

LAW REVIEW 14040
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**Is the Service Member Required To Keep the Employer
Informed of Extensions of the Active Duty Period?**

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

1.3.1.1—Left job for service and gave prior notice

1.3.1.2—Character and duration of service

1.7—USERRA regulations

Q: I am the General Counsel of a state university. I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).¹

An employee of the university (Let’s call him Joe Smith.) was called to active duty, involuntarily, for 12 months, in February 2006. A year later, Smith voluntarily extended his active duty for another year and notified us of the extension. In February 2008, he notified us of another one-year extension, but we have not heard from him since February 2008, until recently.

Smith showed up at our personnel office recently with paperwork showing that he was finally released from active duty in February 2014, eight years after he began his active duty and six years after we last heard from him. He was on active duty continuously from February 2006 to February 2014. He gave us copies of eight separate military orders, each one beginning on the day after the last period ended. All but the last two orders (February 2012 through February 2014) included “magic words” stating that the period of service is exempt from the computation of the five-year limit under section 4312(c) of USERRA, 38 U.S.C. 4312.

It seems clear that Smith left his civilian job for military service in February 2006 and gave us prior notice at that time. He is probably within the cumulative five-year limit, because most of his periods of service are exempt from the computation of the limit. He provided documentation showing that he served honorably and was finally released from active duty without a disqualifying bad discharge from the Army. He applied for reemployment at our personnel office well within the 90-day period after he finally left active duty in February 2014.

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,031 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. Captain Wright initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

Are we required to reemploy Joe Smith? Was he required to keep us informed of the various extensions of his active duty period? Does his failure to keep us informed of extensions beyond February 2009 mean that he does not now have the right to reemployment?

A: I think that Smith is entitled to reemployment because he meets the five USERRA eligibility criteria. As I explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment:

- a. Must have left a position of employment for the purpose of performing service in the uniformed services.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment.²
- d. 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, must report back to work or apply for reemployment within the time limit required by USERRA.

It would seem that the only doubt is about the sufficiency of Smith's notice to the civilian employer, so I will confine my comments to that element. I think that Smith was not required to notify the university each time his active duty period was extended, but I certainly would have advised him to do so.

Section 4312(a)(1) of USERRA requires that "the person [performing uniformed service] (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer." 38 U.S.C. 4312(a)(1).³ The person leaving a civilian job for service is required to give notice *before* leaving. The statute says nothing about giving further notices *during* the period of service.

Section 4331 of USERRA gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA Regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* on December 19, 2005. The regulations are published in title 20 of the Code of Federal Regulations, at Part 1002. 20 C.F.R. Part 1002. The pertinent section is as follows:

² All involuntary service and some voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 (August 2005) for a detailed summary of the five-year limit and its exemptions.

³ "No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review." 38 U.S.C. 4312(b).

§ 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

20 C.F.R. 1002.88 (bold question in original).

I did not find a direct answer to your question in the DOL USERRA Regulations, but I invite your attention to *The USERRA Manual* by Kathryn Piscitelli and Edward Still, published annually by Thomson Reuters.⁴ On pages 96-97 of the 2013 edition, Ms. Piscitelli and Mr. Still write: “Because USERRA’s notice of service requirement requires that notice of service be provided before, not after, an employee departs for military service, an employee is not required to provide continuing notice of military service throughout the time the employee is away from civilian employment.”

Ms. Piscitelli and Mr. Still cite *Sutton v. City of Chesapeake*, 713 F. Supp. 2d 547, 551 (E.D. Va. 2010). Here is the pertinent language from the *Sutton* decision: “For this reason [that USERRA must be read liberally for the benefit of the service member], the Court does not find that Plaintiff was required under USERRA to provide continuing notice of his active military service throughout the time he was away from his civilian employment, as Defendant contends. Therefore, Plaintiff did provide the CPD [Chesapeake Police Department] advance notice of his military service.” Mr. Sutton was held not to have the right to reemployment for other reasons, but it is clear that the court held that he did not lose his right to reemployment because he failed to notify his employer when his original active duty period (for which he had given notice) was extended beyond its original end date.

⁴ The 2014 edition was published recently, and I recommend it highly. To order, contact Thomson Reuters at 800-328-4880.