

You Must Apply for Reemployment—Part 5

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Q: I am a Major in the Army Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I recently completed a period of exactly 179 days of active duty, and I was released from the period of service on Friday, May 22, 2015. I expect to receive follow-on orders for a year or more, but I am not sure exactly when I will receive the orders or when the new active duty period will begin.

I left my civilian job at Daddy Warbucks International (DWI) in November 2014 and gave proper written and oral notice that I was leaving for the purpose of military service. I did not specify when I would be back, but I led my supervisor to believe that it would likely be a matter of years, not months.

I really don't want to go back to DWI for what is likely to be only a few days or weeks before my new active duty period starts. Is it possible and advisable for me to wait until after the end of my expected new active duty period to apply for reemployment at DWI?

A: No! After a period of service of more than 30 days but less than 181 days, you have only 14 days to apply for reemployment.³ Because your period of service was more than 30 days but

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. The Reserve Officers Association (ROA) initiated this column in 1997.

² Captain Wright was the Director of ROA's Service Members Law Center from June 2009 through May 2015.

³ 38 U.S.C. 4312(e)(1)(C). The citation refers to subsection (e)(1)(C) of title 38 of the United States Code. USERRA is codified in title 38 at sections 4301 through 4335 (38 U.S.C. 4301-4335). After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). After a period of service of less than 31 days (like a drill weekend or a two-week annual training period), you are required to report back to work “not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the

less than 181 days, and because you were released from the period of service on May 22, you *must* apply for reemployment not later than June 5. If you fail to do so, you *will not have the right to reemployment*. *See Day v. Lockheed-Martin Space Systems Company*, 2008 U.S. Dist. LEXIS 19982 (E.D. La. March 14, 2008), *affirmed* 2008 U.S. App. LEXIS 26154 (5th Cir. December 23, 2008).

As I have 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 civilian job (federal, state, local, or private sector) for the purpose of performing service in the uniformed services as defined by USERRA.
- b. You must have given the employer prior oral or written notice.
- 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.⁴
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁵
- e. *You must have made a timely application for reemployment after release from the period of service.*

You must meet all five of these conditions to have the right to reemployment. If you fail to make a timely application for reemployment, it really does not matter that you meet the other four conditions.

Q: I left my job at DWI a week before the start of this recent 179-day active duty period. Thus, I have been away from my DWI job for 186 days as of May 22, when the active duty period ended. That means that I have 90 days (not 14 days) to apply for reemployment, right?

A: Wrong. The 14-day deadline to apply for reemployment applies “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.”⁶ It is the *period of service* (not the period of absence from your civilian job) that determines whether you have 14 days or 90 days to apply for reemployment.

completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person’s residence.” 38 U.S.C. 4312(e)(1)(A)(i).

⁴ There are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting your five-year limit with respect to a specific employer. Please see Law Review 201 for a definitive discussion of what counts and what does not count.

⁵ Under section 4304 of USERRA, 38 U.S.C. 4304, you are disqualified from reemployment if you received a punitive discharge by court martial (bad conduct discharge, dishonorable discharge, or dismissal), or if you received an administrative discharge labeled “other than honorable,” or if you are dropped from the rolls of your uniformed service.

⁶ 38 U.S.C. 4312(e)(1)(C) (emphasis supplied).

You had the right to leave your job a week before the start of the active duty period, in order to get your affairs in order and then travel to the place of duty.⁷ But your early departure from your civilian job, in order to get your affairs in order, does not change the fact that you have 14 days, not 90 days, to apply for reemployment.⁸

Q: My father-in-law is a lawyer and he read USERRA carefully at my request. He suggested that section 4312(e)(3) of USERRA extends the deadline for me to apply for reemployment at DWI beyond Friday, June 5. Do you agree?

A: Section 4312(e)(3) can extend your deadline to apply for reemployment, but only for a day or two, and you could be punished for unexcused absence for the period beyond 14 days that you were late in applying for reemployment. Here is the text of section 4312(e)(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) [the right to reemployment] 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.”⁹

The Department of Labor (DOL) USERRA Regulations interpret section 4312(e)(3) as follows:

- (a) If the employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA’s reemployment and other rights and benefits. Rather, the employee becomes subject to the conduct rules, established policy, and general practices of the employer pertaining to an absence from scheduled work.¹⁰

The deadline for you to apply for reemployment is Friday, June 5. If you wait until Tuesday, June 9 to apply for reemployment, you likely would have the right to reemployment, but you would be subject to the employer’s usual sanction for one or two days of unexcused absence.¹¹ If you wait until Tuesday, June 16 to apply for reemployment, you likely would have no right to reemployment, because the usual sanction for an entire week of unexcused absence would likely be termination.

Q: DWI probably does not want me back to work for only a few days, only to leave again for a new period of service. Would it be possible for me to enter into an agreement with the

⁷ 20 C.F.R. 1002.74. The citation refers to section 1002.74 of the Code of Federal Regulations. The Department of Labor (DOL) USERRA Regulations are codified in Part 1002 of title 20 of the CFR.

⁸ The seven days that you were away from work before the start of your active duty period also do not count toward the computation of your five-year limit with respect to your employer relationship with DWI. See 20 C.F.R. 1002.100.

⁹ 38 U.S.C. 4312(e)(3).

¹⁰ 20 C.F.R. 1002.117(a).

¹¹ Such a sanction might be a two-week suspension without pay.

employer whereby I would apply for reemployment but not insist on returning to work immediately?

A: Yes. June 5 is the deadline for you to *apply for reemployment*, not return to work. If you make a timely application for reemployment and meet the other four USERRA conditions, you are entitled to *prompt reemployment, normally within two weeks after your application.*¹²

It is essential that you apply for reemployment by June 5, but when you apply for reemployment you should be up front with the employer about the likelihood that you will be starting a new period of service in the near future. You and the employer could mutually agree that you are waiving the right to prompt reinstatement and the employer is waiving the right to insist that you return to work immediately after applying for reemployment. The agreement should be reduced to writing to avoid misunderstandings and to protect your interests.

According to the Department of Defense (DOD), more than 907,000 Reserve Component (RC) personnel have been called to the colors since the terrorist attacks of September 11, 2001, and more than 350,000 of them have been called up more than once. Many employers (federal, state, local, and private sector) are weary of the burden that USERRA puts on employers in the “operational reserve” era.

In dealing with your civilian employer concerning your absences from work for military training or service, it is essential that you “dot the i’s and cross the t’s.” For each short or long period that you are away from work for service, you need to meet the five USERRA conditions and you need to document that you meet the conditions. If you give the employer an excuse to fire you or to deny you reemployment, it is likely that the employer will utilize that excuse.

Q: This stuff is so complicated. I never spent a day in law school. How am I supposed to figure out this complicated stuff?

A: It really is not that complicated. You just need to keep in mind the conditions that you must meet to have USERRA rights, and then be sure that you meet these conditions and that you can document that you meet the conditions.

I invite your attention to www.servicemembers-lawcenter.org. You will find more than 1,300 “Law Review” articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform.¹³ In these articles, you will find everything you need to know to preserve and enforce your USERRA rights.

¹² 20 C.F.R. 1002.180, 1002.181.

¹³ More than 900 of the articles are about USERRA. We also have articles about the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other military-relevant laws. We also have a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. ROA initiated this column in 1997, and I am the author or co-author of more than 1,200 of the articles.

For the last six years (June 2009 through May 2015), I have been the Director of ROA's Service Members Law Center (SMLC). In that time period, I have provided *free* information and advice to more than 35,000 service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. Approximately half of the inquiries have been about USERRA, and the other half have been about everything you can think of that has something to do with military service and law.

Unfortunately, it is necessary for ROA to suspend the operations of the SMLC, effective May 31, 2015. The 1,300 published articles will remain, and I will continue writing articles as time permits. But we simply cannot continue the service of responding to individual inquiries by e-mail and telephone.

Q: I have seen posters for a DOD organization called “ESGR” at the Reserve Center where I drill. What is ESGR?

A: ESGR is the abbreviation for the National Committee for Employer Support of the Guard and Reserve. DOD established ESGR 43 years ago, in 1972. ESGR's mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. You can reach ESGR toll-free at (800) 336-4590. I invite your attention to the ESGR website, www.esgr.mil.

ESGR has more than 5,000 volunteers including more than 1,000 “ombudsmen” who work with RC members and their civilian employers to mediate disputes about time off from work for military training and service. The ESGR mediation process is informal, quick, and non-confrontational.

ESGR is a good place to go for information and assistance about your USERRA rights, but you need to understand that the folks who answer the telephone at ESGR headquarters and most of the ESGR volunteers in the field are not attorneys. They are not qualified to provide and they do not try to provide detailed information about the text of USERRA, the legislative history, the case law, and the DOL USERRA Regulations. For that, you need to go to www.servicemembers-lawcenter.org.