

If You Leave a Federal Civilian Job for Military Service, You Must Apply for Reemployment with the Same Federal Agency after Leaving Active Duty. Applying for a New Federal Job Is Not Equivalent to Applying for Reemployment.

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

1.3.1.3—Timely application for reemployment

Q: I am a Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).³ I have read with great interest many 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 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 Spouses’ 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>.

³ At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing business as” name—the Reserve Organization of America. The point of the name change is to emphasize that the

On the civilian side, I am a GS-14 for a Federal agency, and I have been on military leave from that job for almost four years, since 1/1/2019. My current military orders expire on 12/31/2022, and this time they will not be extended. I expect to return to the Federal agency early in the new year.

I have been a Federal civilian employee since June 2000, when I completed my initial five years of active duty and began my Federal civilian career. I realize that I have a great deal at stake with respect to my Federal civilian seniority and pension status. It is very important that I return to the Federal civilian workforce in January 2023 with seniority and pension credit for the 19 years of Federal civilian service that I performed before I began this four-year active duty period and with Federal civilian seniority and pension credit for the four-year active duty period as well.

I have read and reread your Law Review 15116 (December 2015), with respect to the five USERRA conditions for reemployment. I am confident that I meet or will soon meet all five conditions, with the possible exception of the last condition—making a timely application for reemployment. Please explain to me the definition of “application for reemployment.” What, exactly, do I need to do now to ensure that I receive the appropriate seniority and pension credit upon returning to Federal civilian employment?

When I left my Federal civilian job in late December 2018 for this current four-year active duty period, I was a GS-14 for an agency in a large Cabinet department. In the fall of 2022, in preparation for my departure from active duty, I have researched USAJOBS⁴ looking for GS-14 and GS-15 positions for which I am qualified and interested. I found a vacancy announcement for a GS-15 position in a different agency within the same Cabinet department that I left in late 2018. I applied, was interviewed, and have been offered the position, with a start date in January 2023. I have not yet accepted the offer.

If I accept this offer, will that mean that I do not get seniority and pension credit for the last four years while I have been away from Federal civilian employment for military service? In your Law Review 22010 (February 2022), you wrote that applying for and accepting a new Federal job in another agency or department, instead of applying for reemployment in the pre-service job, is not necessarily fatal to the individual’s right to seniority and pension credit under USERRA. In Law Review 22012 (also published in February 2022), you recommended that a person in this situation should apply for reemployment with the pre-service Federal

organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

⁴ USAJOBS is a system operated by the United States Office of Personnel Management (OPM). It is the usual way for Federal agencies to announce job vacancies and for individuals to apply for Federal civilian positions.

agency, return to work for that agency, and only then apply for and accept another Federal civilian position.

Are your two February 2022 articles inconsistent? How do you advise that I proceed? Should I turn down the GS-15 offer and return to work in the GS-14 position that I left in late 2018?

Answer, bottom line up front

The two articles are consistent with each other. In Law Review 22010, I was advising a person who had already made the facts before contacting me, and I was arguing on his behalf that he had USERRA rights despite the fact that he had not proceeded in the way that I would have recommended. In Law Review 22012, I was advising a person who had not yet accepted the alternative Federal position and who still had the opportunity to submit a timely application for reemployment with the pre-service agency after leaving active duty.

Your situation is more like the Law Review 22012 situation. Having reconsidered what I have written previously, and having heard about other Federal civilian employees in this situation, I *reiterate my advice that a person in your situation should apply for reemployment with the pre-service Federal agency, return to work at that agency (at least briefly), and only then apply for and accept another Federal civilian position.*

Q: What is an “application for reemployment?”

A: Section 4312(e) of USERRA establishes the requirement to make a timely application for reemployment after completing the relevant period of service, as follows:

(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person’s intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person’s residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(D) 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.

(2)

(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.⁵

Section 4303 of USERRA⁶ defines 17 terms that are used in this law, but the term "application for reemployment" is not defined. The Department of Labor (DOL) USERRA regulation defines the term as follows:

⁵ 38 U.S.C. § 4312(e) (emphasis supplied).

⁶ 38 U.S.C. § 4303.

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. *The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.*⁷

Applying for a vacant Federal position in the same Cabinet department or another department of the Federal Government does not “indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer.”

To ensure that you receive Federal civilian seniority and pension credit for your recent four years of active duty, I strongly suggest that you decline the offer of another position and make a timely application for reemployment in the position that you would have attained if you had been continuously employed (probably but not necessarily the position you left). When you apply for reemployment, you can identify the alternative position as a position in which you are interested.

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 more than 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.

⁷ 20 C.F.R. § 1002.118 (emphasis supplied).

If you are now serving or have ever served in any one of our nation's eight⁸ 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002⁹

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

⁹ You can also contribute on-line at www.roa.org.