

**Apply for Reemployment with the new Company as well as the Company you
Were Working for before your Active Duty**

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

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Q: I am a Senior Airman (E-4) 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).

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 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 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 (VRRRA—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 VRRRA 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 VRRRA 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:

I am currently away from my civilian job for a one-year period of active duty. I will be leaving active duty soon, and I am trying to secure reemployment in the job I left to go on active duty 11 months ago.

In January 2020, I was hired by a large defense contractor—let us call it Daddy Warbucks Industries or DWI. The company had a contract to provide information technology (IT) services and other services to Department of Defense (DOD) organizations at the Pentagon and other facilities in the Washington metropolitan area.

Recently, while I have been on active duty, the DOD contract with DWI expired and was not renewed. DOD awarded the new contract to another company—let us call it Computer Nerds R Us or CNRU. I have heard that many of my former colleagues at DWI, working on this contract, have applied for jobs with CNRU, and some (perhaps most) of them have been hired. The transition from DWI to CNRU will occur just a few days after I leave active duty. Should I apply for reemployment with DWI? Or with CNRU? Or perhaps both?

A: I strongly suggest that you apply for reemployment with both DWI and CNRU. Please see Law Review 20003 (January 2020) for a sample application for reemployment letter.

As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.⁴
- b. You must have given the employer prior oral or written notice. I suggest that you give the notice in writing, by certified mail or the e-mail equivalent.
- c. Your cumulative period or periods of uniformed service, relating to your employment relationship with that employer, must not have exceeded five years. Under section 4312(c)

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 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 For purposes of USERRA, the uniformed services are the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service. 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic & Atmospheric Administration is a uniformed service for other purposes, but not for purposes of USERRA. Please see Law Review 15002 (January 2015).

of USERRA,⁵ there are nine exemptions from the five-year limit. If you are called to active duty involuntarily, the period of involuntary service will not count toward your five-year limit. If you volunteer, the period of service may be exempt, depending on the circumstances. 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.⁶

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military. If you receive a punitive discharge (by court martial) or an administrative discharge called “OTH” (other than honorable), you will not have the right to reemployment.⁷
- e. After release from the period of service, you must be *timely* in reporting back to work or applying for reemployment. If your period of service lasts for fewer than 31 days, you must report for work at your regular place of employment at the start of the first full regularly scheduled work period after you are released from the period of service and after the time reasonably required for *safe transportation* from the place of service to your residence, plus eight hours for rest.⁸ If the period of service lasted for more than 30 days but less than 180 days, you must *apply for reemployment* with your pre-service employer within 14 days after your release from the period of service.⁹ If the period of service lasted for 181 days or more, you have 90 days to apply for reemployment.¹⁰

If you meet the five conditions, you are entitled to *prompt* reinstatement to your job, generally within two weeks after you apply for reemployment.¹¹ You are also entitled to return to the job that you *would have attained if you had been continuously employed*, perhaps a better job than the one you left.¹² You should return to work with the seniority that you had at the time you left plus the additional seniority that you would have attained if you had been continuously employed.¹³ You are also entitled to be treated, upon reemployment, as if you had been continuously employed in the civilian job for purposes of your civilian pension entitlements.¹⁴

Under the circumstances that you have described, CNRU may qualify as the *successor in interest* to DWI. As a result of a USERRA amendment in 2010, it is now clear that *there need not be a merger or transfer of assets for the new company to qualify as the successor in interest*. If CNRU has taken

⁵ 38 U.S.C. 4312(c).

⁶ Since you had only recently been hired by DWI, and since your active duty period only lasted one year, you have not exceeded the cumulative five-year limit.

⁷ 38 U.S.C. 4304.

⁸ 38 U.S.C. 4312(e)(1)(A)(i).

⁹ 38 U.S.C. 4312(e)(1)(C).

¹⁰ 38 U.S.C. 4312(e)(1)(D).

¹¹ 20 C.F.R. 1002.181.

¹² 38 U.S.C. 4313(a)(2)(A). But the job that you would have attained if you had been continuously employed can also be worse than the job you left, or no job at all, if that is what would have happened to you if you had been continuously employed. See 20 C.F.R. 1002.194.

¹³ 38 U.S.C. 4316(a).

¹⁴ 38 U.S.C. 4318.

over the function that DWI formerly performed and has hired all or most of the former DWI employees, CNRU is the successor in interest to DWI.¹⁵

You can have the right to reemployment at CNRU, *but you must apply for reemployment with that company*.¹⁶ You should apply for reemployment with CNRU even if you are uncertain that CNRU qualifies as the successor in interest to DWI.

In addition to applying for *reemployment* with CNRU, you should also apply for *employment* with that company. If CNRU does not qualify as the successor in interest (perhaps because it has hired only a few of the former DWI employees), the company is still required to refrain from discriminating against you *in hiring*. If CNRU has hired other former DWI employees but does not hire you, that may give rise to an inference that the company is discriminating against you based on your membership in the Air Force Reserve and your obligation to perform future training and service for the Air Force. Section 4311 of USERRA¹⁷ forbids discrimination in hiring as well as discrimination against those who are already employed.

You should also apply for reemployment with DWI. It is possible that other DWI employees affected by DWI's loss of the DOD contract were offered DWI jobs on other projects or contracts. It is also possible that the displaced DWI employees were given severance pay or supplemental unemployment benefits. To get those benefits, you need to apply for reemployment with DWI.

Q: Is it logically inconsistent for me to apply for reemployment with both DWI and CNRU?

A: No. When the time comes for you to retain an attorney and sue, your attorney will need to exercise judgment about which claims have probable merit and which do not, and to assert only claims that appear to have merit. But at this point, as you are leaving active duty, you should apply for reemployment with both companies to preserve your options.

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

¹⁵ See *Brown v. Lincoln Property Co.*, 354 F. Supp. 3d 1276 (N.D. Fla. 2019). I discuss *Brown* in detail in Law Review 21013 (March 2021).

¹⁶ The pertinent section of the Department of Labor (DOL) USERRA Regulation provides: "If there has been a change in ownership of the employer, the application [for reemployment] should be submitted to the successor in interest." 20 C.F.R. 1002.119.

¹⁷ 38 U.S.C. 4311.

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 Organization of America
1 Constitution Ave. NE
Washington, DC 20002