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USERRA, the FBI, and "Key Positions." Why Enforcing Reemployment Rights Inside the Intelligence Community Is So Different.

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1.1.1.8—USERRA applies to the Federal Government.
1.2—USERRA forbids discrimination.
1.4—USERRA enforcement.
1.8—Relationship between USERRA and other laws/policies.

Q: Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) apply to the Federal Bureau of Investigation (FBI)?

A: Yes. USERRA applies to employees of the FBI and other intelligence-community ("IC") agencies, but Congress created special statutory provisions for reemployment and enforcement in those agencies, implemented in both Title 38 and Title 5 of the United States Code.[1]

Q. Are all FBI and Federal IC employees prohibited from serving in the Guard or Reserve?

A. No, there is no blanket ban on Reserve or National Guard service. Instead, many positions—especially Special Agents—are designated "key positions," and employees in those billets generally may not serve in the Ready Reserve.[2]

The Ready Reserve is the largest and most significant category of Reserve Components. By statute, it consists of the Selected Reserve, the Individual Ready Reserve (IRR), and certain Inactive National Guard members. It includes service members who are liable for active-duty mobilization during war or national emergency, as determined by the President or Congress. 10 U.S.C. §§ 10142, 10144, 10146.

The legal barrier to Ready Reserve membership for FBI Special Agents is not USERRA. Rather, it is the key-position screening regime established by Congress and implemented through 10 U.S.C. § 10149, 32 C.F.R. Part 44, and DoD Instruction 1200.07. Under these authorities, federal employers must identify civilian positions whose incumbents are "necessary to the maintenance of public health, safety, or national security" and whose absence due to mobilization would "seriously impair the capability of the agency or activity to function effectively." 32 C.F.R. § 44.2(e).

This rationale applies acutely to intelligence-community positions. FBI Special Agents, CIA operations officers, NSA analysts – IC personnel maintain continuous operational coverage; hold national-security clearances requiring daily access to classified systems; perform time-sensitive investigative, counterintelligence, and counterterrorism missions; and occupy roles where a sudden, months-long military mobilization would disrupt active investigations, compromise classified operations, delay criminal or intelligence reporting, and degrade the agency's statutory mission.

For these reasons, DoD and the IC have long determined that Ready Reserve membership is incompatible with such billets. Thus, Special Agents are screened out of the Ready Reserve because mobilization would interrupt critical national-security operations, not because USERRA imposes any restriction. USERRA remains fully applicable on paper; it is the key-position screening doctrine—not USERRA—that prevents Ready Reserve affiliation in these roles.

The combination of (1) key-position screening rules that limit Ready Reserve membership, and (2) USERRA's special, non-judicial enforcement scheme for certain IC agencies, makes it much harder in practice for an FBI employee to invoke and enforce USERRA rights than it is for most other federal or private-sector employees.[3]

In ROA Law Review 08052 (November 2008), we explained how USERRA applies to intelligence agencies and why enforcement is unusually limited. This article updates that discussion and connects it to the key-position rules that directly affect Reserve/Guard eligibility at the FBI.[4] But first, some background for context.

Q: What is USERRA?

A. Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) to modernize and strengthen servicemembers' civilian job protections, updating the Veterans' Reemployment Rights Act, first enacted in 1940.[5] USERRA's purposes are to:

1. Encourage service in the uniformed services;
2. Ensure servicemembers are not disadvantaged in their civilian careers because of their service;
3. Require prompt reemployment in the "escalator" position of seniority, status, and pay; and
4. Prohibit discrimination and retaliation based on military service or obligations.[6]

In broad terms, USERRA:

- Prohibits discrimination in hiring, promotion, retention, or benefits based on past, present, or future military service;[7]

- Creates reemployment rights for servicemembers who leave civilian jobs for uniformed service and then return, if they satisfy the statutory eligibility criteria;[8]
- Defines the reemployment position using the escalator principle—placing the servicemember where he or she would have been but for the period of service;[9] and
- Protects seniority, benefits, and certain rights during and after uniformed service.[10]

USERRA applies to private employers, state and local governments, and the Federal Government, including the Executive Branch, unless a specific statutory exception applies.[11]

I. USERRA and the Federal Government—Special Rules for Intelligence Agencies

For most federal civilian agencies, USERRA reemployment is governed by 38 U.S.C. §§ 4314 and 4324, with the Merit Systems Protection Board (MSPB) and the federal courts playing central roles.[12] Congress, however, created a different regime for a subset of "certain Federal agencies," many of which make up the intelligence community.

A. Who are the "Certain Federal Agencies" in § 4315?

Section 4315, titled "Reemployment by certain Federal agencies," applies to agencies listed in 5 U.S.C. § 2302(a)(2)(C)(ii), which are generally exempt from the ordinary civil-service adverse-action and MSPB-review system.

These include, among others, the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office (NRO), the National Geospatial-Intelligence Agency (NGA), and the Office of the Director of National Intelligence (ODNI).[13]

Congress's intent was clear: USERRA would apply to these agencies in principle, but reemployment and enforcement would follow a special, internal process—not the standard MSPB/civil-service route.[14]

B. Section 4315: Internal Reemployment Procedures and Bar on Judicial Review

Under 38 U.S.C. § 4315(a)–(b), the head of each covered agency must prescribe procedures to ensure that USERRA rights apply to agency employees and that reemployment occurs "in a manner similar to" § 4313's escalator principle.[15]

Section 4315(c) then does two critical things. First, it requires the agency to designate an official who determines whether reemployment is "impossible or unreasonable." Second, it explicitly states that this determination "shall not be subject to judicial review."[16]

In other words, for these agencies, the reemployment decision is ultimately an unreviewable internal executive-branch call, not something the employee can appeal to MSPB or a federal district court.

C. Section 4325: Complaints handled by the agency Inspector General

Congress added 38 U.S.C. § 4325 to create a complaint mechanism specifically for employees of these "certain Federal agencies." An employee who believes USERRA rights were violated may file a complaint with the agency's Inspector General (IG), who then investigates and reports findings to the head of the agency.[17]

In *Dew v. United States*, a case involving FBI Special Agents, the Department of Justice summarized the effect of these provisions in its brief opposing certiorari, explaining that USERRA does not authorize judicial review of an IC agency's decision not to reemploy and contains no comparable provisions allowing injunctive or monetary relief against those agencies.[18] The Supreme Court denied certiorari, leaving in place the Second Circuit's conclusion that Congress intended to preclude judicial review of such claims.[19]

To underscore the lengths to which Congress expected the Federal Government to go in reemploying servicemembers—even those whom an IC agency concludes it cannot reemploy—USERRA imposes a mandatory Office of Personnel Management (OPM) placement rule. When the head of a § 4315 agency determines that reemployment within that agency would be "impossible or unreasonable," the agency must notify both the employee and OPM; OPM is then responsible for identifying a position of like seniority, status, and pay in another federal executive-branch agency and ensuring that the employee is offered that job.[20]

So, USERRA applies in principle, but enforcement inside these agencies is largely internal, and traditional remedies—injunctions, damages, MSPB review, and judicial review—are sharply constrained. That is the first half of the challenge when an IC employee seeks to enforce USERRA protections.

II. Ready Reserve Screening and "Key Positions"

The second half of IC community USERRA reemployment and enforcement route arises even earlier—before USERRA's reemployment protections are triggered. Many intelligence-community positions are designated as "key positions," and people in those billets are generally not allowed to be in the Ready Reserve at all.

A. DoD's Ready Reserve screening rules and the Ready Reserve defined.

Congress directed the Department of Defense to maintain a Ready Reserve that can be mobilized without crippling essential civilian functions.[21] To that end, DoD must periodically screen members of the Ready Reserve to ensure that those who occupy

key civilian positions are not subject to mobilization in a way that would impair essential government functions.[22]

By statute, the Ready Reserve consists of units and individual members of the Reserve Components who are liable for active duty under various mobilization authorities and who are maintained to provide trained units and qualified individuals for active duty in time of war or national emergency.

DoD implements Congress's screening directive through 32 C.F.R. Part 44 and DoD Instruction 1200.07. Under these authorities, employers—including federal agencies—may identify particular civilian jobs as "key positions" that should not be filled by Ready Reservists. If an employee is a Ready Reservist and occupies a key position, the employer is expected to request that the member be transferred to the Standby Reserve or otherwise removed from the Ready Reserve. At the same time, Appendix A to Part 44 emphasizes that nothing in the key-position guidance "shall reduce, limit, or eliminate in any manner any right or benefit provided by USERRA."

Reserve service becomes incompatible with certain IC positions not because of USERRA, but because of this key-position doctrine created by statute and implemented in DoD policy. USERRA itself does not forbid Guard or Reserve membership. Rather, the Ready Reserve screening rules require agencies to identify civilian positions whose incumbents cannot be mobilized without "seriously impairing" the agency's functioning or "compromising the mission."[23]

In the IC context, mobilization removes personnel who possess irreplaceable clearances, compartmented accesses, target knowledge, source relationships, or technical authorities; whose duties cannot be reassigned without mission degradation; and for whom no immediately available, appropriately cleared substitute exists. As a result, Reserve mobilization would interrupt sensitive operations, degrade continuity, and risk national-security harm. It is the key-position designation—not USERRA—that bars many IC employees, including FBI Special Agents, from serving in the Ready Reserve in the first place.

B. FBI Special Agents as "key Federal employees"

The FBI Special Agent (series 1811) position has long been treated as a key position. A 1983 Government Accountability Office (GAO) decision explains the policy: all FBI Special Agent personnel have been designated as key Federal employees and are therefore prohibited from being members of the Ready Reserve.[24] At the same time, those Special Agents may belong to the Standby Reserve and are entitled to military leave under 5 U.S.C. § 6323(a) for certain types of duty. In plain language:

> An FBI Special Agent generally cannot be in the Ready Reserve; but

> A Special Agent may, under some circumstances, affiliate with the Standby Reserve, maintain a Reserve relationship, and still use paid military leave for approved duty under § 6323(a).

Thus, it is not USERRA that bars Special Agents from the Ready Reserve; it is the key-position screening system applied through DoD policy and mirrored in FBI practice.

C. Other FBI Positions

Not every FBI job is a Special Agent billet, and not every position is formally designated key. In principle, employees in non-key positions at the FBI may serve in the Ready Reserve and should receive full USERRA protection when they perform qualifying military service.

However, because the FBI as an agency is covered by 38 U.S.C. §§ 4315 and 4325, even non-key employees must rely on the Bureau's internal reemployment procedures and IG complaint process—and, where applicable, OPM's fallback placement authority—rather than the usual MSPB and judicial-review mechanisms available in other federal agencies.[25]

D. What reemployment can look like in practice—non-key positions.

Although reported decisions rarely describe intelligence-community reemployment outcomes in detail, the combination of USERRA, § 4315, and DoD's USERRA guidance confirms that IC agencies do reemploy returning servicemembers—often into non-key positions.

First, DoD's USERRA guidance for federal employers requires reemployment in the escalator position or, if that is not feasible, "a position of like seniority, status, and pay," and, if necessary, a position of lesser status and pay for which the employee is qualified, with full seniority preserved. This framework applies government-wide and is expressly incorporated by reference for § 4315 agencies, including the FBI, CIA, DIA, and NSA.

In practice, this means that when a returning IC employee's pre-service job has been reorganized or designated key, the agency may satisfy USERRA by reemploying the member in a comparable non-key analytic, training, or staff-support role at the same grade and promotion potential.

Second, where an IC agency head determines that reemployment in the original agency is "impossible or unreasonable," § 4315(c)(2) and implementing regulations require a hand-off to OPM. OPM must then locate and offer an equivalent position in another executive-branch agency—a non-IC, non-key position that still preserves

the servicemember's seniority and USERRA benefits. ROA's Law Review 18047 uses the hypothetical "David Davis," a CIA employee, to illustrate exactly this scenario: after the intelligence agency declines reemployment, OPM is supposed to place him in a comparable job elsewhere in the federal executive branch.[26] Third, CIA's internal regulation on employment and reemployment (AR 3-18) incorporates USERRA and requires the Director of the CIA to submit annual statistics to the congressional intelligence committees on USERRA-related reemployment determinations, including the number of persons whose reemployment was found "impossible or unreasonable." That reporting requirement, together with the OPM placement mechanism, underscores that some IC employees are in fact reemployed—though the specific cases and job titles are not publicly identified.

These mechanisms are not a cure-all: they still operate within a statutory scheme that precludes judicial review of reemployment denials at § 4315 agencies. But they do provide practical pathways for Guard/Reserve members to be reemployed in non-key positions, either within the IC or elsewhere in the executive branch.

III. Putting It Together: Why USERRA Is So Hard to Enforce at the FBI

From a servicemember's perspective, two structural hurdles combine. First, USERRA enforcement inside intelligence agencies is internal and non-reviewable by MSPB or the federal courts. Reemployment decisions are made within the agency under § 4315, and determinations that reemployment is "impossible or unreasonable" are expressly insulated from judicial review. Complaints proceed through the agency's IG under § 4325 rather than through MSPB or district-court litigation.

Second, many of the FBI's highest-profile positions—especially Special Agents—are key positions, and employees in those billets are not permitted to be Ready Reservists in the first place. If a position is properly designated key and the employee is required to leave the Ready Reserve or is blocked from joining it, the person may never perform qualifying Ready Reserve service in that job. Without qualifying uniformed service, there is no reemployment claim to bring under USERRA.

So, when someone says, "USERRA doesn't apply to the FBI," the more precise statement is: USERRA technically applies, but the combination of special enforcement rules and key-position restrictions makes it very difficult for an FBI employee to invoke USERRA and almost impossible to litigate reemployment disputes in court.

From a policy perspective, this is what we highlighted in ROA Law Review 08052 and what subsequent commentary and testimony have confirmed: USERRA protections exist in theory for IC employees, but the practical ability to enforce those protections is unusually narrow.

IV. Practical Takeaways for Guard/Reserve Members Considering Intelligence-Community Jobs

For servicemembers who are already in the Guard/Reserve—or thinking about joining—while working in or applying to the FBI or other intelligence agencies, several practical considerations emerge:

1. There is no absolute, agency-wide ban on Reserve/Guard service at the FBI. Some positions, however, are key positions, and those billets are ordinarily off-limits to Ready Reservists.
2. If you are in a key position, the problem usually arises at the screening stage—not at the USERRA enforcement stage. The agency may require you to separate from the Ready Reserve or decline to hire you if you insist on remaining a Ready Reservist. Those decisions are made under the Ready Reserve screening rules, which operate in tension with USERRA's anti-discrimination protections but are not supposed to override them.
3. USERRA rights are harder to enforce at intelligence-community agencies because of the internal, non-judicial regime created by §§ 4315 and 4325 and interpreted in cases like *Dew*.
4. If you are already a Reservist and considering an FBI or IC position, seek counsel early. You should understand whether the job is already designated key, is likely to be designated key, or leads to a career ladder that includes key positions—and thus what Reserve options (if any) are compatible with that position, and how this may affect your long-term ability to perform meaningful military service and serve in the IC at the same time.
5. Policy reforms are pending and have been recommended by veterans' advocates, ROA, and others. Proposals include repealing §§ 4315 and 4325 or amending them to allow the same substantive and procedural USERRA protections—and MSPB/judicial review—that other federal employees enjoy. Until Congress acts, however, IC employees will continue to face a more constrained path to enforcing USERRA rights.

V. Conclusion

USERRA was designed to ensure that those who perform uniformed service are not penalized in their civilian careers. For most employers, that promise is backed by clear statutory standards, external enforcement, and judicial review.
For the FBI and other intelligence-community agencies, the landscape is different. Congress chose to:

- Preserve USERRA coverage in principle;
- Channel enforcement into internal agency processes and Inspector-General review; and

- Allow those agencies to rely on key-position screening to restrict Ready Reserve membership in certain billets.

The result is a narrower, more fragile form of protection for employees whose careers lie at the intersection of national security and military service. Until Congress reforms §§ 4315 and 4325, and DoD and the IC revisit key-position practices, servicemembers who are also intelligence-community professionals must navigate this terrain carefully—with eyes open to the legal and practical limitations described above.

While Special Agents are barred from Ready Reserve membership, many other FBI job series are not, and employees in those roles may serve in the Ready Reserve and accrue USERRA-protected service. However, because the FBI as an agency is covered by §§ 4315 and 4325, even these employees must rely on the Bureau's internal reemployment procedures, Inspector-General processes, and, where applicable, OPM's placement authority rather than the usual MSPB and judicial-review mechanisms available in other federal agencies.

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LTC Maher served multiple overseas deployments, including missions in Macedonia, Afghanistan (twice), and Kuwait. He also served as Chief of Contracts and Fiscal Law within for General McChrystal's USFOR-A Command in Kabul and as the program manager at the Justice Center in Parwan, assisting the Afghan government—under a Bureau of International Narcotics and Law Enforcement program—with the prosecution of national-security crimes under Afghan law.

He has secured presidential pardons for combat veterans (U.S. Army 1LT Clint Lorance in 2019 and former Marine Dustin Heard in 2020), and his advocacy has been featured in national media, including the STARZ documentary series *Leavenworth* and Don Brown's book, *Travesty of Justice*.

Mr. Maher has taught as an adjunct professor of law for over 20 years and has published extensively on military justice, habeas corpus review of court-martial convictions, federal contracting, and veterans' law. He has delivered continuing legal education lectures recently on USERRA for the Chicago Bar Association, the Illinois Institute for Continuing

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Kevin J. Mikolashek served on active duty as a Judge Advocate in the U.S. Army, including assignments as a prosecutor, operational law attorney in Kuwait, appellate defense counsel, and as an attorney in the Army Litigation Division at the Pentagon. Following his active-duty service, he also served in the U.S. Army Reserve JAG Corps.

Mr. Mikolashek spent a decade as an Assistant United States Attorney in the Eastern District of Virginia, one of the fastest federal dockets in the country. After earning a mid-career M.B.A. from the University of Virginia's Darden School of Business, he served as legal counsel at the Federal Reserve Board and later earned qualification as a Certified Compliance Specialist. He has served on the board of a nonprofit organization and currently serves as the Managing Director of Maher Legal Services, where he focuses on veterans' rights, federal-sector employment disputes, fraud investigations, and national-security matters. Mr. Mikolashek lives in Northern Virginia with his family.

ENDNOTES

1. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified as amended at 38 U.S.C. §§ 4301–4335); Title 5 implements USERRA for federal civilian employees through several mechanisms. First, OPM's restoration regulations in 5 C.F.R. pt. 353 prescribe the procedures agencies must follow when returning employees to duty after qualifying service, incorporating USERRA's escalator principle and seniority protections. See 5 C.F.R. §§ 353.104–.209. Second, Title 5 provides military leave and differential pay entitlements that operate alongside USERRA, including 15 days of paid military leave for training or active duty under 5 U.S.C. § 6323(a), emergency law-enforcement or contingency-operation leave under § 6323(b), and reservist differential pay under § 5538. Third, USERRA's federal-sector enforcement mechanism—MSPB adjudication—is carried out under Title 5 procedures. See 38 U.S.C. § 4324; 5 U.S.C. § 7701. Finally, Title 5 excludes certain intelligence-community agencies from the civil-service and MSPB system, requiring Congress to establish the special regime in 38 U.S.C. §§ 4315 and 4325 for employees of the FBI, CIA, NSA, DIA, and similar entities. See 5 U.S.C. § 2302(a)(2)(C).
2. See 32 C.F.R. pt. 44; Dep't of Def. Instr. 1200.07, Screening of the Ready Reserve (Jan. 22, 2021).
3. See 38 U.S.C. §§ 4314, 4324–4325; 38 U.S.C. § 4315.
4. ROA Law Review 08052 (Nov. 2008).
5. See USERRA, Pub. L. No. 103-353, 108 Stat. 3149.
6. 38 U.S.C. § 4301(a); §§ 4311(a) and (b).
7. *Id*. § 4311.
8. *Id*. § 4312 (right to reemployment).
9. *Id*. § 4313 (escalator provision).

10. *Id*. § 4316 (non-seniority benefits and protection from termination).
11. *Id*. §§ 4303(4), 4314 (federal-sector reemployment section that applies to most federal employees).
12. *Id*. §§ 4314 (Federal employee reemployment rights), 4324 (Enforcement of Rights with Respect to Federal Executive Agencies).
13. *Id*.
14. *Id*. § 4315(a); 5 U.S.C. § 2302(a)(2)(C)(ii).
15. 38 U.S.C. § 4315(a)–(b).
16. *Id*. § 4315(c).
17. *Id*. § 4325.
18. Brief for the United States in Opposition at 13–14, *Dew*, No. 99-1089 (U.S. Dec. 27, 1999).
19. *Dew v. United States*, 192 F.3d 366, 371–72 (2d Cir. 1999), cert. denied, 529 U.S. 1053 (2000).
20. 38 U.S.C. § 4315(c)(2); see 32 C.F.R. pt. 104, app. A (describing OPM's obligation to identify a comparable position when reemployment with the original agency is "impossible or unreasonable").
21. 10 U.S.C. § 10149.
22. *Id*. § 10142.
23. 32 C.F.R. pt. 44; Dep't of Def. Instr. 1200.07, supra note 2.
24. Comp. Gen. Decision B-208706 (Aug. 31, 1983).
25. 32 C.F.R. pt. 44, app. A.
26. ROA Law Review 18047 (2018).

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