

What Sort of Documentation Must I Provide?

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

1.3.1.3—Timely application for reemployment

Q: I am a Lieutenant Colonel in the Air Force Reserve and a life member of ROA. I found your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.¹ I am about to complete a one-year tour of active duty, and I have contacted my civilian employer to inquire about reemployment. The company’s personnel director told me that when I apply for reemployment I must provide documentation. Is that correct? What kind of documentation must I provide?

A: Here is USERRA’s documentation requirement:

“(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 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.

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,002 articles, including almost 800 about USERRA. You will also find 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.

(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)].

Because you are returning from a period of service that has lasted more than 30 days, you are required to provide documentation, upon the employer’s request.² You must provide documentation to establish three elements:

- a. That your application for reemployment is timely.
- b. That you have not 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.
- c. That you are not disqualified by having received a disqualifying bad discharge enumerated in section 4304.

Item (a) and item (c) are easily established by documentation, while item (b) may be more complex. Let us discuss each element separately.

Documentation that your application for reemployment is timely

After a period of service lasting more than 180 days, you have 90 days to apply for reemployment.³ Your DD-214 or other documentation will show the date of your release from the most recent period of service. So long as your application for reemployment is within 90 days of that date, your application is timely. Case closed.

Documentation that you are not disqualified by a bad discharge

Section 4304 of USERRA provides as follows:

“A person’s entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

- (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.

² Please see Law Review 14010 (January 2014).

³ 38 U.S.C. 4312(e)(1)(D).

(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

(3) A dismissal of such person permitted under section 1161(a) of title 10.

(4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.”

38 U.S.C. 4304.

If you received any such disqualifying “bad paper,” it would be shown on your DD-214. If your DD-214 does not show any such bad paper, you are not disqualified under section 4304. Case closed.

Documentation that you are not disqualified by having exceeded the five-year limit

Under section 4312(c) of USERRA, you do not have the right to reemployment if your most recent period of service, when added to earlier periods of non-exempt service, has exceeded five years, with respect to the employer relationship for which you seek reemployment. There are also nine exemptions—kinds of service that do not count toward exhausting your five-year limit.⁴

If your most recent period of service was involuntary, it does not count toward your five-year limit.⁵ Your service, although voluntary, is exempt from the five-year limit if the “Secretary concerned” (the service secretary, the Secretary of the Air Force for you) has made the necessary determination and certification under section 4312(c)(4)(B), 4312(c)(4)(C), or 4312(c)(4)(D). If your most recent period of service was involuntary, that will be shown on your military orders. If your service was voluntary but the Secretary of the Air Force has made the necessary determination to exempt the period of service from the computation of your five-year limit, the necessary certification will be shown in your orders, or perhaps in your DD-214.

If your most recent period of service is exempt from the five-year limit, either because it was involuntary or because you have the necessary certification in your orders or in your DD-214, then providing the orders and/or the DD-214 documents that you have not exceeded the five-year limit. If your most recent period does not count, then you have not exceeded the limit even if your past non-exempt periods added up to four years, 11 months, and 29 days of service.

Your documentation task may be more difficult if your most recent period of uniformed service counts toward your five-year limit. Your DD-214 will show the precise duration of your most recent period of service and the cumulative duration of earlier periods, but it will not show whether the earlier periods were before or after you started working for your current civilian employer and it will not show whether the earlier periods were exempt or not exempt from the

⁴ Please see Law Review 201 (August 2005) for a detailed description of the five-year limit and its exemptions.

⁵ See 38 U.S.C. 4312(c)(4)(A).

five-year limit. If your most recent period when added to the earlier periods adds up to more than five years, you will need to show that at least some of the earlier periods are exempt, so that the total of non-exempt service does not exceed five years.

Q: Beyond these three elements (timely application for reemployment, honorable service, and not having exceeded the five-year limit), is the employer permitted to demand (as a condition precedent to reemployment) other documentation? My employer has said that he will not reemploy me until I bring in documentation showing that I do not have PTSD and that I am not dangerous to the company's employees and customers.

A: The expression of these three elements of documentation clearly shows that the employer is not permitted to demand other elements of documentation. This is a good case for the invocation of the legal doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). By expressing the three elements that the returning service member must document, upon request, Congress demonstrated that the employer is not permitted to demand other documentation elements as a condition upon reemployment.

The classic example of *expressio unius est exclusio alterius* comes in the early Supreme Court case, *Marbury v. Madison*, 5 U.S. 137 (1803). Article III, section 2, clause 2 of the Constitution establishes the *original* (as opposed to appellate) jurisdiction of the Supreme Court-cases affecting ambassadors and other public ministers and disputes between states. The statute at issue in *Marbury* expanded the original jurisdiction of the Supreme Court to include cases in which a *writ of mandamus* is sought against a federal official. The Supreme Court held that since the Constitution expressly states the classes of cases for which the Supreme Court has original jurisdiction, a federal statute that adds additional classes of cases to the original jurisdiction of the Supreme Court is unconstitutional.

Your employer's demand for "no PTSD" documentation is clearly unlawful. It appears that your employer is unduly affected by anti-military animus and stereotypes about veterans.

Q: In the Air Force Reserve, the DD-214 is not routinely provided to the service member as part of the check-out process. The individual must request the DD-214 and then wait for it, sometimes for a year or more. If I don't have a DD-214, what other kind of documentation can I provide?

A: First, let me say that I think that it is unsatisfactory that the Air Force does not routinely provide DD-214s to reservists leaving active duty. I have brought that concern to the attention of the Commander of the Air Force Reserve and to the Executive Director of Employer Support of the Guard and Reserve (ESGR).

The DD-214 is generally the best and most common form of documentation, but it is certainly not the exclusive way for the returning service member to meet the documentation requirement. Section 4312(f)(2) of USERRA provides: "Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary [of Labor] shall satisfy

the documentation requirements in such paragraph.” 38 U.S.C. 4312(f)(2). The Department of Labor (DOL) USERRA regulation provides as follows concerning the kinds of documentation that the returning service member can use to meet the documentation requirement:

“What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?”

(a) Documents that satisfy the requirements of USERRA include the following:

- (1)** DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;
 - (2)** Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
 - (3)** Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
 - (4)** Certificate of completion from military training school;
 - (5)** Discharge certificate showing character of service; and,
 - (6)** Copy of extracts from payroll documents showing periods of service;
 - (7)** Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.
- (b)** The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.”

20 C.F.R. 1002.123 (bold question in original).

Even in the absence of the DD-214, you should be able to obtain timely documentation to show that your application for reemployment was timely, that you served honorably and were not disqualified by a bad discharge, and that you have not exceeded the five-year limit. If the documentation simply does not exist or is not readily available, the employer is required to reemploy you promptly while awaiting the documentation.⁶ When the documentation becomes available, you should provide it to your employer as soon as possible.

Q: In this second decade of the 21st Century, is not the practice of providing paper DD-214s hopelessly outdated?

A: Yes. It is high time for the services to establish a more modern means by which the returning service member can demonstrate to his or her civilian employer or other interested parties the important details of his or her military service. The current system is not much different from the system that was in place in October 1945, when my late father was honorably discharged from the Army Air Force at the end of World War II.

⁶ See 38 U.S.C. 4312(f)(3)(A).