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If you Are Convalescing from an Injury or Illness Incurred during Uniformed Service, you Can Delay your Application for Reemployment

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
About Sam Wright

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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.

Q: I am a Major in the Air Force Reserve and a member of the Reserve Organization of America (ROA).[3] I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On the civilian side, I am a pilot for a major airline—let's call it Very Big Air Line or VBAL. Like all major airlines in our country, our airline's pilot force is unionized. The collective bargaining agreement (CBA) between VBAL and the VBAL Pilots Association (VBAL) governs the terms of my employment with the airline.

I have several questions about how USERRA applies to my employment situation at VBAL. First, what is the relationship between USERRA and the CBA?

A: USERRA is a floor and not a ceiling on your rights as a Reserve Component (RC) service member who is occasionally absent from the civilian job for uniformed service. The CBA can give you greater or additional rights, above and beyond USERRA, but the CBA cannot take away your statutory rights under USERRA. In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress secured the veteran under the Act."[4] Section 4302 of USERRA provides:

> **(a)** Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
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> **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of

[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 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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

[4] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).

> additional prerequisites to the exercise of any such right or the receipt of any such benefit.[5]

When you return to work after a period of uniformed service, you are entitled under USERRA's "escalator principle" to return to the position that you *would have attained if you had been continuously employed in the civilian job during the time that you were away for uniformed service, and you are entitled to the civilian seniority and pension credit that you would have attained if you had remained at the civilian job.* The CBA is certainly relevant in determining what would have happened to your civilian job if you had remained continuously employed.

In many cases, determining what would have happened to the returning veteran if he or she had remained continuously employed can be difficult in controversial. In a unionized airline pilot workforce, this determination is usually simple and straightforward.

Let us say that you were hired by VBAL on 7/1/2014, and your number on the VBAL pilot seniority roster is 4500. Joe Smith was hired on 6/30/2014, and his seniority roster number is 4499. Mary Jones was hired on 7/2/2014, and her seniority roster number is 4501. When you return to work after a period of uniformed service, we look to what happened to Smith and Jones while you were away, and that will tell us what would have happened to you if you had remained continuously employed.

Q: What is the escalator principle?

A: In its first case construing the 1940 reemployment statute, 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."[6] The escalator principle is codified in section 4313(a),[7] section 4316(a),[8] and section 4318[9] of USERRA.

Section 4303[10] of USERRA defines 16 terms used in this law. That section defines "seniority" as follows: "The term 'seniority' means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment."[11]

Q: Can the escalator descend?

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[5] 38 U.S.C. 4302.
[6] *Fishgold,* 328 U.S. at 284-85.
[7] 38 U.S.C. 4313(a),
[8] 38 U.S.C. 4316(a).
[9] 38 U.S.C. 4318.
[10] 38 U.S.C. 4303.
[11] 38 U.S.C. 4303(12).

A: Yes. USERRA does not protect you from a bad thing (like a furlough) that clearly would have happened anyway, even if you had not been away from work for service. The Department of Labor (DOL) USERRA regulation provides:

> **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 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.[12]

Q: The CBA between VBAL and the VBALPA defines two important terms, "seniority" and "longevity." My seniority is based on my original hire date and does not change during my VBAL career. My seniority controls my ability to get preferred work schedules and days off.

Each month, each VBAL pilot submits a proposed work schedule for the next month. Schedule making is based on seniority. Very senior pilots get the schedules they bid for. Very junior pilots get what is left. Since I have worked for VBAL for more than five years, I am just starting to have some control over my work schedule.

The CBA defines "longevity" differently, for a different purpose. A VBAL pilot receives a "longevity" pay raise each year, for the first 12 years of VBAL employment, usually on the anniversary date of his or her hiring. While the "seniority" date does not change during the pilot's VBAL career, the "longevity" date does change if the pilot is away from work for a time.

For example, pilot Mary Jones was away from work for the birth of a child for 50 days in 2017. Her seniority date remained at 7/2/2014, but her longevity date was adjusted to 8/21/2014, 50 days later. The adjustment to her longevity date meant a delay of her receipt of her longevity pay raise each year.

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[12] 20 C.F.R. 1002.194 (bold question and bold "yes" in original).

I was away from work for two years in 2017-19, for military service. I was careful to meet and document that I met the five USERRA conditions, as you described in Law Review 15116 (December 2015).[13] I entered active duty on 10/1/2017 and left active duty on 9/30/2019 and returned to work for the airline on 3/14/2020. The airline said that I was entitled to be treated as continuously employed for purposes of "seniority" but not for purposes of "longevity." Thus, I lost out on the longevity pay raises that I missed while away from work for service. What do you say about this?

A: USERRA's definition of "seniority" is broad enough to include both "seniority" and "longevity" as defined by the CBA. Upon reemployment in March 2020, you were entitled to be paid at the rate that you would have attained if you had been continuously employed, including the longevity pay raises that you missed.

Q: I suffered an injury during the time that I was on active duty. The injury was not catastrophic, but it does not take much to disqualify an airline pilot from flying under the Federal Aviation Administration (FAA) medical rules. I was not able to pass the FAA medical test in October 2019, because I was still convalescing from the injury. I completed my recovery and passed the FAA test on 3/1/2020 and then applied for reemployment, and I returned to work on 3/14/2020.

I have heard that the deadline to apply for reemployment, after a period of service, can be delayed by up to two years if the returning veteran or service member is "convalescing" from a wound, injury, or illness incurred during the period of service. Is that correct? Was my application for reemployment on 3/7/2020 timely under USERRA?

A: Yes. USERRA provides:

> *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.[14]

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[13] To have the right to reemployment under USERRA, you must have left your civilian job to perform uniformed service, and you must have given the employer prior oral or written notice. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of service, and you must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, you must have made a timely application for reemployment.

[14] 38 U.S.C. 4312(e)(2)(A) (emphasis supplied).

Because your period of service lasted longer than 180 days, you had 90 days (starting on the date of release from service) to apply for reemployment.[15] Under section 4312(e)(2)(A), that 90-day deadline to apply for reemployment was tolled (stopped running) during the time it took for you to recover from the injury you incurred during the period of service, because you were still convalescing when you were released from active duty on 9/30/2019. Thus, your application for reemployment on 3/7/2020 was timely.

Q: I understand that I am entitled to seniority credit, under the escalator principle, for the time that I was on active duty, from 10/1/2017 until 9/30/2019. Am I also entitled to seniority credit for the time between 9/30/2019 (when I left active duty) until 3/14/2020 (when I returned to work)?

A: Yes. As I explained in Law Review 19052 (June 2019), the returning service member or veteran is entitled to seniority credit for the *entire time that he or she was away from work for service.* This includes the period of service, and it also includes the time between leaving the civilian job and entering active duty and the time between leaving active duty and returning to work at the civilian job. The period of absence from your VBAL job from 9/30/2019 until 3/14/2020 was "necessitated" by your service and by the injury that you sustained during the service.

Q: In Law Review 18036 (April 2018), you wrote that an airline pilot returning to work from a period of uniformed service who was unable to fly, under the FAA medical rules, because of an injury or illness sustained during the period of service could insist that the airline reemploy him promptly in a non-flying job until he recovered sufficiently to return to the cockpit. Why does that not apply to me?

A: In October 2019, after you were released from active duty, you could have promptly applied for reemployment and you could have insisted that VBAL put you back to work in a non-flying job while waiting for you to recover sufficiently from the injury to pass the FAA medical test, but you did not apply for reemployment at the time. You waited until March 2020 to apply for reemployment, after you had recovered from the injury and could pass the test.

In October 2019 you had an *election of remedies.* This means that you could have A or you could have B, but you could not have both A and B. You could have made a prompt application for reemployment, and you could have insisted on returning to work in a non-flying job. Or you could have waited until after you recovered to apply for reemployment. You chose B. You cannot change your mind now.

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[15] 38 U.S.C. 4312(e)(1)(D).

Q: It is not fair. The chief pilot did not explain these options to me. What do you say about that?

A: The chief pilot and the airline had no obligation to explain USERRA to you. USERRA's only requirement for informing employees of their rights is as follows:

> **(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*.
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> **(b) Content of notice.** The Secretary [of Labor] shall provide to employers the text of the notice to be provided under this section.[16]

Section 4334 was added to USERRA in 2004.[17] The Secretary of Labor promptly promulgated a regulation setting forth the content of the required notice. You will almost certainly find this notice in VBAL employee break rooms or other places where the airline normally puts notices for employees.

There are about 20 federal laws that require employers to post notices for employees. Most employers comply with this posting requirement by posting a large plastic sheet that includes all the required notices. Several companies make and sell these notice sheets for employers to post.

Few employees ever read the posted notices, and reading these notices is not particularly informative because the notices are necessarily terse and general. If you had read the USERRA notice in October 2019, it would not have helped you to understand your options about promptly applying for reemployment in a non-flying job or waiting until you had recovered from the injury and then applying for reemployment.

It is incumbent upon you to understand the law—the employer won't explain it to you. In November 1997, ROA established the "Law Review" column to inform RC service members about their rights under USERRA and other laws that are especially pertinent to those who serve our country in uniform. We have been adding articles for more than 22 years, and we continue to add articles each month.

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[16] 38 U.S.C. 4334 (bold print in original, emphasis by italics supplied).
[17] Public Law 108-454, Title II, section 203(c), December 10, 2004, 118 Stat. 3606.

Please join or support ROA

This article is one of 2000-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:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002