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Reemployment Rights for Laid Off Employees

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Q: I left active duty in the Army in late 2007 and returned to my home town, where I found a job at XYZ Company, a unionized concern. After I had been working there for nine months, the company had economic difficulties as the economy crashed in late 2008. Almost a third of the employees were laid off, but some of them have been called back to work.

Under the collective bargaining agreement between our union and the company, layoffs and recalls from layoff are both based strictly on seniority. Because I had only been working there for a few months, I was among the first to be laid off, and I will likely be among the last to be called back from layoff.

For more than four years, I have been essentially without income, except for unemployment compensation and occasional brief military assignments in the Army Reserve and a few “odd jobs” that I have been able to land. I have been hoping for a recall notice from XYZ, and I have also been actively seeking employment elsewhere, without success. Now, the Army has offered me the opportunity to return to active duty for a year, from January 2013 to January 2014, if I am willing to deploy to Afghanistan. Is it possible for me to take advantage of this opportunity to return to active duty without giving up on the prospect of being recalled to XYZ?

A: Yes, but you must meet the five eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA). As I explained in Law Review 1281 and other articles, you must meet these conditions to have the right to reemployment in your pre-service civilian job:

1. You must have left a position of employment for the purpose of performing voluntary or involuntary service in the uniformed services.
2. You must have given prior oral or written notice to the civilian employer.
3. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have made a timely application for reemployment after release from the period of service.

An individual who has been laid off, with the possibility of recall to work, is considered to hold a position of employment, even while laid off. The person is not working and is not receiving compensation from the employer, but the person still has a “silver thread” of connection to the employer. Leaving a layoff situation to go on active duty is just like leaving an active job. You will have the right to reemployment after the period of service, *provided you meet the five eligibility criteria*.

If you decide to take this opportunity to go on active duty from January 2013 to January 2014, you need to notify XYZ. I suggest that you do so in writing, by certified mail. Sending a certified letter (return receipt requested) will

cost you about \$4. I suggest that is \$4 very well spent, because it will protect your right to reemployment upon returning from service in January 2014.

When you return from active duty, you need to make a timely application for reemployment with XYZ, *even if employees in your seniority group have not yet been recalled to work by XYZ*. Again, I suggest that you send the application for reemployment by certified mail.

If employees in your seniority group have been recalled to work by XYZ by the time you return from active duty in January 2014, you are entitled to reemployment in an active job, although you were in a layoff status at the time you reported to active duty. If the employees in your seniority group have not yet been recalled to work by January 2014, you should at least be permitted to resume your place on the potential recall list.

After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. It is essential that you make a timely application for reemployment and document that you have done so.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed regulations, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* on December 19, 2005. The regulations have been codified in title 20 of the Code of Federal Regulations (C.F.R.) at Part 1002. The DOL USERRA Regulations contain a section that is directly on point to your situation:

§ 1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?

(a) If an employee is laid off with recall rights, on strike, or on a leave of absence, he or she is an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service. Similar principles apply if the employee is on strike or on a leave of absence from work when he or she begins a period of service in the uniformed services.

(b) If the employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service even if he or she did not respond to the recall notice.

(c) If the employee is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee. Reemployment rights under USERRA cannot put the employee in a better position than if he or she had remained in the civilian employment position.

20 C.F.R. 1002.42 (bold question in original).

Q: The employer and the union have told me that I will not have the right to reemployment because the collective bargaining agreement between the union and the employer makes no provision for reemployment. What is the relationship between USERRA and the collective bargaining agreement?

A: In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

Under section 4302 of USERRA, this federal statute is a floor and not a ceiling on your rights with respect to XYZ as your employer. The collective bargaining agreement can give you greater or additional rights, but it cannot take away the rights that Congress has secured for you by enacting USERRA.

Q: I expect that the recall notice from XYZ will likely come sometime in the late summer or early fall of 2013. When that happens, I will almost certainly be in Afghanistan, and I will be fully engaged. Will I lose out on my recall rights with XYZ if I fail to reply promptly to the recall notice?

A: No. The DOL USERRA Regulation quoted above makes clear that you are exempted from the obligation to respond to the recall notice if you are on active duty at the time. But I recommend that you give a *limited power of attorney* to a trusted colleague at XYZ. And give XYZ written instructions to send any communications for you to that trusted colleague. Using the limited power of attorney, the trusted colleague can respond on your behalf to the recall notice, informing XYZ that you want to return to work and that you expect to return from active duty in January 2014.

It is also possible that at some point while you are gone XYZ will offer supplemental unemployment benefits or outplacement assistance to laid off employees. The trusted colleague can use the limited power of attorney to apply for those benefits on your behalf.

Conclusion: I am aware of many folks in this sort of situation who have lost out on valuable rights because they failed to give notice to the civilian employer when leaving a layoff situation for military service or because they failed to make timely applications for reemployment upon returning from service. It is incumbent on you to dot the Is and cross the Ts. Neither the employer, nor the union, nor DOL, nor Employer Support of the Guard and Reserve (ESGR), nor anyone else is going to be there with you every step of the way, reminding you of the steps that you need to take to preserve your legal rights.

I have been dealing with reemployment rights, under USERRA and the predecessor statute, for more than 30 years. Fifteen years ago, in November 1997, I initiated this "Law Review" column. We add new articles each week, and we are now up to 807 articles. We have a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I invite your attention to www.servicemembers-lawcenter.org.

In 2009, I retired from private practice and joined ROA's full-time staff, as the first Director of the Service Members Law Center. I receive and respond to upwards of 800 calls and e-mails per month, mostly about USERRA. I receive calls and e-mails from all over the country and even from Afghanistan and Kuwait. I am here during regular business hours and until 10 pm Eastern Time on Mondays and Thursdays. The purpose of the evening availability is to enable National Guard and Reserve personnel to call me from the privacy of their own homes, outside their civilian work hours.

My e-mail is SWright@roa.org and my telephone number is 800-809-9448, extension 730. Monday or Thursday evening is a particularly good time to call.