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Yes, You Have 90 Days to Apply for Reemployment

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1.1.1.8—USERRA applies to Federal Government
1.3.1.3—Timely application for reemployment
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1.8—Relationship between USERRA and other laws/policies

Q: I work for the United States Department of Interior (DOI), and I recently joined the Army National Guard as a new recruit, with no prior military service. The Army required me to attend "Initial Active Duty Training" (IADT) for eight months, encompassing boot camp and my initial military specialty training. After the end of my eight months of military training, I was not in a hurry to return to my federal civilian job.

I found your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) by doing an Internet search. In more than one article, you have written that after a period of uniformed service of 181 days or more the returning service member has 90 days to apply for reemployment. Accordingly, I spent 80 days looking for a better job, outside the Federal Government, and I applied for reemployment at DOI on day 81, after the date that I was released from the 240 days of military training.

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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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Now, the DOI personnel office is telling me that I do not have the right to reemployment because after IADT I had only 31 days to apply for reemployment, and that my application on day 81 was 50 days late. What gives?

A: The personnel office is confusing USERRA with the 1940 reemployment statute that USERRA replaced.

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 USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II.

The VRRA made confusing and cumbersome distinctions among *categories* of military training or service. Different subsections of the VRRA and different sets of rules governed active duty for training (like annual training in the Reserve or National Guard), inactive duty training (drills in the Reserve or National Guard), IADT, or active duty. Under the VRRA, a person returning from active duty for training or inactive duty training was required to report for work the next day after the completion of this period of training. A person returning from IADT had 31 days to apply for reemployment. A person returning from active duty had 90 days to apply for reemployment.

The apparent idea was that active duty would last for many months, and perhaps years. A period of IADT would last for an intermediate period, perhaps six to eight months. A period of inactive duty training would usually last two days, Saturday and Sunday of one weekend per month. A period of active duty for training would last about two weeks,

usually in the summer. But there were lots of exceptions to this model. In some circumstances, a period of active duty might last only a few days, and a period of active duty for training might last many months or even years.

I have been dealing with the VRRA and USERRA for more than 32 years. I developed the interest and expertise in this law during the decade (September 1982 to September 1992) 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 interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. The version that President Bill Clinton signed on October 13, 1994 was 85% the same as the Webman-Wright draft.

Part of the Webman-Wright idea was to eliminate the VRRA's confusing and cumbersome distinctions among categories of military training or service. We figured that the rules (including the deadline to report back to work or apply for reemployment) should depend upon the *duration* of the period of service, not the category.

A court or administrative agency interpreting the meaning of a statute will often refer to *legislative history* to determine the *intent* of Congress. Legislative history consists of House and Senate committee reports, floor debate statements, and other contemporaneous written materials that can shed light on Congress' intent.

Most of USERRA's legislative history can be found in the 1994 edition of *United States Code Congressional & Administrative News (USCCAN),* at pages 2449-2515. Here are two pertinent paragraphs:

> The Veterans' Reemployment Rights (VRR) provisions of Federal law, which safeguard employment and reemployment rights in

civilian employment of members of the uniformed services, have been in effect for over fifty years. Although the law has effectively served the interests of veterans, members of the Reserve Components, the Armed Forces and employers, the current statute is complex and sometimes ambiguous, thereby allowing for misinterpretations. Members of the uniformed services and employers have, on occasion, expressed confusion and uncertainty regarding their rights and responsibilities under the current chapter 43, title 38, United States Code. Additionally, the implementation of the Total Force Policy, under which members of the Reserve Components have been tasked with greater responsibility for every phase of military preparedness, has rendered the current structure of the reemployment rights provisions somewhat antiquated and cumbersome. Accordingly, the primary goals of the Committee [House Committee on Veterans' Affairs] in undertaking the revision of chapter 43, were to clarify, simplify, and where necessary strengthen the existing veterans' employment and reemployment rights provisions.

For example, because of increased responsibilities, Selected Reservists are sometimes required to train for extended periods. Additionally, because of the diverse designations of the type of training or duty for which servicemembers have been called, uncertainty regarding individuals' eligibility for reemployment rights has arisen in some cases. To clarify this uncertainty, protections and responsibilities imposed under H.R. 995 would be based on actual time spent in the uniformed service and not on the designation of the service or type of training performed.

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2451-52.

Under USERRA, the category of service no longer matters. If the period of service was 181 days or more, the returning service member has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Your application for reemployment on day 81 after release from your IADT period was timely and sufficient.

It appears that the DOI personnel office is using a VRRA reference that became obsolete more than 20 years ago (on October 13, 1994), when President Clinton signed USERRA to replace the VRRA. The DOI personnel office needs to update its reference materials on the reemployment statute. They are certainly welcome to use our Law Reviews or to call me or e-mail me.

As I have explained in Law Review 1281 and other articles, a returning service member must meet five simple conditions to have the right to reemployment under USERRA:

a. 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, including IADT.
b. Must have given the employer prior oral or written *notice.* The individual does not need the employer's permission, and the employer does not get a veto.
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 the individual seeks reemployment. As is explained in Law Review 201 (August 2005), there are nine exemptions—kinds of service that do not count in exhausting the individual's five-year limit.
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.

It seems abundantly clear that you met these five conditions after you were released from the IADT period. Thus, DOI was required to reemploy you *promptly,* or within 30 days after your application.[3] By delaying your reinstatement well past that deadline, DOI has violated your USERRA rights.

[3] 5 C.F.R. 353.207(a).