

## **LAW REVIEW 1217**

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### **You Must Apply for Reemployment—Part 3**

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1.1.1.7—USERRA Applies to State and Local Governments

1.3.1.3—Timely Application for Reemployment

1.3.2.3—Pension Credit for Service Time

**Q: I have been a state police officer for 20 years, since January 1992. I am also a member of the Army Reserve. In January 2008 I volunteered to serve on active duty for a year. That first year was followed by a second year and a third year and I left active duty in January 2011. I thought that the Army would give me follow-on orders and I kept trying to go back on active duty, but I was not successful. Finally, I applied for reemployment with the state police on January 15, 2012, exactly 20 years after I started with the state police.**

**Our state has a 20-year retirement for state police officers. An Army Reserve buddy told me about a federal law called USERRA. He told me that since I now have 20 years with the state police, including my military service time, I can now apply for reemployment, return to work for one day, and then retire from the state police. I tried that, but the state police personnel office told me that I only have 16 years of state police service and that I am four years short of retirement eligibility. Have my USERRA rights been violated?**

**A:** No, your rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have not been violated, because you did not meet the five USERRA eligibility criteria on January 15, 2012, when you applied for reemployment. As I explained in [Law Review 0766](#) and other articles,<sup>111</sup> you must meet five conditions to have the right to reemployment under USERRA:

1. You must have left a position of civilian employment for the purpose of performing voluntary or involuntary service in the uniformed services. It seems clear that you did this in January 2008.
2. You must have given the employer prior oral or written notice. I shall assume that you gave such notice before you went on active duty in January 2008.
3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. I shall assume that your three years of active duty, from January 2008 to January 2011, did not put you over the five-year limit.
4. 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 served honorably.
5. You must have made a timely application for reemployment, after release from the period of service.

It seems clear that you have met the first four conditions, but you failed to meet the last one. You must meet all five conditions to have the right to reemployment under USERRA. Because you failed to make a timely application for reemployment after you were released from active duty in January 2011, the state is not required to reemploy you, and that means that the state is not required to give you state police retirement credit for the time that you have been away from work since January 2008. You are still well short of the time required for state police retirement.

USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335). "After a period of service of more than 180 days, you have 90 days to apply for reemployment." 38 U.S.C. 4312(e)(1)(D). Since you were released from active duty in January 2011, the deadline for you to apply for reemployment expired sometime in April 2011.

Section 4318(a)(2)(A) of USERRA provides: "A person *reemployed under this chapter* shall be treated as not having incurred a break in service with the employer or employers maintaining the [pension] plan by reason of such person's period or periods of service in the uniformed services." 38 U.S.C. 4318(a)(2)(A) (emphasis supplied). You were not *reemployed* under USERRA because you failed to meet the five eligibility conditions.

If you had applied for reemployment within 90 days after leaving active duty, you could have returned to work for a few months, and you could have retired in January 2012 when you reached the 20-year point. If the Army had kept you on active duty until January 2012, you could have applied for reemployment, returned to work for one day, and retired. But you have missed out on these opportunities because you failed to make a timely application for reemployment.

**Q: Are there no exceptions to the rule that I must apply for reemployment within 90 days after leaving active duty?**

**A:** There are two exceptions, but neither helps you under these circumstances. Section 4312(e)(2)(A) provides:

A person who is hospitalized for, or convalescing from, an injury or illness incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, ... submit an application for reemployment with such employer ... Except as provided in subparagraph (B), such period of recovery may not exceed two years.

38 U.S.C. 4312(e)(2)(A).

If you had been wounded or injured during your 2008-11 active duty, or if you had incurred an illness during that duty, your 90-day period to apply for reemployment could have been extended by up to two years. Since you were healthy when you were released from active duty in January 2011, this provision does not help you.

Section 4312(e)(3) provides:

A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall

be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

38 U.S.C. 4312(e)(3).

This means that if you had applied for reemployment on the 93<sup>rd</sup> day after leaving active duty, you would have been entitled to reemployment, but you would have been subject to appropriate employer discipline for three days of unexcused absence. Since your application for reemployment came eight months after the expiration of the 90-day deadline, this provision does not help you.

**Q: I have a line on the possibility of a job with another state police agency in this same state, an agency that is covered by the same 20-year retirement rule. I can go to work for that agency as a police officer for one year and then retire, right?**

**A:** Wrong. Under section 4318 of USERRA you are entitled to state retirement credit for your military service time *upon reemployment under this chapter*. You were not reemployed under this chapter, so you are not entitled to state retirement credit for the three years of active duty, from January 2008 to January 2011. You will need to work four more years for a state police agency, before you are eligible for state police retirement.

**Note:** I have written this article as a lesson for readers. If you want to exercise your USERRA rights, you must meet the eligibility criteria. I strongly suggest that you dot the i's and cross the t's. It is your job on the line, and it is incumbent on you to understand the rules and then comply. It is a continuing frustration to me when I hear from an individual who has messed up irretrievably. If this person had contacted me in early 2011, before his 90-day deadline ran out, I could have helped him, but he waited until eight months after the deadline had expired for him to apply for reemployment.

I have been working reemployment rights issues for almost 30 years. From September 1982 to September 1992, I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On October 13, 1994, Congress enacted and President Clinton signed USERRA, a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. What Congress enacted in 1994 was 85% the same as the Webman-Wright draft.

I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), an attorney for the United States Office of Special Counsel (OSC), and an attorney in private practice. In 1997, I initiated the "Law Review" column in ROA's magazine and website. In 2009, I retired from private practice and joined ROA's full-time staff as the first Director of the Service Members Law Center. In 2011, we added 112 new "Law Review" articles to the website, and we received and responded to 5,405 contacts (an average of 450 per month). Of the 2011 contacts, 62% were about USERRA, and the rest were about other military-relevant laws, like the Servicemembers Civil Relief Act and the Uniformed and Overseas Citizens Absentee Voting Act.

I am available every business day, answering inquiries by telephone and e-mail. On Thursdays, I am here until 2200 Eastern. The point of the Thursday evening availability is

to make it possible for Reserve Component personnel to contact me from the privacy of their own homes, outside their civilian work hours. If the employer is annoyed with Joe Smith because of his repeated absences from work to "play soldier," and if the employer is looking for an excuse to fire Smith (as is all too often the case), the last thing Smith should do is to give the employer the excuse that he or she is seeking. That is why I urge Reserve and National Guard personnel to contact me, but not with the employer's telephone or computer and not during hours paid by the employer.

The Service Members Law Center provides information to service members, regardless of whether they are members of or eligible to join ROA. When I hear from a person who is eligible for ROA and not already a member, I always ask that person to join, and they normally do.

Readers: Please pass along word of my availability to serving Reserve Component members that you know. I am available toll-free at **800-809-9448, extension 730**. My e-mail is [SWright@roa.org](mailto:SWright@roa.org).

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[1] I invite your attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 700 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.