

Reinstate your Civilian Health Insurance upon Reemployment

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.3.2.6—Health insurance reinstatement and continuation

1.8—Relationship between USERRA and other laws/policies

4.4—SCRA right to reinstatement of health insurance coverage upon return from military service

This is a continuation of the hypothetical situation addressed in Law Review 17088, the immediately preceding article in this series. Mary Jones is a Captain in the Air Force Reserve, and she is leaving her civilian job to serve on full-time active duty (voluntarily or involuntarily) for one year, from October 1, 2017 until September 30, 2018.

Mary has good health insurance coverage through her civilian job at Daddy Warbucks Industries (DWI). The coverage costs \$2000 per month, and while working Mary pays \$200 per month and DWI pays the other \$1800. The coverage applies to Mary, her husband Bob, and her daughter Connie.

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 (VRRA—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 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 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.

As I have explained in Law Review 15116 (December 2015) and other articles, Mary Jones or any returning service member or veteran must meet five conditions to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA):³

- a. Must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services. Mary is clearly leaving her DWI job to perform service.
- b. Must have given the employer prior oral or written notice. We shall assume that Mary has given DWI notice.
- c. Must not have exceeded the cumulative five-year limit with respect to the employer relationship for which the person seeks reemployment. If Mary is being involuntarily called to active duty, her one-year period of service does not count toward exhausting her five-year limit with DWI.⁴ If this period of active duty is voluntary and not exempt from the five-year limit, we shall assume that this one-year period does not put her over the five-year cumulative limit.
- d. Must not have received a disqualifying bad discharge from the military.⁵ We shall assume that Mary serves honorably and does not receive a bad discharge.
- e. Must have made a timely application for reemployment. After a period of service of 181 days or more, the returning veteran or service member has 90 days to apply for reemployment.⁶ Let us assume that Mary applies for reemployment at DWI on October 15, 2018, well within the 90-day deadline.

Let us assume that Mary did not elect to continue her DWI health insurance coverage while away from her job for a year of military service. Continuing the coverage would have cost her \$2,040 per month and would have duplicated coverage that she receives from the Department of Defense (DOD) TRICARE system while on active duty.⁷

During Mary's year of active duty, her daughter Connie's kidneys failed. Connie needs very expensive kidney dialysis to preserve her life, and she is on the waiting list for a kidney transplant. Mary meets the five USERRA conditions in October 2018, and the employer must reemploy her promptly in her civilian job at DWI. Under section 4317(b) of USERRA, DWI and the health insurance company must reinstate Mary's health insurance coverage, for herself, her husband, and her daughter. There must be no waiting period and no exclusion of "pre-existing conditions."

³ 38 U.S.C. 4301-35.

⁴ 38 U.S.C. 4312(c)(4)(A).

⁵ 38 U.S.C. 4304.

⁶ 38 U.S.C. 4312(e)(4)(D). Shorter deadlines apply after shorter periods of service.

⁷ Please see Law Review 17088 (September 2017).

While Mary was on active duty for one year, DOD's TRICARE system provided for Connie's medical treatment, including kidney dialysis. Connie's eligibility for TRICARE ends September 30, 2018, when her mother Mary leaves active duty. DWI and the health insurance company are very reluctant to reinstate Mary's health insurance coverage because of the enormous costs of the medical treatment that Connie will need. But section 4317(b) of USERRA requires the employer and the insurance company to do exactly that. USERRA is binding on the insurance company as well as the employer. Section 4317(b) provides:

- (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.⁸

Section 4331 of USERRA⁹ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, DOL published proposed USERRA regulations in the *Federal Register*, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final USERRA regulations in the *Federal Register* in December

⁸ 38 U.S.C. 4317(b) (emphasis supplied).

⁹ 38 U.S.C. 4331.

2005. The regulations are codified in Part 1002 of title 20 of the Code of Federal Regulations.¹⁰ The pertinent section is as follows:

If the employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?

- (a) If health plan coverage for the employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. *An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.*
- (b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. *Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.*¹¹

Reinstatement of health insurance coverage that is not through the service member's civilian job.

Bob Williams is a member of the same Air Force Reserve unit as Mary Jones. Like Mary, he is on active duty from October 1, 2017 until September 30, 2018. Bob has civilian health insurance, but not through his job—he is a self-employed engineer. USERRA (and specifically section 4317 of USERRA) does not apply to Bob's health insurance coverage.

Bob's civilian health insurance coverage was suspended or terminated on October 1, 2017, when Bob entered active duty. After leaving active duty on September 30, 2018, Bob seeks reinstatement of his civilian health insurance coverage. He has the right to such reinstatement under section 704 of the Servicemembers Civil Relief Act (SCRA). That section reads as follows:

- (a) Reinstatement of health insurance. A servicemember who, by reason of military service as defined in section 703(a)(1) [50 USCS § 4023(a)(1)], is entitled to the rights and protections of this Act shall also be entitled upon termination or release from such service to reinstatement of any health insurance that--
 - (1) was in effect on the day before such service commenced; and
 - (2) was terminated effective on a date during the period of such service.

¹⁰ 20 C.F.R. Part 1002.

¹¹ 20 C.F.R. 1002.168 (bold question in original, emphasis by italics supplied).

- (b) *No exclusion or waiting period. The reinstatement of health care insurance coverage for the health or physical condition of a servicemember described in subsection (a), or any other person who is covered by the insurance by reason of the coverage of the servicemember, shall not be subject to an exclusion or a waiting period, if--*
 - (1) the condition arose before or during the period of such service;
 - (2) an exclusion or a waiting period would not have been imposed for the condition during the period of coverage; and
 - (3) in a case in which the condition relates to the servicemember, the condition has not been determined by the Secretary of Veterans Affairs to be a disability incurred or aggravated in the line of duty (within the meaning of section 105 of title 38, United States Code).
- (c) *Exceptions. Subsection (a) does not apply to a servicemember entitled to participate in employer-offered insurance benefits pursuant to the provisions of chapter 43 of title 38, United States Code.*
- (d) *Time for applying for reinstatement. An application under this section must be filed not later than 120 days after the date of the termination of or release from military service.*
- (e) *Limitation on premium increases.*
 - (1) *Premium protection. The amount of the premium for health insurance coverage that was terminated by a servicemember and required to be reinstated under subsection (a) may not be increased, for the balance of the period for which coverage would have been continued had the coverage not been terminated, to an amount greater than the amount chargeable for such coverage before the termination.*
 - (2) *Increases of general applicability not precluded. Paragraph (1) does not prevent an increase in premium to the extent of any general increase in the premiums charged by the carrier of the health care insurance for the same health insurance coverage for persons similarly covered by such insurance during the period between the termination and the reinstatement.*¹²

¹² 50 U.S.C. 4024 (emphasis supplied). I discuss this provision in detail in Law Review 118 (March 2004).