

# LAW REVIEW 1024

## Health Insurance Continuation During Service

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### 1.3.2.6—Health Insurance Reinstatement and Continuation 1.8—Relationship Between USERRA and other Laws/Policies

*"In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, or such person becomes eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, the plan shall provide that the person **may elect** to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the **lesser** of—(A) the 24-month period beginning on the date on which the person's absence begins; or (B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e)." 38 U.S.C. 4317(a)(1) (emphasis supplied).*

*"A person who elects to continue health-plan coverage under this paragraph **may be required to pay not more than 102 percent of the full premium** under the plan (determined in the same manner as the applicable premium under section 49808(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, **except in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.**" 38 U.S.C. 4317(a)(2) (emphasis supplied).*

To understand what this provision means, let us discuss the hypothetical but realistic case of Army Reservist Mary Williams. She has a husband and two young children, and the four of them have health insurance coverage through her job at the XYZ Corp. of Chicago. She is paid every two weeks, or 26 times per year. Each pay period, the total cost of the health insurance coverage is \$500, of which Mary pays \$125 (25%) and XYZ pays \$375 (75%).

Mary is entitled to medical and dental care for herself in the military medical system whenever she is on active duty, for however short or long the duration. See 10 U.S.C. 1074(a)(2)(A). Mary's dependents are entitled to military medical and dental care only when Mary is on active duty for more than 30 days. 10 U.S.C. 1076(a)(2)(A). This does *not* mean that the dependents are covered from day 31. The dependents are covered from day one, provided Mary's orders call for at least 31 days of service.

In 2010, Mary is ordered to perform two weeks (one civilian pay period) of annual training with her Army Reserve unit. Because the ordered period of active duty is less than 31 days, Mary's dependents are not entitled to military medical and dental care during her annual training tour. Thus, Mary should *elect* continued coverage through her civilian job, in accordance with 38 U.S.C. 4317(a). Making this election costs Mary nothing, except for the \$125 that she would normally pay in any case. Making the election protects Mary from the financial difficulty that could arise if her husband or one of the children were to become ill during Mary's two-week annual training tour.

Mary is called to active duty for 365 days, for deployment to Afghanistan, in 2011-12. For this tour of active duty, Mary should *not* elect continued coverage through her civilian job. If she makes that election, having the coverage will cost her \$510 per two-week pay period (102% of the entire premium). That is a lot to pay for coverage that essentially duplicates the coverage that Mary is already entitled to, for herself and her dependents, through the military medical system. Since Mary's dependents will be in a major metropolitan area (Chicago), it should be feasible for them to find medical providers in their area who participate in the TRICARE system.

Joe Adams, a member of Mary's Army Reserve unit, also has health insurance for himself and his family through his civilian job. Joe lives and works in a small town in Wyoming. There are no medical care

providers in Joe's part of Wyoming who participate in the TRICARE system. Thus, Joe might consider electing continued coverage under section 4317(a), so that his wife and children can continue seeing their regular medical care provider in that small Wyoming town. But 102% of the entire premium is a lot to pay for convenience. Even in Joe's situation, electing continued coverage under section 4317(a) probably makes no sense.

Under section 4317(a), the individual employee who is leaving a civilian job for military service must *elect* continued health insurance coverage through the civilian job, or the continued coverage does not apply. In other words, the "default" choice is "no continued coverage during my period of service." If the employer enrolls the departing employee for continued coverage, although the employee has not requested such coverage, the employer is violating section 4317(a). Please see [Law Review 69](#) (April 2003). More than 600 articles are available at [www.roa.org/law\\_review](http://www.roa.org/law_review). You will also find a detailed Subject Index, to facilitate finding articles about very specific topics.

Under section 4302(a), the employer can always choose to do more than USERRA requires. The National Committee for Employer Support of the Guard and Reserve (ESGR), a Department of Defense organization, honors employers that go "above and beyond" the requirements of USERRA in their support of employees and prospective employees who are members of the National Guard and Reserve.

Some employers go "above and beyond" by picking up the cost of continued health insurance coverage for the dependents of the employee who has been called to the colors. This is an excellent way for the employer to provide "above and beyond" support. But remember that if the employer is gratuitously doing something above and beyond the requirements of USERRA, the employer can lawfully choose to cease the "above and beyond" support at any time, even during your deployment to the tip of the spear. Thus, when you are called to active duty you should ensure that your dependents are properly enrolled in the Defense Enrollment Eligibility Reporting System (DEERS), even if your employer has agreed to pick up the cost of continued health insurance coverage.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at [swright@roa.org](mailto:swright@roa.org) or 800-809-9448, ext. 730.