

LAW REVIEW 17024¹

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Don't Apply for Reemployment until you Are Ready To Return to Work

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Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government.

1.1.3.7—Examination to determine fitness

1.3.1.2—Character and duration of service

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Q: I am a federal law enforcement officer and a noncommissioned officer in the Army Reserve. In July 2011, I was recalled to active duty, along with my Army Reserve unit, for one year of service. I was wounded in action, and my active duty was extended by more than four years. The other unit members were released from active duty in July 2012, but I was retained on active duty until just recently.

In the years since I was wounded in Afghanistan, I have had five surgeries and years of physical rehabilitation at an Army hospital. I was part of the “wounded warrior brigade.” Finally, the Army processed me for a military disability retirement and I left active duty on December 31, 2016. My physicians tell me that I will need at least one more surgery and some weeks or months of recovery after that surgery. For that reason, I have not yet applied

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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 the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 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, 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 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me at (800) 809-9448, extension 730, or by e-mail at SWright@roa.org. Please understand that I am a volunteer, so I may not be able to respond to you the same day.

for reemployment at the federal agency where I worked from July 2007 to July 2011, when I was called to active duty. I have been in touch with my federal supervisor and with the agency's personnel office and have informed them of my situation.

The agency's personnel department sent me a confusing letter recently. The letter said that I am required to report back to work within 90 days after leaving active duty and that the deadline expires on March 31, 2017 (90 days after I left active duty on December 31, 2016). The letter ordered me to report back to work by that date or I will be considered AWOL (absent without leave) from my federal law enforcement job.

I thought that the Uniformed Services Employment and Reemployment Rights Act (USERRA) gave me two years to convalesce before reporting back to work. Please help me understand how USERRA applies to my situation and what my options are.

A: It is not correct to say that USERRA gives you two years to convalesce before reporting back to work.³ There is a lot of confusion and “bum scoop” going around concerning the application of USERRA to the “wounded warrior” scenario, so I am taking this opportunity to explain again USERRA’s provisions for the service member or veteran who is returning to a civilian job after military service and who sustained a serious disability (temporary or permanent) while performing that military service. Let us start with the basics.

USERRA’s conditions for reemployment

As I have explained in Law Review 15116 (December 2015) and many other articles, you (or any service member or veteran) 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 voluntary or involuntary service in the uniformed services. You clearly met this condition when you left your federal civilian job in July 2011 to report to active duty with your Army Reserve unit.
- b. You must have given the employer prior oral or written notice that you would be leaving the job for service. For purposes of this article, I will assume that you gave prior notice before you left your job for service in July 2011.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that you have performed with respect to the employer relationship for which you seek reemployment. I will discuss this requirement further below.

³ Please see Law Review 16093 (September 2016).

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military. The fact that you received a military disability retirement in December 2016 clearly shows that you served honorably and did not receive a bad discharge.
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service civilian employer. I will discuss this requirement further below.

USERRA's five-year limit

I have explained the five-year limit in detail in Law Review 16043 (May 2016). The limit is cumulative with respect to the employer relationship for which you seek reemployment. Thus, we must look back to July 2007, when you began your career as a civilian employee of the Federal Government, to determine how much of the five-year limit you have used and how much "head room" you have left.

I have reviewed the military orders that you provided to me. I see that between July 2007 and July 2011 you were away from your federal civilian job for several short periods of Army Reserve training, including drill weekends and annual training. Those training periods do not count toward exhausting your five-year limit.⁴ When you left your job to report to active duty in July 2011, you still had the whole five-year limit to use.

Your orders indicate that you were *involuntarily* called to active duty for one year, from July 2011 to July 2012. That year of involuntary active duty does not count toward exhausting your five-year limit.⁵

You were retained on active duty for 4.5 years after your one year of involuntary active duty ended in July 2012. When a service member is retained on active duty for medical treatment and processing for disability retirement, that extended period of active duty should be but unfortunately is not exempted from the computation of the member's five-year limit.⁶

Your 4.5 years of active duty from July 2012 to December 2016 counts toward your five-year limit, but that is the only period you have performed that counts toward the limit. You still have six months of head room on your five-year limit. You have not exceeded the five-year limit, and you will have the right to reemployment if and when you make a timely application for reemployment.

⁴ 38 U.S.C. 4312(c)(3).

⁵ 38 U.S.C. 4312(c)(4)(A).

⁶ Please see Law Review 17014 (February 2017).

Timely application for reemployment

After a period of service of 181 days or more, you have 90 days (starting on the date of release) to apply for reemployment.⁷ In certain limited circumstances, the deadline for you to apply for reemployment can be extended:

- **(2) (A)** A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or *submit an application for reemployment with such employer* (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.
- **(B)** Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.⁸

Section 4312(e)(2) *extends the deadline for you to apply for reemployment. If you apply for reemployment, or if you make a communication to the employer that can reasonably be construed as an application for reemployment, you have thereby waived the right to delay your application for reemployment.*

What is an application for reemployment?

The Department of Labor (DOL) USERRA Regulation provides as follows concerning the form and content of an application for reemployment:

§ 1002.118 Is an application for reemployment required to be in any particular form?

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a

⁷ 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. After a period of service of 31-180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service of fewer than 31 days, like a drill weekend or a traditional two-week annual training period, you must report for work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the 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).

⁸ 38 U.S.C. 4312(e)(2) (emphasis supplied).

former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.⁹

For reasons that I will explain below, you do not want to apply for reemployment until after you have had your upcoming surgery and after you have recuperated from the surgery and are ready to return to work. You need to keep your employer informed of your status, *but you also need to make clear that you are not applying for reemployment now*. At the end of this article, I am attaching a sample letter that you can send to your employer to cover your bases.¹⁰

USERRA does not give you the right to time off from your civilian job for medical treatment.

Q: The surgery that I will need sometime in the next few months has been necessitated by the combat wound that I received in Afghanistan in 2011. That means that USERRA gives me the right to time off from my civilian job for the surgery and the recuperation after the surgery, right?

A: Unfortunately, that is not correct. USERRA gives you the right to a military leave of absence (unpaid but job-protected) to perform “service in the uniformed services” as defined by USERRA. USERRA’s definition of that term is as follows:

The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an *examination* to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.¹¹

USERRA does not protect your civilian job when you are away from work for medical treatment and recuperation, even if the treatment and recuperation were necessitated by a wound, injury, or illness that you incurred while on active duty. As I explained in Law Review 0965 (October 2009), in 2009 Representative Lloyd Doggett of Texas introduced H.R. 466, the proposed

⁹ 20 C.F.R. 1002.118 (bold question in original).

¹⁰ Reader, please understand that every situation is different, and this sample letter may not be appropriate for your situation. It is important that you seek and obtain competent legal advice as to your options and how you should proceed.

¹¹ 38 U.S.C. 4303(13) (emphasis supplied).

“Wounded Veteran Job Security Act.” If it had been enacted, that bill would have expanded USERRA’s definition of “service in the uniformed services” to include time away from a civilian job for medical treatment necessitated by a wound, injury, or illness incurred during the service of our country. This bill was not enacted during the 111th Congress (2009-10). Representative Doggett introduced essentially the same bill as H.R. 2875 during the 112th Congress (2011-12), but that bill was not enacted. The effort continues.

Because USERRA does not protect your right to be absent from work for medical treatment through the military or the Department of Veterans Affairs, you need to wait until you have had your surgery and have recuperated, before you apply for reemployment.

Q: I have read in several of your “Law Review” articles that USERRA requires employers to make accommodations for disabled veterans. Why doesn’t that part of USERRA apply to me?

A: USERRA requires an employer to make accommodations to a returning disabled veteran *who meets the USERRA eligibility criteria*. You do not yet meet the five USERRA conditions *because you have not yet applied for reemployment*.

As I have explained in Law Review 16063 (July 2016), the employer is required to make reasonable accommodations for the returning disabled veteran who applies for reemployment and who meets the USERRA conditions. The employer must make reasonable efforts to accommodate the disability in the position of employment that the person would have attained if he or she had been continuously employed. If the disability cannot be accommodated in that position, the employer is required to reemploy the person in some other position for which the person is qualified (despite the disability) *or for which the person can become qualified with reasonable employer efforts*.

If you apply for reemployment now, the employer will be required to reemploy you in a position for which you are qualified despite your serious disabilities. The problem is that the employer will likely fire you for “unauthorized absence” when you miss work for some weeks or months for your surgery and recuperation. For that reason, it is important that you wait and submit your application after you have had the surgery and after you have recuperated.

When you are ready to return to work, you need to apply for reemployment. The deadline for you to apply for reemployment (ordinarily 90 days after the date you were released from active duty) is tolled (stops running) while you are convalescing. The period of convalescence can be *up to two years*. You need to apply for reemployment by December 2018 (two years after you left active duty) even if you are still convalescing at that time.

A federal law enforcement position requires vigorous physical activity, at least occasionally. Your serious service-connected disabilities likely disqualify you from returning to a federal law enforcement position, and that disqualification may be permanent. But the Federal Government (your employer) is required to reemploy you in another position for which you are

qualified or for which you can become qualified with reasonable employer efforts. This is a good time for you to start thinking about retraining for another career field.

Thank you for your service to our country in the Army. I hope that this information is useful to you.

Proposed sample letter to your employer:

Mr. Leon James Vance¹²
Director
Naval Criminal Investigative Service
Washington Navy Yard¹³
Washington, DC 20350

Dear Director Vance:

As you may know, I was employed by your agency as a Special Agent from July 2007 (when I was hired) until July 2011 (when I was called to active duty in the Army Reserve). I was deployed to Afghanistan and was wounded in action. The other members of my Army Reserve unit were released from active duty and returned to their homes and civilian jobs in July 2012, but I was retained on active duty until December 31, 2016.

In the years since I was wounded in Afghanistan, I have had five major surgeries and years of intense physical rehabilitation by the Army. Finally, the Army processed me for a military disability retirement. I retired from the Army and left active duty on December 31, 2016.

My physician informs me that I will need one more surgery and several weeks of recuperation after that surgery. Accordingly, *I am not applying for reemployment now*. I intend to apply for reemployment after I have had my surgery and after I have recuperated from that surgery.

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), I am entitled to wait before applying for reemployment *because I am still convalescing from the wounds I received in Afghanistan in 2011*. The pertinent subsection of USERRA is as follows:

- **(2) (A)** A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a

¹² Leon James Vance is not the Director of the Naval Criminal Investigative Service (NCIS), except on the television program. The person asking these questions is really a federal law enforcement officer, but not for NCIS. I have changed some of his facts to disguise his identity and also to make some important legal points.

¹³ The NCIS headquarters was located at the Washington Navy Yard for many years, but some years ago, it moved to Quantico, Virginia. The headquarters is no longer located at the Washington Navy Yard, except of the television program.

person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

- (B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

You can find this subsection in title 38 of the United States Code, at section 4312(e)(2). This subsection clearly applies directly to my situation and allows me to postpone applying for reemployment while I am convalescing.

I invite your attention to www.roa.org/lawcenter. At that website, you will find more than 1,000 "Law Review" articles about USERRA, along with a detailed Subject Index, to facilitate finding articles about very specific topics. I invite your attention specifically to Law Review 17024 (March 2017). For your convenience, I am attaching a copy of that article.

Thank you for your support and prayers during the years that I have been away from my NCIS job for military service and while recuperating from my wounds. I look forward to returning to NCIS as soon as possible.

Very respectfully,

Tony Dinozzo
Special Agent