

When You Leave a Federal Agency for Military Service, I Suggest that You Apply for Reemployment at the Same Agency, but Applying at a Different Agency May Not Be Fatal to Your Rights.

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¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 <mailto:swright@roa.org>.

Q: I am a Commander (O-5) in the Coast Guard Reserve and a life member of the Reserve Organization of America (ROA).³ I only recently became aware of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the Reserve or National Guard. I wish that I had known about your articles in November 2021, when I completed a two-year voluntary recall to active duty.

I started my first Federal civilian job in October 2017, with a Federal agency that I will call Agency A. Just over two years later, I left that job to go on active duty for two years, from 12/1/2019 until 11/30/2021. Last summer, as I was approaching the end of my two-year active duty assignment, I decided that I really did not want to return to Agency A because my supervisor at that agency gave me a hard time about my Coast Guard Reserve service and my absences from work that were necessitated by my service. When I gave my supervisor notice of my two-year activation, in October 2019, he told me “do not bother to apply” to return to Agency A.

Starting in July 2021, I researched Federal job opportunities, using the USAJobs system.⁴ I found a new job at another agency. Let us call it Agency B. When I was interviewed by Agency B, in September 2021, I told the interviewer that I was on active duty in the Coast Guard and would be leaving active duty and would be available to start at Agency B on or about 12/1/2021.

I was selected for the job, and I gave notice, by e-mail, to the personnel office at Agency A that I was accepting a position at another Federal agency and that I was resigning my position at Agency A. I started the new job at Agency B almost immediately after I left active duty, and I am most pleased with the job, which pays 25% more than I had been earning at Agency A.

I am most pleased with the Agency B job, but I also think that I am entitled to seniority and pension credit for the time that I worked for Agency A and the time (December 2019 through November 2021) when I was away from Federal employment for active military service. I think that I meet the five USERRA conditions for reemployment.

The Agency B personnel office has told me that I am a “new hire” at Agency B and that I am not entitled to seniority and pension credit for my prior Federal employment or for my two-

³ 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.

⁴ The United States Office of Personnel Management (OPM) operates USAJobs, and that is the usual way for individuals to apply for and be considered for Federal job opportunities.

year active-duty period because I failed to meet the last of the five USERRA conditions—that I failed to apply for reemployment with my pre-service employer after leaving active duty. Help!

Answer, bottom line up front

If you had contacted me while you were still on active duty, I would have suggested that you apply for reemployment at Agency A and return to that agency at least briefly. You could have returned to work at Agency A and then applied to Agency B, on the USAJobs system. That way, there would have been no issue about your compliance with the USERRA conditions and your right to seniority and pension credit for your prior Federal civilian employment and your two years of active duty.

I realize that we cannot “turn back the hands of time” and change the facts that you have made. We can argue that you have substantially complied with the USERRA conditions and that your situation is salvageable.⁵

Explanation

As I have explained in detail 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 uniformed service.⁶ You clearly met this condition in the fall of 2019.
- b. You must have given the employer prior oral or written notice, or an appropriate officer of your uniformed service must have given the notice for you.⁷ You clearly gave such notice.
- c. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years.⁸

⁵ Because your period of active duty lasted more than 180 days, you have 90 days, starting on the date of release from the period of service, to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). The deadline for you to apply for reemployment at Agency A does not expire until 2/28/2022, 90 days after you left active duty. I suggest that you send a certified letter to Agency A, applying for reemployment, before the deadline expires.

⁶ 38 U.S.C. 38 U.S.C. § 4312(a).

⁷ 38 U.S.C. 38 U.S.C. § 4312(a)(1). Prior notice to the employer is not required in circumstances where giving such notice is precluded by military necessity or otherwise impossible or unreasonable 38 U.S.C. 38 U.S.C. § 4312(b).

⁸ 38 U.S.C. 38 U.S.C. § 4312(c). As I have explained in detail in Law Review 16043 (May 2016) and many other articles, there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit with respect to a specific employer relationship. Your two-year active duty period may have been exempt from the five-year limit, but even if the period is not exempt you are well within the limit.

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁹
- e. You must have made a timely application for reemployment with the pre-service employer after release from the period of service.¹⁰

It is clear that you meet the first four conditions. The question is about the fifth condition. You could have saved yourself a lot of trouble by applying for reemployment at Agency A and returning to work for that agency at least briefly before applying for and accepting the position at Agency B, but I think that you have substantially complied with the requirement to make a timely application for reemployment with your pre-service employer, the Federal Government.

Here is the text of the USERRA subsection imposing the 90-day deadline to apply for reemployment after a period of service of more than 180 days: “In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.”¹¹

I think that your pre-service employer was the Federal Government as a whole, not just Agency A, and that your application for reemployment with Agency B was sufficient under the statute. Section 4303 of USERRA¹² defines 16 terms used in this law, including the term “employer.” The lengthy definition of “employer” includes “the Federal Government.”¹³

Section 4331 of USERRA¹⁴ gives the Secretary of Labor (DOL) the authority to promulgate regulations about the application of USERRA to State and local governments and private employers and the Director of the Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to Federal executive agencies, as employers.

The DOL USERRA regulations are codified in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002.¹⁵ The DOL USERRA regulations were excellent when promulgated in December 2005 but many of the provisions have since been rendered incorrect because of statutory amendments in the last 16 years.¹⁶

⁹ 38 U.S.C. § 4304. You are still in the Coast Guard Reserve, so it is clear that you did not receive a disqualifying bad discharge.

¹⁰ After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

¹¹ 38 U.S.C. § 4312(e)(1)(D).

¹² 38 U.S.C. § 4303.

¹³ 38 U.S.C. § 4303(4)(A)(ii).

¹⁴ 38 U.S.C. § 4331.

¹⁵ 20 C.F.R. Part 1200.

¹⁶ See Law Review 21033 (May 2021).

The OPM USERRA regulations are codified in Part 353 of Title 5 of the C.F.R.¹⁷ The OPM USERRA regulations are not comprehensive and do not contain a provision that is pertinent to the question of whether the Federal employee returning from uniformed service must apply for reemployment at the same agency where he or she worked before the period of service.

The DOL USERRA regulations provide as follows concerning the identity of the person or organization to which or to whom the returning veteran must submit his or her application for reemployment:

To whom must the employee submit the application for reemployment?

The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest.¹⁸

There is a considerable amount of legislative history in 1993-94, as Congress considered replacing the 1940 reemployment statute with USERRA.¹⁹ The report of the Senate Committee on Veterans' Affairs includes the following instructive paragraph:

Because the current VRR law [the 1940 law that USERRA replaced] has been so successful for so long, the [Senate] Committee, as did the House Committee in its report, stresses its intention that the extensive body of case law that has evolved over the past five decades, to the extent that it is consistent with the provisions of the Committee bill, would remain in full force and effect. *This is particularly true with respect to the basic principle established by the Supreme Court in the case of Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) and restated in Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977), that reemployment rights are to be "liberally construed."*²⁰

¹⁷ 5 C.F.R. Part 353.

¹⁸ 20 C.F.R. § 1002.119 (bold question in original). Technically, this section does not apply to Federal agencies as employers, because the DOL USERRA regulations apply to State and local governments and private employers. Nonetheless, Federal agencies should follow the DOL USERRA regulations because USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. § 4301(b).

¹⁹ Public Law 103-353, October 13, 1994, 108 Stat. 3167.

²⁰ S. Rep. No. 103-65, 1993 WL 432576 (Legislative History). This Senate committee report is reprinted in Appendix D-2 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 879-80 of the 2021 edition of the *Manual*.

Applying this legislative history, it is the duty of Agency B, the Merit Systems Protection Board (MSPB), and the United States Court of Appeals for the Federal Circuit to construe liberally the requirement to apply for reemployment with the pre-service employer. Applying that requirement liberally, it is clear that your application for reemployment with Agency B is sufficient, but you could have saved yourself some trouble if you had applied for reemployment at Agency A and had returned to that agency at least briefly.

Q: Following your advice, I applied for reemployment with Agency A on 1/10/2022, by e-mail and also by certified mail. The Agency A personnel officer responded promptly to my e-mail, saying that my application for reemployment on 1/10/2022 was too late because on 10/28/2021, while I was still on active duty, I sent an e-mail to the Agency A personnel officer resigning my position at Agency A to accept a position at Agency B. What do you say about this?

A: The personnel officer is wrong and should know better.²¹ The pertinent section of the DOL USERRA regulations is as follows:

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. *Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment the uniformed service, the employee does not forfeit the right to reemployment after completing service.* The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.²² i

The DOL USERRA regulations also contain the following section:

If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?

²¹ Under section 4335 of USERRA, 38 U.S.C. § 4335, Federal executive agency human resources personnel are required to take periodic training in USERRA.

²² 20 C.F.R. § 1002.88 (bold question in original, emphasis by italics supplied). *See also Rice v. United States Postal Service*, 2016 MSPB LEXIS 684 (Merit Systems Protection Board Feb. 8, 2016).

No. The employee has reemployment rights with the pre-service employer provided that he or she makes a timely reemployment application to that employer. The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer. However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.²³

As I have explained, I believe that Agency A and Agency B are both part of the Federal Government, and the Federal Government is your pre-service employer. Thus, your application for reemployment, submitted to the personnel officer of Agency B, is sufficient under the statute. If the MSPB or the Federal Circuit reject this contention, another way that you can win is by the fact that you did apply for reemployment at Agency A before the 90-day deadline expired. Your application to Agency A, submitted on 1/10/2022, was only 41 days into the 90-day deadline. Your application for reemployment was timely, and Agency A had no right to reject the application based on your “resignation” in October, while you were still on active duty.

Q: Is there any case law about a Federal employee leaving one agency to perform uniformed service and returning to work at a different agency?

A: I have not found any published decision about this scenario in the Federal Government, but I have found a helpful discussion of this issue in the context of the State of Nevada:

The term “employer” is broadly defined as “any person, institution, organization, or other entity that pays salary or wages for work performed or has control over employment opportunities” and specifically includes “a State.” Id. § 4303(4)(A)(iii). The term “State” means “each of the several States of the United States ... (including the agencies and political subdivisions thereof).” Id. § 4303(14). USERRA’s definition of employer also allows for the possibility that an employee may have more than one employer. *See* 29 C.F.R. § 1002.37. Thus, the “employer” of a state employee is not limited to the particular department in which the person is employed. And the Controller’s concession that it qualifies as Ingram’s employer does not preclude the State from also qualifying as Ingram’s employer for purposes of USERRA.²⁴

²³ 20 C.F.R. § 1002.120 (bold question in original). *See also* *Shea v. Iron Workers District Council of New England Pension Fund*, 158 F. Supp. 3d 20, 30 (D. Mass. 2016).

²⁴ *United States v. Nevada*, 817 F. Supp. 2d 1240, 1237-38 (D. Nev. 2011).

It seems to me that this question is easier for the Federal Government than for the State of Nevada because the Federal Government has a unitary executive. In Nevada, like most of the States, there are several elected Statewide officials, including the Controller, and the Governor does not have direct control over the other elected officials.

Conclusion

My advice to others in this situation who have not already taken a job at a new Federal agency instead of applying for reemployment at the pre-service agency is that when you leave a Federal job for uniformed service you should *apply for reemployment with the agency that you left*. If you want to look for a better job with another agency, you should do that *after you have returned to work at the pre-service agency* and after you have at least started the process of making up the missed pension contributions (FERS Basic and the Thrift Savings Plan) while still on the payroll of the pre-service agency. But if you have already found a new job with a different Federal agency, instead of applying for reemployment with the pre-service agency, and if it is too late for you to apply for reemployment with the pre-service agency, there are arguments that you can make to salvage your situation.

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This article is one of 2,300-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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members 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 eight²⁵ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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:

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²⁵ Congress recently established the United States Space Force as the 8th uniformed service.