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Why Did I Receive this COBRA Notice?

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- 1.3.1.1 Left job for service and gave prior notice
- 1.3.2.6 Health insurance reinstatement and continuation
- 1.3.2.10 Furlough or Leave of Absence Clause

Q: Before I deployed, I worked for a Missouri company with 100 employees. When I learned my National Guard unit was being mobilized for Afghanistan, I told my supervisor and human resources that I was being called up. While I know not everyone gets several months advance notice, I did and kept the company informed. I was reported to active duty on November 1 but left in mid-October so I could spend some time with my family before leaving and take care of some personal issues.

After I left, my wife received a COBRA notice stating that I had been terminated and could purchase medical insurance for 24 months, just like any employee who quit or was fired.

Can they fire me for leaving two weeks before my report date?

No. While USERRA statute is silent on leaving before your report date, the Department of Labor has attempted to fill this gap through the USERRA regulations. Section 1002.74 states:

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the

civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

20 C.F.R. 1002.74.

Q: What does the COBRA notice mean? Does that mean I am fired?

A: A law called the Consolidated Omnibus Budget Reconciliation Act (COBRA) applies to a situation where an employee has health insurance through his or her civilian job and the employee leaves the job for any reason other than gross employee misconduct. Under COBRA, the employee is permitted to continue the health insurance coverage through the former employer for 18 months or when the employee find a new job with equivalent coverage, whichever comes first. If you choose to continue your health insurance coverage through your former employer, under COBRA, the former employer is permitted to charge you for the *entire* premium (including the part that the employer normally pays for active employees) plus another 2% to cover the employer's costs in administering this entitlement.

COBRA requires the employer to give notice to the departing employee of his or her right to continue health insurance coverage through COBRA. It is likely that the company's personnel office sent you the standard COBRA notice as a matter of routine, without even thinking about the possibility that your situation is different because you left your job for the purpose of performing military service and that you will almost certainly have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) when you complete your period of service.

I can understand that you and your spouse are concerned that you received from the employer a form letter notice saying that your employment with that company has been "terminated." Please understand that you received, by routine, a form letter that was designed for a situation other than your situation. The letter does *not* mean that you will not have the right to reemployment when you are released from this period of service.

As is explained in Law Review 1281¹ and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left your 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. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,024 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. ROA initiated this column in 1997 and adds new articles each week, including 169 new articles in 2013.

Since your current period of service is involuntary (you were mobilized), it does not count toward your five-year limit. 38 U.S.C. 4312(c)(4)(A).

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, you must have made a timely application for reemployment.

Usually, it makes little or no difference how you or the employer characterize your status during the time that you are away from work for uniformed service. The question of your reemployment does not become ripe until you have been released from the period of service and have applied for reemployment. At that point, you are entitled to reemployment if you meet the five conditions, regardless of how you or the employer characterized your status while you were gone. If you fail to meet one or more of the five conditions, you are not entitled to reemployment.

Q: While I am away from my civilian job for military service, am I entitled under COBRA to elect continued health insurance coverage for myself and my family?

A: You are entitled to continued health insurance coverage while you are away from work for service, but under USERRA rather than COBRA. Section 4317(a) of USERRA provides as follows:

“(a) (1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, or such person becomes eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, the plan shall provide that the person may elect to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of--

(A) the 24-month period beginning on the date on which the person's absence begins; or
(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e).

(2) A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under [section 4980B\(f\)\(4\) of the Internal Revenue Code of 1986](#)) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated--

(A) by the plan in such manner as the plan sponsor shall provide; or
(B) if the sponsor does not provide--

- (i) to the last employer employing the person before the period served by the person in the uniformed services, or
- (ii) if such last employer is no longer functional, to the plan.”

38 U.S.C. 4317(a).

Q: If I am away from work for uniformed service, and if I elect continued health insurance coverage under section 4317(a), how much is the employer permitted to charge me for that coverage?

A: That depends upon the duration of your orders. When you are on an order that calls for *less than 31 days of service* (like a standard two-week annual training tour), your employer is permitted to charge you *only* the part that you normally pay as an active employee. When you are on a period of service of 31 days or more, if you elect the continued coverage through your civilian employer the employer is permitted to charge you up to 102% of the entire premium, including the part that the employer normally pays in the case of active employees.

You should definitely elect this continued coverage for short tours (under 31 days). For the longer tours, this continued coverage is not a good deal, and you will want to decline this continued coverage under most circumstances. When you are on a period of service of 31 days or more, you and your family are covered from day one by the military health care system (TRICARE). You should elect the continued coverage through your civilian job, and pay 102% of the full premium, only if there is a very good reason why you cannot or don't want to use TRICARE.

Q: If I elect the continued health insurance coverage through my civilian job for a long period of service, how long am I entitled to keep that coverage?

A: You can keep the coverage, and pay the substantial premium, until one of three events has happened:

- a. You have been released from the period of service, have applied for reemployment, and have returned to work, at which time you are entitled to reinstate your regular employee coverage.
- b. You have been released from the period of service and you let the deadline for applying for reemployment (90 days after a period of service of 181 days or more) pass without applying for reemployment.
- c. You have been away from work performing uniformed service for 24 months.

When the first of these three events has happened, the employer is permitted to cut you off from this continued coverage, under section 4317(a) of USERRA. But since you are paying 102% of the entire premium the employer may be willing to keep you on the plan.

Q: Am I required to continue my health insurance coverage under section 4317(a), while I am away from work for service, if I want to reinstate my employee health insurance coverage upon my return to work?

A: If you meet the five USERRA conditions and return to work, you are entitled to immediate reinstatement of your civilian employer health insurance coverage, with no waiting period and no exclusion of pre-existing conditions (except service-connected disabilities as determined by the Department of Veterans Affairs). We invite your attention to section 4317(b) of USERRA, which provides:

“(b) (1) Except as provided in paragraph (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 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.

(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

(3) In the case of a person whose coverage under a health plan is terminated by reason of the person having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title but who subsequently does not commence a period of active duty under the order to active duty that established such eligibility because the order is canceled before such active duty commences, the provisions of paragraph (1) relating to any exclusion or waiting period in connection with the reinstatement of coverage under a health plan shall apply to such person's continued employment, upon the termination of such eligibility for medical and dental care under chapter 55 of title 10 that is incident to the cancellation of such order, in the same manner as if the person had become reemployed upon such termination of eligibility.”

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

[1] Military title shown for purposes of identification only. The views expressed in this article are of the author alone and should not be attributed to the Department of the Army, the Department of Defense, or the United States Government. The author is a shareholder in the prominent employment law firm Jackson Lewis, and he has offices in Stamford, Connecticut and Denver, CO. He is a judge advocate in the Army Reserve and a member of ROA.