

## LAW REVIEW<sup>1</sup> 18072

August 2018

### Don't Apply for Reemployment until you Are Ready To Return to Work—Part 2

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.3.1.3—Timely application for reemployment

1.3.2.1—Prompt reinstatement

1.7—USERRA regulations

**Q: I am a Captain in the Army Reserve (USAR) and a member of the Reserve Officers Association (ROA). On the civilian side, I am a federal civilian employee. I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I am currently on a 40-day period of USAR training that ends tomorrow, 8/3/2018. I have heard that after a period of service that lasts more than 30 days but less than 181 days I am entitled to take two weeks off from my civilian job before returning to work. Is that true?**

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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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 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).

**My father has owned and operated a store for decades, and the store has been very successful. He always hoped that one of his two children would take over the store when he was ready to retire, but I have told him repeatedly that with my USAR career and my federal civilian career I am just not interested in owning and operating a store. My sister is a physician, and she is also not interested in carrying on the store.**

**Now that his health has started to deteriorate, and now that he has finally accepted that neither of his children will take over the store, my father has decided to hold a “retirement sale” and sell off the remaining inventory and then close the store, so that he can retire. He asked me to help him in his store for two weeks, conducting a complete inventory and marking down all the items for the retirement sale, and I agreed to do that. That is how I want to use my two weeks off from my federal civilian job, if I am entitled to two weeks off. How does this work?**

**Answer, bottom line up front:**

It is not correct to say that USERRA gives you the right to two weeks off from work in this situation. After a period of service of more than 30 days but less than 180 days, you are required to submit your application for reemployment “not later than 14 days after the completion of the period of service.”<sup>3</sup> Because your period of service ends 8/3/2018, you have until 8/17/2018 to apply for reemployment.

If you want to take two weeks off before returning to work, you must wait until Friday, 8/17/2018 to apply for reemployment. If you report back to work on Monday, 8/6/2018, or if you make a communication to the employer that can reasonably be construed as an application for reemployment, you should expect your supervisor to direct you to report to your desk and get to work. *Do not apply for reemployment until you are ready to return to work.*

### **Explanation**

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

- a. You must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services as defined by USERRA. You clearly did that in late June.
- b. You must have given the employer prior oral or written notice. For purposes of this article, I shall assume that you gave the federal agency prior notice.

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<sup>3</sup> 38 U.S.C. 4312(e)(1)(C). If your period of service had been 181 days or more, you would have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). If your period of service had lasted fewer than 31 days, you would be required to report for work “not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person’s residence.” 38 U.S.C. 4312(e)(1)(A)(i).

- c. You must not have exceeded the cumulative five-year limit on the duration of your period or periods of uniformed service, related to the employer relationship for which you seek reemployment.<sup>4</sup>
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>5</sup>
- e. After release from the period of service, you must have been timely in reporting back to work or applying for reemployment.<sup>6</sup>

**Q: How do I go about applying for reemployment? To whom do I submit the application for reemployment?**

**A:** I invite your attention to two sections of the Department of Labor (DOL) USERRA regulations:<sup>7</sup>

**Is an application for reemployment required to be in any particular form?**

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An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.<sup>8</sup>

**To whom must the employee submit the application for reemployment?**

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The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest.<sup>9</sup>

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<sup>4</sup> As is explained in Law Review 16043 (May 2016) and other articles, there are nine exemptions to the five-year limit. This 40-day USAR training period is probably exempt under section 4312(c)(3), 38 U.S.C. 4312(c)(3). In any case, this 40-day period probably does not put you over your five-year cumulative limit with respect to your employer relationship with the Federal Government.

<sup>5</sup> Please see Law Review 18056 (July 2018).

<sup>6</sup> Please see footnote 3, above.

<sup>7</sup> Section 4331(a) of USERRA, 38 U.S.C. 4331(a), gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register*, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The DOL USERRA regulations are published in Title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The DOL regulations do not, strictly speaking, apply to federal agencies. I have cited the DOL regulations here because the Office of Personnel Management (OPM) regulations, applicable to federal executive agencies, do not go into nearly as much detail and do not address these specific questions—how to apply for reemployment and to whom to submit the application.

<sup>8</sup> 20 C.F.R. 1002.118 (bold question in original).

<sup>9</sup> 20 C.F.R. 1002.119 (bold question in original).

Because the application for reemployment need not be in any particular form, you need to be careful not to make a communication to the employer that can be reasonably construed as an application for reemployment, until you are ready to return to work. That is why I suggested that you wait until Friday, 8/17/2018, and then apply for reemployment by certified mail.

**Q: When I gave notice to my direct federal supervisor in early June, he asked me for a copy of my USAR training orders, and I provided him a copy. He knows that my orders end on 8/3/2018, and he is expecting me to report for work at 8 a.m. on Monday, 8/6/2018. It was only after I left my civilian job to report to the USAR training that my father asked me to help him in his store for two weeks. How do you suggest that I handle this situation?**

**A:** I suggest that you send a polite, non-confrontational letter to your direct supervisor, with a copy to the federal agency's personnel office. Tell him or her that you completed your USAR training as scheduled on 8/3/2018 and that you have 14 days, starting on that date, to apply for reemployment. Cite 38 U.S.C. 4312(e)(1)(C).<sup>10</sup> Make clear that you are *not applying for reemployment* but that you expect to apply within the 14-day window provided by federal law. Then, send the supervisor and the personnel office another certified letter, timed to be received on 8/17/2018. In that letter, explicitly apply for reemployment.

USERRA explicitly gives you 14 days, starting on 8/3/2018 (the date you were released from the USAR training) to submit your application for reemployment. The employer has no right to insist that you submit your application for reemployment and return to work before you are ready to do so, provided you apply within the 14-day window.

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**Q: When I apply for reemployment on 8/17/2018, how long will the agency have to act upon my application and put me back to work?**

**A:** When you make a timely application for reemployment and otherwise meet the five USERRA conditions, the federal agency is required to restore you to your federal civilian position of employment "as soon as possible after making application, but in no event later than 30 days after receipt of the application by the agency."<sup>11</sup>

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<sup>10</sup> This is section 4312(e)(1)(C) of title 38 of the United States Code.

<sup>11</sup> 5 C.F.R. 353.207(a). Section 4331(b)(1) of USERRA, 38 U.S.C. 4331(b)(1), gives the United States Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to federal executive agencies as employers. OPM acted on this authority and promulgated USERRA regulations in 1999. The OPM regulations are codified in Title 5 of the Code of Federal Regulations, Part 353.