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Help—The Army Has Sent Me Home Early!

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1.1.3.3—USERRA Applies to National Guard Service

1.3.1.3—Timely Application for Reemployment

1.3.2.1—Prompt Reinstatement

Q: I am a First Lieutenant in the Michigan Army National Guard. In researching my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), I have found your ROA "Law Reviews" to be a very valuable resource.[1]

Early this year, I learned from my National Guard commanding officer that I was being called to active duty, along with the whole unit, for deployment to Iraq for a year. I gave the employer months of advance notice and left my job on 1 September. I told the employer to expect me back in August or September of 2012.

Expecting me to be gone for a year or more, the employer hired a replacement; let's call her Mary Smith. The employer told Mary that her job was temporary, expected to last until August or September 2012, when I was expected home. I am informed that Mary is doing a fine job.

With the withdrawal from Iraq, the Army is cutting short our unit's mobilization. The Army is now telling us that we will be home by Christmas and off active duty in early January, only four months into an expected year-long mobilization.

What happens to my civilian job? I don't want to displace Mary eight months early, but neither can I afford to be without income for eight months.

A: If you meet the five eligibility criteria under USERRA (and you have it in your power to meet them), you will have the right to reemployment in the position you would have attained if you had been continuously employed or another position for which you are qualified that is of like seniority, status, and pay, even if that means displacing Mary.

When Congress enacted the reemployment statute in 1940 and substantially updated it in 1994, Congress was very much aware that this law sometimes puts a burden not only on the employer but also on the stay-at-home co-workers of the employee who is called to the colors.

During the 1940 debate on the Selective Training and Service Act (STSA), Sen. Elbert Thomas of Utah conceived of the idea of requiring employers to reemploy the young men who were drafted under the STSA. Sen. Thomas drafted and offered an amendment to that effect. The Senate, and later the House, adopted Sen. Thomas' amendment, and the STSA as enacted and signed into law by President Franklin Roosevelt included a chapter on reemployment rights. A year later, as part of the Service Extension Act, Congress expanded the reemployment provision to make it apply to voluntary enlistees as well as draftees.

During the 1940 Senate debate on the STSA, another senator objected to the Thomas amendment, asserting that

requiring reemployment would be unduly burdensome on employers and on the co-workers of those who left their jobs for military service. Sen. Thomas responded, acknowledging the burden and asserting that it was justified "because the lives and property of employers, and everyone else in this country, are protected by such [military] service." Sen. Thomas' eloquent argument carried the day with his colleagues. So, while it is unfortunate that Mary might suffer inconvenience and income loss when you return to work after military service, this burden was clearly contemplated and accepted by Congress.

Allowing the hiring of another employee to defeat the reemployment rights of the returning veteran would render the reemployment statute largely meaningless, and it is clear that the lack of a current vacancy does not defeat the right of the veteran to return to his or her rightful position. This is asserted in the 1993 *Nichols v. Department of Veterans Affairs:*

> The department [Department of Veterans Affairs, employer in the case] first argues that, in this case, Nichols' [the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[2]

As I explained in Law Review 0766, and other articles, you must meet five conditions to have the right to reemployment under USERRA:

a. You must have left a position of civilian employment for the purpose of performing service in the uniformed services.

b. You must have given the employer prior oral or written notice.

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. Your current active duty period does not count toward your limit because it is involuntary—you were mobilized. *See* 38 U.S.C. 4312(c) and Law Review 201.

d. You must have been released from the period of service without having received a punitive or other-than-honorable discharge.

e. You must have made a timely application for reemployment, after release from the period of service.

After a period of service of more than 30 days but less than 181 days, you must apply for reemployment within 14 days after you are released from service. 38 U.S.C. 4312(e)(1)(C). Thus, if you are released from active duty on January 2, you must apply for reemployment by January 16.

Although you expected your period of service to last for a year or more, and you informed the employer of that expectation, your period of service in fact has only lasted about 120 days. Thus, the deadline to apply for reemployment is only 14 days after the date you are released from active duty. The deadline is determined by the actual period of service, not the expected period of service. If you wait until next August to apply for reemployment, even if you think that is doing your employer a favor, you will be giving up your right to reemployment.

When you make a timely application for reemployment and meet the other eligibility criteria, the employer is required to act on your application promptly and put you back on the payroll within two weeks after your application. *See* 20 C.F.R. 1002.181. If you are not in a hurry to return to work, and if you want to make an accommodation for the employer in recognition of the hardship created by your early return (even though the early return is not due to any failing on your part), you should create a clear written record that you have made a timely application for reemployment and that you have agreed to the employer's *request* that you delay your return to

work. It is also important to ensure that your eligibility for your next promotion at work is not delayed by this voluntary accommodation that you have made to the employer's interests.

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[1] Editor's note: You can find more than 900 articles about USERRA and other military-related laws at www.servicemembers-lawcenter.org, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993).