

LAW REVIEW¹ 19113

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You Are Required To Provide Documentation to your Employer when Applying for Reemployment After a Period of Service of 31 Days or More

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[About Sam Wright](#)

1.3.1.1—Left job for service and gave prior notice

1.3.1.3—Timely application for reemployment

1.3.2.1—Prompt reinstatement after service

Q: I am a Lance Corporal in the Marine Corps Reserve 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 1900 “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 1700 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

My Marine Corps Reserve unit drills the first weekend of every month, except when the Monday following that weekend is a federal holiday. In that case, we drill on the third weekend. Our drill weekend generally starts at 7 am on Saturday and ends at 5 pm on Sunday. On the civilian side, I work as a waiter for Quisling's Norwegian Seafood Restaurant, which was founded and is owned and operated by Mr. Vidkun Quisling.

Mr. Quisling gives me a hard time about my Marine Corps Reserve service and about the occasional absences from work that my service necessitates because weekends are the busiest time for the restaurant. When I return to work on Monday after a drill weekend, he always demands to see documentation that I served honorably in the Marine Corps during the time that I was away from work on Saturday and Sunday. I have tried to explain to him that reservists do not ordinarily receive any paperwork at the end of a drill weekend.

I have heard that I am required to provide documentation to my employer, upon the employer's request, when I apply for reemployment after a "long" period of uniformed service, but not when I return to work after a "short" period. Is that true? What is the line between "short" and "long" periods? Where does it say that in USERRA?

A: Section 4312(f) of USERRA provides:

(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;

(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.

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 dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

(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.⁴

The duty to provide documentation to the employer, upon the employer's request, expressly applies to a "person who applies for reemployment."⁵ After a period of service of 31-180 days, the returning service member or veteran must apply for reemployment within 14 days after release from service.⁶ After a period of service of 181 days or more, the returning service member or veteran must apply for reemployment within 90 days.⁷ Thus, after a period of service of 31 days or more, the returning service member or veteran must provide documentation to the employer, upon the employer's request.

After a period of service lasting fewer than 31 days, like a drill weekend or a traditional two-week annual training period, the returning service member is required to *report for work*, not apply for reemployment.⁸ Thus, after these short periods of service there is no requirement to provide documentation to the employer.

The Department of Labor (DOL) USERRA Regulation provides:

⁴ 38 U.S.C. 4312(f) (emphasis supplied).

⁵ 38 U.S.C. 4312(f)(1).

⁶ 38 U.S.C. 4312(e)(1)(C).

⁷ 38 U.S.C. 4312(e)(1)(D).

⁸ 38 U.S.C. 4312(e)(1)(A).

Is the employee required to submit documentation to the employer in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

- (a)** The reemployment application is timely;
- (b)** The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,
- (c)** The employee's separation or dismissal from service was not disqualifying.⁹

Q: My reserve unit commanding officer told me that Department of Defense Instruction (DODI) 1205.12 requires me to provide documentation to my civilian employer even for short periods of service, like drill weekends. Is that correct?

A: No, but that instruction does *recommend* providing such documentation. Here is the pertinent section:

As a matter of policy, the Military Departments strongly *recommend* commanders and service members provide verification of uniformed service to civilian employers *regardless of the duration* upon request. Failure of an employee to comply with this recommendation does not affect the legal responsibilities of the employer under USERRA, including prompt reemployment.¹⁰

Q: I am not required to provide documentation to my employer unless the period of service lasted for at least 31 days. Accordingly, I object to the Marine Corps Reserve providing documentation to my employer for short periods of service, like drill weekends. What do you think?

A: I do not agree. I favor military authorities providing information to civilian employers for all periods of service, including short periods. In Law Review 16027 (April 2016) I wrote:

I call upon Major General John F. Nichols, ANG, the Adjutant General of Texas, to do the following: ...

⁹ 20 C.F.R. 1002.121 (bold question in original, emphasis by italics supplied).

¹⁰ DODI 1205.12, Enclosure 2, page 6, section (2)(a) (emphasis supplied). You can find the complete text of this instruction and my criticism of it in Law Review 19106 (December 2019).

- c. Establish or reestablish procedures whereby ARNG [Army National Guard] and ANG [Air National Guard] receive timely and accurate documentation of their military training and service, in order to minimize problems with their civilian employers.
- d. Establish a procedure whereby Texas employers can receive telephonic reassurance that ARNG and ANG members really did perform military duty or training on days when they claim to have done so.

I support the policy of the Reserve Components to provide information to civilian employers, for short and long periods of service, with the following caveats:

- a. Military records are not always accurate as to the specific dates that an individual reservist or National Guard member performed inactive duty training (drills).¹¹
- b. Military records show the dates that an individual performed uniformed service, but USERRA protects all absences from work that were *necessitated* by the uniformed service, including dates before and after the period of service.¹²

Please join or support ROA

This article is one of 1900-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.

¹¹ Please see Law Review 19110 (December 2019).

¹² Please see Law Review 19109 (December 2019).

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:

Reserve Officers Association
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