

The Company's Personnel Director Is Not your Friend, and she Has No Obligation To Explain to you your Legal Rights

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[About Sam Wright](#)

1.3.1.3—Timely application for reemployment

Q: I am a Captain in the Army National Guard and a member of the Reserve Organization of America (ROA).³ On the civilian side, I work for an intermediate size company—let's call it

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "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 1600 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 43 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: 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

Bicycles R Us or BRU. I was selected for a one-year voluntary recall to active duty, and I gave prior oral and written notice to Cruella Deville, BRU's personnel director.

I left my BRU job on 9/30/2018 and reported to active duty on 10/1/2018. I expected to remain on active duty for the entire Fiscal Year 2018, until 9/30/2019, but in early December the Army discovered a "funding problem" or a "paperwork problem" and released me from active duty, with just one day of notice, on 12/15/2018. The Army assured me that the problem would be worked out in a matter of days, and certainly within two weeks, but the problem was never resolved and on 2/1/2019 I applied for reemployment at BRU, by then convinced that the Army was not going to reinstate my orders or give me a new set of orders.

On 12/16/2018, one day after the Army unexpectedly released me from active duty, I called Ms. Deville, my civilian employer's personnel director. She said that I had requested and had been granted one full year of military leave and that the company had no obligation to me until October 2019, after my year of military leave was over.

When I applied for reemployment on 2/1/2019, Ms. Deville denied my application, saying that I had not made a timely application for reemployment. Is she correct?

A: Unfortunately, yes. Making a timely application for reemployment is one of the five conditions that you must meet to have the right to reemployment under USERRA. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services. You must have given the employer prior oral or written notice. You must not have exceeded USERRA's five-year limit on the period or periods of uniformed service that you have performed, relating to the employer relationship for which you seek reemployment.⁴ You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁵

You meet the first four conditions, but you did not make a timely application for reemployment. Accordingly, BRU was under no obligation to reemploy you when you applied on 2/1/2019.

The deadline to apply for reemployment that applied to you is set forth in USERRA as follows:

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 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.

⁴ Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

⁵ A punitive discharge (awarded by court martial) or an administrative discharge labeled "other than honorable" would disqualify you from the right to reemployment. 38 U.S.C. 4304.

In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer *not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.*⁶

There is one other subsection of section 4312 that is arguably applicable to your situation:

A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.⁷

This provision means that if you are only a day or two late in applying for reemployment, you are entitled to reemployment, but the employer can punish you (perhaps with a two-week suspension without pay) for one or two days of unexcused absence. In your case, your application for reemployment was more than a month late, so this provision probably won't help you.

Because you were released from active duty on 12/15/2018, the 14-day deadline to apply for reemployment expired on 12/29/2018. You can argue that it was "impossible or unreasonable" for you to apply by 12/29/2018, because you were confused about the USERRA requirement to apply for reemployment within 14 days after the unexpectedly early date of release from service. Frankly, I don't think that the judge will buy your argument. "Ignorance of the law is no excuse." It was your responsibility to understand USERRA with respect to the law's requirements on you.

Q: When I contacted Ms. Deville (the personnel director) on 12/16/2018, was she required to explain USERRA to me? Was she required to remind me that, under these circumstances, I was required to apply for reemployment by 12/29/2018?

A: No. Ms. Deville was probably only vaguely familiar with USERRA, if she was aware of it at all. But even if she understood USERRA she was under no obligation to share that knowledge with you. USERRA's only provision about notifying employees of their USERRA rights is as follows:

⁶ 38 U.S.C. 4312(e)(1)(C) (emphasis supplied).

⁷ 38 U.S.C. 4312(e)(3).

(a) Requirement to provide notice. Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. *The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.*⁸

(b) Content of notice. The Secretary [of Labor] shall provide to employers the text of the notice to be provided under this section.⁹

If you look in the employee breakroom at the BRU workplace, or in some other place where notices to employees are customarily posted, you will almost certainly find the required USERRA notice posted on a large laminated plastic sheet, along with many other notices that employers are required to post. Very few employees read these notices, and even if you had read the USERRA notice it would not have helped you much because the notice is necessarily terse and general.

Service members need detailed information about their legal rights when the issue arises, not years later, when it is often too late to do anything about it. That explains why ROA created the Law Review Library in 1997.¹⁰ Today, we have more than 1800 articles, including a detailed Subject Index to facilitate finding articles about very specific topics.

For 25 years, from 1982 (when I went to work for the Department of Labor as an attorney and became aware of the federal reemployment statute) until 2007 (when I retired from the Navy Reserve), I gave hundreds of speeches to units in all seven of the Reserve Components, even the Coast Guard Reserve. Unfortunately, there is no Reserve Component judge advocate, in the Navy or any other service, who is making this effort today. I call upon Reserve and National Guard judge advocates, especially junior judge advocates, to educate themselves about USERRA, and then to share that knowledge with their non-lawyer colleagues at Reserve Centers, National Guard Armories, and other drill sites across our country.¹¹

But the central message is that we need to educate serving Reserve Component members about the Law Review Library, this great asset that ROA has created over a period of 22 years and continuing. And Reserve Component members need to join ROA.

⁸ The fair reading of this italicized sentence is that the employer's *only* notice requirement is to post this notice.

⁹ 38 U.S.C. 4334 (emphasis supplied).

¹⁰ See footnote 1.

¹¹ The Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR) is not particularly helpful in this regard, because that organization has no lawyer on staff. Some of the ESGR volunteers are lawyers, but they are instructed by ESGR headquarters that they must refrain from giving legal advice to service members.

Please join or support ROA

This article is one of 1800-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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