

NUMBER 7, NOVEMBER 1998: Deadline for Returning to Work

Q: In Law Review Number 4 (July 1998), you said that if I leave my civilian job for service in the uniformed services and return to the same employer following service, I am entitled to be treated as if I had been continuously employed for purposes of computing my civilian pension entitlements, provided I meet the eligibility criteria set forth in the Uniformed Services Employment and Re-employment Rights Act (USERRA). You briefly mentioned those criteria and promised further detail in future columns.

In Law Review Number 5 (August 1998), you discussed the requirement of notice to my civilian employer, and in Law Review Number 6 (September 1998) you discussed the required character and duration of my service. The final eligibility criterion, as discussed in Law Review Number 4, is that I return to work or submit my application for re-employment in a "timely" manner. What is the deadline?

A: Under USERRA, the deadline for you to report back to work or to submit your application for re-employment depends upon the duration of the period of service from which you are returning. There are three categories:

- Period of service of less than 31 days (including most Reserve component training): report for work the next day.
- Period of service of 31 180 days: submit application for re-employment within 14 days.
- Period of service of 181 days or more: submit application for re-employment within 90 days.

After a period of service of less than 31 days, you must report back to work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation from the place of service to the person's residence." 38 U.S.Code 4312(e)(1)(A)(i).

For example, assume that you complete your weekend drills at 1600 on Sunday and that it reasonably requires five hours to drive safely from the drill site to your home. Assume further that your Monday job shift starts at 0200. Under these circumstances, you would not be required to be at work for the Monday shift, because you have not had the opportunity to have at least eight hours of rest.

Please remember that USERRA only entitles you to time off. Your employer is not required to pay you for a shift that you don't work. If you need or want to be paid for the Monday shift, you will have to get there with little or no rest.

If you find it "impossible or unreasonable," through no fault of your own, to report back to work the next day, as otherwise required, you must report back to work as soon as possible. See 38 U.S.C. 4312(e)(1)(A)(ii). For example, an automobile accident on the return trip could extend the deadline by a day or two, even if you are not injured.

If your period of service is 31 180 days, you must submit your application for re-employment within 14 days after the completion of the period of service. See 38 U.S.C. 4312(e)(1)(C). If your period of service was 181 days or more, you

must submit your application for re-employment within 90 days. See 38 U.S.C. 4312(e)(1)(D). Any of these deadlines can be extended by up to two years if you are hospitalized or convalescing from a service-connected injury or illness. See 38 U.S.C. 4312(e)(2)(A).

Q: If I miss one of these deadlines by a day or two, am I completely out of luck?

A: Not necessarily. If you miss one of these deadlines, without adequate cause, you do not automatically lose your re-employment rights, but you would then be subject to the employer's normal policies concerning explanations and discipline for unexcused absences. See 38 U.S.C. 4312(e)(3).

For example, assume that you submit your application for re-employment on the 15th day after completing a 179-day period of active duty for special work (ADSW). Assume further that your employer's usual sanction for one day of unexcused absence is a two-week suspension without pay. Under these circumstances, you would have the right to re-employment (assuming that you meet the other eligibility criteria), but the employer could suspend you without pay for two weeks.

Q: What does it mean to "submit an application for re-employment"?

A: You are only required to inform the employer that you worked there before your service, that you have completed your period of service, and that you want your job back. No particular form is required, and the application need not be in writing, although a written application would be prudent. If the employer is large and has a high turnover rate, and if you have been gone for four or five years, don't expect them to remember you.

Q: When I submit my application for re-employment, am I also required to submit any documentation?

A: Yes, if requested by the employer, you must submit such documentation as is readily available to establish that your application is timely and that you are not disqualified by virtue of having exceeded the five-year limit or having received a punitive or other than honorable discharge. See 38 U.S.C. 4312(f)(1). A DD-214 or an endorsed copy of your orders would be an example of such documentation. If your period of service is less than 31 days, you are not required to submit documentation.

Q: What if the documentation does not yet exist or is not readily available?

A: In that case, the employer is required to reinstate you promptly while awaiting the documentation. If the documentation, when it becomes available, establishes that you are not entitled to re-employment, the employer is then free to fire you and to terminate any benefits that you have been provided. See 38 U.S.C. 4312(f)(3). The employer is permitted to delay reinstating you into the pension plan until you provide full documentation. See 38 U.S.C. 4312(f)(3)(B).