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Returning to Work with Two Bad Shoulders

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Q: I am a Major in the Army Reserve and a member of ROA. I read with great interest 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 In late 2011, I was called to active duty and deployed to Afghanistan, where I suffered some serious injuries in the line of duty. I was released from active duty on October 31, 2013.

My civilian job requires vigorous physical activity, and I cannot do the job with my two bad shoulders. I am scheduled to have surgery on my right shoulder in March 2014, followed by months of recuperation and rehabilitation, and then I must have surgery on my left shoulder. My surgeon has told me that it is not possible for me to have both surgeries at the same time, so it will likely be the end of 2014 by the time I am recuperated and ready to return to my civilian job. But I also really need the money. For now, I am receiving neither a civilian salary nor my military pay.

I spoke to an investigator for the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), and he advised me to wait until I am fully recovered from my two shoulder surgeries to apply for reemployment. What do you think?

A: I think that you should apply for reemployment now, before the deadline passes, and that you should return to work in the civilian job. If the disability (temporary or permanent) that you incurred during your recent period of military service makes it impossible for you to return to your pre-service job, the employer is required to reemploy you in some other position for which you are qualified or can become qualified with reasonable employer efforts.

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

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,003 articles, 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.

- a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of uniformed service. You clearly did this in late 2011.
- 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, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. As I explained in Law Review 201 and other articles, *all* involuntary service and *some* voluntary service are exempted from the computation of your five-year limit. I shall assume that you are within the limit.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the Army. This occurred on October 31.
- e. You must have made a timely application for reemployment with the pre-service employer, after release from the period of service. This is the only condition that you have not yet met, and it is not too late for you to meet it.

After a period of service of 181 days or more, you have 90 days to apply for reemployment.² Thus, the deadline for you to apply for reemployment is January 29, 2014 (90 days after October 31). I strongly suggest that you apply for reemployment before January 29.

Section 4312(e)(2) of USERRA provides as follows:

“(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person’s employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person’s control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.”

38 U.S.C. 4312(e)(2).

You can rely upon this provision and apply for reemployment in late 2014 or early 2015, after you have fully recovered from both shoulder surgeries.³ The problem with this approach is that it will leave you without income for as long as a year, or perhaps even longer. I think that it is better for you to apply for reemployment before the 90-day deadline runs out and then to rely on section 4313(a)(3) of USERRA, which provides:

² 38 U.S.C. 4312(e)(1)(D).

³ Of course, this assumes that you will fully recover, and that may not happen.

“(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person’s case.”

38 U.S.C. 4313(a)(3).

For a detailed explanation of the employer’s obligations to the returning veteran who meets the USERRA eligibility criteria and who is returning to work with a temporary or permanent disability sustained or aggravated during the period of uniformed service, I invite your attention to Law Review 0854 (November 2008) and Law Review 0640 (December 2006).

I think that you should return to work in another position, the duties of which you can perform with your two bad shoulders, and then return to your pre-service position when both shoulders are fully healed.

Q: The DOL-VETS investigator told me that I should wait before applying for reemployment and returning to work because USERRA does not give me a job-protected right to be away from work (even without pay) for medical treatment necessitated by an injury incurred during the recent period of service. I know that I will need time at least twice in 2014, for the two shoulder surgeries. Does this change your advice about my returning to work now?

A: The DOL-VETS investigator is correct that USERRA does not give you the job-protected right to time off from your civilian job, after you return to work, for these shoulder surgeries, even though the surgeries were clearly necessitated by your military service. USERRA gives you the right to time off (without pay) from your civilian job for “service in the uniformed services,” which includes active duty, active duty for training, inactive duty training, initial active duty training, funeral honors duty, and time required to be away from work for purposes of an *examination* (not treatment) to determine fitness to perform any such duty.⁴

During the 111th Congress (2009-10), Representative Lloyd Doggett of Texas introduced H.R. 466, the Wounded Veteran Job Security Act. If enacted, it would have expanded USERRA’s definition of “service in the uniformed services” to include time needed to be away from a civilian job for purposes of medical treatment for a wound, injury, or illness incurred during a period of uniformed service. Representative Doggett’s bill passed the House but not the Senate

⁴ 38 U.S.C. 4303(13).

during the 111th Congress, and no such legislation was enacted in the 112th Congress or in the First Session (2013) of the 113th Congress. The effort continues.

Let us assume that you apply for reemployment before the 90-day deadline expires on January 29 and that you are reemployed under USERRA in early February. You may have the right to a job-protected leave of absence of up to 12 weeks (without pay) under the Family Medical Leave Act (FMLA). This federal statute, enacted in 1993, gives a covered employee of a covered employer the right to time off for, among other things, “the employee’s serious health condition that makes the employee unable to perform the employee’s job.” Your shoulder condition certainly qualifies.

To be covered by the FMLA, the employer must have at least 50 employees who work within 75 miles of the place where you work for that employer. To be a covered employee, you must have worked for the employer for at least a year and you must have worked at least 1,250 hours for that employer during the year before your proposed FMLA leave. The DOL FMLA regulation provides as follows concerning the effect of your military leave of absence in the computation of the one-year employment requirement and the 1,250-hour work requirement:

“Pursuant to USERRA, an employee *returning from fulfilling his or her National Guard or Reserve military obligation* [emphasis supplied] shall be credited with the hours of service that would have been performed *but for* [emphasis in original] the period of military service in determining whether the employee worked the 1,250 hours of service. Accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee’s pre-service work schedule can generally be used for calculations.”

29 C.F.R. 825.110(c)(2). *See also* 29 C.F.R. 825.110(b)(2)(i) with respect to the effect of military service on the one-year requirement.

You should be aware that DOL-VETS investigators are not lawyers. Their knowledge of USERRA is sometimes deficient, and they are totally out of their league in giving advice about the relationship between USERRA and other laws, like the FMLA.

I have been dealing with USERRA and the predecessor reemployment statute for more than 31 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for DOL as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991. On October 13, 1994, President Bill Clinton signed into law Public Law 103-353, USERRA, as a long-overdue rewrite of the 1940 reemployment statute. The version enacted in 1994 was about 85% the same as the Webman-Wright draft.

I have also dealt with USERRA and the predecessor reemployment statute as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. In 2009, I retired from private practice and joined ROA's full-time staff as the first Director of the Service Members Law Center.

In 2013, I received and responded to 9,193 inquiries (766 per month on average) from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. Almost half of the inquiries were about USERRA, and the other half were about everything you can think of that has something to do with military service and law.

I am here at ROA answering calls and e-mails during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to encourage Reserve and National Guard personnel to call me from the privacy of their own homes, not from their civilian jobs.