

Law Review 1145

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Back to Work: Timely application for reemployment is essential.

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

1.3.1.2—Character & Duration of Service

1.3.1.3—Timely Application for Reemployment

With the number of calls and correspondence the Service Members Law Center receives, it is never at a loss for different examples of how to ensure that rights are secured when seeking reemployment after an activation. The variety of nuances associated with individuals and their circumstances is often instructive for others, and they allow investigation into specific questions the Law Center receives on a daily basis. In many cases, the slightest deviation from established reemployment procedure can have a long-lasting impact on a career. The following instance might highlight a few important aspects that all should consider when dealing with multiple deployments and requirements necessary to retain all reemployment options.

Q: I am a lieutenant colonel in the Air Force Reserve and a Life Member of ROA. I have read with great interest your Law Review articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). The articles alone are worth the ROA dues, many times over, for a reservist like me.

I left active duty in 2000 and started a new job for a major airline. When the Sept. 11, 2001, terrorist attacks occurred, I was a very junior first officer. After the attacks, my airline and other major airlines suffered a precipitous drop in demand for airline seats, which caused the airline to reduce the number of flights. The reduction in flights led inexorably to a reduction in the need for pilots. Under the collective bargaining agreement between my union and the airline, layoffs (or furloughs, as they are called in the airline business) are based on seniority, and so are recalls from furlough.

Because I was junior with the airline, I was among the first pilots furloughed in January 2002. The union told me to expect it would be several years before I would be recalled, so I arranged to return to active duty in the Air Force in late January 2002. I remained on active duty until January 2011.

In January 2006, after I had been on furlough for four years, the airline notified me by certified letter that I was being recalled from furlough. I responded by certified letter, informing the airline that I was responding favorably to the recall notice but that I could not return to work right away, because I was on active duty in the Air Force. Pursuant to my request, the airline put me on a “military leave” status.

I read with great interest your Law Review 1125, titled “Furloughs and the Five-Year Limit.” I am prepared to argue that my five-year clock started ticking in January 2006, when the airline notified me that I was being recalled from furlough, rather than January 2002, when I started the nine-year active duty period that ended just recently. Thus, I am within the five-year limit, albeit just barely.

But I have another problem. In 2010, my father-in-law suffered a massive stroke and had to retire from his small business. I promised my wife and her father that I would take over the business and wind it down, getting as much money as possible for the unsold inventory and helping the long-term employees find other employment. I had hoped to complete the wind-down process during the 90 days after I left active duty on January 31, 2011, but I am finding that this process is much more complicated than I had anticipated. My 90-day deadline to apply for reemployment was scheduled to run out on May 1, and I was not ready to return to work. Help!

A: As I explained in Law Review 0766, and other articles, you must meet five eligibility criteria to have the right to

reemployment after absence from work for the purpose of performing service in the uniformed services:

- a. You must have left a position of employment for the purpose of performing service in the uniformed services. In January 2002, you held a position of employment, although you had been furloughed. Please see Law Review 31 (October 2001). You left that position in order to perform service.
- b. You must have given the employer prior oral or written notice. For purposes of this article, I shall assume that you gave the airline notice in January 2002 and again in January 2006.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. For purposes of this article, I shall assume that your five-year clock started ticking in January 2006 and that you have not exceeded the limit.
- d. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. I shall assume that you met this criterion on Jan. 31, 2011.
- e. You must have made a timely application for reemployment, after release from the period of service.

Because your period of service was for more than 180 days, you had 90 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). That deadline ran out on May 1. It was *essential* that you applied for reemployment by that deadline. Your wife and her father needed to understand that you had *hundreds of thousands of dollars* at stake, turning on your making a timely application for reemployment. Some other arrangement should have been made to complete the wind-down of your father-in-law's business.

If you met the five eligibility criteria for reemployment, including making a timely application for reemployment, the airline was required by federal law to reemploy you promptly, generally within two weeks after your application. See 20 C.F.R. 1002.181. Moreover, the employer must treat you, for seniority and pension purposes, as if your period of employment with the airline had not been interrupted by uniformed service.

If you failed to meet one or more of the eligibility criteria, the employer was not required to reemploy you. If the employer rehired you, although you failed to meet one or more of the criteria, the employer was not required to treat you as if you had been continuously employed. Thus, you had at stake not only the airline salary but also civilian pension credit for the time that you were on active duty.

The application for reemployment need not be in any particular form, but an application for reemployment must convey the essential message that the applicant is returning from uniformed service and is prepared to return to work in the civilian job. See 20 C.F.R. 1002.118. Applying for reemployment and then immediately asking for more time off, to complete the winddown of the business, is inconsistent with the idea of applying for reemployment in a timely manner.

In managing your military and civilian careers, it is essential that you understand USERRA and other applicable laws. You must be prepared to prove that you meet the eligibility criteria. I strongly suggest that you dot the *I*'s and cross the *T*'s. Don't expect the employer to help you. The Law Review Library and the Service Members Law Center can help you in understanding and complying with these complex legal requirements. Be sure to check us out before the fact and not after.