

## **LAW REVIEW 16072<sup>1</sup>**

**August 2016**

### **USERRA and the Career Intermission Program**

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Update on Sam Wright

1.1.3.2—USERRA applies to regular military service

1.2—USERRA forbids discrimination

1.3.1.1—Left job for service and gave prior notice

1.3.1.2—Character and duration of service

1.3.2.2—Continuous accumulation of seniority—escalator principle

1.3.2.3—Pension credit for service time

**Q: I am a Lieutenant Colonel in the Regular Army, and I recently joined the Reserve Officers Association (ROA).<sup>3</sup> I found your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) by doing an Internet search. I found the articles to be most informative and useful, so I joined.**

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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 1500 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), 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 1300 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. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 34 years. 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 proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC (TR), and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (May 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> Yes, regular officers and noncommissioned officers (NCOs) are eligible for ROA membership, as well as Reserve Component (RC) officers and NCOs.

I graduated from high school in 1996 and immediately thereafter reported to the United States Military Academy for plebe summer. Four years later, I graduated and was commissioned a Second Lieutenant. I have been on active duty continuously for more than 16 years, or 20 years if you count the Academy time. My military specialty is logistics.

In 2009, the Career Intermission Program (CIP) was created in the Navy and Marine Corps. Recently, the Secretary of Defense ordered the Army and Air Force to establish the program as well. Under the CIP, a career officer or enlisted service member who meets certain criteria can apply for an “intermission” of his or her active duty career for a period of one to three years. If accepted for the program, the service member then leaves active duty for the period of the intermission. During that period, the service member receives TRICARE medical benefits for self and family, as well as commissary and exchange benefits, and a small stipend equal to 1/15<sup>th</sup> of his or her military salary.

I have applied for the CIP for two reasons. First, my elderly mother is seriously ill and probably in the final months of life. I want to be home from overseas and able to spend time with her. Second, I have a civilian job in the logistics field more or less lined up. If I work in that job for a year or two, I expect that I will learn a lot about how major civilian companies handle logistics, and that knowledge will be very useful to me in the final stage of my military career, after I return to active duty at the end of the intermission. I also hope that I can set up an interesting and productive civilian job for my second career, after I retire from the Army.

I expect that my request for an intermission will be approved by the Army. In a few months, I will leave active duty for a year, or perhaps two years. Then, I will return to active duty for four or five years and then retire. How does USERRA apply to a situation like this? Does USERRA even apply to a person who leaves a civilian job for service in the Active Component (AC), rather than the Reserve Component (RC), of the armed forces?

**A:** First, USERRA most definitely applies to persons who serve in the AC—it is not limited to those who serve in the National Guard or Reserve (RC).<sup>4</sup>

USERRA can potentially apply to your situation in two ways. First, section 4311 of USERRA<sup>5</sup> makes it unlawful for an employer (federal, state, local, or private sector) to discriminate in *initial employment* based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform future

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<sup>4</sup> Please see Law Review 0719 (May 2007).

<sup>5</sup> 38 U.S.C. 4311.

service.<sup>6</sup> Denying you hiring based on the realization that you will likely leave after a year or two to return to active duty would amount to a violation of section 4311.

Second, if you work for this company for a year or two and then leave to return to active duty, it is conceivable that you could have the right to reemployment when you leave active duty by retirement, four or five years later. As I have explained in Law Review 15116 (December 2015) and many other articles, a person must meet five simple conditions to have the right to reemployment under USERRA:

- a. Left a civilian position of employment for the purpose of performing voluntary or involuntary uniformed service.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.<sup>7</sup>
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.<sup>8</sup>
- e. After release from the period of service, has made a timely application for reemployment.<sup>9</sup>

Let us assume that you leave active duty (for your intermission) in December 2016 and start your new civilian job shortly thereafter. In December 2017 you return to active duty at the end of your one-year intermission, and you give prior notice to the company that you are leaving for the purpose of performing uniformed service. You return to active duty for four years and retire in December 2021, and then promptly apply for reemployment with the company.

Under these conditions, you are entitled to prompt reemployment by the company.<sup>10</sup> Upon reemployment, you are entitled to be treated (for seniority and pension purposes) as if you had been continuously employed by the civilian employer for the entire time between December

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<sup>6</sup> See, e.g., *McLain v. City of Somerville*, 424 F. Supp. 2d 329 (D. Mass. 2006); *Beattie v. Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991).

<sup>7</sup> I explain the five-year limit in detail in Law Review 16043 (May 2016). The limit relates to the employer relationship for which the person seeks reemployment. In your scenario, you are leaving active duty and establishing a new employer relationship, with a new employer, in late 2016. Your active duty from 1996 to 2016 will be irrelevant to your five-year limit with this new employer. I also explain in detail in Law Review 16043 that there are nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit.

<sup>8</sup> The disqualifying bad discharges include a bad conduct discharge or dishonorable discharge or dismissal, awarded by court martial for a serious criminal offense, or an other-than-honorable administrative discharge. 38 U.S.C. 4304.

<sup>9</sup> After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>10</sup> The Department of Labor (DOL) USERRA Regulation provides: "Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment." 20 C.F.R. 1002.181. The citation is to title 20 of the Code of Federal Regulations, section 1002.181.

2017 and December 2021, when you leave active duty by retirement, apply for reemployment, and return to work.<sup>11</sup>

**Q: As I am in touch with the logistics company concerning potential employment, what (if anything) should I tell the company recruiter or personnel office about the CIP and about my obligation to return to active duty in 2017 or 2018?**

**A:** You have no obligation to bring up your military status or obligation, and I recommend that you not do so. If the company asks you about these matters, I strongly recommend that you give an entirely candid and truthful response.<sup>12</sup>

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<sup>11</sup> 38 U.S.C. 4316(a), 4318.

<sup>12</sup> Please see Law Review 16031 (April 2016).