

## You Must Apply for Reemployment—Part 6

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**Q: I am a Lieutenant Colonel in the Army Reserve and a life member of the Reserve Officers Association (ROA). For many years, I have read with great interest and have utilized your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I went to work for Beltway Bandit Incorporated (BBI) in June 1999, after I left active duty in the Army. Since the terrorist attacks of September 11, 2001, I have been away from my BBI job several times, cumulatively amounting to seven years of active duty. Some of these periods were involuntary and some were voluntary.**

**I have read and reread your Law Review 201, about USERRA’s five-year limit and the exemptions—kinds of service that do not count toward exhausting an individual’s five-year limit. I am currently on a year of active duty, from October 1, 2014 through September 30, 2015. I figure that my current active duty period counts toward my five-year limit. The Army has offered me the opportunity to sign up for one more year of voluntary active duty, from October 2015 through September 2016. I am trying to decide whether to take that opportunity or whether to leave active duty at the end of my current orders and apply for reemployment at BBI.**

**After having added up all the non-exempt active duty periods that I have performed since I began my BBI employment in 1999, I figure that I will have exactly 45 days of head room in my five-year limit after September 30, 2015. Thus, if I sign up for one more year of voluntary**

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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 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.

<sup>2</sup> For six years (June 2009 through May 2015), Captain Wright was the Director of ROA’s Service Members Law Center (SMLC) as an employee of ROA. He is continuing the SMLC as a part-time voluntary effort. He is available by e-mail ([SWright@roa.org](mailto:SWright@roa.org)) or by telephone (800-809-9448, ext. 730) from 6-9 pm Eastern on Wednesdays and Thursdays.

active duty, and if that period is not exempt from USERRA's five-year limit, I will not have reemployment rights upon leaving active duty on or about September 30, 2016.

BBI has contracts with several federal agencies in the Department of Defense and the Department of Homeland Security. In the years following the September 11 terrorist attacks, BBI was signing new federal contracts and hiring new employees on an almost weekly basis. In the last six years, BBI's business and its employment level have diminished considerably. I volunteered for my current Army orders in 2014 because I feared being laid off by BBI when the contract I had been working on came to an end in late 2014.

In anticipation of leaving active duty at the end of September, I recently contacted my immediate BBI supervisor and the BBI personnel office to inquire about returning to work in October 2015. Both my supervisor and the personnel office told me strongly that I have no future at the company. They insisted that I am already past the five-year limit and that I likely would have been laid off by BBI in late 2014 if I had not been on active duty at the time. I told them that much of my active duty time has been exempt from the five-year limit and that if I leave active duty at the end of my current orders I will still be within the five-year limit and will have the right to reemployment. They did not want to get into the details about which periods count and which periods do not count toward the limit.

Since BBI has discouraged me about my prospects of returning to work in the fall of 2015, I am considering signing up for one more year of voluntary active duty, but I do not want to forfeit all my reemployment rights at BBI. I asked the company's personnel director for a formal written statement, binding on the company, to the effect that if I sign up for one more year of active duty (October 2015 through September 2016) I will still have reemployment rights at BBI.

**The personnel director refused to make any such statement. Help!**

**A:** You should not expect the company's personnel director to help you—she works for the company, not for you. Moreover, even if she were to state in writing that one more year of voluntary active duty would not put you over the five-year limit, that statement would not necessarily be binding on the company. And meeting the five-year limit avails you nothing if you fail to meet one or more of the other four USERRA conditions.

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. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing service in the uniformed services. It seems clear that you met this requirement when you left your BBI job in September 2014 for your current active duty period (October 1, 2014 through September 30, 2015).
- b. You gave the employer prior oral or written notice. I shall assume that you gave BBI such notice.

- c. You have not 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. More on this condition below.
- d. You must not have received a disqualifying bad discharge from the military. I shall assume that you have served honorably and that the DD-214 that you receive at the end of September (assuming that you leave active duty as scheduled on September 30) will reflect honorable service.
- e. *After release from the period of service, you have made a timely application for reemployment.*

For purposes of this article, I shall assume that you have computed correctly your exhaustion of the cumulative five-year limit and that if you leave active duty on September 30 you will still have 45 days of head room in the limit. If you leave active duty at the end of September, you will then have 90 days (starting on October 1) to apply for reemployment, because your period of service lasted longer than 180 days.<sup>3</sup> To apply for reemployment, you must first have been *released from the period of service.*<sup>4</sup>

Let us assume that you decide not to accept the Army's offer to allow you to remain on active duty for one more year and that you leave active duty as scheduled on September 30 and apply for reemployment in early October, well within the 90-day deadline. At that point, you meet the five USERRA conditions and BBI has the legal obligation to reemploy you "in the position of employment in which the person *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform."<sup>5</sup>

When you left your BBI job in September 2014 for your current active duty assignment, you were working on a BBI contract with a federal agency, and you were expecting that the contract would come to an end by December 31, 2014. Let us assume that the contract did end, as expected. In this situation, you are not entitled to reemployment in your pre-service job, because that job no longer exists. You are entitled to reemployment in the job that you *would have attained if you had been continuously employed* or another job of like seniority, status, and pay for which you are qualified.

How do we determine where you would have been employed by now if you had not been away from work for military service for the last year? Making that determination may be difficult, especially if this is a non-union situation and seniority does not govern selection of individual employees for jobs or layoff.<sup>6</sup> Let us assume that there were ten BBI employees (yourself

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<sup>3</sup> 38 U.S.C. 4312(e)(1)(D).

<sup>4</sup> If you apply for reemployment before you leave active duty, your application is deemed to be in effect on the day after you leave active duty. If you remain on active duty through September 30, 2016, you cannot apply for reemployment until October 1, 2016.

<sup>5</sup> 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

<sup>6</sup> Let us assume that this is a unionized situation and the collective bargaining agreement controls job placement. Your place on the seniority roster is one place ahead of Joe Smith, who was hired the day before you were hired,

included) working on that specific government contract when you left your job in September 2014 for your current military period. Eight of them were picked up on another BBI contract in the same metropolitan area, and the one employee who was not selected had a poor work record, with multiple examples of tardiness and unexcused absence. If you have a good BBI work record, it is *reasonably certain* that you also would have been picked up for this other BBI contract in the same metropolitan area if you had not been on active duty when the prior contract expired.

It matters not that by the time you leave active duty and apply for reemployment in October 2015 there are no vacancies for which you are qualified. The determination of where you would be now if you had not been away from work for military service for the last year must be made based on the facts in place in January 2015 (immediately after the BBI contract ended), not the facts in place ten months later when you return from service. If you can show that you would have been picked up on the other BBI contract in the same metropolitan area in January 2015, you are entitled to that job in October 2015 *even if that means that another BBI employee must be displaced*.

I invite your attention to *Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993).<sup>7</sup> In that case, the Federal Circuit<sup>8</sup> overruled a Merit Systems Protection Board (MSPB) decision for the Department of Veterans Affairs (VA) and against a veteran.

Henry P. Nichols was the GS-13 “Chief, Chaplain Services” at the Brockton/West Roxbury VA Medical Center. Nichols gave advance notice and left his civilian job to serve a three-year active duty tour in the Air Force, from February 1989 to February 1992. After Nichols left, the department appointed another chaplain (Walsh) to the position on a permanent basis. In October 1991, four months before his scheduled release from active duty, Nichols wrote to the department to inform it of his intention to leave active duty in February 1992 and to seek restoration to his position at Brockton, Massachusetts.

The Federal Circuit rejected the department's arguments that it was not required to displace Walsh in order to reemploy Nichols. “The department first argues that, in this case, Nichols’ 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

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and one place behind Mary Jones, who was hired one day before you. In that situation, we can simply look to the jobs held by Smith and Jones to determine where you would now be if your job had not been interrupted by military service.

<sup>7</sup> The citation means that you can find this case in Volume 11 of *Federal Reporter Third Series*, starting on page 160.

<sup>8</sup> The Federal Circuit is the specialized federal appellate court that sits here in Washington and has nationwide jurisdiction over certain kinds of cases, including appeals from decisions of the Merit Systems Protection Board (MSPB).

temporary work dislocations for nonveteran employees, those 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."

But what if most of your BBI colleagues on that specific contract lost their jobs when the BBI contract came to an end? In that case, you are not entitled to better treatment than you would have received if you had been continuously employed. If your colleagues lost their jobs in January 2015, you almost certainly would have lost your job as well.<sup>9</sup>

As I have explained in Law Review 104 and other articles, Congress enacted USERRA<sup>10</sup> and President Bill Clinton signed it into law 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. In its first case construing the VRRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."<sup>11</sup>

The escalator principle is codified in section 4313(a)(2)(A) and section 4316(a) of USERRA.<sup>12</sup> It should be emphasized that *the escalator does not always ascend*.

Section 4331 of USERRA<sup>13</sup> gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, the Department of Labor (DOL) published draft USERRA regulations in the *Federal Register*<sup>14</sup> for notice and comment. DOL considered the comments that were filed and made a few adjustments. DOL published the final regulations in December 2005.<sup>15</sup> Here is a pertinent section about the application of the escalator principle in a situation like yours:

**"Can the application of the escalator principle result in adverse consequences when the employee is reemployed?"**

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<sup>9</sup> If your colleagues received severance pay or supplemental unemployment benefits when they lost their BBI jobs, you are entitled to that same benefit as your "reemployment" mandated by USERRA.

<sup>10</sup> Public Law 103-354, currently codified at 38 U.S.C. 4301-4335.

<sup>11</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

<sup>12</sup> 38 U.S.C. 4313(a)(2)(A), 4316(a).

<sup>13</sup> 38 U.S.C. 4331.

<sup>14</sup> The *Federal Register* is a massive publication every business day. Federal agencies publish proposed regulations, for notice and comment, and final regulations. Final regulations have the force of law, and every resident of our country is charged with knowledge of regulations posted in the *Federal Register*, although it would be impossible to read this massive tome each day. The *Federal Register* is still published in paper form, but in the 21<sup>st</sup> Century most *Federal Register* users access it on-line.

<sup>15</sup> The USERRA regulations are published in Volume 20 of the Code of Federal Regulations at part 1002 (20 C.F.R. Part 1002).

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle."<sup>16</sup>

To summarize, we first need to have you meet the five USERRA conditions (including leaving active duty and applying for reemployment). Then, we need to determine and demonstrate that you would still have an active job at BBI if you had not been away from work for military service for the last year. In that scenario, BBI has a legal obligation to reemploy you upon your application in October 2015. If BBI fails to reemploy you or reemploys you in a position inferior to the position to which you are entitled, the company has violated USERRA and remedies are available to you.

**Q: Let us assume that I leave active duty as scheduled on September 30 and apply for reemployment at BBI a few days later. Let us further assume that I can show that if I had not left my BBI job last September I would still be employed by BBI, because most of my BBI colleagues on the specific government contract were picked up on another BBI contract in the same metropolitan area. Although I am entitled to reemployment, BBI unlawfully refuses to reemploy me. Needing income, I then return to active duty for another year. Will that one more year of active duty put me over the five-year limit and cause me to lose my right to reemployment at BBI?**

**A:** In the scenario you have outlined, that one more year of active duty (fall of 2015 to the fall of 2016) will not count toward your five-year limit. The DOL USERRA regulations provide that "service performed to mitigate economic harm where the employer is in violation of its employment or reemployment obligations to [the individual]" does not count toward the five-year limit.<sup>17</sup>

Under USERRA or any employment discrimination law, a person claiming the right to employment and back pay has a *duty to mitigate damages*. This means that if you are unlawfully fired or denied employment or reemployment, you must make reasonable efforts to find mitigating employment. If you find such alternative employment, your earnings from that

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<sup>16</sup> 20 C.F.R. 1002.194 (bold question in original).

<sup>17</sup> 20 C.F.R. 1002.103(b).

employment will be deducted from the back pay that the lawbreaking employer owes you, on a pay period by pay period basis, for comparable hours of employment.<sup>18</sup>

In your situation, the best way for you to mitigate your damages in the short run is to return to active duty, if the Army gives you that opportunity. Your returning to active duty benefits the employer, because it substantially reduces the back pay that the employer will owe you after you prevail in your case. Thus, your additional period of active duty should not count toward your five-year limit at BBI. This is the logic behind section 1002.103(b) of the DOL USERRA Regulations.

**Q: I am currently serving on active duty in Germany. I have been offered the opportunity to remain on active duty for another year, at this same military command in Germany. If I leave active duty and return to the United States to apply for reemployment at BBI, I will likely lose out on the opportunity to have this one more year of active duty—the Army will give the opportunity to another Army Reserve soldier.**

**I have already inquired about my reemployment rights at BBI, and the company has told me forcefully that I have no reemployment rights. I want to accept the Army's offer and remain on active duty until September 30, 2016. If I leave active duty on that date and then apply for reemployment at BBI, will I then have the right to reemployment?**

**A:** Probably not. Under the DOL USERRA regulation cited, the additional year of active duty is excluded from the computation of your five-year limit only “where the employer is in violation of its employment or reemployment obligations to [you].” The employer is not in violation of its USERRA obligations to you unless you meet all five of the USERRA conditions, including your having left active duty and then made a timely application for reemployment.

Here is how I suggest that you proceed. You need to retain a hard-nosed attorney with excellent negotiating skills. Your attorney may be able to negotiate an enforceable contract with BBI wherein you would remain on active duty for another year and have the right to reinstatement at BBI in October 2016 *as a matter of contract*.

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<sup>18</sup> Please see Law Review 206 for a detailed discussion of the computation of back pay under USERRA.