

## LAW REVIEW<sup>1</sup> 25009

March 2025

### **USERRA’s Escalator Can Descend as well as Ascend, but the Federal Employee Is Exempted from the Descending Escalator.**

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

**1.3.2.2—Continuous accumulation of seniority-escalator principle.**

**1.4—USERRA enforcement.**

**1.7--USERRA regulations.**

**Q: I am a Senior Airman (E-4) in the Air Force Reserve and a member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

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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 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.

<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. 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 (VRRRA—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 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 <mailto:swright@roa.org>.

<sup>3</sup> The factual set-up for this article is hypothetical but realistic.

**I was on active duty in the Air Force for four years, from 2019 until 2023. After I left active duty, I started my first federal civilian job on 8/1/2024. As a new federal employee, I was in a probationary status.**

**At the end of September 2024, I left my civilian job to report for one year of active duty, from 10/1/2024 through 9/30/2025. During February 2025, while I was on active duty, there was a mass layoff of probationary federal employees at the federal agency where I worked. Of the 400 probationary employees, 398 were fired during the month of February 2025. If I had been at work, instead of on active duty, during that month, I almost certainly would have been among those fired.**

**I expect to leave active duty on 9/30/2025, at the end of my current orders. I have read and reread your Law Review 15116 (December 2015). I understand the five USERRA conditions for reemployment, and I have met or will meet those conditions.**

**I left my civilian job to perform uniformed service, and I gave prior oral and written notice to my civilian supervisor and to the personnel office of the federal agency where I worked. This year of active duty is voluntary, and it probably counts toward my cumulative five-year limit with respect to the Federal Government as my employer, but I will still have four years of headroom in my five-year limit after I am released from this period of service. I plan to apply for reemployment during the month of October 2025, well within the 90-day deadline for doing so.**

**Let us assume that I meet the five USERRA conditions in October. Am I entitled at that time to reemployment in an active job even though it is very likely that I would have lost my job anyway even if I had not been on active duty in February 2025 when almost all of the probationary employees (like me) were fired?**

## **Answer, bottom line up front:**

Generally speaking, USERRA does not protect the returning service member or veteran from a bad thing, like a reduction in force or mass layoff, that clearly would have happened anyway even if he or she had not been away from work for service at the time the bad thing occurred. The USERRA escalator can descend as well as ascend, *but under the USERRA regulations promulgated by the Director of the Office of Personnel Management (OPM), federal employees are protected from a descending escalator.* You will be eligible for reinstatement into an active position, regardless of the likelihood that you would have lost your job anyway during February 2025.

## **Explanation**

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994.<sup>4</sup> USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of more than nine million young men, including my late father, for World War II.

In its first case applying the 1940 reemployment statute, 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>5</sup> The escalator principle is codified in sections 4313(a) and 4316(a) of USERRA.<sup>6</sup>

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<sup>4</sup> Public Law 103-353, 108 Stat. 3162 (Oct. 13, 1994). *See generally* Law Review 24047 (October 2024) for a detailed discussion of USERRA on the 30<sup>th</sup> anniversary of the law's enactment.

<sup>5</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

<sup>6</sup> 38 U.S.C. §§ 4313(a), 4316(a).

After a period of service lasting more than 90 days, the returning service member or veteran who meets the five USERRA conditions is entitled to be reemployed as follows:

...in the position of employment in which the person *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.<sup>7</sup>

Section 4316(a) provides:

A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.<sup>8</sup>

It has always been the case that the “escalator” can descend as well as ascend. Indeed, *Fishgold* was a case about a descending escalator. The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

**Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**

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<sup>7</sup> 38 U.S.C. § 4313(a)(2)(A) (emphasis supplied).

<sup>8</sup> 38 U.S.C. § 4316(a).

**Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.<sup>9</sup>

**Q: Does USERRA authorize federal agencies to promulgate regulations about the application of USERRA to employers? If so, what regulations have been promulgated?**

**A:** Section 4331(a) of USERRA<sup>10</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. Section 4331(b) provides:

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<sup>9</sup> 20 C.F.R. § 1002.194 (bold question and bold “yes” in original).

<sup>10</sup> 38 U.S.C. § 4331(a).

The Director of the Office of Personnel Management (in consultation with the Secretary [of Labor] and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, *except that employees of the Federal Government may be given greater or additional rights.*<sup>11</sup>

The OPM USERRA Regulations are codified in Part 353 of title 5 of the Code of Federal Regulations (C.F.R.). The pertinent subsection 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>12</sup>

Even if the federal agency that employed you can establish that your employment would have been terminated anyway, even if you had not been away from your civilian job for military service during February 2025, you are entitled to reemployment in a position that is at least as

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<sup>11</sup> 38 U.S.C. § 4331(b) (emphasis supplied).

<sup>12</sup> 5 C.F.R. § 353.209(a) (emphasis supplied).

good as the position you left in September 2024. This is the clear meaning and effect of section 353.209(a).

**Q: Where do I go from here?**

**A:** First, you need to make a timely application for reemployment within 90 days after you leave active duty on 9/30/2025.<sup>13</sup> If your pre-service employer fails or refuses to reemploy you as required, you can file a formal, written USERRA complaint against that employer with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).<sup>14</sup> That agency will then investigate your complaint.<sup>15</sup> In conducting that investigation, DOL-VETS has the authority to compel the production of records and testimony, by subpoena.<sup>16</sup>

After completing its investigation of your complaint, DOL-VETS is required to notify you of the results of the investigation and of your right to request referral of your complaint to the United States Office of Special Counsel (OSC).<sup>17</sup> If you request referral to OSC, DOL-VETS is required to refer the case file to OSC within 60 days after receiving your referral request.<sup>18</sup>

If OSC is reasonably satisfied that you are entitled to the benefits you seek, OSC may initiate and prosecute an action on your behalf in the Merit Systems Protection Board (MSPB).<sup>19</sup> If OSC declines your request for representation, you can initiate the MSPB action through private counsel that you retain.<sup>20</sup>

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<sup>13</sup> 38 U.S.C. § 4312(e)(1)(D).

<sup>14</sup> 38 U.S.C. § 4322.

<sup>15</sup> 38 U.S.C. § 4322(d).

<sup>16</sup> 38 U.S.C. § 4326.

<sup>17</sup> 38 U.S.C. § 4322(e).

<sup>18</sup> 38 U.S.C. § 4324(a)(1).

<sup>19</sup> 38 U.S.C. § 4324(a)(2).

<sup>20</sup> 38 U.S.C. § 4324(b)(4).

Alternatively, you can decide not to request that DOL-VETS refer the case to OSC, and you can bring an action in the MSPB through private counsel that you retain.<sup>21</sup> You can also bypass DOL-VETS and bring your action in the MSPB through private counsel that you retain.<sup>22</sup> If you proceed with private counsel and prevail, the MSPB will award you reasonable attorney fees, expert witness fees, and other litigation expenses.<sup>23</sup>

For a detailed discussion of USERRA’s enforcement mechanism with respect to Federal executive agencies as employers, please see our Law Review 24052 (November 2024).

### **Please join or support ROA.**

This article is one of 2,200-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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 the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).<sup>24</sup>

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

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<sup>21</sup> 38 U.S.C. § 4324(b)(3).

<sup>22</sup> 38 U.S.C. § 4324(b)(1).

<sup>23</sup> 38 U.S.C. § 4324(c)(4).

<sup>24</sup> See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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 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, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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<sup>25</sup> uniformed services, you are eligible for membership in ROA,<sup>26</sup> 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

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<sup>25</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>26</sup> Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

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 <https://www.roa.org/page/memberoptions> 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<sup>27</sup>

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<sup>27</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).