LAW REVIEW 13118
September 2013

Paid Military Leave for Military Retiree Who Returns to Active Duty

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.1.1.8—USERRA applies to Federal Government
1.1.3.2—USERRA applies to regular military service
1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.4—USERRA enforcement
1.7—USERRA regulations
1.8—Relationship between USERRA and other laws/policies
2.0—Paid leave

Q: I am a retired Army Reserve Colonel and a life member of ROA. I graduated from the United States Military Academy in 1981 and was commissioned a Second Lieutenant in the Regular Army. I left active duty in 1991 and affiliated with the Army Reserve. Two years later, in 1993, I joined the Active Guard and Reserve (AGR) program. I signed up for three years of full-time AGR duty, and those three years were extended to 18. I retired from the Army in 2011, with 30 years of commissioned service, 28 of them on full-time active duty.

I took a full-time civilian job with the Department of the Army and began that job almost immediately after I retired in June 2011. Based on some unique skills and experience that I had, the Army offered me the opportunity to return to active duty for one year, from October 1, 2012 until September 30, 2013. I will be leaving active duty in a few days, and I want to return to my civilian Department of the Army job.

I have already made inquiries about returning to my civilian job. A GS-13 in the civilian personnel office told me that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to me because I was not a member of the National Guard or Reserve when I left my civilian job to go on active duty a year ago. But I was a member of the Army Reserve for the last 20 of my 30 years of service, before I retired in 2011. What do you think?

USERRA is not limited to the National Guard and Reserve

A: Contrary to the GS-13's understanding, USERRA applies to regular military service, as well as service in the National Guard or Reserve.[1] It would not matter if you had served the entire 30-year career in the Regular Army.

USERRA eligibility criteria

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

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. It is clear that this is what you did on or about October 1, 2012.
b. You must have given the employer prior oral or written notice. I shall assume that you gave such notice.
c. Your cumulative period or periods of uniformed service, *with respect to the employer relationship for which you seek reemployment,* must not have exceeded five years. You did not begin your career as a federal civilian employee until after you retired from the Army in June 2011, so all of your active duty prior to that point does not count toward your five-year limit.
d. You must have been released from the period of service without having received a disqualifying bad discharge. You will meet that condition on or about September 30, unless you have done something utterly stupid during this past year.
e. You must have made a timely application for reemployment, after release from the period of service. Because your period of service has been more than 180 days, you have 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D).

USERRA entitlements—the escalator principle

It is very likely that you will meet these five conditions in early October. At that point, the employer (Department of the Army) will have the legal obligation to reemploy you in the position of employment that you *would have attained* if you had been continuously employed, or alternatively (at the employer's option) in another position for which you are qualified that is of like seniority, status, and pay. 38 U.S.C. 4313(a)(2)(A).

The escalator can descend as well as ascend.

Q: Shortly after I reported to active duty last October, the Army base where I had been working as a civilian was closed under the Base Realignment and Closure (BRAC) process. What effect does that development have on my USERRA rights?

---

[1] Please see Law Review 0719 (May 2007). I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 940 articles about USERRA and other laws that are especially 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. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 118 so far in 2013.

A: USERRA entitles you to reemployment in the position that you *would have attained* if you had been continuously employed. USERRA does not protect you from a bad thing like a Reduction in Force (RIF) or a layoff that *clearly would have happened anyway* even if you had not left your job for military service in October 2012.

First, we need to determine what *would have happened* to your civilian job if you had not been on active duty in late 2012, when the base closed. The best way to make that determination is to look at what happened to your colleagues—the other Department of the Army civilians who were working at that base until it closed.

Most of your colleagues probably transferred to new Army civilian jobs at other bases, and that is likely what would have happened to you. Some of your colleagues may have chosen not to move and they were placed on the Priority Placement List (PPL), with priority for other Department of Defense (DOD) jobs in the same metropolitan area. If there are few other DOD jobs in the vicinity, the PPL is likely not worth much.

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). Sections 4313(a) and 4316(a) of USERRA codify the escalator principle in the current reemployment statute. It has always been the case that the escalator can descend as well as ascend.

USERRA regulations by DOL and OPM

Section 4331 of USERRA provides for the Secretary of Labor, the Director of the Office of Personnel Management (OPM), the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), and the intelligence agencies enumerated in 5 U.S.C. 2302(a)(2)(C)(ii) to promulgate regulations about USERRA. Section 4331 in its entirety reads as follows:

"(a)The Secretary [of Labor] (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

(b)

(1)The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

(2)The following entities may prescribe regulations to carry out the activities of such entities under this chapter:

(A)The Merit Systems Protection Board.

(B)The Office of Special Counsel.

(C)The agencies referred to in section 2302(a)(2)(C)(ii) of title 5."

38 U.S.C. 4331.

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] 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 proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received, DOL made some adjustments and published the final regulations in December 2005. The regulations are published in title 20 of the Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). Here is the pertinent subsection:

"Can the application of the escalator principle result in adverse consequences when the employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle."

20 C.F.R. 1002.194 (bold question in original).

But the DOL USERRA Regulations apply to state and local governments and private employers, not to federal executive agencies like the Department of the Army. The OPM USERRA Regulations provide as follows on this point:

"(a) During uniformed service. An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered 'for cause' under this subpart.) He or she is not a 'competing employee' under § 351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay."

5 C.F.R. 353.209(a) (bold heading in original).

The clear purpose and effect of section 353.209(a) is to exempt the returning veteran (like you) from the ill effects of the descending escalator. If you had worked for a state or local government or private employer, you would not be exempted from being reemployed (after his military service) in a position of lesser status and pay than the position he left in October 2012, when you voluntarily reentered active duty.

Paid military leave under section 6323 of title 5

Q: I understand that federal civilian employees are entitled to 15 days of paid military leave per fiscal year. Last October, shortly after I entered active duty, I asked to use and be paid for my 15 paid leave days. The personnel office told me that I am not eligible for paid military leave because I am not a member of the National Guard or Reserve. What do you think?

A: I think that the personnel office is just as wrong about paid military leave as it was about USERRA.

You are referring to section 6323(a)(1) of title 5 of the United States Code, which provides as follows:

'Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for *active duty*, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502–505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year."

5 U.S.C. 6323(a)(1) (emphasis supplied).

The right to paid military leave under section 6323(a)(1) clearly applies to *active duty* as well as active duty for training, inactive duty training, and the other forms of duty that National Guard and Reserve members typically perform. The right to paid military leave under this section is not limited to National Guard and Reserve members, and it is clear that you are entitled to use the 15 workdays during this active duty period that is about to end.

When you return to work in October, you should renew your request for the 15 workdays of paid military leave. If the Department of the Army refuses to pay, you should bring a legal action to recover the money due to you.

USERRA enforcement against federal agencies

Q: If the Department of the Army refuses to reemploy me in the appropriate civilian job and/or refuses to pay me for the 15 days of paid military leave, what happens then?

A: As I explained in Law Review 189 and other articles, USERRA cases involving federal executive agencies as employers are adjudicated by the Merit Systems Protection Board (MSPB), rather than by a federal or state court. *See* 38 U.S.C. 4324. Your case will be initially heard by an Administrative Judge (AJ) of the MSPB. The losing party at the AJ level (you or the Department of the Army) can appeal to the MSPB itself, here in DC. The final decision of the MSPB can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits here in our nation's capital and has nationwide jurisdiction, but only as to certain kinds of cases.