duty and who is doing a fine job doing the work that Josephine previously did.**
b. **Josephine does not have rights under USERRA because her TRU job was "temporary." The TRU business model is to hire recent high school graduates for entry-level positions, and TRU employees almost never stay for more than one year.**
c. **TRU and DWI must be excused from having to comply with USERRA because doing so would impose an "undue hardship" on these companies.**

The DWI attorney also insisted that DWI was never the employer of Josephine and that USERRA does not apply to DWI.

What do you think?

Answer, bottom line up front

In a situation like this, DWI and TRU are joint employers of Josephine. Both are responsible for complying with USERRA, and both can be required by the federal district court to come into compliance and to compensate Josephine for pay and benefits that she has lost because of their noncompliance. If Josephine meets the five USERRA condition,[6] she is entitled to prompt

[6] As I have explained in detail in Law Review 15116 (December 2015) and many other articles, Josephine will need to establish that she left her civilian job to perform uniformed service and that she gave the employer prior oral or written notice. 38 U.S.C. § 4312(a). She must further show that she has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to her employer relationship with TRU and DWI. 38 U.S.C. § 4312(c). Josephine's two-week period of service for annual training does not count toward her five-year limit. 38 U.S.C. § 4312(c)(3). Josephine must have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. § 4304. Josephine was not discharged at all, just released from her period of service. After a period of service of less than 31 days, as in this case, Josephine was required to report for work at the start of the first regularly scheduled work period on the first day after the completion of her period of service, plus the time required for safe transportation from the place of service to her residence, plus eight hours for rest. 38 U.S.C. § 4312(e)(1)(A). Josephine met that requirement when she reported for work at 8 am on the Monday after she completed her annual training. It seems clear that Josephine met the five USERRA conditions.

reinstatement in the position of employment that she left and almost certainly would have continued to hold, but for the interruption necessitated by her military service.[7] Neither the "temporary" nature of Josephine's employment nor the fact that reinstating her necessarily means laying off Bob Jones excuse DWI and TRU from their legal obligation to reinstate Josephine Smith promptly.

The joint employer doctrine

The United States Department of Labor has taken the position that a company should not be able to avoid its responsibilities under the Fair Labor Standards Act (the federal minimum wage and overtime law) by contracting out some employment functions to a staffing company.[8] This principle also applies to USERRA.[9]

Section 4331 of USERRA[10] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The pertinent section of the DOL USERRA Regulation is as follows:

> **Can one employee be employed in one job by more than one employer?**
>
> **Yes.** Under USERRA, an employer includes not only the person or entity that pays an employee's salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. If the security company declines to assign the employee to a job because of a uniformed service obligation (for example, National Guard duties), then the security company could be in violation of the reemployment requirements and the anti-

[7] 38 U.S.C. § 4313(a)(1).
[8] *See* https://www.dol.gov/newsroom/releases/whd/whd20210729-0. *See also* *https://www.thebalancemoney.com/what-are-joint-employers-and-special-employers-4157705#:~:text=Joint%20employers%20are%20two%20or%20more%20businesses%20that,and%20potentially%20workers%27%20compensation%20insurance%20under%20state%20law*.
[9] *See* Law Review 23005 (February 2023) and Law Review 15080 (September 2015).
[10] 38 U.S.C. § 4331.

discrimination provisions of USERRA. Similarly, if the employer at the work site causes the employee's removal from the job position because of his or her uniformed service obligations, then the work site employer could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA.[11]

Josephine need not be a "permanent" employee to have USERRA rights.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), among other articles, Congress enacted USERRA and President Bill Clinton signed it on 10/13/1994. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

Under the VRRA, it was necessary for the returning veteran to establish, as an eligibility criterion for reemployment, that his or her pre-service civilian employer relationship was "other than temporary." Under USERRA, it is no longer necessary to prove that one's pre-service employer relationship was "other than temporary." Under USERRA, "temporary" is a very narrow affirmative defense for which the employer bears a heavy burden of proof. Section 4312(d) of USERRA provides:

> **(1)** An employer is not required to reemploy a person under this chapter if—
>
> **(A)** the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
>
> **(B)** in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or
>
> **(C)** the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.
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> **(2)** In any proceeding involving an issue of whether—
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> **(A)** any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,
>
> **(B)** any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

[11] 20 C.F.R. § 1002.37 (bold question and bold yes in original).

> **(C)** *the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,*
>
> *The employer shall have the burden of proving the* impossibility or unreasonableness, undue hardship, or *the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.*[12]

The pertinent section of the DOL USERRA regulation is as follows:

> **Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**
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> USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.[13]

Because Josephine meets the five USERRA conditions, she is entitled to prompt and proper reinstatement *even if that means that another employee must be laid off to make room for her.*

The pertinent section in the Department of Labor (DOL) USERRA regulation is as follows:

> Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. *The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.*[14]

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that the veteran's right to prompt

[12] 38 U.S.C. § 4312(d) (emphasis supplied).
[13] 20 C.F.R. § 1002.41 (bold question in original).
[14] 20 C.F.R. § 1002.139(a) (emphasis supplied).

reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit[15] has held:

> Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that "the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee."[16]

The United States Court of Appeals for the Federal Circuit[17] has held:

> The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols' [Nichols was the returning veteran and plaintiff] former position was "unavailable" because it was occupied by another and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … 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.[18]

The customer preference of DWI is not a defense to TRU.

There are circumstances where a business might be tempted to discriminate in employment based on a perception (true or untrue) that customers are more likely to patronize the business if the business discriminates in employment. Customer preference is not and must never be an exception to the requirement to refrain from employment discrimination.[19]

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[15] The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[16] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49, 55-56 (1st Cir. 2013).

[17] The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

[18] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite the reader's attention to *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln-St. Louis,* 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group,* 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC,* 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.,* 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.,* 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981); *Jennings v. Illinois Office of Education,* 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Muscianese v. U.S. Steel Corp.,* 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

[19] *See* "The Customer Is Not Always Right", https://www.wigdorlaw.com/customer-preference-discrimination-hiring/.

DWI's insistence that TRU refrain from referring Reserve Component service members to DWI and TRU's stated willingness to comply with that demand both violate USERRA.

Section 4311 of USERRA outlaws discrimination by employers *in initial employment* as well as discrimination against those who are already employed. Section 4311 reads as follows:

> **(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.
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> **(c)** An employer shall be considered to have engaged in actions prohibited—
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> **(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
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> **(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.[20]

[20] 38 U.S.C. § 4312(d) (emphasis supplied).

The pertinent section of the DOL USERRA Regulation is as follows:

> **Does USERRA protect against discrimination in initial hiring decisions?**
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> **Yes.** The Act's definition of employer includes a person, institution, organization, or other entity that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employer need not actually employ an individual to be his or her "employer" under the Act, if it has denied initial employment on the basis of the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employer would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the company or entity denying employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.[21]

The "undue hardship" affirmative defense does not apply to Josephine's situation.

USERRA's "undue hardship" affirmative defense only applies "in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313."[22] Section 4313(a)(3) and section 4313(b)(2)(B) apply to the returning veteran with a disability incurred or aggravated during the period of service who needs an employer accommodation for that disability. Section 4313(a)(4) applies to a returning veteran who needs an employer accommodation for some other reason.

Josephine has not asked for and does not need any special accommodation from DWI or TRU. The "undue hardship" affirmative defense does not apply to Josephine's situation.

[21] 20 C.F.R. § 1002.40 (bold question and bold yes in original).
[22] 38 U.S.C. § 4312(d)(1)(B).

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This article is one of 2,000-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight[23] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002[24]

[23] Congress recently established the United States Space Force as the eighth uniformed service.
[24] You can also contribute on-line at www.roa.org.