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You Are Not Required To Provide your Employer a Copy of your Orders when you Notify your Employer that your Active Duty Has Been Extended

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

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[1] I invite the reader's attention to 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), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 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.

[2] 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 (VRRA—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 VRRA 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 VRRA 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.

I work for a reasonably large company, about 1500 employees. I only know of one other employee who actively participates in the National Guard or Reserve. My direct supervisor at the company has harassed me about my Army Reserve service and the time that I am away from work for training and service in the USAR.

I asked the Army to give me the opportunity to go on active duty for six months, and I was given orders for the period or 4/1/2016 to 9/30/2016. In late September, the Army gave me a new set of orders, for the two-year period from 10/1/2016 through 9/30/2018. I notified my employer's personnel director of the extension, and she has demanded that I send her a copy of my Army orders. Does USERRA require me to provide the employer a copy of my new Army orders?

A: No. You were required to give prior notice to the employer before you left the job in late March,[3] unless giving prior notice was precluded by military necessity or otherwise impossible or unreasonable.[4] You were not required to give the employer notice that your orders had been extended.[5]

You were not required to give the employer notice that your orders had been extended, but I certainly would have recommended that you do so. Keeping the employer informed about when to expect you back is an excellent idea, and doing this will likely make your return to work much smoother and quicker, if you choose to exercise your right to reemployment after you leave active duty.

Because you were not required to notify the employer of the extension, you certainly are not required to provide the employer a copy of your orders.

USERRA has a documentation requirement, but it only applies to a person who is *applying for reemployment* after a period of service of 31 days or more.[6] The fact that USERRA requires documentation in this specific circumstance means that no documentation is required in other circumstances, under the doctrine of *expressio unius est exclusio alterius.* That is Latin for "to express one is to exclude all the others."

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[3] 38 U.S.C. 4312(a)(1).
[4] 38 U.S.C. 4312(b).
[5] *See Sutton v. City of Chesapeake,* 713 F. Supp. 2d 547 (E.D. Va. 2010).
[6] 38 U.S.C. 4312(f)(1). A person who is applying for reemployment after a period of service of 31 days or more is required to provide documentation to the employer, on the employer's request, showing that the person's application for reemployment is timely, that the person has not exceeded USERRA's five-year cumulative limit on the duration of the period or periods of uniformed service, and that the person is not disqualified from reemployment by having received a disqualifying bad discharge from the military. The DD-214 is the usual but not the only form of documentation that can meet this requirement.

The classic example of *expressio unius est exclusio alterius* comes in the early Supreme Court case *Marbury v. Madison,* 5 U.S. 137 (1803). Article III, section 2, clause 2 of the Constitution establishes the *original* (as opposed to appellate) jurisdiction of the Supreme Court-cases affecting ambassadors and other public ministers and disputes between states. The statute at issue in *Marbury* expanded the original jurisdiction of the Supreme Court to include cases in which a *writ of mandamus* is sought against a federal official. The Supreme Court held that since the Constitution expressly states the classes of cases for which the Supreme Court has original jurisdiction, a federal statute that adds additional classes of cases to the original jurisdiction of the Supreme Court is unconstitutional.

The United States Court of Appeals for the Sixth Circuit [7] has utilized this legal maxim in interpreting section 4304 of USERRA. *See Petty v. Metropolitan Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008), *cert. denied,* 556 U.S. 1165 (2009) (*Petty I). See also Petty v. Metropolitan Government of Nashville,* 687 F.3d 710 (6th Cir. 2012) (*Petty II).*

You are not required to provide the employer a copy of your orders, but I strongly urge you to do so. Getting into an argument with the employer about what you are not required to provide serves no useful purpose. You should try to stay on good terms with the employer, just in case you choose to return to that company when you leave active duty two years from now.

Q: The personnel director has demanded that I promise not to extend my active duty past 9/30/2018 and that I commit to returning to work in October 2018. She said that if I do not sign a written commitment to return to work by the end of 2018 I will be "permanently replaced" and I will not have the right to reemployment when I leave active duty and apply for reemployment. Does the employer have the right to make this demand?

A: No. I invite your attention to the Department of Labor (DOL) USERRA Regulation:

> **§ 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?**
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> 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

[7] The Sixth Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

> not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

I suggest that you tactfully refuse to promise to return to the company by the end of 2018. You are not required to make any such commitment, and you should decline to do so. The company has the right to fill your position while you are gone, but the fact that the job has been filled does not excuse the employer from the obligation to reemploy you when and if you are released from active duty and apply for reemployment. In some cases, the employer is required to displace another employee to reemploy the returning service member.[8]

Q: I am reluctant to make any commitments about returning to the company because I want to make the active duty Army my career, but I am not sure that the Army will allow me to remain on full-time active duty long term. If the Army will allow me to remain on active duty after September 30, 2018, I will do so. But because I don't know that I will be able to remain on active duty, I want to keep open the option of returning to work for the company. Does USERRA allow me to keep my options open?

A: Yes. USERRA's legislative history includes the following instructive paragraph:

> The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance 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 on 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 v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 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."[9]

Keeping your civilian job behind you as an unburned bridge, in case the Army does not permit you to remain on active duty after 9/30/2018, is entirely consistent with the legislative intent of USERRA.

Q: What conditions do I have to meet to have the right to reemployment at the company?

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[8] Please see Law Review 0829 (June 2008).

[9] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, part 1), reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Still and Edward Piscitelli. The quoted paragraph can be found on page 669 of the 2016 edition of the *Manual.*

A: As I have explained in Law Review 15116 (December 2015) and other articles, you (or any service member) 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) to perform uniformed service.
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.[10]
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.[11]
e. After release from the period of service, you must have made a timely application for reemployment.[12]

If you meet these five conditions, the employer is required to reemploy you promptly[13] in the position of employment that you would have attained if you had been continuously employed or in another position for which you are qualified that is of like seniority, status, and pay.[14] Upon reemployment, you are entitled to be treated as if you had been continuously employed, for seniority and pension purposes upon reemployment.[15]

Q: I went to work for the company on 4/1/2014 and worked there for exactly two years, until I entered active duty on 4/1/2016. The company has a defined contribution pension plan, commonly called a 401(k) plan. Each employee is permitted to contribute up to five percent of his or her salary, and this pension contribution is taken off the top, before federal and state income tax is imposed on the income. The employer matches these employee contributions dollar for dollar, and the money is placed in an individual account in the employee's name.

While I was working for the company, I was contributing the maximum amount (five percent of my salary) and the company was matching it each pay period. While I have been on active duty, I have tried to make these ongoing employee contributions, to get the employer

[10] There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count.
[11] Disqualifying bad discharges include punitive discharges, awarded by court martial as part of the sentence for a serious criminal offense, and other-than-honorable administrative discharges. 38 U.S.C. 4304.
[12] 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). Shorter deadlines apply after shorter periods of service.
[13] Ordinarily, the employer must put you back on the payroll within two weeks after you apply for reemployment. 20 C.F.R. 1002.181.
[14] 38 U.S.C 4313(a)(2)(A).
[15] 38 U.S.C. 4316(a), 4318.

matches. The company has refused to accept my contributions, returning the checks to me, and the company has refused to make contributions to my individual pension account while I am on active duty. Is the company violating USERRA?

A: No. Under section 4318, the company is required to treat you as continuously employed *upon your reemployment under USERRA, and only when you meet the five conditions.*[16] At this point, in October 2016, you do not meet the five conditions—you only meet the first two conditions, in that you left your civilian job to perform uniformed service and you gave the employer prior notice.

It is by no means certain that you will meet the five conditions. The most likely scenario that would preclude you from reemployment is that you remain on active duty long term and exceed the five-year limit on the duration of service. You could get a great job offer elsewhere and choose not to seek reemployment at this company, or you could win the Publishers' Clearinghouse Sweepstakes and retire. You could do something stupid and receive a disqualifying bad discharge from the Army. God forbid, you could die.

Let us assume that you leave active duty as scheduled on 9/30/2018, at the end of your current orders. You apply for reemployment on 10/1/2018 and return to work on 10/15/2018. At that point, you are entitled to make up the missed employee contributions (the contributions you would have made during the period between 4/1/2016 and 10/15/2018 if you had been continuously employed).[17]

When you return to work in October 2018, you will resume making the ongoing regular contributions, and getting employer matches. On top of those regular contributions, you will make make-up contributions, covering the time that you were away from work for service. Like the regular contributions, the make-up contributions will be pre-tax.

It will be necessary for the company to compute what you would have earned from the company on a pay period by pay period basis, if you had remained continuously employed during the 30 months that you were away from work for service. To make that computation, the company should look at what you were earning before you left and the pay raises and promotions that your colleagues in similar positions earned during that 30-month period.

You must complete the process of making up missed employee contributions during the period that starts on the date of your reemployment and extends for three times the period of service,

[16] 38 U.S.C. 4318(a)(2)(A).
[17] 38 U.S.C. 4318(b)(2).

but not more than five years.[18] In your scenario, the repayment deadline will be 10/15/2023 (five years after the date of your reemployment).

Q: At this company, the vesting period is five years. If an employee leaves the employ of the company before the vesting point, he or she receives a refund of the contributions that he or she has made to the pension account, but the employer matches are forfeited. If I return to work in October 2018, at the end of my current orders, will my 30 months of active duty count in determining when I meet the vesting point?

A: Yes, *if you meet the five USERRA conditions and return to work.*[19] In your scenario, you will meet the five-year vesting point on 4/1/2019, exactly five years after you started working for the company.

If you are going to return to active duty again after October 2018, it would make sense for you to leave active duty and return to work at the company at least long enough to reach the vesting point and to make up the missed employee contributions and receive the employer matches.

You must make the make-up contributions *while employed by the company.* Ordinarily, you will want to make them by payroll deduction, to receive the tax break (making the contributions pre-tax). In your scenario, it would make sense to do the make-up contributions with a lump-sum check, and forego the tax break, to get the benefit of the employer matches before you leave the company again sometime after 4/1/2019. That way, you can take your nest egg with you when you leave the company and reinvest that retirement nest egg in another appropriate retirement account.

[18] 38 U.S.C. 4318(b)(2).
[19] 38 U.S.C. 4318(a)(2)(B).