

## LAW REVIEW<sup>1</sup> 21058

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### **What Kind of a Job Am I Entitled to upon Reemployment?**

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**Q: I am a Lieutenant Colonel in the Army National Guard (ARNG) and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>4</sup>**

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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 2,200 “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), 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 90% of the articles published so far, but we are always looking for “other than Sam” articles by other lawyers who are ROA members or willing to join ROA.

<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 and retired as a Captain (O-6) in 2007. I am a life member of ROA and have served on the national staff as the Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC during its six years in operation as a funded ROA program. I have continued some of the work of the SMLC as a volunteer and ROA member since I left the national staff in 2015.

<sup>3</sup> At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

<sup>4</sup> Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

I am the same guy who asked the questions in Law Review 21057, the immediately preceding article in this series. Let us assume that I am released from active duty and return home in late 2024 and that I meet the five USERRA conditions for reemployment at that time, as you outlined in Law Review 21057. What kind of a job am I entitled to at that time?

The last time that I taught in that school district was for the fall semester of 2019, before I went on full-time AGR duty in December of that year. For several years, I taught fifth grade at George Washington Elementary. I have been in discussions with the school district's personnel director, and she said that she wants to reinstate me as a second-grade teacher at Thomas Jefferson Elementary, on the other side of town. I think that USERRA entitles me to return to the same school and that same classroom where I was working when I left to go on active duty.<sup>5</sup> Am I correct about that?

A: No. A person who is returning from a period of service of 91 days or more and who meets the five USERRA conditions is entitled to reinstatement "in the position of employment in which the person would have been employed if the continuous employment of such person had not been interrupted by such service, *or a position of like seniority, status and pay, the duties of which the person is entitled to perform.*"<sup>6</sup>

If you meet the five USERRA conditions, you are entitled to prompt reinstatement<sup>7</sup> even if that means that another employee must be displaced to make room for you.<sup>8</sup> Section 4313(a)(2)(A) gives the employer some flexibility, to minimize the number of cases where reinstating the returning veteran means displacing another employee. The employer has the option to reemploy the returning veteran in a position other than the position that the veteran would have attained if continuously employed.<sup>9</sup> The alternative position must be of like seniority, status, and pay, and the returning veteran must be qualified to perform the duties of that position.<sup>10</sup>

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<sup>5</sup> Let me say that I think that it is a waste of time for you and the personnel director to argue about what your reemployment rights *may be* three years from now, when you expect to leave active duty. Many things could happen that will mean that the question never arises. The most likely is that you will remain on active duty past December 2024 and exceed the five-year limit. You could do something incredibly stupid and get a disqualifying bad discharge from the Army. You could get a great job offer elsewhere and decide not to return to the school district. You could win the Publisher's Clearinghouse Sweepstakes and retire. God forbid, you could die. You need to understand your USERRA rights for planning purposes, but there is no point in engaging the employer in that discussion until you are within about four months of leaving active duty.

<sup>6</sup> 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

<sup>7</sup> Prompt reinstatement means within 14 days after you apply for reemployment. 20 C.F.R. 1002.181.

<sup>8</sup> See Law Review 21023 (April 2021).

<sup>9</sup> The position that the veteran would have attained if continuously employed is usually but not always the position that he or she held before leaving for uniformed service. The position that the veteran would have attained may be better than or worse than the position that he or she held previously, depending upon what *would have happened, with reasonable certainty*.

<sup>10</sup> If the school district insisted that you teach calculus to gifted high school seniors, that would be objectionable if you are not qualified to teach calculus.

Yes, location is an aspect of the status to which the returning veteran is entitled, but that refers to location as in metropolitan area.<sup>11</sup> USERRA does not entitle you to insist upon returning to the same building where you were working in 2019.

**Q: What rate of pay am I entitled to upon reemployment?**

**A:** You are entitled to the rate of pay that you would have attained if you had been continuously employed by the school district. During the five years that you were away from work for service, there were likely annual cost-of-living pay raises. Also, the school district likely has pay bands, where pay rates increase with the number of years of school district service. You are entitled to those pay raises upon reemployment, as if you had been continuously employed.

**Q: The school district's superintendent is annoyed with me because of my repeated, sometimes lengthy absences from work for military service, although those absences are clearly protected by USERRA. If I return to the status of a part-time National Guard member after I leave active duty in late 2024, that annoyance will likely continue and may increase. What is to keep the school district from reemploying me and then firing me shortly thereafter?**

**A:** If you meet the five USERRA conditions and are reemployed, the employer must not fire you, except for cause, within one year after your proper reinstatement.<sup>12</sup> If the employer fires you during that special protection period, the employer must *prove* (not just say) that the firing was for cause. The purpose of the special protection period is to protect the returning service member or veteran from a bad faith or pro forma reinstatement and to give the returning service member or veteran a reasonable time to get back up to speed in the civilian job.

**Q: What if the employer waits a year and a day and then fires me?**

**A:** In that case, you are protected by section 4311 of USERRA.<sup>13</sup> If you prove that your performance of uniformed service or your application or obligation to perform service was a *motivating factor* (not necessarily the sole reason) for the firing, the firing is unlawful, unless the employer can *prove* that it would have fired you anyway for lawful reasons unrelated to your service.<sup>14</sup>

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<sup>11</sup> See *Armstrong v. Cleaner Services, Inc.*, 79 L.R.R.M. 2921, 2923 (M.D. Tenn. 1972). See also Law Review 20050 (May 2020).

<sup>12</sup> 38 U.S.C. 4316(c)(1). That is for veterans returning after 181 days or more of service. If the period of service was more than 30 days but less than 181 days, the special protection period is 180 days. 38 U.S.C. 4316(c)(2).

<sup>13</sup> 38 U.S.C. 4311.

<sup>14</sup> 38 U.S.C. 4311(c). Please see Law Review 17016 (March 2017), by attorney Thomas Jarrard and me, for a detailed discussion of the legislative history of section 4311 and the case law under that section.

**Q: Teachers and other employees of the school district receive, as part of their compensation, health insurance coverage for themselves and their families as part of their compensation. While I am on active duty, I have TRICARE coverage, and I do not need or want health insurance through my civilian job. After I leave active duty, I will need to reinstate my civilian health insurance coverage through the school district. Does USERRA entitle me to that coverage?**

**A:** If you meet the five USERRA conditions and return to work, you are entitled to *immediate reinstatement* of your health insurance coverage, for yourself and your family. There must be no waiting period and no exclusion of “pre-existing conditions” except for conditions that the United States Department of Veterans Affairs (VA) has determined to be service connected.<sup>15</sup>

**Please join or support ROA.**

This article is one of 2,200-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 October 1922 by a group of veterans of “The Great War” as World War I was then known. Captain Harry S. Truman was one of those veterans. 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 defense. 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 military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs in the Supreme Court and other courts, we educate service members, attorneys, judges, employers, and others about the legal rights of service members and 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 cost 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 eight<sup>16</sup> uniformed services, you are eligible for full ROA membership, including the right to vote and run for office in the organization. Eligibility includes those who are serving or have served in the Active

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

<sup>16</sup> Congress recently established the United States Space Force as the eighth uniformed service.

Component, the Reserve, or the National Guard, and enlisted members as well as officers are eligible.

If you are eligible, please join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448. The cost is only \$20 per year or \$450 for a life membership. If you are not eligible, please support us financially to help us continue this work. You can mail us a check as follows:

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