

**Number 85, Web Site only:  
Reinstatement Of Health Insurance Coverage After Military Service**

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Q: I started a new job with a new employer on 1 September 2001. Under the company's rules, a new employee is eligible for health insurance coverage after 90 days of employment. After only 30 days on the job, I was recalled to active duty in the Air Force Reserve. I served on active duty for one and was released on 30 September 2002. I went back to work almost immediately. My employer told me that I would not be covered by the company's health insurance until 60 days after my re-employment. I think that this is unfair. If I had not been called to active duty, I would have met the 90-day threshold by 1 December 2001. Have my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) been violated?

A: Under USERRA, a person who meets the eligibility criteria is entitled to re-instatement in his or her pre-service job and to be treated, for seniority purposes after re-employment, as if he or she had been continuously employed.

In its first case construing the VRR law, the Supreme Court enunciated the "escalator principle" when it 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. 275 284-85 (1946).] USERRA specifically codifies the escalator principle. [See 38 U.S.C. 4316(a). See also House Report No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2466 (legislative history of USERRA).]

I have discussed the escalator principle in some detail in Law Reviews 53 (October 2002), 56 (November 2002), 57 (December 2002), 59 (December 2002), and 60 (December 2002). I have explained that the escalator principle applies to "perquisites of seniority." I think that it is clear beyond any doubt that your right to health insurance coverage was a perquisite of seniority to which you were entitled upon re-employment in October 2002. Making you wait another 60 days for health insurance coverage was a clear violation of USERRA. I also invite your attention to Law Review 10 (June 1999).

Q: I was concerned about allowing my family and myself to be without health insurance coverage for two months, so I purchased an interim policy for those two months, at a cost of \$1,000. As it turned out, nobody in the family needed any health care during those two months, but I had no way of anticipating that we would be so fortunate. Am I entitled to collect that \$1,000 from the employer?

A: Yes. You had a duty to mitigate the damages caused by the employer's USERRA violation. Purchasing the interim health insurance coverage was certainly a prudent thing for you to do, and the happy occurrence that nobody got sick does not detract from the conclusion that your actions were prudent. If the employer had complied with USERRA, you would not have needed to spend the \$1,000. The amount that you had to spend is a good way to measure your damages, and I think that is a very valid claim against the employer. If you would have paid \$100 for the health insurance, through the job, if the employer had complied, that \$100 should of course be deducted from the \$1,000.

Q: I think that my employer violated USERRA willfully. When my employer told me that I would have to wait 60 days to get health insurance through my job, I contacted the National Committee for Employer Support of the Guard and Reserve (ESGR) at 1-800-336-4590. An ESGR volunteer visited my employer's personnel director and explained USERRA and left some printed material specifically addressing the health insurance issue. The personnel director told the ESGR volunteer to "pound sand." Am I entitled to punitive damages?

A: "The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) [actual damages] as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful." [38 U.S.C. 4323(d)(1)(C)] "A violation shall be considered to be willful if the employer or potential employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the provisions of this chapter." [House Report No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2471 (USERRA's legislative history) (internal citations omitted).] The ESGR volunteer's testimony could be most helpful in establishing the willfulness of the violation. If you prove actual damages of \$900 and the willfulness of the violation, the court should award you \$1,800.

NOTE: I have heard from an Army Reservist who was employed by the Corrections Department of a state government from December 1992 until December 2000. She was recalled to active duty from January to September 1998. Upon returning to her civilian job in October 1998, she went to the personnel office to request that her employee medical and dental insurance be reinstated, and she was assured that it had been reinstated. Because she met the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA), she was entitled to immediate reinstatement of that insurance. [See 38 U.S.C. 4317(b). See generally Law Review 10 (June 1999).]

In December 1998, her daughter required heart surgery, which the insurance company approved in advance. In the summer of 1999, however, the hospital and doctors started billing her for the cost, which is close to \$10,000. For reasons that are not entirely clear, her civilian employer never

reinstated her medical insurance coverage.

She left state employment in December 2000 to take a federal job, and she has since been recalled to active duty again. Bill collectors repeatedly call her about this alleged debt, which has affected her credit rating and even her security clearance.

Lesson to be learned: Getting back on the payroll at your civilian job, after returning from military service, is just the first step. You are also entitled to reinstatement in the health insurance plan, the pension plan, and on the seniority roster, as if you had been continuously employed. You are entitled to these things, and you should politely insist on written evidence that they have been accomplished. The best time to work out these matters is in the first pay period after your return to work, when records and other evidence are most readily available.

\*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.