

You Will Not Have the Right to Reemployment if you Leave a Private Sector Job To Become a Temporary Air National Guard Technician

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- 1.1.3.1—USERRA applies to voluntary service
- 1.1.3.3—USERRA applies to National Guard service
- 1.3.1.1—Left job for service and gave prior notice
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a traditional (part-time) Air National Guard (ANG) member—I am a Staff Sergeant (E-6). I recently joined the Reserve Officers Association (ROA)³ because I am impressed with your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve our country in uniform.

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1600 “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 1400 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 (VRRRA—the 1940 version of the federal reemployment statute) for 36 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.

³ In 2013, ROA members amended the ROA Constitution to make noncommissioned officers eligible for full membership, including voting and running for office.

Like other Reserve Components,⁴ the ANG is made up primarily of part-timers like me, but the component needs a cadre of full-timers to provide full-time support in functions like recruiting, organizing and preparing for the training of the part-timers, maintaining the aircraft, vehicles, and other equipment, etc. These full-time personnel account for 5% to 10% of component members.

In the ANG and USAFR, as well as the USAR and ARNG, “technicians” provide most of these full-time support services. I am informed that a technician is a civilian employee of the Air Force or Army but is required, as a condition of employment, to be a member of the unit or one of the units that he or she supports. During drill weekends and annual training periods, the technician participates in his or her military capacity, but the rest of the time the technician works as a civilian employee, although he or she wears a military uniform and observes military courtesies (saluting, etc.) while at work.

The ANG unit of which I am a member has a technician—let’s call her Mary Jones. Jones is unable to work because of serious illness. The ANG leadership of my state has offered me the opportunity to come on board as a “temporary technician” for the last four months of this fiscal year (June through September). I have been told that on October 1 I may be offered a permanent job if Jones has not recovered from her illness or if there is another vacancy, but that I should not assume that I will have a job after September 30. I am reluctant to take on this temporary technician position if the result will be that I am unemployed just four months later.

I have a satisfactory job at an intermediate-size local company—let’s call it Coors Heineken & Schlitz, Inc. or CHSI. If I leave my CHSI job to take on the temporary technician opportunity, and if the ANG does not extend me past 9/30/2018, will USERRA give me the right to reemployment at CHSI?

A: No. USERRA gives you the right to reemployment in your pre-service job if you meet five simple conditions. The first condition is that you must have left your civilian job *to perform uniformed service*. If you leave a civilian job to take another civilian job, you do not have the right to reemployment at the first job. The “temporary technician” position that you have described is a civilian position of employment, and you will not have the right to reemployment at CHSI.⁵

You should tell the ANG leadership that you are willing to perform the full-time support function for four months in a military capacity but not in a technician capacity. The ANG can put

⁴ Our national has seven Reserve Components. In order of size they are the Coast Guard Reserve (USCGR), the Marine Corps Reserve (USMCR), the Navy Reserve (USNR), the Air Force Reserve (USAFR), the ANG, the Army Reserve (USAR), and the Army National Guard (ARNG).

⁵ Please see Law Review 18024 (March 2018).

you on four months of military orders under title 32 of the United States Code. If you want to retain the option of returning to your job at CHSI, you must meet the five USERRA conditions:

- a. You must leave your civilian job to perform uniformed service, as defined by USERRA.
- b. You must give the employer prior oral or written notice.
- c. You must not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to your CHSI job.⁶
- d. You must be released from the period of service without having received a disqualifying bad discharge from the military.⁷
- e. You must have made a timely application for reemployment after release from the period of service.⁸

⁶ Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

⁷ Please see Law Reviews 18039 and 18040 (May 2018).

⁸ 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.