

USERRA Gives you the Right To Continue your Civilian Health Insurance while you Are on Active Duty, But you Probably Don't Want To

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1.3.2.6—Health insurance reinstatement and continuation

1.8—Relationship between USERRA and other laws/policies

Section 4317 of USERRA provides:

- (a) (1) In any case in which a person (or the person's dependents) has coverage under a health plan *in connection with the person's position of employment, including a group health plan* (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974, and such person is absent from such position of employment by reason of service in the uniformed services, or such person becomes eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, the plan shall provide that the person may elect to continue such coverage as provided in this subsection. The

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "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 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 the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 35 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, 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 by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of--

- (A) the 24-month period beginning on the date on which the person's absence begins; or
 - (B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e).
 - (2) *A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.*
 - (3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated--
 - (A) by the plan in such manner as the plan sponsor shall provide; or
 - (B) if the sponsor does not provide--
 - (i) to the last employer employing the person before the period served by the person in the uniformed services, or
 - (ii) if such last employer is no longer functional, to the plan.
- (b)
 - (1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, or by reason of the person's having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service or eligibility. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.
 - (2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

- (3) In the case of a person whose coverage under a health plan is terminated by reason of the person having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title but who subsequently does not commence a period of active duty under the order to active duty that established such eligibility because the order is canceled before such active duty commences, the provisions of paragraph (1) relating to any exclusion or waiting period in connection with the reinstatement of coverage under a health plan shall apply to such person's continued employment, upon the termination of such eligibility for medical and dental care under chapter 55 of title 10 that is incident to the cancellation of such order, in the same manner as if the person had become reemployed upon such termination of eligibility.³

Section 4317(a) gives you the right to *continue* your civilian health insurance, through your civilian job, while you are away from that job for uniformed service. Section 4317(b) gives you the right to *reinstate* your civilian health insurance when you complete your period of service and return to your civilian job. I will discuss section 4317(a) in this article and section 4317(b) in Law Review 17089, the next article in this series.

It is not necessary to continue your civilian health insurance coverage, through your employer, to have the right to reinstate it upon your return to work, after your release from the period of service. As I explain below, continuing your health insurance coverage under section 4317(a) is a very expensive proposition for the employee who is away from his or her civilian job for military service for a period of months, and the coverage that the service member is purchasing duplicates health care coverage that he or she has, for the service member and his or her family members, through the Department of Defense (DOD) system called TRICARE. If the projected period of service (as called for in the military orders) is for 31 days or more, the service member and his or her family are covered from day one of the period of service by the TRICARE system.⁴ Except in the most unusual circumstances, electing continued health insurance coverage during the period of service of 31 days or more, under section 4317(a), is foolish and wasteful.

Continuation of civilian health insurance coverage during a period of service of 31 days or more

Let us take a hypothetical but realistic example. Mary Jones is a Captain in the Air Force Reserve, as a traditional reservist. On the civilian side, Mary is employed by a large company—let's call it Daddy Warbucks Industries (DWI). Mary has a good health insurance plan through her DWI employment, and that plan covers Mary, her husband Bob (a self-employed lawyer with no health insurance of his own), and their young daughter Connie, who has serious health issues. The health insurance cost is \$2000 per month. While working, Mary pays \$200 per month (deducted from her DWI salary each pay period) and DWI pays the other \$1800.

³ 38 U.S.C. 4317 (emphasis supplied).

⁴ 10 U.S.C. 1076(a)(2)(A).

Mary leaves her civilian job at DWI for one year of voluntary or involuntary active duty—USERRA applies equally to voluntary and involuntary duty. Under section 4317(a), Mary has the right to elect continuation of her DWI health insurance coverage, for herself and her husband and her daughter, but she would be foolish to make that election, because DWI is permitted to charge her \$2,040 per month for the continued coverage. That figure represents the full cost of the coverage plus a two percent fee. Perhaps Mary is willing to pay that amount, so that her husband and daughter can continue seeing the same civilian health care providers during the year that Mary is away from her job for Air Force service,⁵ but \$2,040 per month is a lot to pay for a little convenience.

If Mary elects to continue her health insurance through DWI, under section 4317(a), she can continue that coverage (paying the full premium plus a two percent fee) until the earlier of the day after the deadline for her to apply for reemployment has passed without her having applied for reemployment or the date that is 24 months after she began the period of service.⁶ To understand the duration of this maximum permissible period of coverage, let us consider two scenarios.

First scenario

Mary begins her one-year period of service on October 1, 2017. One year later (September 30, 2018), Mary leaves active duty as scheduled. Because her period of service exceeded 180 days, Mary has 90 days (starting on the date of release from active duty) to apply for reemployment.⁷ Thus, the deadline for her to apply for reemployment is December 29, 2018 (90 days after September 30). For whatever reason, Mary allows the 90-day deadline to pass, without applying for reemployment at DWI. In this situation, the coverage period under section 4317(a) expires on December 30, 2018.⁸

Second scenario

Mary completes her one year of service on September 30, 2018. Her active duty period is extended for another two years, voluntarily or involuntarily. In this situation, the coverage period under section 4317(a) expires on October 1, 2019, which is 24 months after Mary entered active duty on October 1, 2017.

Continuation of civilian health insurance during a period of service scheduled to last fewer than 31 days

⁵ If Mary, Bob, and Connie live in a metropolitan area that is far from any major military installation, it may be difficult for them to find physicians and other health care providers who are willing to participate in DOD's TRICARE system.

⁶ 38 U.S.C. 4317(a)(1).

⁷ 38 U.S.C. 4312(e)(1)(D).

⁸ Mary is paying the entire cost of the health insurance premium plus a two percent fee. DWI might choose to continue allowing Mary to pay for the insurance and the fee, but the company is not required to make that choice.

As an Air Force reservist, Mary is away from her civilian job for short periods of Air Force Reserve training many times each year. Each month, she performs a period of inactive duty training (drill), usually on Saturday and Sunday but sometimes for more than two days and sometimes on other days of the week. Each year, Mary is required to perform a period of annual training with her unit. Traditionally, annual training tours last about two weeks, but in the years since the terrorist attacks of September 11, 2001 annual training tours are sometimes longer. Mary is not entitled to TRICARE health coverage for husband Bob and daughter Connie during these short military tours.⁹

I invite the reader's attention to section 4317(a)(2):

A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, *except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.*¹⁰

Under the italicized "except" clause, DWI is permitted to charge Mary only the employee share (\$200 per month, prorated for the part of the month that Mary is away from her job for military service) of the cost of health insurance coverage. For these short tours, Mary should elect continued health insurance coverage through DWI, for husband Bob and daughter Connie. Some people have terrible luck. Husband Bob or daughter Connie could suffer a serious and expensive illness or injury even during a short gap in coverage, so Mary will want to ensure that there is no gap in her health insurance coverage for her daughter and her husband.

There has been a lot of confusion about section 4317(a). The distinction is *not* between the first 30 days and day 31 and beyond. The distinction is between a period of service that is scheduled to last for 31 days or more and a period of service that is scheduled to last for fewer than 31 days.

Does Mary need to elect continued health insurance coverage through DWI, or is coverage continued automatically?

Section 4317(a) provides that an employee who is away from his or her civilian job for a short or long period of military training or service "may *elect* to continue such [health insurance] coverage as provided in this subsection."¹¹ Thus, the default result (if the employee does not make an election) should be the civilian health insurance is not continued. A person in Mary's situation should affirmatively elect (preferably in writing) to continue civilian health insurance coverage for short military tours, like drill weekends and annual training periods. For military

⁹ 10 U.S.C. 1076(a)(2)(A).

¹⁰ 38 U.S.C. 4317(a)(2) (emphasis supplied).

¹¹ 38 U.S.C. 4317(a)(1) (emphasis supplied).

tours of 31 days or more, the service member entering active duty should not elect continued civilian health insurance coverage, except perhaps in the most unusual circumstances.

I am aware of cases where civilian employers, including federal agencies, have automatically continued civilian health insurance coverage for employees departing their jobs for military service and later have billed the employee for thousands of dollars for health insurance that the employee did not request, did not need, and did not use during periods of active duty.¹² In order to avoid this problem, I suggest that you make an explicit election in writing, either to continue or not to continue your civilian health insurance coverage, when you leave your c

¹² Please see Law Review 69 (April 2003).