

South Carolina Department of Corrections Fails to Reinstate Health Insurance Coverage of Returning National Guard Member

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

- 1.1.1.7—USERRA applies to state and local governments
- 1.1.3.3—USERRA applies to National Guard service
- 1.3.1.2—Character and duration of service
- 1.3.1.3—Timely application for reemployment
- 1.3.2.6—Health insurance continuation and reinstatement
- 1.7—USERRA regulations
- 1.8—Relationship between USERRA and other laws/policies

Aldous Copeland is a Staff Sergeant (SSG) in the South Carolina Army National Guard and a new member of ROA. He works for the South Carolina Department of Corrections (SCDC) as a corrections officer. He was mobilized and deployed to Afghanistan in 2011. He was released from active duty in early 2012 and returned to work in April of that year. He met the conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4335.¹

SSG Copeland left his civilian job for the purpose of performing uniformed service, and he gave prior notice to SCDC. He has not exceeded USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service, and since this was an involuntary call-up it did not count toward his cumulative five-year limit with SCDC.² SSG Copeland served honorably and was released from active duty without a disqualifying bad discharge from the Army. After his release, he made a timely application for reemployment at SCDC.

Under section 4317(b)(1) of USERRA, Copeland was entitled to *immediate reinstatement* of his SCDC health insurance coverage upon his reemployment, with no waiting period and no exclusion of pre-existing conditions. Section 4317(b)(1) 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

¹ The citation means that you can find USERRA in title 38 of the United States Code, at sections 4301 through 4335.

² I invite the reader's attention to Law Review 201 (August 2005) for a detailed discussion of the five-year limit and its exceptions. Please go to www.servicemembers-lawcenter.org. You will find 1,033 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. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

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.

38 U.S.C. 4317(b)(1) (emphasis supplied).

The SCDC personnel office delayed reinstating Copeland's SCDC health insurance coverage until January 2014, two years after SSG Copeland returned from military service. The personnel office apparently relied on South Carolina state law, but the state law is irrelevant here. Federal law (USERRA) gave SSG Copeland the right to immediate reinstatement of his health insurance coverage, and section 4302(b) of USERRA provides that USERRA supersedes and overrides a state law that purports to limit USERRA rights or to impose additional prerequisites on the exercise of USERRA rights. Section 4302(b) provides:

"This chapter *supersedes any State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."

38 U.S.C. 4302(b) (emphasis supplied).

Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause") provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³

It appears that SSG Copeland did not specifically request reinstatement of his SCDC health insurance coverage when he returned to work in April 2012. He was not required to make that specific request, under USERRA. It was sufficient that he *apply for reemployment*, and he did so within the 90-day period permitted under 38 U.S.C. 4312(e)(1)(D).

An application for reemployment need not be in any particular form and indeed need not be in writing. The Department of Labor (DOL) USERRA Regulation provides as follows concerning the necessary content of an application for reemployment:

"§ 1002.118 Is an application for reemployment required to be in any particular form?"

³ Yes, it is capitalized just that way, in the style of the late 18th Century.

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.”

20 C.F.R. 1002.118 (bold question in original).⁴

It was not necessary, as a matter of law, for SSG Copeland to inform SCDC of its USERRA obligations, and ignorance of the law is no excuse. It is the responsibility of SCDC and other employers to familiarize themselves with USERRA and other federal statutes. It has now been almost 20 years since President Bill Clinton signed USERRA (Public Law 103-353) into law on October 13, 1994.

Having said that, let me quickly add that perhaps if SSG Copeland had reminded the employer of its USERRA obligations, specifically including the obligation to reinstate his health insurance coverage immediately upon his reemployment, a lot of grief and trouble might have been avoided. Accordingly, I have prepared a new *sample application for reemployment letter*. Please see Law Review 14045, the immediately following article in this series.

SSG Copeland did not realize that his SCDC health insurance coverage had not been reinstated until several months after he returned to work. He scheduled a routine checkup with his physician, but the visit was canceled at the last minute when it was realized that his insurance coverage was not in effect and that he was uninsured. SSG Copeland then requested that the SCDC personnel office reinstate his coverage, but the office refused to do so because the “open season” enrollment period had ended. SSG Copeland then requested medical treatment from the United States Department of Veterans Affairs (VA) because no other treatment option was available to him.

The VA scheduled SSG Copeland for a colonoscopy, but only after many months had passed. When the colonoscopy was finally performed, it revealed colon cancer. The delay in conducting the colonoscopy caused unknown but likely most significant and irreparable harm to SSG Copeland, in that colon cancer (like many forms of cancer) is much more effectively treated when the treatments begin early in the course of the disease. *The delay in diagnosis and treatment is directly attributable to South Carolina’s failure to comply with USERRA. Yes, this issue really is that important.*

⁴ The citation means that you can find this provision in title 20 of the Code of Federal Regulations (C.F.R.) at section 1002.118. Section 4331 gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published draft USERRA Regulations in the *Federal Register*, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in December 2005.

ROA's Executive Director (Major General Andrew B. Davis, USMC (Ret.)) has written a letter to South Carolina Governor Nikki R. Haley⁵, asking her to take action to ensure that SCDC and other state agencies comply with USERRA and that some remedy is provided to SSG Copeland for the major harms that he has suffered because of SCDC's failure to comply with USERRA.

On March 27, 2014, General Davis testified at a hearing of the Senate Judiciary Committee and asked the Committee to support legislative fixes to ensure that there are effective enforcement mechanisms in place under USERRA with respect to all employers, including state and local governments. General Davis highlighted SSG Copeland's situation as an example of the need for progress in this area. We will keep the readers informed of progress.

⁵ Governor Haley's husband Michael is also a member of the South Carolina Army National Guard, and he was mobilized and deployed to Afghanistan several months after SSG Copeland. We are confident that when this matter is brought to the Governor's personal attention she will take action to correct the injustice done to SSG Copeland and to prevent a recurrence of USERRA violations by state agencies as employers.