

**Your “Resignation” in 2014, when you Enlisted in the Army,  
Does Not Defeat your Right to Reemployment in 2018, When you Were  
Released from Active Duty**

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1.1.1.7—USERRA applies to state and local governments

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**Q: I was recently on active duty for exactly four years, from 4/1/2014 until 3/31/2018. When I left active duty a few weeks ago, I promptly applied for reemployment with the employer that I left in March 2014, to report to boot camp in the United States Army (the Regular Army, not the Army Reserve or Army National Guard). Responding to my application for reemployment, my pre-service employer, the City of Mudville, told me to “pound sand.” I contacted the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR), at 800-336-4590. ESGR headquarters put me in touch with an ESGR volunteer “ombudsman” (a retired Army Reserve Colonel) in the Mudville area. The ombudsman contacted the Personnel Director of the City of Mudville, and she told him to**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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 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 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](mailto:SWright@roa.org).

“pound sand” also. The ombudsman referred me to your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have read several of them.

I graduated from Mudville High School in June 2011. A few days later, I started a job with the Mudville Sanitation Department, as a “sanitation engineer” riding the back of a garbage truck and putting garbage and recycling materials in the back of the truck and helping the driver to remove them from the truck at Mudville’s landfill. As you can imagine, this job payed only slightly more than the minimum wage, and the working conditions were most unpleasant.

In late 2013, I decided that I did not want to spend the rest of my working years riding on the back of a garbage truck, and I visited a local Army recruiter. I took the physical and the Armed Forces Qualifying Test at a Military Examination and Processing Station (MEPS), and I was found qualified. I enlisted in the Army and reported to boot camp on 4/1/2014, when my active duty began.

In 2014, when I enlisted, I had no idea that federal law gave me the right to reemployment at the civilian job that I left to join the Army. I did not give the matter much thought because returning to the back of the garbage truck was the last thing on my mind at the time. I did not “request a military leave of absence” and I did not promise to return to Mudville after my military service ended. I did announce that I had enlisted in the Army and that I planned to make the Army my career. In late March 2014, at the end of my last day of work for the City of Mudville, my civilian supervisor took me and several of my colleagues to dinner at a nice restaurant, and during dinner he read a letter signed by the Mayor of Mudville, congratulating me on my enlistment in the Army. In my resignation letter, and in other ways, I made the City of Mudville realize that I was resigning because I had enlisted.

At the time, in early 2014, I intended to serve on active duty for 20 years or more and to qualify for a military retirement. Unfortunately, when my initial active duty obligation expired four years later the Army did not give me the opportunity to reenlist, and I left active duty on 3/31/2018.

When I visited the Army recruiter in late 2013 and early 2014, he told me that in four years of active duty I would get a lot of very valuable training that would qualify me for a much better job than the garbage truck job I left. Unfortunately, it did not work out that way. Since I returned to Mudville several weeks ago, I have diligently sought civilian employment, without success. When I joined the Army in early 2014 returning to the back of the garbage truck was the last thing on my mind, but I guess that it beats unemployment.

The Mudville Personnel Director and City Attorney insist that I am not entitled to reemployment for the following reasons:

- a. I served in the Regular Army, not the National Guard or Reserve, and USERRA only applies to the National Guard and Reserve.

- b. If I had the right to reemployment, I waived it when I signed a written “resignation” letter in early 2014.
- c. I will not be hired because Mudville already has enough sanitation engineers and dozens of well-qualified candidates seeking to be hired in those positions.

**What do you think of the City’s assertions?**

**Answer, bottom line up front**

Neither your resignation letter, nor your service in the Regular Army, nor the lack of a present vacancy in the Sanitation Department defeat your right to reemployment with the City of Mudville. If you meet the five USERRA conditions (and you almost certainly meet them), you are entitled to reemployment in the job that you *would have attained if you had been continuously employed* (perhaps a better job than the one you left) or another job (for which you are qualified) that is of like seniority, status, and pay.<sup>3</sup> Moreover, you are entitled to the seniority and pension credit that you would have earned if you had remained continuously employed.<sup>4</sup>

### **USERRA applies to state and local governments**

As I explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue update to and improvement of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. The federal reemployment statute has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the VRRA to make it apply also to state and local governments, like the City of Mudville.<sup>5</sup>

### **Conditions for reemployment under USERRA**

As I have explained in Law Review 15116 (December 2015) and many other articles, a service member or veteran must meet five simple conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian position of employment (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.
- b. Must have given the employer prior oral or written notice.

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<sup>3</sup> 38 U.S.C. 4313(a).

<sup>4</sup> 38 U.S.C. 4316(a), 4318.

<sup>5</sup> On 12/3/1974, President Gerald Ford signed into law the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), Public Law 93-508, 88 Stat. 1593. VEVRAA moved the VRRA from title 50 of the United States Code (war and national defense) to title 38 (veterans’ benefits) and made several substantive changes to the VRRA. The most important substantive change was to expand the law to make it apply to state and local governments. The federal reemployment statute has applied to the City of Mudville and other local governments for almost 44 years. It is high time for the City of Mudville to understand and accept that it has obligations under this law.

- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.<sup>6</sup>
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>7</sup>
- e. Must have made a timely application for reemployment after release from the period of service.<sup>8</sup>

### **Left job to perform uniformed service**

You clearly left your City of Mudville job to perform uniformed service. USERRA applies to service in the regular military, as well as service in the National Guard or Reserve.<sup>9</sup>

### **Gave prior notice to the employer**

You told the employer that you were resigning to join the Army, and that is all that you were required to do. You were not required to mention the name of the statute (USERRA). You were not required to predict that you would be returning and seeking reemployment. Telling the employer that you would not be coming back did not defeat your right to reemployment at the City of Mudville.

Section 4331 of USERRA<sup>10</sup> gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* on December 19, 2005. These regulations were then incorporated into the Code of Federal Regulations (C.F.R.). One section of the DOL USERRA Regulations is right on point to your situation:

#### **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?**

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No. When the employee leaves the employment position to begin a period of service, he

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<sup>6</sup> As I have explained in Law Review 16043 (May 2016) and other articles, there are nine exemptions—kinds of service that do not count toward exhausting your five-year limit.

<sup>7</sup> Under section 4304 of USERRA, 38 U.S.C. 4304, you do not have the right to reemployment if you have received a punitive discharge (dismissal, dishonorable discharge, or bad conduct discharge) by court martial, or if you have received an “other than honorable” administrative discharge, or if you have been “dropped from the rolls” of your uniformed service.

<sup>8</sup> 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.

<sup>9</sup> Please see Law Review 0719 (May 2007) and Law Review 17112 (November 2017).

<sup>10</sup> 38 U.S.C. 4331.

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.<sup>11</sup>

When DOL published the final regulations in the *Federal Register* on December 19, 2005, it also published a lengthy and scholarly preamble. The preamble includes the following pertinent paragraph:

Section 1002.88 implements the long-standing legal principle that an employee departing for service is not required to decide at the time whether he or she intends to return to the pre-service employer upon completion of the tour of duty. Rather, the employee may defer the decision until after he or she concludes the period of service, and the employer may not press the employee for any assurances about his or her plans. See H.R. Rep. No. 103-65, Part 1, at 26 (1993) (“One of the basic purposes of the reemployment statute is to maintain the service member’s civilian job as an ‘unburned bridge.’”) and S. Rep. No. 103-158, at 47 (1993), both of which cite *Fishgold v. Sullivan Drydock & Repair Corp.*, 275, 284 (1946).<sup>12</sup>

### **The five-year limit**

You were on active duty for four years, after you left your Mudville job to enlist in the Army. You did not exceed the five-year limit.

### **You did not receive a disqualifying bad discharge**

As I have explained in Law Review 18039 (May 2018), a person who has received a punitive discharge by court martial or an other-than-honorable administrative discharge, or who has been dismissed or dropped from the rolls of an armed force, is not entitled to reemployment.<sup>13</sup> You served honorably, and you did not receive one of the enumerated disqualifying bad discharges.

### **Timely application for reemployment**

After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply for reemployment.<sup>14</sup> You applied for reemployment well within that deadline.

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<sup>11</sup> 20 C.F.R. 1002.88 (bold question in original, emphasis by italics supplied).

<sup>12</sup> *Federal Register*, December 19, 2005, at page 75256, near the top of the right-hand column.

<sup>13</sup> 38 U.S.C. 4304.

<sup>14</sup> 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

**The present lack of a vacancy does not defeat your right to reemployment.**

Because you meet the five USERRA conditions, you are entitled to timely reinstatement even if that means that another employee must be displaced. I invite your attention to *Nichols v. Department of Veterans Affairs*:<sup>15</sup>

The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).'*Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.<sup>16</sup>

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<sup>15</sup> 11 F.3d 160 (Fed. Cir. 1993).

<sup>16</sup> *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). Nichols was the supervisory chaplain (GS-13) at a Department of Veterans Affairs (VA) medical facility when he left the job for military service. When he returned from service, he was reinstated as a GS-13 chaplain at the same facility, but the VA refused to make him the supervisor of the other chaplains at the facility. The Merit Systems Protection Board agreed with the VA, but the Federal Circuit reversed, holding that being the supervisor of other chaplains was part of the status to which Nichols was entitled and that Nichols must be reemployed as the supervisor of chaplains even if that meant displacing Walsh.