

**LAW REVIEW 710**  
**(February 2007)**

**Applying for Reemployment—Continued**

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CATEGORY: USERRA Reemployment

**Q: I am a Coast Guard Reservist. I was recalled to active duty, with my Port Security Unit, and deployed to Southwest Asia for more than a year. I had been employed by the XYZ Corporation for four years, before I was mobilized. I gave the company prior notice of my mobilization, and I believe I meet the eligibility criteria for reemployment rights, under the Uniformed Services Employment and Reemployment Rights Act (USERRA); but the XYZ Corporation has refused to reemploy me.**

I was released from active duty on July 1, 2006, and I made a conscious decision to wait before applying for reemployment. I spent more than two months looking for a better job, and I briefly took a job with the ABC Corporation, in the same city but a different industry from the XYZ Corporation. The ABC job did not seem to be working out, so I resigned from ABC and applied for reemployment at XYZ on Sept. 25, 2006, which was 87 days after I left active duty.

**The XYZ personnel director says I gave up my right to reemployment at XYZ when I sought and took a job with another employer. In your Law Review 0622 (July-August 2006), you wrote, “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.” I showed the personnel director your Law Review 0622, but she was not convinced. Do you have some other authority for the proposition that the returning veteran is permitted to seek and take employment elsewhere, during the 90-day period, without giving up the right to reemployment?**

**A:** The language you quote, from my Law Review 0622, is actually from the 1988 edition of the *Veterans' Reemployment Rights (VRR) Handbook*. As I explained in detail in Law Review 104, Congress enacted USERRA in 1994 as a long-overdue rewrite of the VRR law, which can be traced back to 1940.

The VRR law did not give the Department of Labor (DOL) rulemaking authority, but DOL did publish the *VRR Handbook* in 1956 and update it in 1972 and 1988. Several courts, including the Supreme Court, cited the VRR Handbook with approval and gave it a “measure of weight,” although it did not have the status of a regulation.

As I explained in Law Review 0604, section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary

of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published the final USERRA Regulations in the *Federal Register* Dec. 19, 2005. The regulations are now published in the *Code of Federal Regulations (CFR)*, at 20 CFR Part 1002. You can also find these regulations on the DOL website, at [www.dol.gov/vets/](http://www.dol.gov/vets/).

The USERRA Regulations are in question-and-answer format, and there is a question-answer set that fits your situation:

*“If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?*

No. The employee has reemployment rights with the pre-service employer provided that he or she makes a timely reemployment application to that employer. *The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer.* However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.” (20 CFR 1002.120. Emphasis added).

Because your period of service was for more than 180 days, you had 90 days, starting on the date of your release from active duty, to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). Your application for reemployment on day 87 was timely under the statute. It appears to be clear that you met the other four criteria for reemployment when you applied on Sept. 25, 2006. You left your position of employment for the purpose of performing uniformed service, and you gave the employer prior notice. Because your most recent period of service was involuntary (as in a mobilization), it does not count toward your cumulative five-year limit with that employer (see Law Review 201.) You did not receive a punitive (by court martial) or other-than-honorable discharge that would disqualify you under 38 U.S.C. 4304.

The USERRA Regulations address the issue of *timely* reemployment in two sections:

*“When is an employee entitled to be reemployed by his or her civilian employer?* The employer must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act’s eligibility criteria as described in Subpart C of these regulations.” (20 CFR 1002.180).

*“How is ‘prompt reemployment’ defined?*

*‘Prompt reemployment’ means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee’s*

*application for reemployment.* For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position." (20 CFR 1002.181. Emphasis added).

As I explain in Law Review 206, if the employer delays in complying with its legal obligation to reemploy you, the employer is required to compensate you by way of back pay for the economic harm you suffer due to the employer's failure to comply with its legal obligation. If the delay extends for more than a few weeks, you are also entitled to interest on the back pay. Please see Law Review 0611.

I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (ESGR), a Department of Defense organization established in 1972 to assist National Guard and Reserve (including Coast Guard Reserve) personnel with exactly this sort of problem. You can reach ESGR toll-free at 1-800-336-4590. The ESGR headquarters will put you in touch with an ESGR volunteer in your state who can explain the law to the employer and to try to work this out informally. If ESGR is unable to assist you, your next step is to file a formal written complaint with DOL; but please give ESGR the opportunity to work this out informally before you "make a federal case" out of this.

*Military title shown for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.*