

Number 77, June 2003:

I Am Being Demobilized. What About My Civilian Job?

By CAPT Samuel F. Wright, JAGC, USNR*

1.3.1.3 (timely application for reemployment).

Q: I am a captain in the Air Force Reserve. In October 2001, I was involuntarily recalled to active duty for 12 months. A year later, I was involuntarily extended for a second year. I expect to leave active duty in October 2003. I have read your Law Review articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and was particularly interested in Law Review 29, "I Am Being Recalled. What About My Civilian Job?" I followed your advice and sent a certified letter to my employer's personnel office, before going on active duty almost two years ago. Now that my active duty period is nearing its end, please reiterate what I need to do now to get my job back.

A: USERRA is codified in Title 38, United States Code, sections 4301 through 4333 (38 U.S.C. 4301-4333). You can find the complete text of USERRA at www.esgr.com. That is the Web site of the National Committee for Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization that assists National Guard and Reserve personnel with civilian job problems. You can reach ESGR at 1-800-336-4590. In this article, we will refer to many Law Review articles that have already been published in *The Officer*. You can find all the back issues on the ROA Web site, www.roa.org. Click on "Legislative Affairs" then "Law Review Archive" at the bottom of the drop-down menu.

As is explained in Law Review 29 and in Law Reviews 5-7, there are five basic eligibility criteria for re-employment rights:

- You must have left the civilian job for the purpose of performing service in the uniformed services. [38 U.S.C. 4312(a). Law Review 5.]
- You must have given prior notice to the civilian employer that you were leaving for the purpose of performing uniformed service. [38 U.S.C. 4312(a)(1). Law Review 5.]
- During the employment relationship to which you wish to be restored, your cumulative period or periods of service in the uniformed services must not have exceeded five years. All involuntary service and some voluntary service are exempted when computing the five-year limit. [38 U.S.C. 4312(c). Law Review 6 discusses in considerable detail the five-year limit and its exemptions.]
- You must have been discharged or released from the period of service, and you must not have received a punitive or other-than-honorable discharge or have been dropped from the rolls of your service. [38 U.S.C. 4304. Law Review 6.]
- You must have submitted a timely application for re-employment. [38 U.S.C. 4312(c). Law Review 7.]

It appears that you already meet criteria 1–3 and will soon meet item 4. Because your active duty has been involuntary, it does not count toward your five-year limit [Law Review 6]. We will focus on the deadline for you to submit your application for re-employment. Because your period of service has exceeded 180 days, you will have 90 days to submit your application for re-employment. [38 U.S.C. 4312(e)(1)(D). Law Review 7.]

Q: Does that mean that I must wait 90 days to get my job back?

A: No. The 90 days belong to you, not the employer. When you submit your application, whether on the first day or the 90th day, the employer is required to act on it in a reasonably prompt manner (generally days, not weeks or months). [Law Review 8.]

If you are anxious to get back on the payroll at your civilian job, you should submit your application for re-employment right away. If you need some time off, you should take that time off before you submit your application for re-employment.

If you are planning to take time off before you submit your application for re-employment, you should ensure that you have health-plan coverage during the interim period. Because you were involuntarily called, you are entitled to continuing coverage under the military health-care system for a transition period. If you have fewer than six years of total active duty, your military health coverage continues for 60 days. If you have more than six years of active duty (not necessarily all in one period), your military health coverage continues for 120 days. For more information, see www.tricare.osd.mil/.

Do not blithely assume that your military coverage remains in effect. You need to register, for yourself and your family members, and you will need to pay a premium for the family members. Be sure to obtain written evidence of your military coverage, and the end date of that coverage. Arrange to return to work and reinstate your civilian coverage before your military coverage expires. You do not want a gap in your coverage.

Q: I want to take some time off before going back to work, but my employer's personnel office has stated that when I leave active duty my "military leave" becomes a "personal leave" and I will no longer continue accruing seniority, as if I had been continuously employed. Is the personnel office correct?

A: No, the personnel office is wrong. You are entitled to the continuous accumulation of seniority during the entire period of your military-related absence from your civilian job. This includes the period between leaving the job and entering active duty, the period of active duty, and the period between leaving active duty and returning to work [Law Review 60].

Q: A friend of mine, a Marine Corps Reservist employed by the same company, was called to active duty for Operation Iraqi Freedom. He was seriously injured, and he has lost his left leg. He is now in a VA hospital. He has been fitted for prosthesis, and he is undergoing a long and difficult rehabilitation—learning to walk all over again. How does USERRA apply to his situation?

A: The deadline to apply for re-employment can be extended by up to two years, while your

friend is hospitalized or convalescing from a service-connected injury or illness [38 U.S.C. 4312(e)(2)(A). Law Review 7.]. When he submits his application, the employer is required to make reasonable accommodations (training, equipment, schedule, etc.) to enable him to do the job he would have had if he had remained continuously employed [38 U.S.C. 4313(a)(3)]. If the disability cannot be reasonably accommodated in that position, the employer is required to re-employ your friend in another position that will provide like seniority, status, and rate of pay, or the closest approximation that is consistent with the circumstances of his case [38 U.S.C. 4313(a)(3)(B)].

Q: I have earned 60 days of leave from the Air Force during this two-year tour of duty, and I have not used any of that leave. I may be home on terminal leave as soon as early August. Can I submit my application for re-employment while on terminal leave?

A: Yes, you can submit the application while on terminal leave, but the employer is not required to act on your application until you actually leave active duty. Until the actual release date, you do not meet the eligibility criterion of having been released from the period of uniformed service. Moreover, it should be emphasized that the 90-day clock on your deadline to submit your application for re-employment does not start ticking until the actual release date. If you want to go back to work while on terminal leave, and if the employer wants you back, there is no legal impediment to your being re-employed while on terminal leave.

Q: You have stated that I must “submit an application for re-employment.” What, exactly, does that mean?

A: The essential message you must convey is: “I used to work here. I left this job for military service. Now, I am back from the military. I want my job back.” Because you have been gone for two years, you may find a new cast of characters at your place of employment. Don’t assume that they are aware of your situation. They may think that you are simply applying for a new job. We strongly suggest that you send a certified letter to the employer’s personnel office, in accordance with the attached sample.

If you simply call up your former supervisor and tell him or her that you are available to return to work, but fail to fill out the paperwork requested by the employer within the 90-day period, you could forfeit your re-employment rights. [See McGuire v. United Parcel Service, Inc., 1997 WL 543059 (N.D. Ill. 1997) (unpublished Federal District Court case available on Westlaw, a computerized legal research service offered by the West Publishing Company).]

Q: When I applied for re-employment, my pre-service employer said, “I honor your military service, but I have a business to run. I filled your position, and the new employee has worked out fine. Putting you back to work would mean displacing her, and that would be enormously disruptive. I am sorry that I do not have a job for you.”

A: If you meet USERRA’s eligibility criteria, the employer has a mandatory, judicially enforceable obligation to re-employ you. You need not prove that the refusal to re-employ you was based on anti-military animus. [See Jordan v. Air Products and Chemicals, Inc., 225 F. Supp. 2d 1206 (C.D. 2002). Law Review 61.] The fact that the job has been filled and that the new employee has proved to be a stellar performer does not defeat your right to re-employment. [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. 1011 (E.D. Mich. 1985), affirmed, 802 F.2d 457 (6th Cir. 1986); *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).]

In other words, you should not accept the employer's refusal to re-employ you under these circumstances. You should file a complaint and pursue it to conclusion. USERRA's enforcement mechanism is discussed in detail in Law Reviews 12, 24, 34, 35, 61, 65, and 67. You can start the process by calling ESGR at 1-800-336-4590.

* Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.

SAMPLE LETTER FOR RE-EMPLOYMENT

Number 77.1 (Sample Letter): Sample application for re-employment**

Ms. Jane Doe
Human Resources Director
XYZ Corporation
154 Plantation Dr.
Anytown, CA 96584

Re: Application for re-employment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4333

Dear Ms. Doe:

I went to work for your company on [provide date]. On [date] I gave you notice of my impending call to active duty in the U.S. military. [If you gave written notice, attach a copy, if possible. If your notice was oral, provide as much information as possible about when, how, and to whom you gave the notice.] I have completed my period of service, and I am now applying for re-employment.

I have the right to re-employment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which you can find in Title 38, United States Code, sections 4301-4333. You can find the text of USERRA, and a lot of other information about this law, on the Web site of the National Committee for Employer Support of the Guard and Reserve (ESGR). Please see www.esgr.com. You may also call ESGR at 1-800-336-4590.

I have attached a copy of my DD-214, showing the date I entered and left active duty

and that I was released from duty under honorable conditions. [If you do not have a DD-214, attach and refer to a copy of your endorsed orders, a letter from your commanding officer, or some other documentation showing the dates and characterization of your military service.] Please note that I meet USERRA's eligibility criteria as to prior notice, duration and character of service, and timely application for re-employment.

Please accept this letter as my formal application for re-employment. With your permission, I plan to report for work at [insert time and date]. If this is not acceptable to you, please call me as soon as possible at [telephone number]. Thank you for your prompt attention to this matter.

Sincerely,
Audie Murphy

** We strongly recommend that you send this letter to your organization's human resources director by certified mail, return receipt requested. Also, send a copy by certified mail to your pre-service supervisor. The point is to establish that you have made a proper application in a timely fashion.