

Don't Apply for Reemployment until you Are Ready To Return to Work.

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

[About Sam Wright](#)

1.3.1.3—Timely application for reemployment

1.3.2.7—Adequate rest before and after service

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). Thirteen months ago, I left my job at a big company (let us call it Daddy Warbucks Industries or DWI) when I was called to active duty for a year. I was deployed to the Middle East, and my duties were very onerous. I need a rest before returning to my civilian job.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 “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 1,800 of the articles, but we are always looking for “other than Sam” articles.

² BA 1973 Northwestern University; JD 1976 University of Houston School of Law; LLM 1980 Georgetown University Law Center. I served as a judge advocate in the Navy and Navy Reserve and retired in 2007. I am a life member of ROA. I participated in the drafting of USERRA while employed as an attorney for the United States Department of Labor (1982-92). For six years (June 2009 through May 2015), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015) for a detailed discussion of the accomplishments of the SMLC. I have continued writing new “Law Review” articles as a volunteer and member of ROA. 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: 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.

I was released from active duty last week and arrived home late Sunday night. On Monday, I drove to the DWI facility and found the manager. I told him that I am home, and I provided him a copy of my Air Force DD-214, showing that I served honorably and have been released from active duty.

The manager told me: “Welcome home. You are back on the payroll as of tomorrow morning (Tuesday). We expect to see you at 7 a.m. tomorrow morning.”

Time out! I need a rest. I thought that you wrote that I am entitled to 90 days of rest before returning to work, after a period of uniformed service lasting 181 days or more. What gives?

A: I never said or wrote that you are entitled to 90 days of rest. What I said was that after a period of service of 181 days or more you must apply for reemployment within 90 days after the date of your release from active duty.⁴ If you need a rest, or if you want to look for a better job, or if for any other reason you do not want to return to work right away, you should wait before submitting your application for reemployment.

An application for reemployment need not be in any specific form and it need not be in writing. When you showed up at your workplace on the day after you arrived home, with a copy of your DD-214 in hand, you effectively applied for reemployment, and the employer acted favorably in putting you back on the payroll right away the next morning. Your actions effectively mooted the 90-day deadline to apply for reemployment.

I invite your attention to our Law Review 0622, published in 2006. Because we published that article 15 years ago, we are republishing a condensed version of it now.

As I explained in Law Review 7, you have 90 days to apply for reemployment after a period of uniformed service that lasted 181 days or more.⁵ If you meet the five USERRA conditions for reemployment, including having made a timely application for reemployment, you are entitled to *prompt* reinstatement in the position that you would have attained if you had been continuously employed, or another position, for which you are qualified, that is of like seniority, status, and pay. You are also entitled, upon reemployment, to seniority and pension credit that you had when you left and the additional seniority and pension credit that you would have received if continuously employed.⁶ *This includes seniority and pension credit for the time (up to 90 days) after you leave active duty and before you apply for reemployment.*⁷

⁴ 38 U.S.C. 4312(e)(1)(D).

⁵ 38 U.S.C. 4312(e)(1)(D).

⁶ 38 U.S.C. 4316(a), 4318.

⁷ Please see Law Review 60.

The Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR) has always advised National Guard and Reserve personnel to *keep your employer informed* about your status and when the employer can expect your return. I have seen many cases where the returning service member promptly informed the employer and was told: “Great. Start work right now.” My advice is that you not apply for reemployment *until you are ready to return to work.*

On the other hand, I certainly recognize the value of the ESGR advice to keep your employer informed. If you are home from an active duty deployment, especially in a small town, it is likely that the employer or your supervisor will see you or hear that you are back. That will likely give rise to the question: “If Smith is home, why is she not back at work?”

If you are home but not yet ready to return to work, I suggest that you send a polite note to the employer, starting with: “*This is not an application for reemployment.*” Tell the employer the date that you left active duty. Tell the employer that you are not yet ready to return to work. Offer to consult with the employer about a mutually convenient date for you to return to work. It is likely that the employer will appreciate your cooperation in giving the employer time to reinstate you.

The 90-day application period can be very valuable for some returning veterans. The 1988 *Veterans’ Reemployment Rights Handbook* states: “The veteran cannot be compelled to apply before the end of the statutory 90-day period. During these 90 days, he can seek and take employment elsewhere or do anything else he wishes, provided such actions are followed by a proper application [for reemployment] within the 90-day period.”

Please join or support ROA

This article is one of 2,000-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 100 years 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 serving or have ever served in any of our nation's seven uniformed services, you are eligible for ROA membership, 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:

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