

# LAW REVIEW 14101<sup>1</sup>

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## **We're so Productive that We Are Being Sent Home Early**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

1.3.1.2—Character and duration of service

1.3.1.3—Timely application for reemployment

1.3.2.1—Prompt reinstatement in civilian job after service

**Q: I am a Major in the Army Reserve and a life member of the Reserve Officers Association (ROA). For years, I have read with great interest and utilized your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have used those articles in managing my relationship with my civilian employer concerning my Army Reserve service and the occasional absences from my job that are necessitated by that service.**

**I have a PH.D in computer science, and I am an untenured assistant professor at a major state university. I volunteered for a year of active duty at a major military headquarters, along with three other reservists who are also experts in computer science, information technology, and cyber warfare. The four of us were tasked to work together on improving cyber security at this headquarters. It was expected that our work would require a full year, but we worked very hard and brought our considerable civilian expertise to the project and finished it in just five months. I had expected to be on active duty until late July 2015, but now I am being released from this period of active duty on December 31, 2014. The other three reservists are also being sent home early.**

**I gave my dean plenty of advance notice that I would be away from work for all of the 2014-15 academic year, and he hired another assistant professor to fulfill my teaching responsibilities for the year. I had expected to be back at work in August 2015, in time for the start of the 2015-16 academic year, but now it looks like I will be back in January 2015, unless the Army can find me a new assignment and give me a new set of orders.**

**If I show up in January rather than August, the dean will be really angry. He is already mad at me for agreeing to perform this duty, but after he has made arrangements for a substitute for all of the 2014-15 year he will be even madder to see me back early. How do you suggest that I handle this matter?**

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://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.

<sup>2</sup> Captain Wright is the Director of ROA's Service Members Law Center (SMLC). He can be reached by telephone at (800) 809-9448, ext. 730. His e-mail is [SWright@roa.org](mailto:SWright@roa.org).

**A:** First, let me congratulate you and your three colleagues for your diligence and productivity and for having disproved (at least in this instance) Parkinson’s Law: “Work expands so as to fill the time available for its completion.”

Under section 4312(e)(1)(C) of USERRA, you have 14 days to apply for reemployment after a period of service of more than 30 days but less than 181 days. 38 U.S.C. 4312(e)(1)(C). 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). It is the *actual duration* (not the expected duration) that counts in determining the deadline for you to apply for reemployment. It is very important for you to apply for reemployment within 14 days after you are released from active duty on December 31, even if you do not intend to insist upon returning to work until August.

As I have explained in Law Review 1281 and 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) for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that you meet this requirement.
- b. You must have given the employer prior oral or written *notice*. You do not need the employer’s permission, and the employer does not get a veto.
- c. You 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. As is explained in Law Review 201, there are nine exemptions from the five-year limit—kinds of service that do not count toward exhausting your limit. Since this period of service is voluntary, it probably counts toward your limit, unless your orders contain “magic words” to the effect that the Secretary of the Army has determined that this period does not count because you are meeting a critical requirement. I shall assume, for purposes of this article, that this current period of service does not put you over the cumulative five-year limit.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military. You will meet this requirement as of December 31.
- e. After release from the period of service, you must have made a timely application for reemployment. You must apply for reemployment by January 14, but applying for reemployment is not the same thing as reporting back to work.

Under USERRA, the deadline to apply for reemployment depends upon the duration of the period of service from which you are returning, not the category of service, as under the reemployment statute that was in effect prior to the enactment of USERRA in 1994. Section 4312(e) sets forth the deadlines 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 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).

It is not unusual for a school, school district, or college to claim that it is "impossible or unreasonable" to reemploy the returning service member during the middle of an academic year and that the service member should be required to wait until the start of the next academic year to return to work. These arguments have been firmly rejected by the courts. *See, e.g., Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *affirmed*, 802 F.2d 457 (6<sup>th</sup> Cir. 1986). The *Fitz* case is cited with approval in USERRA's legislative history. *See* H.R. Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2458.

The fact that the university has filled your position temporarily or permanently in no way detracts from the university's obligation to reemploy you promptly upon your application. There are circumstances where reemploying the returning service member necessarily requires the employer to displace another employee, and your case appears to be one of those cases.

Case law under USERRA and the predecessor reemployment statute makes it clear that you will be entitled to return to your position of employment even if that position has been filled during your absence. For example, I offer a lengthy quotation from *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993): "The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who "left private life to serve their country." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).'*Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him."

For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite your attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, *supra*; and *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981).

The Department of Labor (DOL) USERRA Regulations provide that the returning service member who meets the USERRA conditions is entitled to *prompt* reinstatement, and that except in the most unusual circumstances the employer must put the person back on the payroll within two weeks after his or her application for reemployment. See 20 C.F.R. 1002.180, 1002.181.

You have a clear legal right to return to your teaching job in January, even if that means displacing the temporary replacement. I can understand that you want to cut the university, the department, and the temporary replacement some slack and that you do not wish to insist on returning to work in January. I suggest that you send the dean and the university's personnel department a certified letter, before January 14. Say that you are applying for reemployment but that you are willing to be flexible on the return date, in recognition of the unexpected development that your expected year of active duty has been cut short after just five months.

If you fail to apply for reemployment by January 14, the university is likely to take the position that you have no right to reemployment in August, because you failed to make a timely application for reemployment. It is important that you not give the employer any basis to deny you reinstatement.