LAW REVIEW 15005[1]

January 2015

USERRA and Health Insurance

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1.3.2.6—Health insurance continuation and reinstatement

Under section 4317(a)[3] of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[4] a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services[5] is entitled to *continue* his or her civilian health insurance coverage *during* the period of uniformed service. Under section 4317(b),[6] a person who is reemployed under USERRA[7] is entitled to *immediate reinstatement* of the civilian health insurance, through the civilian job. There must be no waiting period and no exclusion of "pre-existing conditions."

Please do not conflate section 4317(a) with section 4317(b)—they deal with different situations at different times. You need not continue your civilian health insurance coverage while you are gone

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 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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[3] 38 U.S.C. 4317(a).

[4] As I have explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

[5] For USERRA purposes, "service in the uniformed services" includes active duty, active duty for training, inactive duty training, initial active duty training, and funeral honors duty, as well as time required to be away from a civilian job for purposes of an examination to determine fitness to perform any such duty. 38 U.S.C. 4303(13).

[6] 38 U.S.C. 4317(b).

[7] To be reemployed under USERRA, one must meet five simple conditions. One must have left a civilian job for the purpose of performing uniformed service and must have given the employer prior oral or written notice. The person's cumulative periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment, must not have exceeded five years. 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. Please see Law Review 201 (August 2005) and Law Review 1281 (August 2012). I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,050 "Law Review" articles about USERRA and other 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, and we add new articles each week, including 169 new articles added in 2013. At the end of May 2014, we ran out of room at www.servicemembers-lawcenter.org. You can find the most recent articles at the website of ROA's Department of Texas, www.roastateoftexas.org. Thank you to Captain Morgan Little and the Department of Texas for making room for our new articles, including this article.

in order to reinstate it upon your return to your civilian job, following a period of uniformed service. In most cases, you will not want to continue your civilian health insurance coverage while you are on active duty—you don't need it, and it is very expensive. In almost all cases, you will want to reinstate your civilian health insurance immediately upon your return to your civilian job.

As the Director of the Service Members Law Center (SMLC) at the Reserve Officers Association (ROA), I received and responded to 8,109 inquiries (675 per month on average) in 2014, from service members, military family members, attorneys, employers, Employer Support of the Guard and Reserve (ESGR) volunteers, Department of Labor (DOL) investigators, congressional staffers, reporters, and others. More than half of the inquiries were about USERRA, and the other half were about everything you can think of that has something to do with military service and law.

As SMLC Director, I am here at my post at ROA headquarters, answering calls and e-mails, during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to encourage Reserve and National Guard personnel to call me or e-mail me from the privacy of their own homes, not from their civilian jobs. As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer. Moreover, if the employer is annoyed with you because you have been called to the colors five times since September 11, 2001 and expect to be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

Based on the calls and e-mails that I have received, from employers as well as service members, I believe that there is a great deal of confusion about section 4317, so I am writing a new Law Review to clarify the provisions of this section. Let us start with the text:

"§ 4317. Health plans

(a) (1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, or such person becomes eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, the plan shall provide that the person *may elect to continue* such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of--

(A) the 24-month period beginning on the date on which the person's absence begins; or

(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e).

(2) *A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan* (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may

not be required to pay more than the employee share, if any, for such coverage.

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated--

(A) by the plan in such manner as the plan sponsor shall provide; or

(B) if the sponsor does not provide--

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(b) (1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, or by reason of the person's having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service or eligibility. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.

(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

(3) In the case of a person whose coverage under a health plan is terminated by reason of the person having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title but who subsequently does not commence a period of active duty under the order to active duty that established such eligibility because the order is canceled before such active duty commences, the provisions of paragraph (1) relating to any exclusion or waiting period in connection with the reinstatement of coverage under a health plan shall apply to such person's continued employment, upon the termination of such eligibility for medical and dental care under chapter 55 of title 10 that is incident to the cancellation of such order, in the same manner as if the person had become reemployed upon such termination of eligibility."[8]

USERRA's legislative history explains the intent of Congress concerning this section: "Section 4315(c)(1) [later renumbered to 4317(a)] would provide that an employee on military leave shall, at his or her request, be covered by [health] insurance provided by the employer for up to 18 months [recently amended to extend the period to 24 months]. This protection is similar to the continuation of health insurance under the so-called COBRA provisions of the Employee Retirement Income Security Act, 29 U.S.C. 1161, et seq., but applies to all individuals entering the uniformed services, without limiting qualifications such as the size of the workforce of the person's employer. The individual employee may be required to pay the entire cost of continuing insurance coverage under section 4315(c)(1) [now 4317(a)], except in the case of persons serving periods of training or service for 30 or fewer days. In the case of these short tours, the employer is required

[8] 38 U.S.C. 4317 (emphasis supplied).

to continue the insurance coverage, and the individual employee may only be required to pay the employee share, if any. Dependents of Reserve Component members are entitled to participate in the military health-care system, including CHAMPUS [now called TRICARE], only when the member has been called to serve for at least 31 days. The Committee [House Committee on Veterans' Affairs] section 4315(c)(1) [now 4317(a)] to ensure that there be no gap in health insurance coverage of the reservist's family while the reservist is performing military training."[9]

The distinction that must be made is not between the first 30 days and thereafter. Rather, the distinction is between a period of service of less than 31 days and a period of service of 31 days or more. I am including this article in this column because it has come to my attention that there is a lot of misunderstanding of this issue among Reserve Component members and their civilian employers.

Please note that section 4317(a) *permits* (does not require) the employer to charge up to 102 percent of the entire premium, if the period of service is at least 31 days. The employer is permitted to charge any lesser amount or nothing at all. Many employers are going "above and beyond" the requirements of USERRA by continuing the health insurance coverage for the families of employees who have been called to the colors, and not charging for this benefit. The Department of Defense organization called Employer Support of the Guard and Reserve (ESGR) honors those employers who do more than the law requires.

Examples

To understand how section 4317 works, let us discuss several hypothetical but realistic examples:

1. **Short period of military training—elect continued coverage**

Joe Smith is a Corporal (E-4) in the Marine Corps Reserve and an employee of the ABC Corporation. Joe has a wife and two young children, one of whom has serious health problems. Joe is scheduled to perform 15 days of annual training with his Marine Corps Reserve unit.

At ABC Corporation, Joe and his fellow employees have health insurance that is financed by the company (90%) and the individual employee (10%). The full premium for Joe's health insurance, for himself and his family, is $500 per two-week pay period, of which Joe pays 10% ($50) and the employer pays the other 90% ($450).

Because Joe's annual training period is scheduled to last less than 31 days, he is not entitled to military health care coverage for his family during this short tour of duty. Thus, Joe needs to continue his civilian health insurance coverage during his annual training tour. He should *elect continued coverage,* meaning that he should inform the employer (preferably in writing) that he wants his civilian health insurance coverage to continue during the 15 days that he will be away from work. Because the military period is less than 31 days, the employer is permitted to charge Joe only the $50 per pay period that he normally pays.

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[9] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2467.

USERRA does not require the ABC Corporation to pay Joe for the time that he is away from work for military training or service. If Joe will be away from work for an entire pay period, and thus receive no wages for that pay period, he may need to write a check for the $50 payment that is normally withheld from his pay.

Joe needs to ensure that there is no gap in his health insurance coverage, especially since one child has serious health concerns. Going without coverage even for a few days can lead to a medical and financial disaster.

2. Long period of military service—do not elect continued coverage

Mary Jones is a Chief Petty Officer (E-7) in the Coast Guard Reserve. She has a husband and three school-age children. She works for the DEF Corporation, which has excellent health insurance coverage (a so-called "Cadillac plan") for employees, and the company pays the entire premium. Mary does not know the premium, because she has never been asked to pay part of it, but in fact the premium is $800 per two-week pay period.

Mary has been called to one year of active duty in the Coast Guard. Under section 4317(a), Mary has the right to *elect* continued health insurance through her DEF Corporation job, but if she does so the employer is permitted to charge her up to 102% of the *entire premium,* meaning $816 per two-week pay period.

Mary does not need and cannot afford this expensive DEF Corporation health insurance. If Mary, her husband, or any of the three children need health care during Mary's year on active duty, they are entitled to use the military system (TRICARE). Mary should not elect continued DEF coverage.

If Mary has said nothing to DEF Corporation about electing to continue her health insurance coverage, the company *should not continue the coverage for her and expect her to pay this exorbitant premium.* Because section 4317(a) requires the individual to *elect* continued coverage, the default position should be no continuation of coverage.

In a very recent USERRA case, Judge Robert Holmes Bell of the United States District Court for the Western District of Michigan wrote:

"USERRA provides that when a person has coverage under a health plan in connection with his employment, and the person is absent from work due to military service, 'the plan shall provide that the [service] person may elect to continue such coverage.' 38 U.S.C. 4317(b)(1). USERRA does not prohibit any employer from continuing health care coverage and requiring payments for that coverage by a military service member. USERRA is focused on a serviceman's right to continued coverage, and on prohibiting employers from improperly discontinuing coverage. USERRA does not speak to a servicemember's right to discontinue coverage, nor does it prohibit an employer from continuing coverage for a servicemember who has not specifically chosen to continue it. The plain language and intent of USERRA is to protect the ability of employees on military leave to maintain their health care coverage, not to punish employers for maintaining health care coverage

for those employees who have not made an election to discontinue coverage. Plaintiff has not pointed to any language in USERRA that would require a plan to discontinue coverage for a serviceman who has made no choice on whether to continue or discontinue coverage during his deployment. Indeed, it would likely be a violation of USERRA or the union contract if the Village discontinued Plaintiff's benefits during his deployment if Plaintiff did not specifically request such an action."

Eichaker v. Village of Vicksburg, 2015 WL 113902 (W.D. Mich. Jan. 8, 2015), slip opinion at page 8.

I respectfully submit that Judge Bell has this wrong. Under section 4317(a), the individual who is leaving a civilian job for military service must *elect* continued health insurance coverage or such coverage should not be continued. Except for the short tours as in Example 1, it will be exceedingly rare for the individual to make such an election if she is fully informed of the alternatives and the consequences.

However, because of the *Eichaker* case and other circumstances of which I am aware, I strongly recommend that when you give notice to your employer of an impending period of military service, you should explicitly say "I elect continued health insurance coverage through my job" or "I do not elect continued health insurance coverage through my job." I recommend that you give notice of service in writing, by certified mail, and that you include one of these two sentences in the notice. The cost of sending a certified letter is worthwhile because it helps you avoid misunderstandings and proof problems.

3. Long period of service—elect continued coverage

Charlie Adams is a Captain (O-3) in the Alaska Army National Guard. He lives and works in a remote village in Alaska. The nearest military treatment facility is many hundreds of miles away, and the only physician in the village has made it clear that he will not participate in the TRICARE program because it is too complicated and the physician does not like the TRICARE physician compensation rates.

Adams has a wife and three young children, one of whom has serious health concerns. Adams has been called to active duty for one year, for deployment to Southwest Asia. His wife and the three children will remain behind in the remote village.

Adams wants to continue his excellent civilian health insurance plan through his civilian job, and he is willing to pay 102% of the entire premium, because he wants his wife to continue taking the three children (especially the one who is chronically ill) to their family physician in the village during the year or more that Adams is on active duty in Southwest Asia. Under section 4317(a), Adams has a right to continue his civilian health insurance coverage, but the employer is permitted to charge him up to 102% of the entire premium, including the part that the employer normally pays for active employees.

Under section 4317(a), Adams has the right to continue his civilian health insurance coverage for up to 24 months *if he remains on active duty that long.* Let us assume that Adams remains on

active duty for 18 months and then leaves active duty. For whatever reason, Adams has chosen not to return to work for the pre-service employer, and he does not apply for reemployment within 90 days, as required by section 4312(e)(1)(D) of USERRA.[10]

In this scenario, Adams' right to continued health insurance coverage through his pre-service employer expires 91 days after the date that he left active duty.[11] Of course, Adams is paying the entire premium plus another 2% for the employer's administrative costs, so the employer may not be in a hurry to throw Adams off the plan.[12]

4. Health insurance reinstatement after release from service

Mary Jones (Example 2 above) did not elect to continue her "Cadillac" health care plan at the DEF Corporation during her year of active duty in the Coast Guard. Now, Mary has completed her year of active duty and has promptly applied for reemployment at DEF. She had 90 days to apply for reemployment, after release from the period of service, but she chose to apply the very next day after her release.

Mary is entitled to prompt reemployment because she meets the five USERRA eligibility conditions. She left her job for the purpose of performing uniformed service, and she gave the employer prior oral or written notice. She has not exceeded the cumulative five-year limit on the duration of her periods of service, and since this was an involuntary call-up it does not count toward her five-year limit in any case.[13] She served honorably and was released without a disqualifying bad discharge from the Coast Guard. After release, she has made a timely application for reemployment.

DEF Corporation is required to put Mary back on the payroll within two weeks after her application.[14] Upon reinstatement to her civilian job, Mary is entitled to immediate reinstatement of her civilian health insurance coverage, as if she had remained continuously employed. There must be no waiting period and no exclusion of "pre-existing conditions." This applies to Mary, her husband, and their three children.

During her year on active duty, Mary suffered a serious injury in the line of duty, and the Department of Veterans Affairs has determined that the injury and resulting disability and need for medical care are all service-connected. DEF Corporation and its health insurance carrier are not required to pay for Mary's health care for the service-connected condition.[15]

5. Health insurance canceled based on expected mobilization, but mobilization canceled.

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[10] 38 U.S.C. 4312(e)(1)(D).
[11] 38 U.S.C. 4317(a)(1)(B).
[12] If Adams needs to continue this health insurance coverage, it might make sense for him to apply for reemployment within 90 days, return to work briefly, and then resign and exercise his right (under COBRA) to continue his health insurance coverage for another 18 months.
[13] 38 U.S.C. 4312(c)(4)(A).
[14] 20 C.F.R. 1002.181.
[15] 38 U.S.C. 4317(b)(2).

Charlotte Williams is a First Lieutenant (O-2) and a nurse in the Army Reserve. The Army notified her that she and her Army Reserve unit were to be mobilized and deployed to West Africa to fight the Ebola epidemic, and she shared that information with her civilian employer, the GHI Corporation. Charlotte's GHI health insurance coverage was canceled on February 1, 2015, based on her mobilization, which was expected imminently. At the very last minute, Charlotte's orders were canceled by the Army.[16]

This is exactly the sort of scenario that Congress had in mind when it enacted section 4317(b)(3), as follows:

"(3) In the case of a person whose coverage under a health plan is terminated by reason of the person having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title but who subsequently does not commence a period of active duty under the order to active duty that established such eligibility because the order is canceled before such active duty commences, the provisions of paragraph (1) relating to any exclusion or waiting period in connection with the reinstatement of coverage under a health plan shall apply to such person's continued employment, upon the termination of such eligibility for medical and dental care under chapter 55 of title 10 that is incident to the cancellation of such order, in the same manner as if the person had become reemployed upon such termination of eligibility."[17]

Mary should return to work at GHI as soon as possible after she learns that her orders have been canceled. She is entitled to immediate reinstatement in the civilian job and immediate reinstatement of her GHI health insurance coverage.

[16] Military orders are sometimes canceled at the last minute for any number of reasons. Perhaps Charlotte flunked the military physical, or perhaps the mobilization was canceled because the epidemic suddenly and miraculously ended.
[17] 38 U.S.C. 4317(b)(3).