

NUMBER 8, December 1998:
Entitlements of the Returning Veteran

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Q: Assuming that I leave my job for service in the uniformed services, and assuming that I meet the eligibility criteria discussed in detail in "Law Review" Numbers 5-7, am I entitled to immediate reinstatement in my civilian job?

A : As was explained in "Law Review No. 7" (The Officer, November 1998), if your period of service was less than 31 days (such as a drill weekend or a 2-day annual training tour), you must report for work at your first regularly scheduled shift following the completion of the service, the time reasonably required for safe transportation from the place of service to your residence, and the expiration of an eight-hour period (for rest). If you do this, you are entitled to immediate reinstatement. For example, if you report to work at 0800 Monday morning following your AT, you are entitled to be back on the payroll as of Monday morning.

As also explained in Law Review No. 7, if your period of service was for 31 days or more, you must submit an application for re-employment. In that situation, the employer is required to act on your application, and re-employ you, in a reasonably prompt manner. How much time is "reasonable" will depend upon the circumstances, but generally the waiting period should be measured in days, not weeks or months.

Q: When I returned from service, my preservice employer told me that I could not be reinstated immediately because no vacancy existed. The employer promised that the first vacancy to come open will be reserved for me. Is this good enough?

A No. Your right to re-employment is not contingent upon there being a vacancy. Sometimes, it is necessary for the employer to displace another employ-ee to make room for the returning veter-an. 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. 10 11 (E. D. Mich. 1985); *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).

The answer may be different if, at your place of employment, layoffs are based on seniority, and if the employer can show that you would have been laid off if you had been continuously employed instead of serving in the uniformed services. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). I explained the "escalator principle" in Law Review No. 4 (The Officer, July 1998). Remember that the "escalator" can go down as well as up.

If your job would have gone away even if you had not been serving in the uniformed services, you may be entitled to supplemental unemployment benefits or severance pay. See *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980); *Accardi v Pennsylvania Railroad Co.*, 383 U.S. 225 (1966).

Am I entitled to the exact job I left?

A: If your period of service was for less than 91 days, you are entitled to the exact job. See 38 U.S. Code 4313(a)(1)(A), If your period of service was for 91 days or more, the employer has the option to re-employ you in "a position of like seniority, status and pay." See 38 U. S. C. 4 313 (a) (2) (A).

Q :I recently completed four years of active duty, after leaving a job as an assistant manager of a store (part of a national chain) in Washington, D.C. When I applied for re-employment after leaving active duty, The chain offered me a job as the manager of a new store in Fairbanks,Alaska. This would be a great career Move for me, but my elderly parents live in Washington, and my wife has a high-paying government job here In Washington. I really don't want to move to Alaska. Am I entitled to re-employment as the assistant manager in Washington, D.C.?

A Yes. provided that the job still exists, and even if it has been filled. Commuting area has been held to be an aspect of the "status" to which the returning veteran is entitled. See *Armstrong v. Cleaner Services, Inc.*, 79 LRRM 2921 (-NI.D. Tenn. 4972); *Britton v Department of Agriculture*, 23 MSPR 170 (1984).

Q: I was a civilian employee of the Navy's Space and Naval Warfare Systems Command (SPAWAR) when I entered active duty in 1995. In July 1997, while I was on active duty, SPAWAR moved from Arlington, Va., [which is near Washington, D.C.], to San Diego, Calif. I was released from active duty in August 1998. Am I entitled to re-employment by the Department of the Navy in the Washington area?

A: No, because in this case the "escalator" has taken you to San Diego. If you had not been on active duty in July 1997, you would have been offered the choice between moving to San Diego or being placed on the "priority placement list" in the Washington, D.C., area. upon your release from active duty, you are entitled to the same choice.

Q. When I was recalled to active duty for Operation Desert Shield/Storm, I had been the nurse manager of a medical facility. When I was released from active duty, I was reinstated as the assistant nurse manger with the same salary. Is this good enough?

A. No, because the assistant nurse manager does not have the same 'status' as the nurse manager. See *Ryan v. Rush-Presbyterian-St. Luke~3*

Medical Center, 15 F.3d 697, 699 (7th Cir. 1994).

Q: What's to keep the employer from reinstating me and then firing me the first time I'm three minutes late for work?

A: If your period of service was 181 days or more, it is unlawful for the employer to discharge you, except for cause, within one year. See 38 U.S.C. 4316(c)(1). If your period of service was for 31-180 days, the period of special protection is 180 days. See 38 U.S.C. 4316(c)(2). If you are fired during the period of special protection, the employer has a heavy burden of proof, to prove that you were guilty of "cause" for discharge. See *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968). This provision is intended to protect you from a bad faith or pro forma reinstatement.

Note to readers; If your employer is giving you a hard time about time off from work for Reserve component training or service, or if you believe that your employer has denied you rights under USERRA, I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) at 1-800-336-4590. You may also wish to visit NCESGR's "web site" at www.esgr.com.