

Reemployment Rights for Wounded Warriors

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Q: I am a Sergeant First Class in the Army National Guard (ARNG). I joined the Reserve Officers Association (ROA) recently, after you amended your constitution to make noncommissioned officers eligible. In January 2009, I began a new job with a major corporation—let's call it Daddy Warbucks International (DWI). From January 2009 to March 2010, I had drill weekends and annual training plus some additional military training and one period of state active duty³ that required my absence from my DWI job for a few days at a time. I was harassed by my DWI supervisor about these military-related absences from work, but these problems were resolved (at least temporarily) with help from a volunteer ombudsman of the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR).

In March 2010, I was recalled to active duty with my ARNG unit and deployed to Afghanistan. I expected to be on active duty for about a year, and the other members of the unit returned

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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³ The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects your civilian job when you are away from the job for military duty or training under title 10 or title 32 of the United States Code. USERRA does not apply to state active duty—called by the Governor, under state authority, paid with state funds, for state emergencies like riots, floods, fires, etc. Every state has a state law that protects National Guard members on state active duty. We have 54 articles (50 states, District of Columbia, Guam, Puerto Rico, and the Virgin Islands) on the state laws that protect Guard members on state active duty, in the "state laws" section at www.servicemembers-lawcenter.org. The period when you were away from your DWI job for state active duty does not count toward your five-year limit under USERRA.

home and were released from active duty in March 2011, but I was wounded in Afghanistan and my active duty has been extended for medical treatment and rehabilitation.

I have had five surgeries and extensive physical rehabilitation at a military hospital. I have made a lot of progress, but I recently reached the apparent limit of my recovery. I had hoped to recover sufficiently to be found “fit for duty” and to leave active duty and return to my part-time ARNG status, but it now seems clear that I will not recover sufficiently to return to a full duty status. I am being processed for a disability retirement from the Army, and that process will likely be completed by the end of this calendar year (2015). I will be medically retired and released from active duty.

In March 2015, I received a letter from the DWI personnel office, informing me that I had been “terminated” by DWI because my “military leave” had exceeded five years (March 2010 to March 2015). Should I respond to that letter? If so, how should I respond?

Doing an Internet search, I have found your most valuable “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). How does USERRA apply to my situation?

A: I think that it is clear that you will have the right to reemployment at DWI when you leave active duty later this year, and the employer’s “termination” of you has no legal effect.⁴ I suggest that you send a short, polite letter to the personnel director, but don’t get into an extended legal argument about your USERRA rights at some point in the future.

Conditions for reemployment under USERRA

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

- a. You must have left a civilian 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, but there are nine exemptions (kinds of service that do not count toward exhausting your 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 made a timely application for reemployment.

⁴ Terminating your employment because you have been gone more than five years is a violation of section 4311 of USERRA, 38 U.S.C. 4311. Please see Law Review 14090.

I think that it is clear that you already meet the first two conditions, and you have it in your power to meet the other conditions by the end of this year. Let me discuss these conditions separately.

Left job for service and gave prior notice

It is clear beyond any quibble that you left your DWI job for military service in March 2010, and I shall assume that you gave prior oral or written notice to DWI before you left.⁵ You were not required to notify DWI that your active duty period had been extended beyond March 2011.⁶

You were not required to ask for or obtain DWI's permission before you left your job for military service in March 2011—you were only required to give notice. And when you gave notice of your impending departure for military service, you were not required to decide if you would want reemployment after release from service, and you were not required to predict that you would be returning to your civilian job in any particular time frame.

Section 4331 of USERRA⁷ gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, the Department of Labor (DOL) published draft USERRA regulations in the *Federal Register*⁸ for notice and comment. DOL considered the comments that were filed and made a few adjustments. DOL published the final regulations in December 2005.⁹ Here are two pertinent sections about prior notice to the civilian employer:

1002.87. Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

⁵ No specific amount of advance notice is required. If the Army sprung these orders on you at the last minute and you only gave a few days of notice to the employer, the lateness of the advance notice does not defeat your right to reemployment. You were excused from the requirement to give any advance notice if giving such notice was precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b). This citation refers to subsection (b) of section 4312 of title 38 of the United States Code. USERRA is codified in title 38, at sections 4301-4335.

⁶ See *Sutton v. City of Chesapeake*, 713 F. Supp. 2d 547 (E.D. Va. 2008). This is a decision of the United States District Court for the Eastern District of Virginia. The citation means that you can find this case in Volume 713 of *Federal Supplement Second Series* and this case starts on page 547. If you had contacted me at the time, I certainly would have advised you to keep your employer informed of extensions of your active duty, beyond the initial period for which you gave notice.

⁷ 38 U.S.C. 4331.

⁸ The *Federal Register* is a massive publication every business day. Federal agencies publish proposed regulations, for notice and comment, and final regulations. Final regulations have the force of law, and every resident of our country is charged with knowledge of regulations posted in the *Federal Register*, although it would be impossible to read this massive tome each day. The *Federal Register* is still published in paper form, but in the 21st Century most *Federal Register* users access it on-line.

⁹ The USERRA regulations are published in Volume 20 of the Code of Federal Regulations at part 1002 (20 C.F.R. Part 1002).

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.¹⁰

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.¹¹

This statement in the USERRA Regulations, to the effect that the service member is not required (upon giving notice of an impending period of uniformed service) to predict that he or she will return to the civilian employer and seek reemployment is buttressed by a paragraph in USERRA's 1994 legislative history:¹²

The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an "unburned bridge." Not until the individual's discharge or release from service and/or transportation back home, which triggers the application time, does the servicemember have to decide whether to recross that bridge. *See Fishgold, supra*, 328 U.S. at 284: "He is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life."

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2459 (report of the House Committee on Veterans Affairs).

USERRA's five-year limit on the duration of service

Section 4312(c) of USERRA sets forth the five-year limit as follows:

¹⁰ 20 C.F.R. 1002.87 (bold question in original).

¹¹ 20 C.F.R. 1002.88 (bold question in original, emphasis by italics supplied).

¹² Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994. USERRA is a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service--

- (1) that is required, beyond five years, to complete an initial period of obligated service;
- (2) *during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;*
- (3) *performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or*
- (4) performed by a member of a uniformed service who is--
 - (A) *ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;*
 - (B) *ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;*
 - (C) *ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;*
 - (D) *ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;*
 - (E) *called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or*
 - (F) *ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.*

38 U.S.C. 4312(c) (emphasis supplied).¹³

The five-year limit applies “with respect to the employer relationship for which a person seeks reemployment.”¹⁴ The military service that you performed prior to January 2009 (when you began your DWI job) does not count toward exhausting your limit with respect to DWI.

¹³ Please see Law Review 201 for a definitive summary of what counts and what does not count toward exhausting your five-year limit.

¹⁴ 38 U.S.C. 4312(c).

Your military training periods between January 2009 and March 2010 do not count toward your five-year limit.¹⁵ Your year of involuntary active duty, from March 2010 to March 2011, is also exempt from the computation of your five-year limit.¹⁶

Your active duty after March 2011, because of your medical treatment and processing for a disability retirement, likely does count toward your five-year limit, but your five-year limit does not expire until March 2016. If you are unable, through no fault of your own, to obtain orders releasing you from active duty by March 2016, the period of duty after the exhaustion of the five-year limit does not cause you to lose your right to reemployment.¹⁷

If you leave active duty by medical retirement by the end of 2015, as you expect to do, you will be within the five-year limit and you will have the right to reemployment, assuming of course that you meet the other four conditions.

Release from service under honorable conditions

Section 4304 of USERRA provides:

A person's entitlement to the benefits of this chapter by reason of service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

- (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.
- (2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.¹⁸
- (3) A dismissal of such person permitted under section 1161(a) of title 10.
- (4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.¹⁹

I am confident that you have served honorably and that when you are released from active duty later this year you will not have one of these disqualifying bad discharges.

Timely application for reemployment

After a period of service of 181 days or more, you have 90 days to apply for reemployment.²⁰ When you are released from active duty later this year, it is essential that you apply for reemployment within 90 days after the date of your release.²¹

¹⁵ 38 U.S.C. 4312(c)(3).

¹⁶ 38 U.S.C. 4312(c)(4)(A).

¹⁷ 38 U.S.C. 4312(c)(2).

¹⁸ The "Secretary concerned" is the service secretary—the secretary of the Army in your case.

¹⁹ 38 U.S.C. 4304.

Your entitlements upon reemployment

If you meet the five USERRA conditions, DWI has the legal obligation to reemploy you *promptly*²² in the position of employment that you would have attained if you had been continuously employed²³ and to treat you (upon reemployment) *as if you had been continuously employed* for seniority and pension²⁴ purposes during the 14 months that you worked for DWI before you were called to the colors in March 2010 and during the six or more years that you were away from work for military service.²⁵

Don't burn your bridges at DWI.

Q: I am still annoyed with the company about the “termination” letter that I received in March 2015 and about the hassles that I received from my supervisor, about my ARNG training responsibilities, during the 14 months that I worked for the company before I was called to active duty in March 2010. I really don’t think that I want to return to work for DWI when I finally leave active duty later this year. I am tempted to write back to the DWI personnel director and tell her to “take this job and shove it.” What do you think about that?

A: I strongly advise you not to send any such “take this job and shove it” letter. You should keep to yourself your intentions about returning or not returning to your pre-service employer. As I have stated, USERRA keeps your right to return to that job as an “unburned bridge” behind you. Sending such a “take this job and shove it” letter would not, as a matter of law, amount to a waiver of your right to reemployment, but it would certainly complicate your return to work for the company.

When you leave active duty later this year, you will then have 90 days (starting on the date of release) to apply for reemployment at DWI. That will be the proper time for you to decide if you want to return to work for the company, not now, when you are angry about the “termination” letter.

²⁰ 38 U.S.C. 4312(e)(1)(D). If upon your release from active duty you are still hospitalized or convalescing from the injury or illness that you sustained while on active duty, the deadline to apply for reemployment is extended during the period of hospitalization or convalescence, up to two years. 38 U.S.C. 4312(e)(2).

²¹ Please see Law Review 15001 for a detailed discussion of what it means to “apply for reemployment.”

²² Absent unusual circumstances, the employer must have you back at work and on the payroll within two weeks after you apply for reemployment. 20 C.F.R. 1002.181.

²³ The position that you would have attained if you had been continuously employed may be better than the position that you left, the same position, a worse position, or no position at all, depending upon what would have happened if you had never left. In determining what would have happened, we need to look to what happened to your DWI colleagues in similar jobs and with similar seniority. Based on the substantial passage of time, you are probably entitled upon reemployment to a better position than the position you left in March 2010.

²⁴ As I explained in detail in Law Review 15007, you must apply for reemployment and return to work for the pre-service employer in order to get pension credit for your military service time.

²⁵ 38 U.S.C. 4316(a), 4318.

If you leave active duty and apply for reemployment at DWI, and if you meet the five USERRA conditions, you are entitled to return to the DWI payroll with a start date for seniority and pension purposes of January 2009, when you first went to work for the company. I urge you to think long and hard before you walk away from valuable seniority and pension rights.

When you leave active duty later this year with significant service-connected physical disabilities, it may be difficult for you to find a civilian job that comes close to what you are entitled to at DWI. Don't burn any bridges unnecessarily.

It should also be noted that your problems with DWI have related to your military career in the ARNG, and your military career is likely coming to an end this year with your pending disability retirement. USERRA gives you the right to job-protected time off from your civilian job for military training and service, but USERRA cannot eliminate the inevitable friction between civilian employers and employees who are members of the National Guard or Reserve. After you return to work at DWI with your military disability retirement in hand, this military-related friction with the company will be a problem for other employees, not for you, because you will not thereafter be asking for time off from work for military service or training.

Your USERRA rights as a disabled veteran

Q: My civilian job at DWI required vigorous physical activity at least occasionally. Because of the disabilities resulting from the wounds that I received in the line of duty in Afghanistan, it will be difficult or impossible for me to do the job that I performed at DWI before I was called to active duty. Does USERRA require DWI to make accommodations for my service-connected disabilities?

A: Yes. If you meet the five USERRA conditions and return to work at DWI, the company is required to make reasonable efforts to accommodate your disability in the position of employment that you would have attained if you had been continuously employed.²⁶ Of course, there are some employment positions where a disability cannot be reasonably accommodated—a blinded veteran cannot return to the cockpit of a commercial airliner. If your disabilities cannot be reasonably accommodated in the position of employment that you would have attained if you had been continuously employed, the company has the duty to reemploy you in some other position for which you are qualified or can become qualified with reasonable employer efforts.²⁷

Summary

²⁶ 38 U.S.C. 4313(a)(3).

²⁷ *Id.* Please see Law Review 0640 and Law Review 0854 for a detailed discussion of the rights of disabled veterans under USERRA.

In the aftermath of the terrorist attacks of September 11, 2001, the transformation of the “strategic reserve” to the “operational reserve” has been accomplished, far beyond anything that those who served in the Reserve Components in the 1970s and 1980s might have envisioned.²⁸ In the operational reserve era, those who serve our country in the National Guard or Reserve need detailed information about USERRA and other laws that are pertinent to their military service, and they need this information before the fact rather than after the fact. They can find this information at www.servicemembers-lawcenter.org. We have more than 1,300 articles, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

²⁸ More than 900,000 Reserve and National Guard personnel have been called to the colors since September 11, 2001, and more than 350,000 of them have been called more than once. The days of Reserve or Guard service as “one weekend per month and two weeks in the summer” are gone, and probably gone forever. Please see Law Review 13099, titled “This is not your father’s National Guard.”