LAW REVIEW 0622
Category: USERRA—Applying for Reemployment

Don't Apply For Reemployment Until You Are Ready To Return To Work

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As I explained in Law Review 7, you have 90 days to submit your application for reemployment if your period of service was 181 days or more. Title 38, U.S. Code, section 4312(e)(1)(D) [38 U.S.C. 4312(e)(1)(D)]. If you meet the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA), including making a timely application for reemployment, you are entitled to be treated, for seniority and pension purposes after you return, as if you had been continuously employed during the entire military-related absence from work. *This includes the period of up to 90 days, after you leave active duty, before you apply for reemployment.* Please see Law Review 60.

The National Committee for Employer Support of the Guard and Reserve (ESGR) has always advised National Guard and Reserve personnel to *keep your employer informed.* I have seen many cases where the returning member communicated with the employer, as recommended by ESGR, and then was told "Great. Start work right now." My advice is that you not apply for reemployment *until you are ready to return to work.*

On the other hand, I certainly recognize the value of the ESGR practical advice to keep your employer informed. If you are home from active duty, especially in a small town, it is likely that the employer or your supervisor will see you or hear that you are back. Of course, that will give rise to the question, "If Smith is back in town, why is he not back at work?"

If you are home but not yet ready to return to work, I suggest you send a polite note to the employer, starting with "*This is not an application for reemployment."* Tell the employer the date that you left active duty. Tell the employer that you need some time off before returning to work. Ask the employer to contact you, so that you can agree upon a mutually convenient date for your return to work—perhaps the employer would welcome the additional weeks to make arrangements for your return. For example, the employer may need to lay off the person who was hired to replace you in your absence, and

the employer might welcome having some additional weeks to give notice to the replacement.

If the employer has been paying differential pay while you are away from work for military service, it really is incumbent upon you to notify the employer that you have left active duty. It is likely that the employer will discontinue the differential payments. As I explained in Law Review 18, your employer is *not required* to make up the difference if your military pay is less than your regular civilian pay. Please do not poison the well for Reserve Component personnel who will follow you. If you continue receiving these differential payments after you leave active duty, because the employer is not aware that your active duty period has ended, you are in effect receiving money under false pretenses. Your employer could react by discontinuing the practice of paying differential pay.

The 90-day application period can be very valuable for some returning veterans. The 1988 *Veterans' Reemployment Rights Handbook* states, "The veteran cannot be compelled to apply before the end of the statutory 90-day period. During this 90 days, he can seek and take employment elsewhere or do anything else he wishes, provided such actions are followed by a proper application [for reemployment] within the 90-day period."

You can wait to apply for reemployment, but I urge you to think this through clearly before you decide upon that course of action, and consider this sad story. I have heard from an Army Reserve nurse who was mobilized and deployed to Afghanistan. He served an intense year of active duty, and upon return to the United States and release from active duty he needed some time to unwind. He took his family on a vacation to a warm place. While on vacation, standing on a beach, he was watching a hang-glider. The man lost control of his kite, and the kite struck the recently separated Reservist in the arm, separating bone from muscle. This accident occurred four days after the Reservist had left active duty.

The Reservist was entitled to transitional Tricare, and the Army provided him surgery and rehabilitation for the injury. The problem is that he has not fully recovered and probably never will fully recover from the injury. His civilian job is as a paramedic for a fire department. The permanent disability of his arm makes it difficult, if not impossible, for him to perform his paramedic duties.

If this had been a disability incurred or aggravated in military service, the employer would be required to make reasonable efforts to accommodate the disability or to reemploy him in an alternative position if the disability could not be reasonably accommodated. *See* 38 U.S.C. 4313(a)(3). I also invite your attention to Law Reviews 121, 130, and 136. That employer obligation does not apply here, because the accident resulting in the disability occurred four days after the Reservist left active duty.

However, under the Americans with Disabilities Act (ADA), the employer is prohibited from discriminating against the person on the basis of his disability, as long as the person is qualified to work for the employer with or without a reasonable accommodation (regardless of his military status). The ADA does not require the employer to re-hire the disabled Reservist, only that, given that the Reservist is entitled to return to work under USERRA, the ADA prohibits the employer from using the disability as a reason to not rehire the Reservist without making a reasonable effort to accommodate the disability, including placing him in an alternative position.

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