

LAW REVIEW¹ 24018

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If upon your Release from Active Duty you Are Hospitalized or Convalescing from an Injury or Illness Incurred during your Active Service Period, you Can Wait To Apply for Reemployment.

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

1.3.1.3—Timely application for reemployment.

1.3.2.9—Accommodations for disabled veterans.

Q: I am a Colonel in the Air Force Reserve and a life member of the Reserve Organization of America (ROA).³ On the civilian side, I am a

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 (VRRA—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 VRRA 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 VRRA 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 The Reserve Officers Association (ROA) was established in 1922 and received a congressional charter in 1950. In 2018, ROA members amended the ROA Constitution to make enlisted service members, as well as officers, eligible for membership. ROA adopted the "doing business as" name of Reserve Organization of America to emphasize that we represent and seek to recruit service members and veterans of all ranks.

pilot for a major airline—let us call it Very Big Air Line or VBAL. I am also an active member of the VBAL Pilots Association (VBALPA).

I was recently away from my VBAL job for exactly one year of military service, from 10/1/2022 until 9/30/2023. Near the end of my year of active duty, I was seriously injured in an automobile accident. I suffered compound fractures in both arms. I cannot presently return to work as an airline pilot because I cannot pass the Federal Aviation Administration (FAA) medical examination. I have received surgery and therapy on both arms, and I expect to recover fully from these injuries, but that will likely take 12-18 months.

I have heard that the deadline to apply for reemployment after a period of uniformed service that lasted 181 days or more is normally 90 days but that there is a provision for an extension of the deadline for a person who is hospitalized or convalescing from an injury or illness incurred during the active military period. Is that true?

Answer, bottom line up front:

Yes. In the case of a person who is hospitalized or convalescing “from an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services” the person’s deadline to apply for reemployment can be extended during the period of hospitalization or convalescence and that period of convalescence or hospitalization can last up to two years.⁴

Q: In Law Review 19076 (August 2019), you wrote that a returning veteran in a situation like my situation has the right to insist that the

⁴ 38 U.S.C. § 4312(e)(2)(A).

airline reemploy the veteran in a non-flying position until the veteran can pass the FAA medical examination and return to the cockpit.

What gives?

A: You are not entitled to reemployment at this time because you do not yet meet the five USERRA conditions for reemployment. You have not made a timely application for reemployment.

Q: What are USERRA's conditions for the right to reemployment?

A: As I have explained in Law Review 15116 (December 2015) and many other articles, you (or any returning service member or veteran) must meet five 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 “service in the uniformed services” as defined by USERRA.⁵
- b. You must have given the employer prior oral or written notice.⁶
- 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.⁷
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁸

⁵ 38 U.S.C. § 4312(a).

⁶ 38 U.S.C. § 4312(a)(1).

⁷ 38 U.S.C. § 4312(c). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit.

⁸ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offences) and OTH (“other than honorable”) administrative discharges.

- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.⁹

You do not have the right to reemployment because you have not yet met the final condition—you have not made a timely application for reemployment.

Because your most recent period of active duty lasted for more than 180 days, you had 90-days, starting on the date of your release from active duty (9/30/2023) to apply for reemployment.¹⁰ That deadline expired on 12/29/2023, 90 days after you left active duty on 9/30/2023. Because you are convalescing from the injuries that you sustained in the automobile accident, you can apply for reemployment after you complete the convalescing, and the period of convalescence can last up to two years.¹¹

But in the meantime, you have not applied for reemployment, and you are not entitled to reemployment. If you wanted to return to work in a non-flying capacity, you should have applied for reemployment in October 2023, and you should have made clear that you were insisting on returning to work in a non-flying capacity.¹²

Q: It is not fair! I talked to the VBAL Chief Pilot at length, and I explained the situation to him. I relied on his advice.

⁹ After a period of service that lasted more than 180 days, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

¹⁰ 38 U.S.C. § 4312(e)(1)(D).

¹¹ 38 U.S.C. § 4312(e)(2)(A).

¹² See Law Review 19076 (August 2019).

A: You should not seek legal advice from the Chief Pilot. He works for the airline, not for you, and he probably does not have a detailed understanding of USERRA. In any case, the employer had no obligation to explain USERRA to you. The employer's only obligation about informing employees is to post a notice about USERRA.¹³

To understand USERRA, you need to read our “Law Review” articles about the law. Our articles are available for free to everyone.

Please join or support ROA

This article is one of 2,100-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. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).¹⁴

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had

¹³ 38 U.S.C. § 4334. The notice is very general. Reading it would not have helped you understand your rights and responsibilities in this situation.

¹⁴ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

commanded American troops in the recently concluded “Great War.” 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 more than 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 advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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 eight¹⁵ 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 <https://www.roa.org/page/memberoptions>.

¹⁵ Congress recently established the United States Space Force as the eighth uniformed service.

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
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¹⁶ You can also contribute on-line at www.roa.org.