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Improve USERRA. Progress Has Been Made, But More Needs To Be Done.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.8—USERRA applies to the Federal Government.
1.3.1.2—Character and duration of service.
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1.5—USERRA arbitration.
1.8—Relationship between USERRA and other laws/policies.

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,300 "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), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), 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 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.e

A decade ago, I proposed fourteen amendments and improvements for the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3] This article updates those proposals. Eight have been accomplished, and the other six are still pending.

Proposed Improvements Accomplished.

Provide an effective enforcement mechanism for USERRA violations by state government agencies as employers.

The 11th Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."[4] As enacted in 1994, USERRA permitted a person who claimed that his or her State government employer had violated this law to sue the State in federal court. In 1998, the United States Court of Appeals for the 7th Circuit[5] held that USERRA was unconstitutional insofar as it permitted an individual to sue a State in federal court.[6]

Later in 1998, Congress reacted to the *Velasquez* precedent by amending section 4323 of USERRA (which governs USERRA enforcement with respect to State and local governments and private employers) to its present wording. Section 4323 provides as follows: "In the case of action [to enforce USERRA] against a State (as an employer)

[3] *See* Proposals to Improve USERRA, Law Review 15089 (October 2015).
[4] The 11th Amendment was ratified on 2/7/1795. Yes, it is capitalized just that way, in the style of the late 18th Century. By its terms, the 11th Amendment precludes a federal court lawsuit against a State by a citizen of another State, but 135 years ago, the Supreme Court held that the 11th Amendment also bars a suit against a State by a citizen of the same State. *See Hans v. Louisiana,* 134 U.S. 1 (1890).
[5] The 7th Circuit is the intermediate federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.
[6] *See Velazquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State."[7]

What does "in accordance with the laws of the State" mean? We contend that it means that State courts are required to hear and adjudicate claims that State agencies, as employers, have violated USERRA and that we only look to State law to identify the specific State court where the lawsuit should be filed. Several State high courts have held that USERRA does not override State law claims of sovereign immunity.[8] That argument ended on 6/29/2022, when the United States Supreme Court decided *Torres v. Texas Department of Public Safety,* holding:

> The Constitution vests in Congress the power "[t]o raise and support Armies" and "[t]o provide and maintain a Navy." Art. I, §8, cls. 1, 12–13. Pursuant to that authority, Congress enacted a federal law that gives returning veterans the right to reclaim their prior jobs with state employers and authorizes suit if those employers refuse to accommodate them. See Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §4301 *et seq*. This case asks whether States may invoke sovereign immunity as a legal defense to block such suits.
>
> In our view, they cannot. Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military. States thus gave up their immunity from congressionally authorized suits pursuant to the "plan of the Convention,'" as part of "'the structure of the

[7] 38 U.S.C. § 4323(b)(2).
[8] *See, e.g., Clark v. Virginia Department of State Police.* 292 Va. 725, 793 S.E. 2d 1 (2016), *cert. denied,* 138 S. Ct. 500 (2017).

> original Constitution itself.' *PennEast Pipeline Co.* v. *New Jersey*, 594 U.S. ___, ___ (2021).[9]

As a result of the *Torres* precedent, State courts in all 50 States are now required to hear and adjudicate claims that State agencies, as employers, have violated USERRA. This is important because a substantial percentage of National Guard and Reserve part-timers (perhaps 10%) have civilian jobs working for State agencies.

The Reserve Organization of America played an important role in this accomplishment. We drafted and filed an amicus curiae ("friend of the court") brief urging the Supreme Court to grant certiorari in the *Torres* case. After the Supreme Court agreed to hear the case, we filed a new amicus brief on the merits.[10]

Other improvement proposals that have been accomplished.

a. Eliminate the word "noncareer" from USERRA's first statutory purpose.

Section 4301, USERRA's first section, sets forth three statutory purposes that Congress had in mind when it enacted this law in 1994. As originally enacted, and until quite recently, the first statutory purpose was "to encourage *noncareer* service in the uniformed services."[11] In Law Review 15089 (October 2015), I proposed that Congress remove the word "noncareer" from this first statement of purpose. I explained the rationale for this proposal as follows:

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[9] *Torres v. Texas Department of Public Safety,* 597 U.S. 580, 584 (2022).

[10] *See* Law Review 24054 (November 2024) for a detailed discussion of the implications of the *Torres* case and the USERRA enforcement mechanism concerning State agencies as employers. *See* Law Review 24028 (May 2024) for a detailed discussion of ROA's amicus briefs.

[11] 38 U.S.C. § 4301(a)(1) (emphasis supplied).

> The word “noncareer" was intended to be a shorthand for the five-year limit on the duration of the period or periods of uniformed service, relating to a specific employer relationship, but some courts have treated the word as an additional limitation on the duration of permissible absences from civilian work for uniformed service. *See, e.g., Woodman v. Office of Personnel Management,* 258 F.3d 1372 (Fed. Cir. 2001). We propose to eliminate the word “noncareer” to make clear that there is no such additional limitation.

On 1/2/2025, President Joe Biden signed into law the Senator Elizabeth Dole 21st Century Veterans Healthcare and Benefits Improvement Act (Dole Act).[12] In addition to making improvements in health care and benefits administered by the United States Department of Veterans Affairs, the Dole Act also made several very welcome amendments to USERRA. The Reserve Organization of America (ROA) suggested and advocated for those amendments.

I invite the reader’s attention to our Law Review 25006 (February 2025). That article summarizes the Dole Act’s USERRA amendments. The article is by Colonel George C. Aucoin, USMC (Ret.), a life member of the Reserve Organization of America and a semi-retired USERRA lawyer. In his article, Colonel Aucoin wrote:

> USERRA’s first purpose, as expressed in section 4301(a)(1), was, until just recently, “to encourage noncareer service in the uniformed services.” The Dole Act has eliminated the word “noncareer.” This is a major improvement.

[12] Public Law 118-210, 138 Stat. 2706.

The inclusion of the qualifier “noncareer” gave employers the opportunity to argue that “Mary Jones does not have the right to reemployment because her service amounted to ‘career’ service.” Because of the amendment, employers will no longer have the opportunity to make this argument.

With the protection of USERRA, it is entirely possible and often necessary for a National Guard or Reserve service member to have two careers, a full-time civilian career and a part-time military career that becomes full-time when the member is called to full-time military duty. Deleting the word “noncareer” was entirely necessary and appropriate.

b. Expand USERRA’s protection against employer retaliation for exercising USERRA rights.

In Law Review 25006, Colonel Aucoin wrote:

Until very recently, section 4311(b) of USERRA read as follows:

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.[13]

The Dole Act amended section 4311(b) by adding "or other retaliatory action" after "employment action." This is a welcome addition.

In a recent case, a United States District Court Judge, hearing a motion to dismiss, held that an allegation that a supervisor had initiated a malicious criminal prosecution against an employee to reprise against the employee for having exercised his USERRA rights was not a violation of section 4311(b), even if true, because a criminal prosecution, even if malicious, was not an "adverse employment action."[14] We had this case in mind when we proposed this amendment, and we are most pleased that this amendment has been enacted.

c. Expand the availability of preliminary injunctive relief for service members whose USERRA rights have been violated.

In Law Review 25006, Colonel Aucoin wrote:

The Dole Act expands and improves the availability of preliminary injunctive relief in situations where an employer has violated USERRA or where a violation has been threatened or appears to be imminent. Going forward, the service member or veteran will be entitled to injunctive relief if he or she meets a four-part test:

[13] 38 U.S.C. § 4311(b).

[14] *See Lara v. Rock Valley Community College Police Department,* 2023 U.S. Dist. LEXIS 36689, 2023 WL 2374979 (N.D. Ill. March 6, 2023). *See also* Law Review 23032 (June 2023) and Law Review 23064 (December 2023).

a. A violation of USERRA has occurred or has been threatened or appears to be imminent.
b. The service member or veteran has shown that he or she is likely to succeed on the merits when the case goes to trial.
c. The harm to the service member or veteran outweighs the harm to the employer.
d. Granting injunctive relief is in the public interest.

Traditionally, preliminary injunctive relief has been available in civil cases generally only when the party seeking relief can show *irreparable injury* if the preliminary injunctive relief is denied. It is not ordinarily possible to get injunctive relief to stop an employer from firing an employee. The idea is that an unlawful firing is not irreparable because if the employee wins the trial the court can award back pay.[15]

Let us say that Joe Smith has enlisted in the Regular Army and is in the Delayed Entry Pool, expecting to enter active duty in four months. The employer learns that Smith has enlisted and fires him, angry that Smith defied the employer's "order" not to enlist. How is Smith to pay his rent and put food on the table in the four months remaining before he enters active duty? It is of little comfort to Smith that he can sue and maybe, two or three years later, after he is already on active duty, he can get a backpay award.

The Dole Act amended USERRA to provide that preliminary injunctive relief cannot be denied on the basis of the possibility

[15] *See Sampson v. Murray,* 415 U.S. 61 (1974); *Bedrossian v. Northwestern Memorial Hospital,* 409 F.3rd 540 (7th Cir. 2005) *See generally* Law Review 200 (published in 2005).

that the plaintiff who has been unlawfully fired or denied reemployment may receive back pay months or years later. This is a most welcome improvement.

e. Improve USERRA's provision for liquidated damages for willful employer violations.

In Law Review 23006, Colonel Aucoin wrote:

> Section 4323 of USERRA[16] provides for enforcement of USERRA against private employers and political subdivisions of states (counties, cities, school districts, and other units of local government). Until very recently, section 4323 provided as follows about the remedies that a federal district court can award in cases against private employers and political subdivisions:
>
> (A)The court may require the employer to comply with the provisions of this chapter.
> (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
> (C) The court may require the employer to pay the person an amount equal to the amount referred to in subsection (B) [and in addition to that amount] as liquidated damages, if the employer's failure to comply with the provisions of this chapter was willful.[17]

[16] 38 U.S.C. § 4323.
[17] 38 U.S.C. § 4323(a)(1).

The Dole Act amended the “liquidated damages” provision to read as follows: ”The court may require the employer to pay the person the greater of $50,000 or the amount equal to [loss of wages and benefits suffered by reason of an employer’s failure to comply] as liquidated damages, if the Court finds that the employer knowingly failed to comply with the provisions of this chapter.”

Let us consider a hypothetical but realistic scenario. Joe Smith left his job as a cook at Quisling’s Norwegian Seafood Restaurant to enlist in the Army. Smith gave the restaurant prior notice before leaving his job. He served honorably on active duty for four years, within the five-year limit, and he made a timely application for reemployment after leaving active duty. Smith met the five USERRA conditions for reemployment. Vidkun Quisling, the owner-operator of the restaurant, was aware of his legal obligation to reemploy Smith, but Quisling willfully refused to do so because of his animus against members of the United States military.

Smith quickly found a new job at another restaurant in the same city, and the backpay award was quite modest, just $500. Until quite recently, Quisling would have lucked out because of Smith’s diligence and good fortune in quickly finding alternative employment. Under the Dole Act amendment, Quisling must pay *the greater of* the actual damages ($500) or $50,000. This will deter employers from violating USERRA willfully.

f. Improve the USERRA provision for requiring the lawbreaking employer to pay the attorney fees incurred by the successful USERRA plaintiff—Federal sector.

Section 4324 of USERRA[18] provides an enforcement mechanism that applies to federal executive agencies as employers.[19] If you are claiming that a federal executive agency has violated your USERRA rights, you must file your complaint with the Merit Systems Protection Board (MSPB),[20] not a federal or state court. An MSPB case, including an MSPB USERRA case, starts before an Administrative Judge (AJ) of the MSPB. MSPB AJs hear and decide cases at seven regional offices, in Arlington (Virginia), Atlanta, Dallas, Denver, Oakland, and Philadelphia.

The assigned AJ conducts a hearing and makes findings of fact and conclusions of law. Either party, the individual plaintiff or the agency defendant, can appeal to the MSPB itself, at its headquarters in our nation's capital. The individual plaintiff, but not the agency defendant, can appeal the MSPB's decision to the United States Court of Appeals for the Federal Circuit.[21]

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[18] 38 U.S.C. § 4324. *See generally* Law Review 24052 (November 2024) for a detailed discussion of USERRA's enforcement mechanism with respect to federal executive agencies as employers.

[19] As I have explained in Law Review 24052, federal executive agencies include the Cabinet-level federal departments like the Department of Defense and the Department of Labor, as well as military departments like the Department of the Army and the Department of the Navy, and independent federal agencies like the National Labor Relations Board and the Federal Election Commission. Federal nonappropriated fund entities like the Army & Air Force Exchange Service and officers' clubs at military bases also qualify as "federal executive agencies." *See* Law Review 08013 (April 2008). Section 4324 also applies in a situation where a federal executive agency violates USERRA while acting as the joint employer of an employee of a federal contractor. *See Silva v. Department of Homeland Security,* 2009 M.S.P.R. 189 (2009). *See also* Law Review 23005 (February 2023).

[20] The MSPB is a quasi-judicial federal executive agency that is responsible for hearing adjudicating cases involving federal civilian employees and their federal agency employers under several federal statutes, including USERRA. The MSPB has three members, each of whom is nominated by the President with confirmation by the Senate. In Fiscal Year 2024, the MSPB decided 4,740 cases, including 29 USERRA cases. *See* *https://www.mspb.gov/about/annual_reports/MSPB_FY_2024_Annual_Report.pdf*.

[21] 38 U.S.C. § 4324(d)(1). 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 MSPB decisions.

If you are claiming that a federal executive agency has violated your USERRA rights, you can initiate your USERRA case in two ways. First, you can file a formal complaint, in writing, with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).[22] That agency will investigate your complaint and advise you of the results of the investigation.

If the DOL-VETS investigation shows that your complaint has probable merit, DOL-VETS will try to persuade the employer to comply with USERRA and to compensate you for the pay and benefits that you lost because of the violation. If DOL-VETS is unable to persuade the employer to comply, you can request that DOL-VETS refer the case file to the United States Office of Special Counsel (OSC).[23] If OSC is reasonably satisfied that your USERRA case against a federal executive agency has merit, OSC can act as your attorney in filing your case in the MSPB and representing you in that case.[24]

Alternatively, you can retain private counsel and initiate your own MSPB USERRA case.[25] If you proceed with private counsel and prevail, the MSPB can award you attorney fees as part of the relief. USERRA states:

> If the Board [MSPB] determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the

[22] *See* 38 U.S.C. § 4322(a)(2).
[23] The OSC is a federal executive agency that is headed by the Special Counsel of the United States, who is nominated by the President and confirmed by the Senate.
[24] *See* 38 U.S.C. § 4324(a)(2).
[25] *See* 38 U.S.C. § 4324(b). You can also represent yourself and initiate your own USERRA MSPB case, but I do not recommend that course of action. Abraham Lincoln said: "A man who represents himself has a fool for a client."

> Board *shall* [formerly "may, in its discretion"], award such person reasonable attorney fees, expert witness fees, and other litigation expenses.[26]

The Dole Act changed "may, in its discretion" to "shall" in this subsection. This is a most welcome amendment.

Sergeant Major Richard Erickson is an Army Reservist (now retired) whose USERRA rights were egregiously violated by the United States Postal Service (USPS). His USERRA case against the USPS dragged on for almost 20 years and went to the Federal Circuit three times. When the case finally ended, the MSPB awarded Erickson substantial attorney fees for the representation of Erickson before the MSPB, but the MSPB held that it lacked the authority to order the USPS to pay Erickson's attorney fees for representation in the Federal Circuit. Erickson appealed to the Federal Circuit, which affirmed the MSPB decision on attorney fees.[27]

The Dole Act corrected this egregious loophole by enacting a new subsection of section 4324, as follows:

> In such Federal Circuit proceeding, the court *shall* award such person reasonable attorney fees, expert witness fees, and other litigation expenses if such person (A) prevails in such Federal Circuit proceeding and (B) is not represented by the Special Counsel in such Federal Circuit proceeding.[28]

This is a most welcome amendment.

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[26] 38 U.S.C. § 4324(c)(4) (emphasis supplied).
[27] *See Erickson v. United States Postal Service,* 759 F.3d 1341 (Fed. Cir. 2014), *cert. denied,* 514 U.S. 1150 (2015).
[28] 38 U.S.C. § 4324(d)(3) (emphasis supplied) (added by the Dole Act).

g. Improve the USERRA provision for requiring the lawbreaking employer to pay the attorney fees incurred by the successful USERRA plaintiff—non-Federal sector.

Section 4323 of USERRA[29] provides an enforcement mechanism for cases involving state and local governments and private employers. Like section 4324, section 4323 provides for ordering the award of attorney fees from the lawbreaking employer to the plaintiff, a service member or veteran. As with section 4324, the Dole Act changed "may, in its discretion" to "shall."[30] This is a most welcome amendment.

These ROA proposals have not yet been enacted.

a. Make unenforceable agreements to submit future USERRA disputes to binding arbitration.

Problem:

Many Reserve Component service members and veterans are unable to get to court with their USERRA claims because, when they were hired by private sector employers, they were required to sign, as a condition of hiring, an agreement that they will submit any future employment-related claims to binding arbitration, rather than complaining to government agency or suing the employer in federal or state court.

I invite the reader's attention to Law Review 22048 (August 2022), by Lieutenant Colonel Nicole Mitchell and me. In that article, we wrote:

[29] 38 U.S.C. § 4323.
[30] 38 U.S.C. § 4323(h)(2).

> The arbitrator's decision is not reviewable by any court, and the whole process is unfair and opaque. I [Mitchell] am convinced that I would have had much better shot with a federal district judge determining questions of law, reviewable by the Court of Appeals, and with questions of fact determined by a jury of my peers.

Solution:

Persuade Congress to amend USERRA, adding a provision that makes clear that USERRA overrides any employer-employee agreement, whether collectively bargained through a union or entered into between the individual employer and employee, and that preclusion applies to procedural rights as well as substantive rights.

Proposed statutory language:

Please see Law Review 15089 (October 2015).

b. Provide for the Merit Systems Protection Board (MSPB) to require federal executive agencies to pay liquidated damages for willful USERRA violations.

Section 4323 of USERRA[31] provides an enforcement mechanism for cases involving state and local governments and private employers. Section 4324[32] provides an enforcement mechanism for federal executive agencies as employers. Section 4323 includes a provision

[31] 38 U.S.C. § 4323.
[32] 38 U.S.C. § 4324,

requiring the defendant employer to pay liquidated (extra) damages if the court finds that the defendant violated USERRA willfully. The Dole Act amended the "liquidated damages" provision to read as follows: "The court may require the employer to pay the person the greater of $50,000 or the amount equal to [loss of wages and benefits suffered by reason of an employer's failure to comply] as liquidated damages, if the Court finds that the employer knowingly failed to comply with the provisions of this chapter."[33]

Section 4324 does not contain a provision requiring a federal agency to pay liquidated damages (extra damages) for violating USERRA willfully. I propose that the "liquidated damages" provision in section 4323 should be added to section 4324. Federal employees, former federal employees, and prospective federal employees who were unlawfully denied hiring should have the same rights and remedies as are available against a private employer. Indeed, they should have better rights because 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."[34] Under current law, there is no provision for requiring a federal government agency to pay extra damages for violating USERRA willfully. This proposal would close that loophole.

c. Amend the list of "prohibited personnel practices" for federal employees to make specific reference to USERRA.

Section 2302 of title 5 of the United States Code[35] enumerates 12 Prohibited Personnel Practices (PPPs). A federal employee who

[33] 38 U.S.C. § 4323(a)(1).
[34] 38 U.S.C. § 4301(b).
[35] 5 U.S.C. § 2302.

commits a PPP can be disciplined by the MSPB, including removal from the federal workforce, for committing a PPP. PPP # 11 is as follows: "take, or fail to take, recommend or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement."[36]

Proposed change.

We propose to add "or the Uniformed Services Employment and Reemployment Rights Act" to section 2302(b)(11).

Rationale for change

To promote USERRA compliance within the Federal Government, federal supervisors and personnel officials must be held personally accountable and must pay a price, from their own pockets, for willfully violating USERRA.

Reference

Law Review 25034 (September 2025).

d. Provide for awarding nonpecuniary compensatory damages, as well as pecuniary damages, in USERRA cases.

Under section 4323 and section 4324, as currently written, only pecuniary damages (like back pay) can be awarded to successful USERRA plaintiffs.

[36] 5 U.S.C. § 2302(b)(11).

Proposed change and rationale.

We propose that Congress amend sections 4323 and 4324 to provide for awarding nonpecuniary compensatory damages to service members and veterans who have suffered harms because of USERRA violations.

e. Make federal intelligence agencies, like the FBI and the CIA, subject to USERRA and to the USERRA enforcement mechanism, just like other federal executive agencies.

At a July 1991 meeting at the New Executive Office Building, the federal intelligence agencies requested and were granted exemption from the USERRA enforcement mechanism under section 4324, but not from USERRA itself. The intelligence agencies promised to establish, and sections 4315 and 4325 of USERRA[37] requires them to establish internal mechanisms for enforcing USERRA. More than three decades have passed since USERRA was enacted on 10/13/1994, but the intelligence agencies have not established those mechanisms. These agencies routinely flout USERRA and get away with it. Repealing sections 4315 and 4325 is necessary to give intelligence agency employees, former employees, and prospective employees effective USERRA rights.

Reference

Law Review 08052.

f. Amend USERRA's definition of "service in the uniformed services" to include time required to be away from civilian

[37] 38 U.S.C. §§ 4315, 4325.

employment for medical treatment necessitated by military service.

Current law

Under USERRA, a person who is absent from a civilian job (federal, state, local, or private sector) to perform "service in the uniformed services" and who meets the five USERRA conditions is entitled to reemployment in the civilian job after release from the period of service. USERRA's definition of "service in the uniformed services"[38] is broad, but it does not include a period an employee must be away from his or her civilian job for medical or dental treatment necessitated by a wound, injury, or illness incurred during a period of uniformed service. Thus, an employee does not have the right, under USERRA, to miss work for medical appointments or treatment for service-connected conditions.

Proposed change.

In USERRA's definition of "service in the uniformed services" add the following: "a period for which a person is absent from a position of employment for medical or dental treatment of a condition, injury, wound, or illness incurred or aggravated during a period of uniformed service."

Rationale for change

Here is the scenario that has recurred hundreds if not thousands of times. Joe Smith left his job at XYZ Corporation when he was called to

[38] 38 U.S.C. § 4303(13).

active duty. He deployed to Afghanistan and was wounded in action. He has largely but not fully recovered from his wounds. He has been released from active duty, and he has returned to work at XYZ.

Twice per month, Smith needs to travel to a military or Department of Veterans affairs medical treatment facility. These appointments are available only on regular workdays, not weekends. Smith has exhausted his sick leave entitlement at XYZ. He does not have the right to take time off, even without pay, under the Family Medical Leave Act (FMLA) because the employer does not reach the FMLA threshold on the number of employees.

Does Smith have the right, under USERRA, to time off, even without pay, from his XYZ job for these necessary medical appointments? Under current law, the answer is no, because this situation does not fall within the USERRA definition of "service in the uniformed services." Our proposal would broaden the definition to include this sort of situation.

Please join or support ROA.

This article is one of 2,300-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 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).[39]

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. General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War" invited junior officers who had served under him in Europe to the meeting. One of those junior officers 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.

[39] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight[40] uniformed services, you are eligible for membership in ROA,[41] 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 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[42]

[40] Congress recently established the United States Space Force as the eighth uniformed service.
[41] Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.
[42] You can also contribute on-line at www.roa.org.