

LAW REVIEW 11101

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Don't Apply for Reemployment Until You Are Ready To Return to Work—Part 2

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1.3.1.3—Timely Application for Reemployment

Q: I am a volunteer ombudsman for Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization that seeks to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. For years, I have been using your "Law Review" articles as a resource when trying to resolve disputes between Guard and Reserve members and their civilian employers. I am working on a tough one that I want to consult you about.

The reservist (let's call her Mary Smith) recently returned from 18 months in Afghanistan. She returned home at the end of October but is on "terminal leave" until 30 November. On 15 November, she sent a letter to her civilian employer in which she wrote, "I am home from my active duty, and I can apply for reemployment starting on 2 January 2012."

The employer responded by demanding that she return to work by 15 December, and threatened to fire her if she is not back at work by that date. I thought that the Uniformed Services Employment and Reemployment Rights Act (USERRA) gave her the right to 90 days off before returning to work. What gives?

A: It is not correct to say that USERRA gave her the right to 90 days off before returning to work. USERRA gave her the *right to wait* up to 90 days to submit her application for reemployment, but she gave up that right when she applied for reemployment on 15 November. After she had applied for reemployment, USERRA did not give her the right to specify her return to work date.

As I explained in [Law Review 0766](#) and other articles, a person returning from service in the uniformed services (whether for five hours or five years) must meet five conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian position of employment for the purpose of performing service in the uniformed services—active duty, active duty for training, inactive duty training, initial active duty training, funeral honors duty, etc.
- b. Must have given the civilian employer prior oral or written notice, before leaving work for service.
- c. Cumulative period or periods of uniformed service, relating to the employer relationship for which she seeks reemployment, must not have exceeded five years. *All* involuntary service and *some* voluntary service are exempted from the computation of the limit. Please see Law Review 201.
- d. Must have been released from the period of service without having received a punitive or other-than-honorable discharge.
- e. Must have made a timely application for reemployment, after release from the period of service.

After a period of service of more than 180 days, an individual has up to 90 days to submit his or her application for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

The 90-day deadline did not start running until Smith was *released from active duty*—on 30 November. While she was on terminal leave, she was still on active duty, and the deadline to apply for reemployment had not started

running. Because she was still on active duty when she applied for reemployment, her application is deemed to be effective as of the date of her release from active duty.

As of 1 December, the day after her release from active duty, Smith met the five eligibility criteria for reemployment, and the employer was required to reemploy her *promptly*—generally within two weeks after her application. *See* 20 C.F.R. 1002.181.

Most returning veterans want to return to their civilian jobs as quickly as possible, after leaving active duty. They cannot afford to take many weeks off without pay. Some returning veterans need time off to readjust to civilian life, and reacquaint themselves with their families, especially after intense combat experiences. The 90 days to apply for reemployment can be very valuable for the returning veteran who needs some time off, for whatever reason, but it is important that the veteran understand this provision and use it correctly.

However, if you are home from active duty and choose to wait a few weeks before applying for reemployment, it is quite likely that your employer or some of your fellow employees will see you at church, at the store, etc. This may give rise to the question: “Mary Smith is back in town. Why is she not back at work?” To avoid this, I suggest that you send a letter like the following to your employer:

Mr. Archie Bunker
Edith's Restaurant
123 Park Ave.
Queens, NY

Dear Mr. Bunker:

This is not an application for reemployment. I have returned safely from my military deployment, and I thought that you would want to know that. Thank you for your prayers and concerns about my safety.

I need some time off to readjust to civilian life. Because I was on active duty for more than 180 days, the Uniformed Services Employment and Reemployment Rights Act (USERRA) gives me up to 90 days, starting on the date of my release from active duty, to apply for reemployment in my pre-service civilian job. I expect to apply for reemployment and return to work at your establishment, but I am not ready or required to do so yet.

If you wish to discuss the timing of my application for reemployment and return to work, please call me at *****.