

LAW REVIEW 831

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CATEGORY: 1.5: Timely Application for Reemployment

Applying for Reemployment after Military Service

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

As I explained in Law Review 77 and other articles, you must meet five eligibility criteria to have the right to reemployment after a period of service in the uniformed services (anything from a drill weekend to five years of full-time voluntary active duty). You must have left a position of civilian employment for the purpose of performing voluntary or involuntary uniformed service, and you must have given your civilian employer prior oral or written notice. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years (as I explain in Law Review 201, all involuntary service and some voluntary service are exempted from the computation of the five-year limit, and when you start a new job with a new employer you get a fresh five-year limit with the new employer). You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. Finally, you must have been timely in reporting back to work or applying for reemployment.

You must meet all five of these conditions to have the right to reemployment, and you have the burden of proof in establishing that you meet each condition. I strongly suggest that you dot the i's and cross the t's on these criteria. Even in the old days, when National Guard or Reserve service generally consisted of one weekend per month and two weeks in the summer, civilian employers frequently objected to the inconvenience of accommodating Reserve Component training. Now that Reserve Component personnel are routinely called to active duty for lengthy periods, civilian employers are frequently willing to pay four-figure hourly rates to law firms to try to deprive you of your rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Don't let them get away with this outrage.

This article addresses the final eligibility criterion—timeliness in reporting back to work or applying for reemployment.

As I explain in Law Review 104, the federal reemployment statute can be traced back to 1940, when it was enacted as part of the Selective Training and Service Act. The reemployment statute has had many formal names, but it came to be known colloquially as the Veterans' Reemployment Rights Act (VRRA). This law served our nation well for more than half a century, but over the years numerous piecemeal amendments and sometimes conflicting court decisions made it confusing and cumbersome at times. In 1994, Congress enacted USERRA (Public Law 103-353) as a complete recodification of the VRRA. USERRA made major improvements in the reemployment statute, but this is not a new law in 1994. You should think of the reemployment statute as 68 years old, not 14.

Under the VRRA, the deadline for reporting back to work or applying for reemployment depended upon the *category* of service from which the individual was returning. After a period of active duty for training, no matter how long, the member was required to report back to work the next work day. See 38 U.S.C. 2024(d) (1988 edition of the U.S. Code). After a period of active duty, no matter how short, the individual had up to 90 days to apply for reemployment. See 38 U.S.C. 2021(a), 2024(a), 2024(b) (1988).

Under USERRA, the deadline for reporting back to work or applying for reemployment depends upon the *duration* of the period of service from which the individual is returning, not the category. This rule is much more sensible and understandable.

Reporting back to work after a period of fewer than 31 days of service

After a period of fewer than 31 days of service, like a drill weekend or a two-week annual training period, you are required to report to the employer "not later than the beginning of the first full regularly scheduled work period on

the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i). The same deadline applies to a person returning from an examination to determine fitness for uniformed service. 38 U.S.C. 4312(e)(1)(B).

The Department of Labor (DOL) USERRA regulations, published in December 2005, address this requirement as follows: "If the period of service in the uniformed services was less than 31 days, or the employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the employer not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee's residence. For example, if the employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning." 20 C.F.R. 1002.115(a).

After a drill weekend or two-week annual training period, or after an examination to determine your fitness to join a uniformed service, you should plan on reporting back to work at your civilian job the very next work day, unless you must travel a great distance from the place of military training, service, or examination to your residence. Congress recognized that occasionally there will arise circumstances beyond your control that make reporting back to work the next day impossible or unreasonable—for example, you could have an automobile accident while driving home from your drill weekend Sunday evening. In such a situation, you are required to report back to your civilian employer "as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person." 38 U.S.C. 4312(e)(1)(A)(ii). See also 20 C.F.R. 1002.115(a) (final sentence).

Applying for reemployment after a longer period of service

After a period of 31 to 180 days of uniformed service, you must apply for reemployment within 14 days. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, you must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D). These deadlines can be extended up to two years if you are hospitalized for or convalescing from an injury or illness incurred in or aggravated during a period of service. 38 U.S.C. 4312(e)(2)(A). Please see Law Review 0832 for a detailed discussion of the provision for sick and injured members.

Actual duration, not expected duration, controls in determining the deadline.

In determining the deadline for you to report back to work or apply for reemployment, it is the *actual duration*, not the expected duration that controls. For example, let us say you are recalled to active duty for 18 months for deployment to Iraq. You report with your unit to a military base within the United States for a month of pre-deployment training, and you break your leg during that training. You are released from active duty and sent home just 28 days after the start of the period of service. In such a situation, it may be necessary for you to report back to work the next work day after you get home, unless the broken leg makes it impossible or unreasonable for you to do so.

What is an application for reemployment?

"An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested." 20 C.F.R. 1002.118.

"The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest." 20 C.F.R. 1002.119.

I invite your attention to the electronic attachment to Law Review 77, a sample application for reemployment letter.

In some circumstances, you must provide documentation with your application for reemployment.

“A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person’s employer (upon the request of such employer) documentation to establish that—

- (A) the person’s application is timely;
- (B) the person has not exceeded the service limitations set forth in subsection (a)(2) [the five-year limit] (except as permitted under subsection (c)); and
- (C) the person’s entitlement to the benefits under this chapter has not been terminated pursuant to section 4304 [punitive or other than honorable discharge].”

38 U.S.C. 4312(f)(1). See also 20 C.F.R. 1002.121.

“Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary [of Labor] shall satisfy the documentation requirements in such paragraph.” 38 U.S.C. 4312(f)(2).

“What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than 30 days?

- (a) Documents that satisfy the requirements of USERRA include the following: (1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;
- (2) Copy of duty orders prepared by the facility where the orders were fulfilled, carrying an endorsement indicating completion of the described service;
- (3) Letter from the commanding officer of a personnel support activity or someone of comparable authority;
- (4) Certificate of completion of a military training school;
- (5) Discharge certificate showing character of service;
- (6) Copy of extracts from payroll records showing character of service;
- (7) Letter from National Disaster Medical System (NDMS) team leader or administrative officer verifying dates and times of NDMS training or federal activation.

(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all these documents are available or necessary in every instance to establish reemployment eligibility.”

20 C.F.R. 1002.123.

Please see Law Review 100 for an explanation of the application of USERRA to NDMS personnel.

Congress recognized that there will be circumstances wherein the documentation simply does not yet exist or is not reasonably available to the servicemember completing a period of service. In such a situation, the unavailability of the documents should not be permitted to delay the member’s return to work at the civilian job.

“Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies the regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), or (C) of paragraph (1) [the five eligibility criteria for reemployment], the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.” 38 U.S.C. 4312(f)(3)(A).

“An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).” 38 U.S.C. 4312(f)(3)(B).

“An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.” 38 U.S.C. 4312(f)(4).

“The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment of more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.” 20 C.F.R. 1002.122.

I know that this statutory and regulatory language, quoted at length in this article, must sound dense and complicated. It really is not all that difficult. You just need to take these requirements one step at a time.