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USERRA Overrides Agreement You Signed when You Were Hired

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Q: I am a pilot for a small cargo airline. When I was hired, 18 months ago, I signed a contract with the employer in which I agreed that if I left the employ of the company for any reason before the 5th anniversary of my hiring I would have to repay the cost of my pilot training, perhaps in excess of \$300,000. My father served a career in the Air Force, and now I am interested in joining the Air Force. I have been meeting with an Air Force recruiter, but I have not yet signed on the dotted line with the Air Force.

I told the personnel director of the airline that I have been meeting with a recruiter and that I am seriously considering joining the Air Force. He reacted very negatively, and he told me that if I join the armed forces I will be required to repay the airline for my training costs. Is that true?

A: I think that the cost-reimbursement contract that you signed is clearly contrary to the Uniformed Services Employment and Reemployment Rights Act (USERRA) and is void as against public policy. Section 4302(b) of USERRA provides: “This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.” Title 38, United States Code, section 4302(b) [38 U.S.C. 4302(b)].

As is explained in Law Review 104^[1] (December 2003) and other articles, Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in 1940. In addressing the purpose and intent of section 4302(b), USERRA’s legislative history provides: “An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee [House Committee on Veterans’ Affairs] bill and would be void.” House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2453.

If you leave your cargo airline job to take a civilian job with another employer, the cargo airline can probably enforce the contract and get a court order requiring you to repay the training costs. But military service is fundamentally different from civilian employment. If you leave your airline job for military active duty, I do not believe that a court would enforce that contract.

Q: The employer has threatened to fire me if I join the Air Force or any other service. There will likely be a delay of several months between when I sign the Air Force enlistment contract and take the oath and when I report to active duty for Officer Training School (OTS). The Air Force will not be paying me during that interim period. I am concerned that if the cargo airline fires me right after I enlist I will be in financial distress until I report to active duty several months later. What does USERRA provide about this kind of scenario?

A: Section 4311(a) provides: “A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment*, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.” 38 U.S.C. 4311(a) (emphasis supplied).

USERRA’s legislative history clearly indicates that Congress specifically anticipated that section 4311(a) would apply to exactly this scenario: “If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee’s military service, and processing of the claim should not await completion of the service, even if only for lost wages.” House Report No. 103-65, 1994 *USCCAN* 2449, 2456-57.

Q: I probably will remain on active duty for four years or more, and it is likely that I will not want to return to the cargo airline when I leave active duty, but I would like to keep that option and avoid burning that bridge. How does USERRA apply to this situation?

A: As is explained in Law Review 1281 (August 2012) and other articles, you will have the right to reemployment at the cargo airline if you meet five conditions:

1. You must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services. If you decide to enlist, you will clearly meet this criterion.
2. You must have given the employer prior oral or written notice. You certainly have it in your power to give such notice. This is a notice requirement, not a permission requirement. You do not need the employer’s permission, and the employer does not get a veto.
3. You must not have exceeded the cumulative five-year limit with respect to the duration of the period or periods of uniformed service that you perform, with respect to the employer relationship for which you seek reemployment. See Law Review 201 (October 2005) for a detailed description of what counts and what does not count toward 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.
5. You must have made a timely application for reemployment, after release from the period of service. 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.

If you meet all five of these conditions, you will have the right to reemployment, and that includes being treated for seniority and pension purposes as if you had been continuously employed by the civilian employer during the entire time that you were away from work for service. If you fail to meet one or more of the five conditions, you will not have the right to reemployment.

The reemployment statute keeps your right to return to your civilian job behind you as an unburned bridge, regardless of what you may have intended or said about your intentions before you left the job for service or during the period of service. You cannot waive the right to reemployment until you have the right to reemployment, and you do not have the right to reemployment until you have been released from the period of service and have applied for reemployment.[\[2\]](#)

There is absolutely no point in you and the cargo airline arguing now about what your reemployment rights may or may not be some years from now, when you leave active duty. It is unlikely but certainly not impossible that you will seek reemployment and that you will be entitled to reemployment. For now, this dispute is absurdly hypothetical.

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 863 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

[2] See *Leonard v. United Airlines, Inc.*, 972 F.2d 155 (7th Cir. 1992). I discuss *Leonard* in some detail in Law Review 857 (November 2008).