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USERRA Protects Absence from a Civilian Job for Military Medical *Examination* but not Treatment

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[Update on Sam Wright](#)

- 1.1.3.7—Examination to determine fitness
- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.3.1.3—Timely application for reemployment
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.3.2.3—Pension credit for service time
- 1.3.2.6—Health insurance continuation and reinstatement
- 1.3.2.9—Accommodations for disabled veterans
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a Captain in the Army Reserve (USAR) and a member of the Reserve Organization of America.³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to 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.

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.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name:

On the civilian side, I work for a major corporation—let's call it Daddy Warbucks Industries or DWI. In January 2017, I was involuntarily called to active duty with my USAR unit and deployed to Afghanistan, where I was wounded in action. Other unit members demobilized and returned home in January 2018, but I was retained on active duty for medical treatment. I am still on active duty, but it is likely that I will be leaving active duty soon. I am being processed for a disability retirement from the Army because of my combat wounds and resulting physical limitations.

I went to work for DWI in January 2010, so I had seven years of seniority and pension credit with the company when I was called to the colors in January 2017. I want to return to the company to claim the seniority and pension credit that I had when I left and the additional seniority and pension credit that I would have attained if I had remained continuously employed with the company instead of returning to active duty in January 2017. What conditions must I meet to have the right to reemployment at DWI?

I read in your Law Review 19030 (March 2019) that absence from a civilian job for a military medical examination qualifies as “service in the uniformed services” under USERRA and that an employee is entitled to at least unpaid military leave from his or her civilian job for such an examination. In the months after I finally leave active duty, probably later this year, I will need to return to a military or Department of Veterans Affairs medical treatment facility for follow-up treatment. Will USERRA entitle me to absences from work for those medical appointments?

Answer, bottom line up front

First, you will be entitled to reemployment at DWI if you meet the five USERRA conditions. I will discuss those conditions in detail below.

Second, USERRA's definition of “service in the uniformed services” includes absence from civilian work for an *examination* but not for medical treatment, even if the condition for which you need treatment is the direct result of your military service.

Explanation

Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

1. USERRA's conditions for reemployment

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you (or any returning 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 uniformed service.⁴
- b) You must have given the employer prior oral or written notice.⁵
- 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.⁶ I will discuss this condition separately, below.
- d) You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁷
- e) After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.⁸

I will discuss each condition as it applies to your situation.

a. Left job for service and gave prior notice

You left your job in January 2017 to report to active duty. I shall assume, for purposes of this article, that you gave DWI prior oral or written notice.

b. Cumulative five-year limit on periods of service

As I have explained in detail in Law Review 16043 (May 2016) and other articles, there is a cumulative five-year limit on the duration of the period or periods of uniformed service that you can perform with respect to the employer relationship for which you seek reemployment. There are also nine exemptions. That is, there are nine kinds of service that do not count toward exhausting your five-year limit.

First, we must determine how much (if any) of your five-year limit you used between January 2010 (when you were hired by DWI) and January 2017 (when you began your current active duty period). Your drill weekends and annual training periods do not count toward exhausting your five-year limit.⁹ If you were called up involuntarily, that period is also exempt from your five-year limit.¹⁰

⁴ 38 U.S.C. 4312(a).

⁵ 38 U.S.C. 4312(a)(1).

⁶ 38 U.S.C. 4312(c).

⁷ 38 U.S.C. 4304.

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.

⁹ 38 U.S.C. 4312(c)(3).

¹⁰ 38 U.S.C. 4312(c)(4)(A).

Your one-year period of involuntary active duty, from January 2017 until January 2018, is exempt from your five-year limit.¹¹ The period since January 2018 (14 months and counting) when you have been retained on active duty for medical treatment, rehabilitation, and processing for a disability retirement is not exempt from your five-year limit.¹²

To preserve your right to reemployment at DWI, you need to leave active duty before you have exhausted your five-year limit.

c. Released from active duty without a disqualifying bad discharge

You will not have the right to reemployment if you receive a disqualifying bad discharge from the military.¹³ I am confident that you will not receive a disqualifying bad discharge.

d. Timely application for reemployment

After a period of service of 181 days or more, you have 90 days to apply for reemployment.¹⁴ If at the time you are released from active duty you are “hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services,” the deadline to apply for reemployment can be extended during the period of hospitalization or convalescence, but such period of hospitalization or convalescence must not exceed two years.¹⁵

2. Entitlements of the reemployed veteran

If you meet the five USERRA conditions, you are entitled to prompt reinstatement in the position of employment that you *would have attained* if you had been continuously employed by the employer (possibly a better position than the position you left) or another position (for which you are qualified) that is of like seniority, status, and pay.¹⁶ Upon reemployment, you are entitled to DWI seniority credit for the seven years (January 2010 to January 2017) that you worked for the company before your period of uniformed service and for the additional period that you have been away from your DWI job for uniformed service.¹⁷ You are also entitled to DWI pension credit for the time you worked for the company before your service and for the period that you have been away from your job for

¹¹ 38 U.S.C. 4312(c)(4)(A).

¹² Please see Law Review 13034 (February 2013) and Law Review 17014 (February 2017). Active duty for these purposes should be exempt from the five-year limit, but that would require a statutory amendment, and no such amendment has been enacted.

¹³ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial as part of the sentence for a conviction for a serious crime) and other-than-honorable administrative discharges.

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

¹⁵ 38 U.S.C. 4312(e)(2)(A).

¹⁶ 38 U.S.C. 4313(a)(2).

¹⁷ 38 U.S.C. 4316(a).

service.¹⁸ You have a lot at stake, and you should not walk away from these entitlements lightly.

It is likely that you will be returning to work with a significant disability that you incurred while on active duty. The employer will be required to make reasonable efforts to qualify you for the position that you would have attained if you had been continuously employed at DWI during the time that you have been away from work for military service. If you cannot qualify for that position, because of the disability, the employer is required to reemploy you in another position for which you are qualified or for which you can become qualified with reasonable employer efforts.¹⁹

3. Should I apply for reemployment now or wait for up to two years while convalescing?

Under section 4312(e)(2)(A) of USERRA,²⁰ the deadline for you to apply for reemployment can be extended by up to two years if you are convalescing or hospitalized for an injury or illness incurred or aggravated while on active duty. Please understand that this provision does not give you two years off with pay. While you are convalescing and waiting to apply for reemployment, you are not entitled to pay and other benefits of the reemployed veteran.²¹

If you need to return to work, you should apply for reemployment soon after leaving active duty. If you need more time to convalesce, you should wait to apply for reemployment. If you plan to wait, I suggest that you send a letter to the employer that explains that you are not yet applying for reemployment but that you retain the right to apply for reemployment when you complete your convalescence of up to two years. Please see the sample letter at the end of this article.

If you will be needing days off from work for medical appointments or recuperation from follow-up surgery, that is a reason to wait to apply for reemployment. Unfortunately, time off from work for medical treatment does not qualify as “service in the uniformed services” even if the treatment was necessitated by an injury or illness incurred on active duty.²² During the 111th Congress (2009-10), Representative Lloyd Doggett introduced H.R. 466, the proposed Wounded Veteran Job Security Act. If enacted, that bill would have amended USERRA’s definition of “service in the uniformed services” to include time off from work for medical treatment under these circumstances. Unfortunately, Representative Doggett’s bill was not enacted.

¹⁸ 38 U.S.C. 4318.

¹⁹ 38 U.S.C. 4313(a)(3). Please see Law Reviews 17073 (July 2017), 17058 (June 2017), 16063 (June 2016), 16007 (January 2016), 15065 (August 2015), and 0640 (December 2006) for a detailed discussion of the rights of the veteran returning to work with a disability incurred on active duty.

²⁰ 38 U.S.C. 4312(e)(2)(A).

²¹ Please see Law Review 16093 (September 2016).

²² See *Kieffer v. Planet Fitness of Adrian LLC*, 2017 U.S. Dist. LEXIS 131969 (E.D. Mich. Aug. 18, 2017). I discuss that case in detail in Law Review 18085 (September 2018).

A reason to apply for reemployment now, rather than waiting for convalescence, is that section 4317(b) of USERRA²³ entitles you to immediate reinstatement of your employer-provided health insurance coverage upon your reemployment. There must be no waiting period and no exclusion of pre-existing conditions except for service-connected disabilities.

Another option to consider is applying for reemployment and then demanding to be put back on the payroll in a “sick leave” status.²⁴

In deciding whether to apply for reemployment now or whether to wait while convalescing, I suggest that you consider the answers to the following questions:

- a. Have you recovered as much as you are going to recover? If you wait another year or two to return to work, will you then be demonstrably better qualified to return to work?
- b. Will you be needing time off from work for medical treatment and recuperation in the weeks and months after you return to work?
- c. How much sick leave do you have in the bank? Does it make sense to demand reinstatement on the payroll in a sick leave status? Is it likely that you can recuperate before your sick leave balance is exhausted?
- d. What kind of accommodations could DWI reasonably make that would make it possible for you to do the job you left or some other DWI job? How physically demanding is your DWI job?

If you decide to wait while convalescing and not apply for reemployment within 90 days after you leave active duty, I suggest that you send the employer a letter like the following:

Ms. Mary Jones
Director of Human Resources
Daddy Warbucks Industries
1310 Smith St.
Houston, TX 77002

Dear Ms. Jones:

As your records will confirm, I was hired by DWI in January 2010 and worked for the company continuously until January 2017, when I was called to active duty by the Army Reserve. I gave the company prior oral and written notice that I would be leaving my job to report to active duty as ordered.

²³ 38 U.S.C. 4317(b).

²⁴ Please see Law Review 18036 (April 2018). How much sick leave did you have in the bank when you left your DWI job to report to active duty in January 2017? You probably did not accumulate additional sick leave while you have been on active duty.

I reported to active duty and deployed to Afghanistan, where I was wounded in action. I expected to be released from active duty in January 2018, and the other members of my Army Reserve unit were released from active duty at that time. Because of my wounds, I was retained on active duty until [date]. I am still convalescing from my wounds.

I am not applying for reemployment currently. Section 4312(e)(2) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides:

- 2)** (A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.
- (B)** Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

Title 38, United States Code, section 4312(e)(2).

Within the next two years, I expect to be recovered from my wounds sufficiently to be able to return to work at DWI. When I am sufficiently recovered, I will apply for reemployment. In the meantime, please respect my privacy and do not contact me. Thank you for your consideration.