

LAW REVIEW 14094¹

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You Have 90 Days To Apply for Reemployment

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Q: I am a First Class Petty Officer (E-6) in the Coast Guard Reserve (USCGR). I joined the Reserve Officers Association (ROA) recently, after you amended your constitution to make noncommissioned officers and petty officers eligible for membership.

I am a GS-9 employee of the Department of the Navy (DON), and over the last few years I have had considerable difficulty with my DON civilian supervisor about my absences from work for USCGR duty and training. I have found your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) to be most useful to me and other reservists, in dealing with our civilian employers about issues of this kind.

I recently completed one year of USCGR active duty, from October 1, 2013 to September 30, 2014. As I understand your articles, I have 90 days to apply for reemployment, starting on September 30, because I was on active duty for more than 180 days. Is that correct? I do plan to return to work, but first I need some time off for readjustment. I plan to apply for reemployment in mid-December, well before the 90-day deadline has passed.

In early October, I was at the Navy base where I have my civilian job, shopping at the Navy Exchange. I ran into the civilian personnel officer of the DON organization where I work. She noticed that I was not in my Coast Guard uniform, and she asked me if I had been released from active duty. I told her that September 30 had been my last day on active duty. She then asked when I was coming back to work, and I told her that under USERRA I have up to 90 days to apply for reemployment, and that I plan to apply for reemployment in late December and return to work just after Christmas.

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find almost 1,300 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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The civilian personnel officer told me that I was wrong about having 90 days to return to work. She said that since I was off active duty I was required either to return to work or to take annual leave or FMLA leave.³ She asked me to send her my DD-214 and other paperwork. I told her that I would send her the paperwork but that I was not ready to apply for reemployment until mid-December. I sent her the paperwork as promised, along with a letter making clear that I was not applying for reemployment and was not required to do so until the end of December.

The personnel officer never notified me of any personnel actions, and I was unaware that I had been put into a “back to work” status until late November, when I received a bill for \$285 from the Defense Finance and Accounting Service (DFAS). As a federal civilian employee, I participate in the Federal Employees Health Benefit Plan (FEHBP), and the \$285 represents my out of pocket premium for two two-week pay periods. DON put me back in a “work status” in late October, although I have not been back to work and I have received no civilian pay from DON since I returned from my recent year of active duty.

I have not used and do not need FEHBP insurance, at least until I return to work. I have six months of transitional TRICARE coverage, for the six-month period that started on October 1, 2014.

I contacted DFAS, and they told me that I must work with my DON civilian personnel office, and that according to DFAS I must pay the \$285 per pay period health insurance premium for each pay period starting when DON put me in a “back to work” status. I have tried to contact the DON civilian personnel officer, but she will not take or return my telephone calls or answer my e-mails.

Help! What do I do now?

A: First, DFAS is correct that this is a personnel issue, to be worked out with the DON personnel office, not a financial issue, to be worked out with DFAS. In the early 1990s, the Department of Defense (DOD) consolidated the Navy Finance Office (located in Ohio), the Marine Corps Finance Office (located in Missouri), the Air Force Finance Office (located in Colorado), and the Army Finance Office (located in Indiana), to form DFAS. DFAS is responsible for finance and accounting functions for the four DOD services and all DOD components. This includes civilian and military payroll functions. The individual services and other DOD components are still responsible for civilian and military personnel functions. The determination of your “back to work” date is a personnel function, not a payroll function.

³ FMLA is the abbreviation for the Family Medical Leave Act, an important statute enacted by Congress in 1993. The FMLA applies to large employers, including the Federal Government. The FMLA gives a covered employee of a covered employer the right to up to 12 weeks off (generally without pay) for the birth or adoption of a child, for the serious illness of the employee, or for the employer to care for the serious illness of a close relative (spouse, child, etc.). Unless you fit within one of these categories, you are not eligible for FMLA leave.

Second, you are correct that you have the right to wait up to 90 days, after the date that you were released from active duty, to apply for reemployment, because your most recent period of service lasted longer than 180 days. Section 4312(e) of USERRA⁴ sets forth the deadline for reporting back to work or applying for reemployment after release from a period of service, as follows:

(e) (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

⁴ USERRA is codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335).

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.

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

As I have explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. Must have made a timely application for reemployment, after release from the period of service.

At this point, you have met the first four conditions but not the fifth—you have not applied for reemployment. The deadline for you to do so is December 29—90 days after you were released from active duty on September 30.

As I have explained in Law Review 104 and other articles, Congress enacted USERRA⁵ on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men (including my late father) for World War II.

The Supreme Court has decided 16 VRRRA cases and one USERRA case.⁶ The first Supreme Court VRRRA case came in 1946, just months after the end of World War II. In that case, the Court referred to the fact that the returning service member or veteran was not required to report back to the civilian job immediately upon release from active duty: "These guarantees [of reemployment] are contained in section 8 of the Act [VRRRA] and extend to a veteran honorably discharged and still qualified to perform the duties of his old position. *He has a stated period of time [90 days after release from military service] in which to apply for reemployment. He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life.*" *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1964) (emphasis supplied).

⁵ Public Law 103-353.

⁶ Please see Category 10.1 in our Law Review Subject Index for a case note on each of these 17 cases.

From the beginning (1940), the reemployment statute has given the returning service member or veteran a reasonable time to decide whether he or she even wants to return to the pre-service civilian job and to readjust to civilian life before returning to the civilian job. The Department of Labor (DOL) USERRA regulations⁷ provide that the returning service member is entitled to do what he or she wants (even start a new job with a different employer), so long as he or she submits a timely application for reemployment within 90 days after release from the period of service (for periods of service of 181 days or more).⁸

The bottom line is that USERRA gives you up to 90 days, following release from a period of service of at least 181 days, to submit your application for reemployment, and you have made the decision to wait for most of that 90-day period before submitting your application. The DON personnel officer has deprived you of a valuable right by putting you in a “back to work” status, against your will, before you have even applied for reemployment.

Q: Where do I go from here?

A: First, I suggest that you provide a copy of this article to the DON personnel officer. She needs to undo the October “back to work” action and put you back into the military leave status, and to cancel the charge for health insurance. You are not yet back on the federal civilian payroll, and you do not need or want the FEHBP insurance. I hope that after the DON personnel officer reads this article she will see the error of her ways and act expeditiously to correct the erroneous personnel action.

If the DON personnel officer refuses to make the necessary corrections, I suggest that you contact Employer Support of the Guard and Reserve (ESGR), the DOD organization that works with National Guard and Reserve members and their civilian employers (federal, state, local, and private sector) to work out problems of this nature. Call ESGR at 800-336-4590. The ESGR headquarters will put you in touch with a volunteer ESGR ombudsman in your area. The ombudsman will contact the DON personnel officer to try to work this out. The ESGR process is quick, informal, and non-confrontational.

If ESGR is unable to get the DON personnel officer to fix this problem, call me again and I will put you in touch with an attorney who can bring an action on your behalf, in the Merit Systems Protection Board (MSPB).

⁷ Section 4331 of USERRA (38 U.S.C. 4331) gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL promulgated proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA regulations (along with a lengthy and scholarly preamble) on December 19, 2005. 70 *Federal Register* 75246-75313. The USERRA regulations are codified in title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002).

⁸ 20 C.F.R. 1002.120.