

## LAW REVIEW<sup>1</sup> 19011

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### USERRA Rights of the Returning Veteran

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**Q: I am a Private in the United States Army. I enlisted some months ago and will be reporting to basic training in just two weeks. I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

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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 1700 "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 1500 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).

**I enlisted for eight years, and in my enlistment contract I agreed to remain on active duty for four years, from February 2019 until February 2023. I expect to leave active duty at that time and return to my job at Daddy Warbucks Industries (DWI), where I have worked for five years. I want to return to work for DWI when I leave active duty in February 2023, but when I told the manager of the DWI plant where I work that I was leaving to join the Army he expressed irritation and told me not to expect reinstatement at the company. What do I need to do to preserve my right to reemployment at DWI?**

**A:** As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you (or any service member or veteran) 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 voluntary or involuntary service in the uniformed services. That is exactly what you are doing in two weeks.
- b. You must have given the employer prior oral or written notice that you were leaving the job to perform service. You have given such notice.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.<sup>3</sup>
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>4</sup>
- e. After release from the period of service, you must have made a timely application for reemployment.<sup>5</sup>

**Q: Let us assume that I meet these five conditions in February or March of 2023. At that point, what am I entitled to under USERRA?**

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<sup>3</sup> Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions to the limit—that is, there are nine kinds of service that do not count toward exhausting your limit. The period of regular active duty that you are about to start will likely not be exempt, but the expected duration (four years) is well within the five-year limit.

<sup>4</sup> If you receive a punitive discharge by court martial or administrative discharge characterized as “other than honorable,” you will not have the right to reemployment. See 38 U.S.C. 4304.

<sup>5</sup> After a period of service of 181 days or more, you have 90 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). After a period of service of 31-180 days, you have 14 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(C). After a continuous period of service of fewer than 31 days, you must report for work at the start of the first regularly-scheduled work period on the first day after your release from the period of service and the time reasonably required for safe transportation from the place of service to your residence plus eight hours (for rest) after your arrival at home. See 38 U.S.C. 4312(e)(1)(A). In determining the deadline for you to apply for reemployment, it is the *actual period of service*, not the expected period of service, that controls. For example, let us assume that you are seriously injured at basic training and honorably discharged from the Army just 60 days into your period of service. In that situation, you would have 14 days (not 90 days) to apply for reemployment.

**A:** When you return from active duty and meet the five conditions, including having made a timely application for reemployment, the employer has the legal obligation to reemploy you in *the position of employment that you would have attained if you had been continuously employed at DWI during the time you were away from work for service*, or alternatively in another position for which you are qualified that is of like seniority, status, and pay.<sup>6</sup> The position that you *would have attained* will most likely be the position that you left, but it may be a better position, a worse position, or no position, depending on what happened to your colleagues at DWI during the time that you were away from work for service.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."<sup>7</sup> Section 4316(a) of USERRA<sup>8</sup> codifies the escalator principle in the current version of the reemployment statute.

It has always been the case that the escalator can descend as well as ascend. Let us say that DWI has 300 stores but is going through hard times financially. In February 2021, when you are two years into your four-year active duty period, the company closes 150 stores, including the store where you worked before you entered active duty. All the employees at the closing stores lost their jobs in February 2021. In this scenario, the escalator descended to the exit and you are out of luck.<sup>9</sup>

The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

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**Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**

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**Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job

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<sup>6</sup> 38 U.S.C. 4313(a)(2)(A).

<sup>7</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

<sup>8</sup> 38 U.S.C. 4316(a).

<sup>9</sup> If other employees laid off in 2021 when the 150 stores closed received severance pay, you will also be entitled to severance pay—you get what you would have received if you had been continuously employed by DWI in February 2021, when the layoffs occurred. See *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225 (1966). I discuss *Accardi* in detail in Law Review 08061 (December 2008). You may also be entitled to supplemental unemployment benefits, if other employees adversely affected by the store closings received those benefits. See *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980). I discuss *Coffy* in detail in Law Review 09019 (May 2009). When you leave active duty in 2023, you should apply for reemployment at DWI, even if it is only for the purpose of claiming these benefits.

classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.<sup>10</sup>

**Q: Joe Smith, the manager of the DWI store where I work, told me that I will not be reemployed if there is no suitable vacancy for me when I return from the Army in early 2023. Is that true?**

**A:** First, there is no point in your getting into an argument with the employer about what your reemployment rights may be four years from now. It is by no means certain that you will have the right to reemployment or that you will want reemployment in 2023. At this point, you meet the first two conditions for reemployment, but you do not meet the other three. You could voluntarily remain on active duty past February 2024 and go over the five-year limit. You could do something stupid and get a disqualifying bad discharge from the Army. You could get a great job offer elsewhere, or you could win the Publisher's Clearinghouse Sweepstakes and retire. God forbid, you could die, or the employer could go the way of Studebaker and Montgomery Ward. If your supervisor insists on continuing the conversation, send him a polite letter or e-mail saying that the question of your rights under USERRA can be resolved if you leave active duty and apply for reemployment. If you leave active duty in February 2023 and make a timely application for reemployment, and if you meet all five of the USERRA conditions at that time, the employer has the legal obligation to reemploy you *even if doing so necessitates displacing another employee.*<sup>11</sup>

**Q: At DWI, employees with zero to four years of seniority earn four hours of annual leave (vacation, time off with pay) per two-week pay period. Employees with four to ten years of seniority earn six hours of annual leave per pay period, and employees with more than ten years of seniority earn eight hours of annual leave per pay period.**

**I started working for the company in February 2014, so in February 2018 (almost a year ago) I started earning six hours of annual leave per pay period. If I meet the five USERRA conditions and return to work for DWI in February or March of 2023, will I start earning eight hours of**

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<sup>10</sup> 20 C.F.R. 1002.194 (bold question and bold "yes" in original).

<sup>11</sup> Please see Law Review 08029 (June 2008).

**annual leave per pay period in February 2024, ten years after I started to work for the company?**

**A:** The escalator principle applies to benefits that qualify as perquisites of seniority. To qualify, a benefit must meet a two-part test. First, the benefit must be *intended to reward longevity in service to that employer*, rather than short-term compensation for services. Second, it must be *reasonably certain* (not necessarily absolutely certain, but more than a possibility) that you would have received the benefit if you had been continuously employed.

Going from four hours of annual leave per pay period to six and then to ten clearly meets this two-part test. If you meet the five USERRA conditions and return to work for DWI, you should start earning eight hours of annual leave per pay period starting in February 2024 (ten years after you began your DWI employment in February 2014).

**Q: When I leave active duty and return to work for DWI in February 2023, I should be able to use all the leave (six hours per pay period) that I would have earned during the four years of active duty, right?**

**A:** No. The Supreme Court has held that vacation days are not perquisites of seniority because they do not meet the first part of the two-part test.<sup>12</sup>

**Q: I think that I am entitled to annual leave earned during my active duty under the collective bargaining agreement (CBA) between my union and DWI. Is that possible?**

**A:** Yes, that is possible. USERRA is a floor and not a ceiling on the rights of those who are away from their civilian jobs for military service. The CBA can give you greater or additional rights, but it cannot take away your USERRA rights.<sup>13</sup>

**Q: DWI has a generous retirement plan, under the CBA between the union and the company. The individual employee is permitted to contribute up to 5% of his or her DWI compensation (pre-tax) to an individual account in the employee's name, and the employer matches that employee contribution. Let us assume that I leave my DWI job to report to active duty in February 2019, and I leave active duty (as planned) in February 2023 and meet the five USERRA conditions and return to work for the company in March 2023. What are my USERRA rights with respect to my retirement account in this scenario?**

**A:** When you return to work in March 2023, you will resume making the ongoing contributions and getting the company match, and you also have the right to make make-up contributions,

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<sup>12</sup> See *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). I discuss this case in detail in Law Review 09007 (February 2009).

<sup>13</sup> 38 U.S.C. 4302.

based on what you would have earned from DWI and what you would have contributed to the pension account if you had been continuously employed, and you are entitled to employer matches on these employee contributions when you make them. Both the ongoing contributions and the make-up contributions should be pre-tax.<sup>14</sup>

The employer is not required to make contributions to your retirement account while you are on active duty and away from work. The employer's obligation to make these contributions does not apply until you leave active duty, meet the five USERRA conditions, return to work, and do the make-up contributions.<sup>15</sup>

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<sup>14</sup> Please see Law Review 17051 (May 2017).

<sup>15</sup> Please see Law Review 18099 (October 2018).