

LAW REVIEW 14073

July 2014

After 42 Days of IMA Duty, How Long Do I Have to Report back to my Civilian Job?

By Captain Samuel F. Wright, JAGC, USN (Ret.)¹

1.3.1.3—Timely application for reemployment

Q: I am a Colonel in the Air Force Reserve. I just recently became a life member of ROA. I am very impressed with the “Law Review” column² and the Service Members Law Center (SMLC). On several occasions, I have consulted the SMLC Director [Captain Samuel F. Wright, JAGC, USN (Ret.)] concerning my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). On more than one occasion, he has gone out of his way to provide me information by telephone and e-mail during evening and weekend hours, when I am away from my civilian job. His advice and assistance have been spot-on, and I have become a life member of ROA because I want to support this most important work.

In the Air Force Reserve, I am an Individual Mobilization Augmentee (IMA) at a major joint-service command in Florida, more than 1,000 miles from the city where I live and work. I will perform most of my military duty for Fiscal Year 2014 (October 1, 2013 through September 30, 2014) by performing an almost (but not quite) continuous period of six weeks (39 days) of service, from Monday, July 7 through Friday, August 15. I will perform 30 days of military duty during that 42-day period. I will be performing military duty Monday-Friday but not on weekends.

I have read with great interest your Law Review 1281 and other articles. I understand that after a period of service of less than 31 days, I must report back to work the next work day, after the completion of my period of service, the time reasonably required for safe transportation from the place of service to my residence, plus eight hours (for rest). I understand further that I have 14 days to apply for reemployment after a period of service of 31-180 days and 90 days to apply for reemployment after a period of service of 181 days or more.

¹ Captain Wright is the Director of the Service Members Law Center (SMLC) at the Reserve Officers Association (ROA). He can be reached by telephone at (800) 809-9448, ext. 730. His e-mail is SWright@roa.org.

² We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1300 articles about 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.

How would you characterize my upcoming 30-in-42 day period of service? If this is a period of service of 31 days or more, I have 14 days to apply for reemployment, meaning that I can take the rest of the summer off and apply for reemployment on Monday, September 1 (Labor Day). If this period is characterized as being less than 31 days (because of the weekend interruptions), I must report back to work on Monday, August 18.

A: It is important that you dot the is and cross the ts—don't give your employer any excuse to deny you reemployment. I think that it is reasonable to argue that this upcoming period of service is a continuous period of service of 31 days or more, but I do not recommend that you bet your job on that argument. I urge you to report back to work at the civilian job as soon as possible after your safe travel the 1,000 miles from the place of service to your residence—return to work on Monday, August 18, or perhaps Tuesday August 19 if your travel home from the place of military duty requires the entire weekend and Monday.

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

- a. You must have left a position of employment (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—you do not need the employer's permission, and the employer does not get a veto.
- c. You 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 you seek reemployment. ALL involuntary service (as in a mobilization) and SOME voluntary service (including Reserve training duty) are exempted from the computation of the five-year limit. Please see Law Review 201—a definitive treatise on what counts and what does not count in exhausting your five-year limit.
- 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 been timely in reporting back to work or applying for reemployment. More on this below.

Section 4312(e) of USERRA sets forth the deadline for you to report back to work or apply for reemployment, after a period of uniformed service. Here is the entire text of that subsection:

(e) (1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) *In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer--*

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that

service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) *In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service* or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

(2) (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.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

38 U.S.C. 4312(e) (emphasis supplied).³

After a *continuous* period of service of *less than 31 days* (like a drill weekend or a traditional two-week annual training tour), you must *report for work* at your first regularly scheduled work period on the first calendar day *after* you have completed the period of service, plus the time reasonably required for *safe* transportation from the place of service to your residence, plus eight hours (for rest). For example, let us say that you complete a drill weekend at 5 pm on Sunday afternoon and your Monday work day starts at 8 am. If your home, your drill site, and your civilian job are all in the same reasonable commuting area, you must be back at work at 8

³ The citation means that this is subsection (e) of section 4312 of title 38 of the United States Code.

am Monday. If your drill site is located at some considerable distance from your home, you can report back to the civilian job at 8 am on Tuesday.⁴

After a *continuous* period of service of 31-180 days, you have 14 days to apply for reemployment. After a continuous period of service of 181 days or more, you have 90 days to apply for reemployment. You need not wait 90 days or even 14 days, but if you want to take some time off before applying for reemployment the law gives you that right.

Q: How did you get so smart about USERRA?

As I explained in Law Review 104 and other articles, I have been dealing with USERRA and the predecessor reemployment statute for 32 years—since 1982. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (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. This was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II. The version of USERRA that President Clinton signed into law on October 13, 1994 was about 85% the same as the Webman-Wright draft.

I have also dealt with the VRRA and USERRA 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. Five years ago (June 2009), I retired from private practice and became a full-time employee of ROA, when we established the Service Members Law Center (SMLC). In 2013, as SMLC Director, 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 the inquiries (48.6%) were about USERRA, and the other half were about everything you can think of that has something to do with military service and law.

As SMLC Director, I am here at my post at ROA headquarters, answering e-mails and telephone calls, during regular business hours Monday-Friday and until 10 pm Eastern Time on Mondays and Thursdays. The point of the evening availability is to make it possible for Reserve and National Guard personnel to call me or e-mail me from the privacy of their own homes, not

⁴ If it is impossible or unreasonable for you to return to work the next business day after completion of the period of service, time reasonably required for safe transportation and eight hours for rest, because of factors beyond your control (like an automobile accident on the return trip), you must report back to work as soon as reasonably possible. *See* 38 U.S.C. 4312(e)(1)(A)(ii).

from their civilian jobs. As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer. Moreover, if the employer is annoyed with you because you have been called to the colors five times since the terrorist attacks of September 2001 and expect to be called up again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking. Thus, if you are calling or e-mailing me, or ESGR, or DOL, or your private attorney with respect to matters of this kind you should do so from your own equipment, away from your civilian job and outside your civilian job hours.