

## Dot the Is and Cross the Ts To Obtain Reemployment

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Update on Sam Wright

1.1.2.3—USERRA applies to employees who have been laid off

1.3.1.2—Character and duration of service

1.3.1.3—Timely application for reemployment

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**Q: I am a Lieutenant Colonel in the Air Force Reserve (USAFR) and a life member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

I was commissioned a Second Lieutenant in 1998, through the Air Force Reserve Officers Training Corps (ROTC) program. I served on active duty for nine years and left in 2007, after which I affiliated with the USAFR. I found a job as a pilot for a small commercial airline—let's call it Dinky Regional Airline (DRA). When the economy tanked the next year, I was furloughed (laid off). Not knowing how long the furlough might last and needing regular income, I volunteered to go back on active duty on October 1, 2008, initially for one year. Although I was already in a furlough status, I gave notice to DRA by means of a certified letter to the Chief Pilot. I also gave the Chief Pilot written notice of each extension of my active duty.

I have been on active duty continuously since October 1, 2008, on a series of orders. My current orders expire September 30, 2016, and this time there probably won't be an extension. What do I need to do to secure reemployment rights at DRA?

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1400 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1200 of the articles.

<sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. From 2009 to 2015, I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. After ROA discontinued the SMLC last year, I have continued writing new articles and answering questions on a volunteer basis. I am available by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

**A:** As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services. When you are furloughed or laid off,<sup>3</sup> you still hold a “position of employment” for as long as there remains a possibility that you will be called back to work. Thus, you left a “position of employment” to go on active duty in 2008, and you meet this criterion.
- b. You must have given the employer prior oral or written notice. You clearly meet this criterion.
- 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. More on this condition below.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military. I am sure that you have served honorably and that the DD-214 that you receive on September 30 will reflect honorable service.
- e. You must have made a timely application for reemployment, after release from the period of service. After a period of service of 181 days or more, you have 90 days to apply for reemployment.<sup>4</sup> You certainly have it in your power to meet this criterion, by applying for reemployment at DRA within 90 days after you leave active duty.

The five-year limit (with its nine exemptions) is set forth in section 4312(c) of USERRA, as follows:

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- **(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;

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<sup>3</sup> The “furlough” terminology is used primarily in the airline industry. In other industries, this circumstance is called a “layoff.” The idea is that your employment is suspended because of poor economic conditions and the employer’s reduced need for employees. There is a possibility, if not a likelihood, that you will be called back to work when economic conditions improve or when vacancies are created.

<sup>4</sup> 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

- (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, 12304a, 12304b, 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.<sup>5</sup>

As I explain in detail in Law Review 201 (August 2005), there are nine exemptions to the five-year limit—that is, kinds of service that do not count toward exhausting your limit with respect to a specific employer. I suggest that you read my Law Review 201 very carefully and then review all of your orders for all of your military service periods, going back to 2007, when you began your job at DRA.<sup>6</sup> If you are under the five-year limit when the exempt periods are subtracted, you can have the right to reemployment at DRA. If you are already beyond the five-year limit, you are out of luck. I do not have the power to turn back the hands of time.

**Q: I have reviewed your Law Review 201 and all of my orders, and I find that four of my eight years of active duty, since 2008, have been exempt from the five-year limit.**

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<sup>5</sup> 38 U.S.C. 4312(c).

<sup>6</sup> Any military service that you performed prior to the start of the relevant civilian job is irrelevant for purposes of computation of the five-year limit.

**I will leave active duty on September 30, but I will most likely be on terminal leave for the last two months of this active duty period (August and September). I would like to earn double pay for those two months (my Air Force pay and my DRA pay). Does USERRA give me the right to return to my DRA job while I am on terminal leave?**

**A:** No. When you are on terminal leave, you do not yet meet one of the five USERRA conditions, in that you have not yet been *released* from the period of service. When you are on terminal leave, you are still on active duty, just like when you are on leave at any time during your active duty period.

It may be that DRA will be anxious to have you back at work and will be pleased to return you to the payroll as an active pilot while you are on terminal leave. If so, there is no legal impediment to your returning to work on terminal leave.

**Q: I have a possibility of getting a pilot job with a major airline, a job that pays much more than the DRA job. If I take a job at the major airline and decide that I do not like it and quit and then apply for reemployment at DRA within the 90-day deadline, will I have the right to reemployment at DRA?**

**A:** Yes.

Section 4331 of USERRA<sup>7</sup> gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA Regulations, for notice and comment, in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in the *Federal Register* in December 2005. The Regulations are codified in title 20 of the Code of Federal Regulations, Part 1002.<sup>8</sup>

Here is the pertinent section of the DOL USERRA Regulations:

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**§ 1002.120 If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?**

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<sup>7</sup> 38 U.S.C. 4331.

<sup>8</sup> 20 C.F.R. Part 1002.

No. The employee has reemployment rights with the pre-service employer provided that he or she makes a timely reemployment application to that employer. The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer. However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.<sup>9</sup>

Because your period of service has lasted longer than 180 days, you have 90 days to apply for reemployment.<sup>10</sup> That 90-day period starts running on October 1, the day after you leave active duty. You must apply for reemployment at DRA by December 29, 2016. What you choose to do during the 90-day period, after release from service and before application for reemployment, is none of DRA's business.

It is essential that you *not apply for reemployment at DRA*, and not make a communication to DRA that can reasonably be construed as an application for reemployment, until you are ready to return to work.

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<sup>9</sup> 20 C.F.R. 1002.120 (bold question in original).

<sup>10</sup> 38 U.S.C. 4312(e)(1)(D).