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What Is an Application for Reemployment?

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Q: I am a Master Gunnery Sergeant in the Marine Corps Reserve. For many years, I have been utilizing your “Law Review” articles² about the Uniformed Services Employment and Reemployment Rights Act (USERRA) in my problems with my civilian employer about time off from work for USMCR training and service. I recently joined ROA after you amended your constitution to make noncommissioned officers (NCOs) eligible for full membership.

In your Law Review 1281 and other articles, you have set forth in detail the five conditions³ that the individual Reserve Component (RC) member⁴ must meet to have the right to reemployment under USERRA. The final condition is that the person must have made a timely application for reemployment. What exactly is an application for reemployment? Must it be in writing? To whom does one address such an application? Is any particular form of words required? Can you please provide a sample application for reemployment letter?

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² We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1,300 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. ROA initiated this column in 1997.

³ To have the right to reemployment under USERRA, the person must have left his or her civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services. The person must have given the employer prior oral or written notice. The person’s cumulative period or periods of uniformed service, relating to the employer relationship for which the person is seeking reemployment, must not have exceeded five years, but there are nine exemptions—kinds of service that do not count toward the limit. See Law Review 201 (August 2005). The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment with the pre-service employer.

⁴ USERRA also accords the right to reemployment to a person returning from *regular* military service, if he or she meets the five USERRA conditions. Please see Law Review 0719 (May 2007).

A: Section 4312(e) of USERRA⁵ is 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.

⁵ 38 U.S.C. 4312(e). This means subsection (e) of section 4312 of title 38 of the United States Code, which has 49 titles (broad subject areas). Sections are numbered consecutively within each title.

After a period of service of less than 31 days (like a drill weekend or a traditional two-week annual training period), the service member simply reports for work at the start of the member's regularly scheduled work period on the first calendar day after the completion of the period of service, the time reasonably required for safe transportation from the place of service to the person's residence, plus eight hours for rest.⁶ Thus, after a drill weekend the RC member must report for work at the start of the Monday shift, unless the member must travel a great distance from the drill location to his or her home. If reporting back to work that next day is impossible or unreasonable because of factors beyond the individual's control, the individual must report back to work as soon as possible thereafter.⁷

If the period of service was 31-180 days, the service member must submit an application for reemployment within 14 days after the date of release from service.⁸ If the period of service was 181 days or more, the member has 90 days to apply for reemployment.⁹ The person need not wait 90 days or even 14 days to seek reemployment. Most persons leaving active duty seek to return to work promptly, in order to get back on the civilian payroll as soon as possible after leaving the military payroll. But if the person needs time to readjust to civilian life after intense combat service, the person should wait to apply for reemployment within the deadline.

The application for reemployment need not be in writing, and no particular form of words is required. The essential message is "I used to work here. I left my job for military service. Now, I am back from the military, and I want to return to work." Simply inquiring about the availability of work is not sufficient.

Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* September 20, 2004. After considering comments received and making a few adjustments, the Department of Labor (DOL) published in the December 29, 2005, *Federal Register* the final USERRA regulations. They took effect January 18, 2006. The regulations are published in Title 20, Code of Federal Regulations (CFR), Part 1002 (20 C.F.R. Part 1002). Two sections of the Regulations address the form of the application for reemployment and to whom the application must be made:

§ 1002.118 Is an application for reemployment required to be in any particular form?

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

⁶ 38 U.S.C. 4312(e)(1)(A)(i).

⁷ 38 U.S.C. 4312(e)(1)(A)(ii).

⁸ 38 U.S.C. 4312(e)(1)(C).

⁹ 38 U.S.C. 4312(e)(1)(D).

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.¹⁰

§ 1002.119 To whom must the employee submit the application for reemployment?

The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest.¹¹

The application for reemployment need not be in writing and need not follow any particular format, but to avoid giving the employer any possible excuses I suggest that you make your application in writing, by certified mail. Here is a sample format:

*Honorable William Penn
Mayor, North Abingdon Township
Snookerville, PA 18991*

Dear Mayor Penn:

I have worked for the township since _____. I was away from my civilian job for military service from [date] to [date]. I gave the township prior written notice¹² of my departure for military service on [date]. I am enclosing herewith a copy of my notice.

I am entitled to reemployment under a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA). I meet the USERRA conditions for reemployment. I left my civilian job for the purpose of military service, and I gave you (the employer) prior notice. I have not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to my employer relationship with the township. I served honorably and was released from the period of service without a disqualifying bad discharge from the military. I am making my application for reemployment now, well within the 90-day period allowed me by law.¹³

I am enclosing a copy of the DD-214 that I received from the military. This form shows clearly that my service was honorable, and it shows the date that I was released from the recent period of service, thus showing that my application for reemployment is timely. If you have any

¹⁰ 20 C.F.R. 1002.118 (emphasis by italics supplied, bold question in original).

¹¹ 20 C.F.R. 1002.119 (bold question in original).

¹² The prior notice to the employer can be oral or written, but I strongly advise you to give written notice, just as I advise you to make a written application for reemployment.

¹³ Under section 4312(e)(1)(D) of USERRA, 38 U.S.C. 4312(e)(1)(D), you have 90 days to apply for reemployment, after a period of service of 181 days or more. Shorter deadlines apply after shorter periods of service.

questions, please contact me immediately at _____. I am anxious to return to work as quickly as possible.

Because I meet the five USERRA conditions, you (the township) have the legal obligation to reemploy me promptly in the position that I would have attained if continuously employed (possibly a better position than the one I left) or another position (for which I am qualified) that is of like seniority, status, and pay, even if that means that another employee must be displaced. Upon reemployment, I am entitled to be treated, for seniority and pension purposes, as if I had been continuously employed by the township during the period when I have been away from work for military service. I am also entitled to immediate reinstatement of my health insurance coverage, for myself and my family, through my civilian job. There must be no waiting period and no exclusion of "pre-existing conditions."

As a federal statute, USERRA supersedes and overrides state laws and local ordinances and contracts and collective bargaining agreements that purport to limit my USERRA rights or to impose additional prerequisites (beyond the five USERRA conditions) on my exercise of these rights. USERRA does not supersede a state law or local ordinance or a contract or collective bargaining agreement that provides me greater or additional rights, beyond USERRA.

You can find USERRA in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335). If you have questions about USERRA, I suggest that you call the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), at (800) 336-4590. I also invite your attention to www.servicemembers-lawcenter.org. This is the website of the Service Members Law Center (SMLC) at the Reserve Officers Association (ROA). The SMLC Director is Captain Samuel F. Wright, JAGC, USN (Ret.), and he was one of the drafters of USERRA, which was enacted by Congress in 1994 to replace a 1940 law. Captain Wright can be reached toll-free at (800) 809-9448, ext. 730. His e-mail is SWright@roa.org.

Thank you for your prayers and support during my recent active duty period. I look forward to returning to my civilian job with a minimum of problems.

Very respectfully,

First Lieutenant Audie Murphy, USAR

There is no legal requirement that you inform the employer in detail of its obligations under USERRA or that you provide the employer with referral information for ESGR and the SMLC. These details are included in the sample letter as a matter of courtesy to the employer and to facilitate your quick and easy return to work.

Q: When the RC member submits an application for reemployment or reports back to work, after release from a period of uniformed service, is the member required to provide documentation to the civilian employer?

A: Yes, but only on the employer's request and only when the individual is returning from a period of 31 days or more of service. There is no documentation requirement when reporting back to work after a period of service of 30 days or less.

The returning service member is required to provide documentation, upon the employer's request, showing that the application for reemployment is timely. Usually, this is quite easy. The DD-214 will show the date that the individual was released from the period of service. The application for reemployment must be submitted within 14 days after that date, if the period of service was 31-180 days. If the period of service was 181 days or more, the application must be made within 90 days after the date of release from the period of service.

The returning service member is required to provide documentation, upon the employer's request, showing that the person is not disqualified from reemployment by virtue of having received a disqualifying bad discharge from the military. Usually, this documentation requirement is easy to meet. The DD-214 will generally show that the individual served honorably and did not receive a disqualifying bad discharge.¹⁴

The returning service member is required to provide documentation, upon the employer's request, showing that the individual is not disqualified from reemployment by virtue of having exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to that specific civilian employer.¹⁵ If the individual has been away from this particular employer for more than five years cumulatively, the individual will need to provide documentation showing that at least some of the periods are exempt from the computation of the five-year limit, so that the non-exempt periods do not exceed five years.

The DOL USERRA Regulations provide as follows concerning the documentation requirement:

§ 1002.121 Is the employee required to submit documentation to the employer in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

(a) The reemployment application is timely;

¹⁴ In most cases, the RC member is not *discharged* from the military—he or she is simply *released from active duty*. For example, I have 15 DD-214s, for periods of service of varying duration. At the end of each period of service, I was released from active duty and reverted to my part-time Navy Reserve status. In April 2007, when I had 30 years of commissioned service, I was transferred to the Inactive Status List (gray area retiree). I retired from the Navy Reserve when I turned 60 on May 9, 2011. I have never been discharged.

¹⁵ Please see Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count in exhausting the individual's five-year limit.

(b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,

(c) The employee's separation or dismissal from service was not disqualifying.¹⁶

§ 1002.122 Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.¹⁷

§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

(a) Documents that satisfy the requirements of USERRA include the following:

(1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;

(2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;

(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;

(4) Certificate of completion from military training school;

(5) Discharge certificate showing character of service; and,

(6) Copy of extracts from payroll documents showing periods of service;

(7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

(b) The types of documents that are necessary to establish eligibility for reemployment will vary

¹⁶ 20 C.F.R. 1002.121 (bold question in original).

¹⁷ 20 C.F.R. 1002.122 (bold question in original).

from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.¹⁸

Regardless of the duration of the period of service from which you are returning, I recommend that you provide your employer such documentation as you have readily available, without waiting for the employer's request. The idea should be to get back to work as quickly and easily as possible, not to pick a fight with the employer about what kinds of documentation you are not required to provide.¹⁹

Q: My USMCR unit was called to active duty for seven months in 2007 and we spent most of that time in Iraq. For the last three weeks of our seven-month active duty period, we were back at home on "terminal leave" until we were formally released from active duty on September 30, 2007. Is it possible for the individual RC member to apply for reemployment and return to work at the civilian job while on terminal leave?

A: If the individual wants to return to work while on terminal leave, and if the employer wants the individual back on terminal leave, there is no legal impediment to the individual returning to work.²⁰ But in this situation the RC member does not have the right to *insist* on returning to work, over the employer's objection. When you are on terminal leave, you are still on active duty. Thus, you do not yet meet the USERRA condition of having been *released* from the period of service.

Q: When my USMCR unit was mobilized and deployed to Iraq, one of our unit members was seriously wounded in action. He was retained on active duty for another two years, after the rest of us left active duty after seven months. Then, he was medically retired from the Marine Corps, and he was transferred to a Department of Veterans Affairs (VA) medical center for another year of intensive treatment and rehabilitation. Although he lost his left arm and leg, he is doing well with prosthetic devices, and he wants to return to work. How does the 90-day deadline to apply for reemployment work in this scenario?

A: First, this individual was retained on active duty for another two years, so the 90 days did not start running until he finally left active duty. Furthermore, his 90-day deadline to apply for reemployment can be tolled (stops running) during a period of hospitalization or convalescence (after release from active duty) from an injury or illness incurred or aggravated during the period of uniformed service.²¹

¹⁸ 20 C.F.R. 1002.123 (bold question in original).

¹⁹ It is true that many civilian employers have an inflated idea about the kind of documentation that the RC member will have after a drill weekend or a two-week annual training period.

²⁰ Even in federal civilian employment, there is no prohibition on receiving two federal paychecks (one military and one civilian) while on terminal leave at the end of an active duty period. See 5 U.S.C. 5534a. This section is discussed in detail in Law Review 14062 (May 2014), by Commander Wayne L. Johnson, JAGC, USN (Ret.).

²¹ 38 U.S.C. 4312(e)(2)(A).

The DOL USERRA Regulations provide as follows about the extension of the deadline to apply for reemployment in this sort of situation:

§ 1002.116 Is the time period for reporting back to an employer extended if the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?

Yes. If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer, and is not applicable following reemployment.²²

Q: If Lance Corporal Mary Jones meets the five USERRA conditions, including having made a timely application for reemployment following release from her period of service, how quickly must the employer have her back on the payroll in her civilian job?

A: The DOL USERRA Regulations provide as follows on that point:

§ 1002.180 When is an employee entitled to be reemployed by his or her civilian employer?

The employer must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.²³

§ 1002.181 How is "prompt reemployment" defined?

"Prompt reemployment" means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.²⁴

²² 20 C.F.R. 1002.116 (bold question in original). I also invite the reader's attention to Law Review 0854 (November 2008) for a detailed discussion of the application of USERRA to the wounded warrior scenario.

²³ 20 C.F.R. 1002.180 (bold question in original).

²⁴ 20 C.F.R. 1002.181 (bold question in original).