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Right to Health Insurance Reinstatement when Returning to Work after Military Service

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Q: I am a Lieutenant Colonel in the Army Reserve and a member of ROA. I recently completed a two-year active duty period overseas, and I have returned to my civilian job as a state government employee. I have worked for the state for 15 years, and at the time I was called to the colors two years ago I had an excellent health insurance plan for myself and my family.

Employees of the state receive only a very basic health insurance plan for the first year of their employment. After the first year, employees become eligible to select a more comprehensive plan that is targeted to their specific family needs. Each year, in February, there is an "open season" when each individual employee has the opportunity to choose a new plan or keep the existing plan. The comprehensive health insurance plan is important to me, because one of my three children has serious health problems and frequently needs expensive medical care.

I completed my active duty and returned to my civilian job in April 2013. I applied immediately to reinstate the health insurance coverage that I had when I was called to the colors in early 2011. The personnel office insists that, under state law, any employee returning to work after a break of more than six months must be put in the basic health insurance plan and that I cannot elect the premium plan that I had until the next open season, in February of 2014.

I think that my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have been violated. What do you think?

A: If you met the USERRA eligibility criteria when you returned to work in April 2013, you are clearly entitled to immediate reinstatement of the premium health insurance plan that you had in effect when you left your job for military service.

As I explained in Law Review 1281[1] and other articles, you must meet five conditions to have the right to reemployment under USERRA:

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 883 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.

a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. You must have given the employer prior oral or written notice.
c. 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.
d. You must not have received a disqualifying bad discharge.
e. You must have made a timely application for reemployment, after release from the period of service.

It is clear that you left your job for the purpose of service, and I shall assume that you gave prior notice and that you did not have a disqualifying bad discharge. After release from active duty of more than 180 days, you had 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). It is clear that you were back at work well within that 90-day period.

The five-year limit could be an issue, because the limit is cumulative, with respect to the employer relationship for which you seek reemployment. Please see Law Review 201 for a definitive discussion of what counts and what does not count toward exhausting an individual's five-year limit.

Let us assume that your recent two-year active duty period did not put you over the cumulative five-year limit with respect to your employment by the state and that you otherwise meet the five conditions for reemployment. Because you meet the USERRA conditions, you are entitled to immediate reinstatement of your health insurance coverage for yourself and your family, under section 4317(b)(1) of USERRA, which provides as follows:

"Except as provided in paragraph (2)[2], in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, or by reason of the person's having become eligible for medical and dental care under chapter 55 of title 10 [of the United States Code] by reason of subsection (d) of section 1074 of that title, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service or eligibility. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person."

38 U.S.C. 4317(b)(1).

Section 4331 of USERRA (38 U.S.C. 4331) gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published draft USERRA regulations, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published final USERRA regulations in December 2005. Those regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002 (20 C.F.R. Part 1002). The DOL USERRA regulations provide as follows concerning the employer's obligation to reinstate the returning veteran's health insurance coverage upon reemployment:

"If the employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?

(a) If health plan coverage for the employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.

[2] Paragraph (2) pertains to the situation wherein the person returning from military service suffered an injury or illness during the period of active duty. Paragraph (2) is not pertinent to you because you are not claiming to have suffered such an injury or illness.

(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section."

20 C.F.R. 1002.168 (bold question in original).

Q: The Personnel Director said that she cannot give me my same health insurance back because state law mandates that an employee with a break in service of more than six months must go back to the basic health insurance plan, like a rookie employee. What do you say about that?

A: Your rights are governed by federal law (USERRA), and not by state law. Section 4302(b) of USERRA provides: "*This chapter [USERRA] 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." 38 U.S.C. 4302(b) (emphasis supplied).

I also invite your attention to Article VI, Clause 2 of the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[3]

As a nation, we are celebrating the sesquicentennial of a great war fought about the supremacy of federal authority over state authority. State officials in your part of the country sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

Since your state personnel office is confused about your health insurance entitlements, they may also be confused about your seniority and pension entitlements under USERRA. Under section 4316(a) of USERRA [38 U.S.C. 4316(a)], you are entitled to be treated *as if you had been continuously employed* by the state during your recent two-year active duty period, for purposes of seniority in your civilian job. This means that you now have 15 years of state government seniority, not 13 years. The state must credit you for the two years that you have been away from work for military service.[4]

Under section 4318 of USERRA (38 U.S.C. 4318), you are also entitled to state employee *pension* credit for the two years that you were away from work for military service. Your 2011-13 active duty must not be permitted to delay your eligibility to retire from state employment, and it must not be permitted to reduce the amount of your monthly pension check.

Q: I don't want to "make a federal case" out of this issue if I don't have to, but the health insurance coverage is really important to me because of my sick daughter. How do I secure my USERRA rights without unnecessarily annoying the state agency that employs me?

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[3] Yes, it is capitalized just that way, in the style of the late 18th Century.

[4] The two years of seniority credit could be crucial if your state government has financial problems and finds it necessary next year to eliminate state positions and lay off employees. In public employment, such reductions in force are normally made in seniority order. Having two more years of state employee seniority could easily make the difference between keeping your job and losing it. The two additional years of seniority can also shorten the time until your next promotion or at least eligibility for consideration of promotion.

A: I suggest that you contact Employer Support of the Guard and Reserve (ESGR) at 800-336-4590. ESGR is a Department of Defense organization that was created in 1972. Its mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. Upon request, ESGR headquarters will put you in touch with an ESGR ombudsman in your state, and that ombudsman will work with you and the employer, in an informal and non-confrontational way. Within 14 days, ESGR will resolve the issue or tell you that it is unable to do so.

If your employer tells the ESGR ombudsman to "pound sand" (which happens sometimes), call me and I will discuss with you your options for enforcing your USERRA rights. I am available toll-free at 800-809-9448, extension 730, or by e-mail at Swright@roa.org. I am here answering telephone calls and e-mails during regular business hours and until 2200 Eastern Time on Mondays and Thursdays. The point of the evening availability is to enable you to call me from the privacy of your own home, and not from your civilian job.