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A Person Leaving a Civilian Job to Go on Active Duty Has the Right to Terminate his or her Civilian Health Insurance Coverage and to Reinstate it upon Reemployment

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[Update on Sam Wright](#)

1.3.2.6—Health insurance reinstatement and continuation

Q: I am the civilian personnel officer for a small federal agency. We have an employee—let's call him Nathan Hale—who has notified me that he has volunteered to return to active duty for one year and that he wants to terminate his federal civilian health insurance coverage under the Federal Employees Health Benefit Program (FEHPB). I tried to dissuade him from dropping the FEHBP because it is an excellent program and he will need it after he returns to work, even if he does not need it while he is on active duty. Nonetheless, Hale insisted that he has the right to terminate his health insurance coverage while he is on active duty and to reinstate it immediately upon reemployment.

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. You can reach me by e-mail at SWright@roa.org.

Hale referred me to your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) at www.roa.org/lawcenter. I searched the Subject Index, but I did not find an article directly on point to this issue. Please tell me if what Hale is saying is correct.

A: I addressed that issue in Law Review 11007 (January 2011). Since more than eight years have passed since that article was published, I will address the issue again now. What Hale told you is correct.

Section 4317 of USERRA addresses health insurance coverage as follows:

a)

(1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, or such person becomes eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, the plan shall provide that the person *may elect* to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of--

(A) the 24-month period beginning on the date on which the person's absence begins; or
(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e).

(2) *A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan* (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, *except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.*

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated--

(A) by the plan in such manner as the plan sponsor shall provide; or
(B) if the sponsor does not provide--

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(b)

(1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, or by reason of the person's having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, *an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage* upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service or eligibility. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.

(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

(3) In the case of a person whose coverage under a health plan is terminated by reason of the person having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title but who subsequently does not commence a period of active duty under the order to active duty that established such eligibility because the order is canceled before such active duty commences, the provisions of paragraph (1) relating to any exclusion or waiting period in connection with the reinstatement of coverage under a health plan shall apply to such person's continued employment, upon the termination of such eligibility for medical and dental care under chapter 55 of title 10 that is incident to the cancellation of such order, in the same manner as if the person had become reemployed upon such termination of eligibility.³

Health insurance continuation

An employee who leaves a civilian job (federal, state, local, or private sector) to perform a period of uniformed service that is expected to last for 31 days or more *may elect* continued health insurance through the civilian job, but in that case the employer is permitted to charge the employee up to 102% of the entire premium, including the part that the employer normally pays in the case of active employees.⁴ Except in the most unusual circumstances, the employee would be foolish to elect continued health insurance coverage through the civilian job while away from the job for an extended period of active duty.

³ 38 U.S.C. 4317 (emphasis supplied).

⁴ 38 U.S.C. 4317(a).

A person who is on active duty under orders calling for 31 or more days of continuous service is entitled to coverage under the Department of Defense (DOD) health plan (TRICARE) from day one of the period of service, for the service member and for his or her dependents.⁵ Thus, the service member does not need the health insurance coverage through his or her civilian job and would be foolish to pay for such coverage.

A person leaving a civilian job *may elect* to continue health insurance coverage through the civilian job while on active duty. *If the service member has not elected continued coverage, you (the civilian employer) must not continue the coverage and expect the employee to pay for it.*⁶

Health insurance reinstatement

When Nathan Hale is released from his year of active duty, he will have the right to prompt reemployment at your agency if he meets the five USERRA conditions:

- a. He must have left his job to perform service in the uniformed services.⁷
- b. He must have given you (the employer) prior oral or written notice before leaving the job.⁸
- c. His cumulative period or periods of uniformed service, relating to his employment relationship with your agency, must not have exceeded five years.⁹
- d. He must have been released from the period of service without having received a disqualifying bad discharge from the military.¹⁰
- e. He must have made a timely application for reemployment after release from the period of service.¹¹

When Hale meets these five conditions, he is entitled to *prompt* reemployment at your agency.¹² Upon his return to work, Hale is entitled to *immediate* reinstatement of his health insurance coverage for himself and his spouse and children—there must be no waiting period and no exclusion of “pre-existing conditions.”¹³ *It is not necessary for Hale to request reinstatement of*

⁵ 10 U.S.C. 1074.

⁶ 38 U.S.C. 4317(a)(1).

⁷ 38 U.S.C. 4312(a).

⁸ 38 U.S.C. 4312(a)(1). Hale is excused from the obligation to provide prior notice if giving such notice is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b).

⁹ 38 U.S.C. 4312(c). As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting an individual’s five-year limit with respect to a specific employer.

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

¹¹ 38 U.S.C. 4312(e). After a period of service of 181 days or more, Hale has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

¹² 20 C.F.R. 1002.180. “‘Prompt reemployment’ means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee’s application for reemployment.” 20 C.F.R. 1002.181.

¹³ 38 U.S.C. 4317(b).

his health insurance coverage—he is only required to make a timely application for reemployment. You (the employer) must reinstate his health insurance coverage, for himself and his family, as part of his reemployment.

Q: What if Hale is wounded or injured in the line of duty and returns to work with a service-connected disability or condition? Are we required to provide medical care through our health insurance coverage for those conditions?

A: No. The Department of Labor (DOL) USERRA regulation provides:

USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.¹⁴

Q: We have another employee—let's call her Martha McSally—who is a Captain in the Air Force Reserve. She has provided me a copy of her orders for a 28-day annual training tour starting next month. She told me that she wants her health insurance coverage, through our agency, to continue in effect during his 28-day annual training tour and that we (the employer) can only charge her the employee share of the cost of the coverage. Is McSally correct?

A: Yes. Section 4317 provides: “in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such [health insurance] coverage.”¹⁵

Because McSally's orders call for a period of uniformed service lasting for fewer than 31 continuous days, she is not entitled to TRICARE coverage for her husband and her children during her 28-day annual training tour. McSally needs to continue her health insurance coverage through your agency during her 28-day annual training tour to ensure that there is no lapse in coverage.

¹⁴ 20 C.F.R. 1002.168(b).

¹⁵ 38 U.S.C. 4317(a)(2).