

**Number 31, October 2001:
Re-employment Rights After Being Furloughed**

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Q: I served on active duty for eight years as a naval aviator. I left active duty earlier this year and took a job as a co-pilot for a major airline. After the 11 September atrocities, my airline reduced the number of scheduled flights by 20 percent and "furloughed" 20 percent of the employees. Under the collective bargaining agreement (CBA) between my union and the airline, furloughs are based strictly on seniority. Because I have only a few months of seniority with the airline, I was among those furloughed. Under the CBA, there is a possibility (no guarantee) that I will be recalled to work sometime in the next two years, if business picks up or there are vacancies because of the retirement of more senior pilots.

In the meantime, I have no income, except for some unemployment compensation, which will soon expire. I am in a Naval Air Reserve unit. If I were called to active duty, that would actually be very good news financially, in light of my situation with the airline right now. I don't want to give up my dream of eventually becoming an airline pilot, however. If I leave now, will I be giving up whatever recall rights that I have at the airline?

I am vaguely aware of the re-employment rights law, but I have heard that it has a five-year limit on the duration of service. Am I out of luck because I have already served on active duty for eight years?

A: You have re-employment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA is codified at Title 38, United States Code, Sections 4301-4333 (38 U.S.C. 4301-4333). You can also find the complete text of USERRA on the Web site of the National Committee for Employer Support of the Guard and Reserve (NCESGR): www.esgr.org.

I also suggest that you check out the ROA Web site, (www.roa.org—click on "Law Review"). All of the published Law Review articles are available on the Web site, and 16 of the 31 are about USERRA.

With regard to your question about the five-year limit, that limit only includes service "with respect to the employer relationship for which a person seeks re-employment" [38 U.S.C. 4312(c)]. Your eight years of active duty were before you went to work for the airline, so you have your entire five-year limit to use. (See Law Review 6.)

Q: Will I have re-employment rights if I volunteer instead of waiting to be called?

A: Yes. Contrary to popular misconception, USERRA applies to voluntary as

well as involuntary service. (See Law Review Number 29.)

Q: As I have said, I am not really employed by the airline at the moment, because I have been furloughed. Does that matter?

A: No. Although you have been furloughed, you are still an employee of the airline. If you leave that status to perform service in the uniformed services, and if you meet USERRA's eligibility criteria, you will have the right to re-employment. [See *Colon v. Shawnee County, Kansas*, 815 F.2d 594 (10th Cir. 1987)].

Assume that you enter active duty in October 2001 and leave in October 2002. If you can show that you would have been recalled to work in September 2002, if you had not been on active duty, you will be entitled to re-employment in an active job. Otherwise, you will at least be entitled to reinstatement on the furlough list, in the status that you would have had if you had not gone back on active duty.

Q: What do I need to do right now?

A: If you are going back on active duty, voluntarily or involuntarily, you must give notice to your civilian employer. Except in very limited circumstances (e.g., prior notice to employer precluded by military necessity), the person who is to perform service in the uniformed services must give prior notice to the civilian employer. (See generally Law Review 5). The fact that you are in a furlough status does not exempt you from the requirement to give prior notice.

I suggest that you send a certified letter to the airline's personnel office and attach a copy of this Law Review article. You should give a copy of your notice to a trusted friend or relative.-- 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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