

LAW REVIEW 17112¹

November 2017

Yes, Your Son Can Have the Right to Reemployment after Regular Navy Service

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Q: I am a retired Navy Reserve Captain and a life member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 17102 (October 2017). That article caught my eye because I believe that it may be pertinent to my son’s situation.

¹ I invite the reader’s attention to www.roa.org/lawcenter. 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), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 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.

My son graduated from high school in 2008 and shortly thereafter went to work for a local company—let's call it Coors Heineken & Schlitz Incorporated or CHSI. In 2012, he visited a Navy recruiter and enlisted in the Navy. In his enlistment contract, he agreed to remain on active duty for at least six years, because he had chosen the Navy's nuclear power program. He gave notice to the company's personnel department and his immediate supervisor, and the company put on a luncheon for him on his last day at work in September 2012. I attended the luncheon, as the proud father.

When my son left CHSI in September 2012, he had no idea that he might someday return and seek reemployment. I don't think that my son had ever heard of USERRA at the time. I was aware of the law, but I thought that it only applied to Reserve and National Guard service.

When my son enlisted in 2012, his intent was to make the Navy his career, but things change. Now, he expects to leave active duty on 9/30/2018, exactly six years after he entered active duty on 10/1/2012. Is it possible that my son will have the right to reemployment at CHSI?

A: Yes. Your son will have the right to reemployment at CHSI if he meets the five USERRA conditions:

- a. Left a civilian job (federal, state, local, or private sector) to perform "service in the uniformed services" as defined by USERRA.
- 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 service, relating to the employer relationship for which the person seeks reemployment.
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.³
- e. After release from the period of service, has made a timely application for reemployment.⁴

A person who meets these five conditions is entitled to prompt reinstatement in the job that he or she would have attained if he or she had remained continuously employed by the civilian employer, or another job (for which he or she is qualified) that is of like seniority, status, and pay.⁵ Upon reemployment, the person is entitled to be treated as if he or she had been continuously employed, for seniority and pension purposes in the civilian job.⁶

³ Disqualifying bad discharges include bad conduct discharges and dishonorable discharges (awarded by court martial for serious offenses) and other-than-honorable administrative discharges. 38 U.S.C. 4304.

⁴ 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.

⁵ 38 U.S.C. 4313(a)(2)(A).

⁶ 38 U.S.C. 4316(a), 4318.

Your son already meets the first two conditions, and he can easily meet the other three next year when he leaves active duty as scheduled on 9/30/2018. Your son gave notice to CHSI before he left the company in September 2012. It was not necessary for him to mention USERRA or to predict that he would be returning and seeking reemployment. I invite your attention to the pertinent section of the Department of Labor (DOL) USERRA Regulations:

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?

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 not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.⁷

There is a five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment. There are also nine exemptions. That is, there are nine kinds of service that do not count in exhausting an individual's five-year limit. The first subsection of section 4312(c) of USERRA exempts "any service ... that is required, beyond five years, to complete an initial period of obligated service."⁸ If your son is released from active duty as scheduled on 9/30/2018, and if he meets the other four USERRA conditions, he will have the right to reemployment at CHSI.

If your son meets the five USERRA conditions, he will be entitled to prompt reinstatement (within two weeks after his application)⁹ even if that means that another employee must be displaced to make room for him.¹⁰ He will be entitled to reinstatement in the position that he would have attained if he had been continuously employed (possibly a better position than the one he left) or another position for which he is qualified that is of like seniority, status, and pay.¹¹ Upon reemployment, he will be entitled to be treated for seniority and pension purposes as if he had been continuously employed during the entire period that he was away from his

⁷ 20 C.F.R. 1002.88 (bold question in original).

⁸ 38 U.S.C. 4312(c)(1).

⁹ 20 C.F.R. 1002.181.

¹⁰ Please see Law Review 08029 (June 2008).

¹¹ 38 U.S.C. 4313(a)(2)(A).

CHSI job for military service.¹² Upon reemployment, he is entitled to immediate reinstatement of his CHSI health insurance coverage.¹³

Q: I have encouraged my son to affiliate with the Navy Reserve after he leaves active duty. How will the five-year limit work for him as a Navy Reservist who has been reemployed by CHSI?

A: In this scenario, your son will have no head room in his five-year limit at CHSI. His drill weekends and annual training tours will not count toward exhausting his five-year limit. If he is involuntarily recalled to active duty, that involuntary service period will not count toward his five-year limit. If he returns to active duty voluntarily, he needs to ensure that his orders contain the “magic words” indicating that the Secretary of the Navy has determined that his voluntary active duty period does not count toward the five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count toward the five-year limit.

¹² 38 U.S.C. 4316(a), 4318.

¹³ 38 U.S.C. 4317(b).