

## LAW REVIEW<sup>1</sup> 20060

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### Why Did I Receive this COBRA Notice after I Left my Job To Go on Active Duty?

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[About Sam Wright](#)

1.3.2.6—Health insurance continuation and reinstatement

1.8—Relationship between USERRA and other laws/policies

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

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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 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.

<sup>2</sup> 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 44 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 38 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](mailto:SWright@roa.org).

<sup>3</sup> 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

**On the civilian side, I work for a huge company—let us call it Daddy Warbucks Industries or DWI. I recently left my DWI job to go on active duty for a year. I am in Southwest Asia. I gave both oral and written notice to my DWI supervisor and to the DWI personnel office. The personnel office put me on a “military leave” status. I fully expect to return to my DWI job at the end of my year of active duty.**

**The DWI personnel office recently sent a “COBRA notice” to my home. My husband read it and panicked. He told me about it by e-mail, and it concerns me too. The notice said that since I recently “left” my civilian job I have the right to “continue” my health insurance coverage through DWI, but I must pay 102% of the full premium, including the part (90%) that DWI normally pays while I am at work.**

**The notice annoys and concerns me because I have not left my DWI job at all—I am on military leave. And why would I want to pay 102% of the whole premium for DWI health insurance coverage when I have the TRICARE system for myself, my husband, and our young son?**

**A:** Do not be concerned. The company sent you the “COBRA notice” only because it is required to do so by another law, the Consolidated Omnibus Budget Reconciliation Act (COBRA). The company sends that same form notice to all persons who leave DWI employment for whatever reason. Those who leave the company for military service make up less than 1% of those leaving the company. It would be administratively difficult for the personnel office to separate out the 1% who have left for military service from the 99% who have left for other reasons. The boilerplate COBRA notice does not mean that the company thinks that you resigned your job or that it is denying that you will have the right to reemployment when you return from your call to the colors.

I invite your attention to the website of the United States Department of Labor (DOL):

COBRA—the Consolidated Omnibus Budget Reconciliation Act—requires group health plans to offer continuation coverage to covered employees, former employees, spouses, former spouses, and dependent children when group health insurance coverage would otherwise be lost due to certain events. Those events include:

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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.

1. A covered employee's death.
2. A covered employee's job loss or reduction in hours for reasons other than gross misconduct.
3. A covered employee's becoming entitled to Medicare.
4. A covered employee's divorce or legal separation.
5. A child's loss of dependent status (and therefore coverage) under the plan.

COBRA sets rules for how and when plan sponsors must offer and provide continuation coverage, how employees and their families may elect continuation coverage, and what circumstance justify terminating continuation coverage.

Employers *may* require individuals to pay for continuation coverage. Premiums cannot exceed the full cost of the coverage, plus a two percent administration charge.<sup>4</sup>

Whenever a DWI employee is fired (for reasons other than gross misconduct) or laid off, or whenever an employee resigns or otherwise leaves the company, DWI is required to send the COBRA notice. Do not let this notice trouble you or your husband back home. The notice does not have any effect on your rights under USERRA.

Under COBRA, the employer is permitted to charge *up to* the full premium plus another 2% for "administration." For example, let us say that the full cost of your DWI health insurance (for yourself, your husband, and your son) is \$1000 per month. While working, you pay 10% (\$100). If you choose to continue the coverage under COBRA, the company can make you pay the full \$1000 plus another \$20 (2%) for administration.

The company is *permitted* to charge you that much. The company could choose to charge you some lesser amount or nothing at all. But very few employers charge less than the maximum permissible amount.

As you said, it would make no sense for you to pay \$1020 per month for health insurance coverage that duplicates what you are already entitled to through TRICARE, while you are on active duty.

**Q: I have heard that USERRA has its own provision like COBRA, permitting a person who leaves a civilian job for military service to continue health insurance coverage through the civilian job while away from work for military service. Is that correct?**

**A:** Yes. Section 4317 of USERRA provides:

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<sup>4</sup> See "An Employer's Guide to Group Health Continuation Coverage under COBRA", <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/an-employeres-guide-to-group-health-continuation-coverage-under-cobra.pdf>.

**(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 [29 USCS § 1167(1)]), 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 [10 USCS § 1074], 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 [26 USCS § 4980B(f)(4)]) 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 [29 USCS § 1002(37)], 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.<sup>5</sup>

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.<sup>6</sup> 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.

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.<sup>7</sup> 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.

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<sup>5</sup> 38 U.S.C. 4317 (emphasis supplied).

<sup>6</sup> 38 U.S.C. 4317(a).

<sup>7</sup> 10 U.S.C. 1074.

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, the civilian employer must not continue the coverage and expect the employee to pay for it.*<sup>8</sup>

**Q: Do I need to continue my DWI health insurance while I am away from work for military service in order to have the coverage when I return to work after I complete my year of active duty?**

**A:** No. You have the right to immediate reinstatement of your DWI health insurance immediately upon your return to work, even if you did not continue the health insurance coverage while you were away from work for service.

When you are released from your year of active duty, you will have the right to prompt reemployment at DWI if you meet the five USERRA conditions:

- a. You must have left the civilian job to perform service in the uniformed services.<sup>9</sup>
- b. You must have given the employer prior oral or written notice before leaving the job.<sup>10</sup>
- c. Your cumulative period or periods of uniformed service, relating to your employment relationship with DWI, must not have exceeded five years.<sup>11</sup>
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>12</sup>
- e. You must have made a timely application for reemployment after release from the period of service.<sup>13</sup>

When you meet these five conditions, you are entitled to *prompt* reemployment at DWI.<sup>14</sup> Upon your return to work, you are entitled to *immediate* reinstatement of your health insurance coverage for yourself and your spouse and child—there must be no waiting period

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<sup>8</sup> 38 U.S.C. 4317(a)(1). Legally, you are not required to give the employer notice that you do *not* want to continue your health insurance coverage through your civilian job. As practical advice, I suggest that you send such a notice to your employer by certified mail or the e-mail equivalent. Sending such a notice will help to avoid misunderstandings and expense for health insurance coverage that is neither needed nor wanted.

<sup>9</sup> 38 U.S.C. 4312(a).

<sup>10</sup> 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).

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> 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.

and no exclusion of “pre-existing conditions.”<sup>15</sup> *It is not necessary for you to request reinstatement of your health insurance coverage*—you are only required to make a timely application for reemployment. The employer must reinstate your health insurance coverage, for yourself and your family, as part of your reemployment.<sup>16</sup>

**Q: What if I am wounded or injured in the line of duty and return to work with a service-connected disability or condition? Is DWI required to provide medical care through its 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.<sup>17</sup>

**Q: How does section 4317 work when I am away from my DWI job for a short period of military training like a drill weekend or a two-week annual training tour?**

**A:** 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.”<sup>18</sup>

When your orders call for a period of uniformed service lasting for fewer than 31 continuous days, you are not entitled to TRICARE coverage for your husband and child during that short training tour. You need to continue your health insurance coverage through DWI during such a short training tour to ensure that there is no lapse in coverage.

**Q: My good friend Bob Smith is a member of the same Army Reserve unit that I belong to. Like me, he has been mobilized and deployed to Southwest Asia. He is self-employed. He has health insurance for himself and his family, but not through his civilian job. Does USERRA give**

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<sup>15</sup> 38 U.S.C. 4317(b).

<sup>16</sup> Because your employer may be unaware of its obligations under USERRA, it would be prudent to remind the employer. You can do so by sending the personnel director a copy of or link to this article.

<sup>17</sup> 20 C.F.R. 1002.168(b).

<sup>18</sup> 38 U.S.C. 4317(a)(2).

**Bob the right to reinstatement of his health insurance coverage when we return from our year of active duty?**

**A:** USERRA does not apply to Bob's situation because he does not have a civilian job (he is self-employed), but Bob has a similar right under the Servicemembers Civil Relief Act (SCRA). The pertinent SCRA section is as follows:

- (a)** Reinstatement of health insurance. A servicemember who, by reason of military service as defined in section 703(a)(1) [[50 USCS § 4023\(a\)\(1\)](#)], is entitled to the rights and protections of this Act shall also be entitled upon termination or release from such service to reinstatement of any health insurance that--
  - (1)** was in effect on the day before such service commenced; and
  - (2)** was terminated effective on a date during the period of such service.
- (b)** No exclusion or waiting period. The reinstatement of health care insurance coverage for the health or physical condition of a servicemember described in subsection (a), or any other person who is covered by the insurance by reason of the coverage of the servicemember, shall not be subject to an exclusion or a waiting period, if--
  - (1)** the condition arose before or during the period of such service;
  - (2)** an exclusion or a waiting period would not have been imposed for the condition during the period of coverage; and
  - (3)** in a case in which the condition relates to the servicemember, the condition has not been determined by the Secretary of Veterans Affairs to be a disability incurred or aggravated in the line of duty (within the meaning of section 105 of title 38, United States Code [[38 USCS § 105](#)]).
- (c)** Exceptions. Subsection (a) does not apply to a servicemember entitled to participate in employer-offered insurance benefits pursuant to the provisions of chapter 43 of title 38, United States Code [[38 USCS §§ 4301](#) et seq.].
- (d)** Time for applying for reinstatement. An application under this section must be filed not later than 120 days after the date of the termination of or release from military service.
- (e)** Limitation on premium increases.
  - (1)** Premium protection. The amount of the premium for health insurance coverage that was terminated by a servicemember and required to be reinstated under subsection (a) may not be increased, for the balance of the period for which coverage would have been continued had the coverage not been terminated, to an amount greater than the amount chargeable for such coverage before the termination.

**(2)** Increases of general applicability not precluded. Paragraph (1) does not prevent an increase in premium to the extent of any general increase in the premiums charged by the carrier of the health care insurance for the same health insurance coverage for persons similarly covered by such insurance during the period between the termination and the reinstatement.<sup>19</sup>

### **Please join or support ROA**

This article is one of 2000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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, 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](http://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  
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<sup>19</sup> 50 U.S.C. 4024.