

# LAW REVIEW 1107

## I Never Asked To Continue My Health Insurance When I Left the Job To Serve

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

### 1.3.2.6—Health Insurance Reinstatement and Continuation

**Q:** I worked for a large corporation when I was called to active duty in 2008. I notified my direct supervisor that I was leaving the job for military service and that I did not need or want to continue my health insurance coverage through my job while I was on active duty, because I knew that I would have the military health care system for myself and my family during my service. I completed the involuntary call-up period and remained on active duty voluntarily, and we are now approaching three years that I have been away. I don't know if I will ever seek reemployment with this company.

Just recently, the company sent me a bill for thousands of dollars for health insurance coverage that I have not needed nor used. I protested that I had notified my direct supervisor that I did not want the health insurance and that I should not be charged. The company responded, saying that I was required to notify the company's benefits department and that notifying my direct supervisor was not enough. I cannot afford to pay this bill, and I don't think that I should have to. Help!

**A:** The employer is clearly wrong, and you do not owe the company for continuing health insurance coverage without your explicit request that it be continued. The relevant subsection of the Uniformed Services Employment and Reemployment Rights Act (USERRA) is as follows: "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 day 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).

If you wish to continue your health insurance coverage through your civilian job while you are away from work for uniformed service, you must explicitly *elect such continued coverage*. In other words, the default election is no coverage, not continued coverage. Of course, USERRA overrides and supersedes any employer policy or practice or collective bargaining agreement to the contrary. See 38 U.S.C. 4302(b).

USERRA provides as follows concerning the cost of continued health insurance coverage: "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 of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, *except that 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).

For example, Army Reservist Mary Smith works for the XYZ Corporation. She has a husband and two children, and the four of them are covered by her XYZ health insurance during her employment. The health insurance coverage for the four persons costs \$500 per two-week pay period. XYZ pays \$450 and Mary herself pays the other \$50.

Mary is going on annual training with her Army Reserve unit, and that will require that she be away from her civilian job for exactly one pay period. Because her period of service is scheduled to last less than 31 days,

Mary's dependents are not entitled to military health care coverage during this short period of service. Mary will not be paid by her civilian employer during the two weeks that she is away from work for military training.

It makes sense for Mary to elect continued coverage from XYZ during her two-week annual training tour, and to pay the \$50 employee share of the cost of the coverage. In the unlikely but certainly not inconceivable event that her husband or one of the children needs medical care during that period, having the XYZ coverage in effect will be necessary to pay for the cost of that care.

Army National Guard member Bob Jones also works for XYZ. He has been called to active duty for a year, for deployment to Afghanistan. Bob has a wife and two children, and the four of them are covered by his XYZ health insurance. The coverage costs \$500 per pay period, and Bob pays just \$50 as an active employee.

Because Bob's Army orders call for more than 30 days of service, he, his wife, and the two children are covered by the military health care system starting on the day he reports to active duty. See 10 U.S.C. 1076(a)(2)(A). Bob does not need XYZ health insurance coverage during the time that he is on active duty, because he is entitled to utilize the military health care system for himself and his family during that time. It would be foolish for him to pay \$510 per pay period (102% of the entire premium) for coverage that is essentially equivalent to what he gets from the military for free.

Under section 4317(b) of USERRA, Bob is entitled to *reinstatement* of his XYZ health insurance coverage immediately upon his reemployment, after he is released from the period of service. There must be no waiting period and no exclusion of pre-existing conditions, except for service-connected conditions for which Bob is entitled to coverage from the military or the U.S. Department of Veterans Affairs. It is not necessary to *continue* the health insurance coverage during the service in order to *reinstate* the coverage upon return from service. See 20 C.F.R. 1002.168.

If Bob wants to continue his XYZ health insurance coverage, he must specifically *elect* continued coverage. If he elects the coverage, XYZ is permitted to charge him up to 102% of the entire premium, including the part that the employer normally pays in the case of active employees. It is unlawful for the employer to *assume* that Bob wants the continued coverage and to charge him for it. Except in the most unusual circumstances, the employee who is leaving a job for long-term (more than 30 days) military service neither needs nor wants continued health insurance coverage through the civilian job.

Let us say that Bob's family lives in a small town with only two physicians, and neither of them is willing to participate in the TRICARE military health care system. Maybe it is worthwhile to Bob to pay for continued XYZ health insurance coverage, in order to ensure continuity of care for his wife and children, but \$510 per pay period is a lot to pay for convenience. The wife and children will probably be better off using TRICARE, even if they must travel some distance to find a health care provider that participates in TRICARE.

USERRA does not supersede or override an employer policy or practice or a collective bargaining agreement that provides *greater or additional rights*. Section 4317(a)(2) *permits* the employer to charge the absent employee up to 102% of the entire premium. XYZ could choose to offer Bob the continued health insurance coverage for no premium or for just the usual \$50 per pay period employee premium. The National Committee for Employer Support of the Guard and Reserve (ESGR) honors employers that go above and beyond the requirements of USERRA in supporting employees who serve in the National Guard and Reserve.