LAW REVIEW[1] 18091
September 2018

USERRA, the Five-Year Limit, and the Documentation Requirement

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.1.3.1—USERRA applies to voluntary service
1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
1.3.2.1—Prompt reinstatement after service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.3.2.3—Pension credit for service time

Q: I am the personnel director of a large company—let's call it Coors Heineken & Schlitz Incorporated or CHSI. I have read with interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

We have an employee who is a Navy Reserve Master Chief Petty Officer (E-9)—let's call her Josephine Miller. She is a valuable employee when she is here, but for years she has been

---

[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. 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.

annoying us greatly with her frequent and sometimes lengthy absences from work for her Navy service. I added up all the periods when she has been away from work to serve in the Navy, and the total period of absence came to exactly seven years during the 15 years that she worked for our company, from September 2001 until September 2016. In other words, she was gone almost half the time, and I don't think that our company should have to put up with this.

Two years ago, in September 2016, Miller returned from a lengthy period of voluntary Navy service and came to my office to apply for reemployment. I told her that she was not entitled to reemployment because her cumulative period of Navy service during the 15 years since CHSI hired her has been seven years, or two years beyond the five-year limit.

Miller claimed that several of her periods of service do not count toward the five-year limit and that when the exempt periods are subtracted her cumulative period of service is within the five-year limit. I asked her for documentation of her assertion, and she came back a week later with a collection of Navy DD-214 forms orders. I added up the periods of service in the DD-214 forms, and it came to exactly six years—still a year beyond the five-year limit. But the DD-214 forms did not include short periods of service, like drill weekends and two-week annual training tours, and the DD-214 forms did not include days or weeks that she was away from work immediately before and immediately after the periods of service shown in the forms.

I denied Miller's application for reemployment in September 2016 because she did not provide me documentation that I requested showing that she had not exceeded the five-year limit. Two years later, and just a few days ago, Miller brought in new Navy paperwork showing that two of her periods of service, totaling 18 months, are exempt from the five-year limit. Now, she tells me that she is under the five-year limit and that I must reemploy her and pay her back pay for the last two years.

I am willing to rehire Miller because she told me that she recently retired from the Navy Reserve and won't be asking for any more time off for military service. I am not willing to pay Miller two years of back pay because she did not meet the five conditions for reemployment when she applied for reemployment in September 2016. What do you think?

A: First, Congress fully understood that the reemployment statute puts burdens on civilian employers. Those burdens are tiny, as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform. More than 45 years ago, in 1973, Congress abolished the draft and established the All-Volunteer Military. No one has been drafted by our country for almost two generations, but someone must defend this country. Before you complain about the "burdens" that USERRA puts on you and your company, you should remind yourself that our country is not drafting you, nor is it drafting your children and grandchildren. When you find Reserve Component service members in your workforce or among job applicants, you should cheerfully comply with USERRA and go

over and above the requirements of USERRA in supporting those who serve in your place and in the place of your offspring.[3]

Second, it should be emphasized that *USERRA applies equally to voluntary as well as involuntary military service.* USERRA's definition of "service in the uniformed services" provides: "The term 'service in the uniformed services' means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority."[4]

Third, only *periods of uniformed service* count toward exhausting the individual's five-year limit. The periods when Miller was absent from work immediately before and immediately after her uniformed service periods do not count toward exhausting her five-year limit.[5]

Fourth, there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting the individual's five-year limit. Only five of the nine exemptions require the "Secretary concerned" to make a determination and certification. The documentation that Miller provided you in September 2016 was enough to establish that she was within the five-year limit.

For example, Miller was involuntarily called to active duty for a year in 2007, for service in Iraq. In 2016, she provided you a copy of her orders for that period, and the orders cite section 12302 of title 10 of the United States Code. Section 12302 is one of the sections specifically mentioned in section 4312(c)(4)(A).[6] Miller did not need "magic words" in her orders or her DD-214 to show that this one-year period did not count toward her five-year limit with CHSI. The documentation that she provided in 2016 was enough. Moreover, Miller's drill weekends and two-week annual training tours are exempt from the five-year limit, and no "magic words" are needed for those periods.[7]

Fifth, *you had no right to deny or delay her reemployment while awaiting documentation that did not exist or was not readily available.* Miller gave you all the documentation that she had available in September 2016. You should have reemployed her at least provisionally while awaiting the documentation that did not become available until two years later.

Section 4312(f) sets forth USERRA's documentation requirement as follows:

> **(1)** A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that--
>
> **(A)** the person's application is timely;

---

[3] Please see Law Review 17055 (June 2017).
[4] 38 U.S.C. 4303(13) (emphasis supplied).
[5] *See* 20 C.F.R. 1002.100.
[6] 38 U.S.C. 4312(c)(4)(A).
[7] 38 U.S.C. 4312(c)(3).

(B) *the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c));* and

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)

(A) Except as provided in subparagraph (B), *the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer.* If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) *An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).*

(4) *An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.*[8]

I also invite your attention to the pertinent section of the Department of Labor (DOL) USERRA Regulations:

Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.[9]

[8] 38 U.S.C. 4312(f) (emphasis supplied).
[9] 20 C.F.R. 1002.122 (bold question and bold "Yes" in original).

You (CHSI) had a clear duty to reemploy Miller promptly after she applied for reemployment in September 2016. You had no right to deny her application based on her lack of documentation that did not even exist at the time. Accordingly, you owe her back pay for the 24-month period when you unlawfully denied her reemployment.

Q: Here at CHSI, we have a pension plan for our employees. We could not reinstate Miller to the pension plan in September 2016 because we did not know for sure, at that time, that she met the five USERRA conditions. Once money has been put in an employee's pension plan account, it cannot be removed, even if the money was put in the account erroneously. What gives?

A: Those who drafted USERRA (Susan M. Webman and I) thought about that issue and included the following proviso:

> *An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).*[10]

Now that you have finally reemployed Miller 24 months late, you must treat her, for pension purposes, *as if she had been continuously employed by CHSI* during all the times that she has been away from work for service in the uniformed services.[11] You must also treat her as if she had been continuously employed during the 24 months that you unlawfully denied her reemployment.

Q: Who determines that a period of service is exempt from an individual's five-year limit?

A: As I have stated, there are nine exemptions in section 4312(c), and only five of them require the "Secretary concerned" to make a determination and certification. For the other four exemptions, no "magic words" by the "Secretary concerned" are required.

The term "Secretary concerned" refers to the Service Secretary, like the Secretary of the Air Force, the Secretary of the Army, or the Secretary of the Navy. The authority to make determinations that result in periods of time being excluded from USERRA's five-year limit has been delegated to the Assistant Secretary of the Army for Manpower & Reserve Affairs (M&RA), the Assistant Secretary of the Navy for M&RA, or the Assistant Secretary of the Air Force for M&RA. For the Coast Guard, that authority has been delegated to the Commandant of the Coast Guard.[12]

---

[10] 38 U.S.C. 4312(f)(3)(B) (emphasis supplied).

[11] 38 U.S.C. 4318. This includes the periods when she was away from work, immediately before and after her periods of service. Please see Law Review 60 (December 2002).

[12] Please see Law Review 16075 (August 2016) and Law Review 12094 (September 2012).