

**Number 34, November 2001:
Applicability of USERRA to the Legislative and Judicial Branches**

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Q: I have enjoyed reading your series of articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) on the ROA Web site (www.roa.org). I particularly enjoyed reading "Law Review Number 12" (November 1999), entitled "Enforcement of USERRA Rights."

I see in this review how the law is enforced against the executive branch of the federal government, but I see no mention of the legislative branch. I work for a United States senator. I am also a major in the Air Force Reserve, and I expect to be called to active duty. If that happens, will I have enforceable re-employment rights?

[Note: This question is based on an amalgamation of several inquiries that we have received from ROA members who are Capitol Hill staffers. Please do not try to identify these facts with any one particular individual.]

A: You must give your employer notice that you are leaving for the purpose of service in the uniformed services, just as in the case of any other employer. When you complete the period of service, you must make a timely application for re-employment. If the senator re-employs you and treats you as if you had been continuously employed for seniority purposes, as required by USERRA, then you have no problem.

If the senator does not re-employ you, for whatever reason, you should apply to the director of the Office of Personnel Management (OPM). Under those circumstances, the OPM director will be responsible for finding you an equivalent position in the executive branch of the federal government. [See 38 U.S.C. 4314(c).]

Q: If OPM fails to find me a suitable alternative position in the executive branch, what can I do about that?

A: If OPM fails to comply with its USERRA obligations, you can bring a legal action against OPM in the Merit Systems Protection Board (MSPB). [See 38 U.S.C. 4324(b).] The procedures are described in "Law Review Number 12."

Q: Getting a job in the executive branch is certainly better than being unemployed, but I really want to work in the legislative branch. If I meet USERRA's eligibility criteria for re-employment, is there any way that I can enforce my USERRA rights against the senator?

A: Yes, but not under USERRA directly. USERRA is one of 11 federal statutes expressly made applicable to the legislative branch by the Congressional Accountability Act (CAA). [See 2 U.S.C. 1316.] If you meet USERRA's

eligibility criteria, you can enforce your re-employment rights against the senator by utilizing the CAA enforcement procedures. No federal agency will help you in enforcing your CAA rights.

Q: Will I be forced to choose between implementation of USERRA through OPM and enforcement of USERRA through the CAA?

A: No. You can go to OPM to get an equivalent position in the executive branch, to restart your federal salary after your release from active duty. Then, you can bring an action against the senator under the CAA. [See 2 U.S.C. 1361(d)(2).] OPM should not and almost certainly will not ask you to sign a document waiving your rights against the senator, in exchange for finding you a suitable executive branch position.

Q: In the senator's office, am I entitled to the exact position that I held previously?

A: Not necessarily. If your period of service is for 91 days or more, the employer has the option to re-employ you in another position of like seniority, status and rate of pay. [See 38 U.S.C. 4313(a)(2)(A). See generally "Law Review Number 8."]

Q: I am the senator's administrative assistant (AA), which is the top staff position in the office. There is no other position of like status. President Bush has warned the country to expect a long war. I don't see how the senator can do without an AA while I am on active duty for many months, or maybe years. The senator will almost certainly hire a new AA after I leave for active duty. If the senator likes the new AA and does not want to replace him or her on my return, where does that leave me?

A: Being the person in charge of the office is certainly an aspect of "status" to which the returning veteran is entitled. [See *Ryan v. Rush-Presbyterian-St. Luke's Medical Center*, 15 F.3d 58, 60 (7th Cir. 1994).]

The senator is not required to hold the AA position open during your absence, but upon your return the senator may be required to displace the new AA in order to re-employ you. An employer has no right to deny re-instatement simply because no vacancy exists. [See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992); *Goggin v. Lincoln, St. Louis*, 702 F.2d 698, 703-04 (8th Cir. 1983); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 1011 (E.D. Mich. 1985), *aff'd*, 802 F.2d 457 (6th Cir. 1986); *Anthony v. Basic American Foods*, 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49, 55 (N.D. Miss. 1981).]

We hope that the senator will not seek exemption from legal obligations applicable to employers generally. Such an attempt to gain exemption would be fundamentally inconsistent with the CAA. The basic philosophy of that law is that Congress should be subject to the same laws that it writes for the rest

of the country.

Q: The senator I work for is up for re-election next year. He will probably be re-elected, but it would not be correct to say that re-election is certain. What happens if I don't leave active duty until after January 2003, and in the meantime the senator has left office?

A: In that case, you could still go to OPM and get an equivalent position in the executive branch, under 38 U.S.C. 4314(c).

Q: My wife, a Naval Reservist, graduated from law school last May. She is currently employed as a law clerk to a U.S. Court of Appeals judge. If she is recalled to active duty, what will happen to her re-employment rights?

A: If the judge does not re-employ her, for whatever reason, she can go to OPM for an equivalent position in the executive branch, under 38 U.S.C. 4314(c). There is no enforcement mechanism against the judicial branch of the federal government. ROA

*Military title used for purposes of identification only. The views expressed herein should not be attributed to the Department of the Navy or the U.S. government generally.

Captain Wright was employed as an attorney for DoL for ten years. He was largely responsible for drafting USERRA, along with one other DoL attorney. He also helped to write the successful appellate briefs for the veterans in both the Imel and the Akers cases. Most recently, he was on active duty for 71 days (May-July 2001), including 40 days in Bahrain. Please see his July 2001 "Law Review" article.

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