

LAW REVIEW 924

(JUNE 2009)

CATEGORY:1.3.1.1 Left Job for Service and Gave Prior Notice

1.3.1.2 Character & Duration of Service

1.3.1.3 Timely Application for Reemployment

Dot the I's and Cross the T's

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

I am frequently frustrated when I hear from National Guard and Reserve personnel who meet most but not all of the conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Failing to meet even one of the five conditions means that you do not have the right to reemployment. If the employer chooses to take you back, although you do not meet the criteria, the employer is *not required* to treat you as if you had been continuously employed, for seniority and pension purposes after you return, during the period that you were away from work for uniformed service. I have heard from Reserve Component members who have lost hundreds of thousands of dollars in pension benefits because they failed to meet a single condition.

I invite the reader's attention to the Law Review column, available on ROA's website, at www.roa.org/law_review. You will find more than 500 articles, mostly by me and mostly about USERRA and related laws. I invite your attention specifically to Law Review 0766 ("USERRA: A Primer"), published in December 2007.

To have the right to reemployment under USERRA, you must meet five conditions:

1. You must have left a *position of employment* in order to perform service in the uniformed services.
2. You must have given the pre-service employer *prior oral or written notice*.
3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.
4. You must have been released from the period of service without having received a punitive or other-than-honorable discharge.
5. You must have made a *timely application* for reemployment.

You must meet all five of these conditions, and you must demonstrate that you meet each condition. With a little planning and with a basic understanding of this law, you can meet these conditions and clearly prove that you do so. I initiated ROA's Law Review column in 1997 to help Reserve Component members in meeting the conditions in order to protect their rights.

You hold a "position of employment" *even if you have been laid off*. As long as there is some possibility that you will be called back to work, as business conditions improve, you still have an employment relationship with that employer. If you leave a layoff situation for voluntary or involuntary service in the uniformed services, you can have the right to reemployment upon returning from service, *but you must meet the other four conditions*. This includes giving prior notice to your employer, before you report for service. I discuss this issue in detail in Law Reviews 31, 39, and 0756.

You should *always* give notice to your civilian employer, whenever you will be away from work for a period of uniformed service, short or long. A period of service can be anything from five hours to five years, and in some cases longer. It costs about \$4 to send a certified letter, and that is \$4 well spent. I suggest you give notice in writing, by certified mail, and retain a copy of the notice that you sent, as well as evidence from the U.S. Postal Service that your notice was received. Send the notice even if you think it is unlikely that you will want to return to that particular employer after you complete your service. Please see Law Review 0812.

Your cumulative period or periods of uniformed service, relating to a particular employer, must not exceed five

years. When you start a new job with a new employer, you get a fresh five-year limit with the new employer. Moreover, section 4312(c) of USERRA [38 U.S.C. 4312(c)] sets forth eight specific exemptions from the limit. Your periodic Reserve Component training and involuntary mobilizations do not count toward your limit. Some voluntary service is also exempted. I invite the reader's attention to Law Review 201 for a detailed discussion of what counts and what does not count toward your limit. If you plan to do a lot of voluntary active duty, it is important that you monitor closely what counts toward your limit. Do not exceed the five-year limit through inadvertence.

You must be released from the period of service without having received a punitive or other-than-honorable discharge, and *then* you must make a timely application for reemployment. You may make inquiries with your employer while you are on active duty, but you should follow up with a formal application for reemployment, in writing, *after* you have been released from active duty. Please see the attachment to Law Review 77, for a sample reemployment letter of application.

If your period of service was less than 31 days (like a drill weekend or a two-week annual training period), you must report for work at the start of your first regularly scheduled work period after the completion of the period of service, the time required for safe transportation from the place of service to your residence, plus eight hours for rest after you arrive home. If your return is delayed by factors beyond your control, like a vehicle accident on the way home, you must report back to work as soon as reasonably possible thereafter.

If your period of service was 31 to 180 days, you must apply for reemployment within 14 days. If your period of service was 181 days or more, you have up to 90 days to apply for reemployment. The 14-day or 90-day period starts on the day that you are actually released from the period of service. If you are home on terminal leave at the end of your period of service, you are still on active duty, and the clock does not start ticking until you are actually released.

It is essential that you apply for reemployment before the deadline passes, *even if the employer has told you that you will not be permitted to return to work*. I suggest that you make your application for reemployment in writing, by certified mail.

If you meet these five conditions, the employer has the *legal obligation* to reemploy you in the position of employment that you would have attained if you had been continuously employed or in another position, for which you are qualified, that is of like seniority, status, and pay. The fact that the job has been filled does not excuse the employer from the obligation to reemploy you, even if that means displacing another employee. Please see Law Reviews 206 and 0829.

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994 as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. In its first case construing the VRRA, 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 the war." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). Section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies the escalator principle in the current statute.

It should be emphasized that the escalator can descend as well as ascend. USERRA does not exempt you from a layoff or reduction in force that *clearly would have happened anyway* even if you had not been away from work for service at the time. If you work for a unionized employer, layoffs are probably based strictly on seniority. In such a situation, it is generally easy to determine what would have happened if you had not been away. If the layoffs reached your place on the seniority roster, you are included in the layoff, even though you were on active duty in Iraq at the time.

In such a situation, your "escalated reinstatement position" is a place on the layoff list. If you would have received severance pay or supplemental unemployment benefits if you had been at work when the layoffs occurred, you are entitled to those benefits upon your reemployment. If persons on the layoff list are later called back to work, you must be called back in the same order, as if you had been continuously employed.

I invite your attention to Law Review 0711 for an interesting application of these principles. A Reserve Component member worked for Ford when he was called to active duty. When he returned, he met the USERRA eligibility criteria, but he was not reemployed. He quickly found another job with equal pay and better long-term job security.

A few weeks later, Ford offered employees a substantial buy-out to resign their employment and waive their benefits, and this individual applied. He was entitled to \$100,000, based on his years of Ford employment. Both Ford and the union told him he was ineligible because he was not on the Ford payroll on the date that the buy-out was offered. But the point is that he *would have been* on the Ford payroll on that date if Ford had complied with USERRA. This individual eventually received his \$100,000 through the efforts of Fred Samuelson, a volunteer ombudsman for the National Committee for Employer Support of the Guard and Reserve.

A much more common situation today is that there is no union and no collective bargaining agreement establishing the order of layoffs. In such a situation, the returning veteran is entitled to reemployment in an active job unless the employer can *prove* that this individual *would have been laid off* (not just could have been laid off) even if he or she had not been away from work for service at the time the layoffs occurred.

If you meet the conditions for reemployment but have not been reemployed, you should not passively accept the employer's violation. You can get a court to order the employer to reemploy you and to compensate you for the pay and benefits you lost because of the employer's violation. If the court finds that the employer's violation was willful, the court will award you double damages.

Meeting the five eligibility criteria does not guarantee that you will be reemployed with no problem, but if you do not meet the criteria I can almost guarantee that you will have a problem, and if you don't meet the conditions you do not have enforceable rights. It is essential that you clearly establish that you meet the conditions. I hope the Law Review articles on the web will be useful to you in understanding what you must do to protect your rights.