

LAW REVIEW 14010
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**Requirement to Provide Documentation to Employer only
Applies after Periods of Service of 31 or more Days**

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

1.3.1.3—Timely application for reemployment

Q: I am an Air Force Reserve officer and a life member of ROA. I am a regular reader of your “Law Review” articles¹ and have found them to be immensely helpful to me in understanding my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

As a civilian, I am a pilot for a major cargo carrier. I am frequently away from my civilian job for training or service in the Air Force Reserve, and most of these military service periods are very short, like two days. My employer requires me to provide documentation after any period of military training or service, no matter how short. In your Law Review 13067 (May 2013), you wrote, “*There is no documentation requirement after a period of service of less than 31 days.*” (Emphasis in original) Where in USERRA does it say that I am not required to provide documentation after periods of service than last less than 31 days?

A: The documentation requirement is set forth in section 4312(f) of USERRA, as follows:

“(f)

(1) *A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person’s employer (upon the request of such employer) documentation to establish that—*

(A) the person’s application is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

(C) the person’s entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)

(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,002 articles about 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. Captain Wright initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

Title 38, United States Code, section 4312(f) [38 U.S.C. 4312(f)] (Emphasis supplied.)

Under section 4312(f)(1), the obligation to provide documentation upon request to the employer only applies to *“A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2).”* 38 U.S.C. 4312(f)(1) (emphasis supplied). Subsection (C) of section 4312(e)(1) provides that a person who is returning to work after a period of service of 31-180 days must apply for reemployment within 14 days after the date of release from the period of service. Subsection (D) provides that the deadline to apply for reemployment after a period of service of 181 days or more is 90 days after the date of release from service. Subsection (e)(2) deals with the situation wherein the returning service member is hospitalized or convalescing (immediately after release from the period of service) from an injury or illness incurred or aggravated during the period of service.²

After a period of service of less than 31 days, the returning service member must “notify the employer ... of the person’s intent to return to a position of employment with such employer ... by reporting to the employer” “not later than the beginning of the first full regularly scheduled work on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person’s residence.” 38 U.S.C. 4312(e)(1)(A)(i).³

The language of USERRA could not be clearer. The obligation to provide documentation to the employer following a period of service only applies when returning from a period of service of 31 days or more. Moreover, the Department of Labor USERRA regulation clearly provides that the documentation requirement only applies “if the period of service exceeded 30 days.” 20 C.F.R. 1002.121.

² In such a situation, the deadline to apply for reemployment can be extended by up to two years, if the hospitalization and convalescence last that long.

³ The same deadline applies after a period of absence from a civilian job for the purpose of an examination to determine fitness to perform service in the uniformed services. 38 U.S.C. 4312(e)(1)(B). It is difficult to envision circumstances wherein an absence for the purpose of examination would last more than three days.

