

**Number 39, March 2002:
Possibility of Layoff Before or During Military Service**

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Q: I have found your Law Review columns about the Uniformed Services Employment and Re-employment Rights Act (USERRA) very informative. I work for a large company that is going through hard times. According to rumor, there are likely to be major layoffs in the next six months. Meanwhile, the commanding officer of my Marine Corps Reserve unit has told us that our unit is very high on the call-up list and that we should expect to be activated. If I were to be called to active duty in December 2001 and there are major layoffs at the company in January 2002, what effect will that have on my re-employment rights upon completion of my active duty?

A: You must meet the USERRA eligibility criteria. Those criteria are explained in detail in Law Reviews 5-7. All of the Law Review columns are available on ROA's Web site (www.roa.org), under The Officer magazine online, in the members section.

Upon your re-employment, you are entitled to be treated, for seniority purposes, as if you had been continuously employed. We call this the "escalator principle." That name comes from a 1946 Supreme Court case, wherein the Court held, "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during his military service." [*Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-5 (1946).]

The escalator does not always go up, however. If there are layoffs during your military service, the question will be whether you would have been affected by the layoff if you had not left the job for military service. If the answer is yes, your re-employment rights may be into a layoff or furlough situation. USERRA does not entitle you to something (active employment) that you would not have enjoyed even if your civilian career had not been interrupted by military service.

Upon your return from service, we need to "reconstruct your escalator history." One way to do that is to find another employee in your "peer group" who started work for the company on the same day you did, or as close to you as we can find. What happened to that person's job during your military service? The answer to that question will give us some idea what would have happened to your job.

As you can imagine, these determinations can get complicated and controversial. Assume that you find, on your return from service, that the particular job that you had held no longer exists. That does not necessarily mean that you would have been laid off if you had been there. It is entirely

possible that if you had been there when the job was abolished you would have been able to avoid layoff by exercising your "bumping" rights to displace another employee with less seniority holding a position for which you were qualified and which was not being abolished. It is also possible that you would have been able to avoid layoff by finding a vacant position for which you were qualified. You are entitled to a presumption that, if you had been there, you would have acted rationally and in accordance with your own interests.

Even if it is established conclusively that you would have been laid off in January 2002, that does not end the inquiry. Perhaps you will be able to establish that you would have been recalled to work in September 2002, prior to your release from active duty in December 2002.

Q: At this company, when jobs are abolished the persons holding those jobs generally receive severance pay. The amount of the payment is equal to one month of salary for each year of company service. If my job is abolished while I am away for service, am I entitled to severance pay?

A: Yes. If you would have received a severance payment if you had been continuously employed, you are entitled to the payment upon your return. [See *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225 (1966). See also *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980) (supplemental unemployment benefits).]

Q: The preceding discussion seems to assume a formalized system of seniority governing layoffs. What if there is no system of seniority and the company lays off whom it chooses, without regard to seniority?

A: You are correct that the statute does not create a system of seniority. It assumes a system of seniority. If layoffs are not governed by seniority, you are entitled to re-employment in an active position, unless the employer can establish, to a high degree of probability, that you would have been laid off even if you had not been called away for service. For example, the employer might establish that most of the employees in your department were laid off (and not recalled) during your period of service. In that case, it can be said that objective facts establish that you probably would have lost your job even if you had not been called to serve.

We must guard against employers trying to use pretexts to defeat the re-employment rights of returning veterans. The Supreme Court has held that the re-employment statute should be liberally construed for those who have laid aside their civilian pursuits to serve our country. [See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).]

Q: My supervisor at work keeps asking me pointed questions about the possibility that I will be called to active duty. What happens if I get fired or "laid off" before I am activated?

A: If the employer fires you because of your impending activation, that would constitute a violation of 38 U.S.C. 4311, USERRA's anti-discrimination provision. [See Law Review Number 35.] The employer will probably try to argue that you have not been fired, only laid off. It is likely that the court will look behind the clever labels dreamed up by the employer and its attorney.

If you are affected by a bona fide layoff just prior to your activation, you should nonetheless give your employer notice that you have been called to active duty. [See Law Review Number 31.] It costs you very little to send a certified letter to your employer. You should act to protect whatever rights you may have.

Q: If I sense an imminent layoff, I will probably try to find another position in another department of the same company, or even in another company. What if I am selected for a new job but I get called to active duty just before the start date?

A: USERRA's anti-discrimination provision protects against discrimination in hiring, as well as discrimination against those who are already employed. The law's protection is not limited to those persons who are immediately available to start work. [See Law Review Number 35.] -- 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.

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