

## **It Is not your Responsibility To Document your Physical and Psychological Readiness To Return to Work**

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- 1.1.1.7—USERRA applies to state and local governments
- 1.3.1.2—Character and duration of service
- 1.3.2.1—Prompt reinstatement after service
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.3.2.3—Pension credit for service time
- 1.3.2.9—Accommodations for disabled veterans
- 1.7—USERRA regulations
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a Sergeant Major (E-9) in the Army Reserve. I joined the Reserve Officers Association (ROA) recently, after you amended your constitution to make noncommissioned officers eligible for full membership.**

**I was born in 1976 and graduated from high school in 1994. I enlisted in the Regular Army and served on active duty for exactly four years, from October 1, 1994 to September 30, 1998. After I left active duty, I affiliated with the Army Reserve and have served continuously ever since.**

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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 1,350 "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> Captain Wright was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA, from June 2009 through May 2015. During that six-year period, he received and responded to more than 35,000 e-mail and telephone inquiries. He is no longer employed by ROA, but he is continuing the SMLC on a part-time volunteer basis, as a member of ROA. He is available by e-mail at [SWright@roa.org](mailto:SWright@roa.org) or by telephone at (800) 809-9448, ext. 730. Please recognize that Captain Wright is a volunteer, and he may not be able to respond to your call or e-mail on the same day. Captain Wright received his BA from Northwestern University in 1973, his JD (law degree) from the University of Houston in 1976, and his LLM (advanced law degree) from Georgetown University in 1980. He has been dealing with reemployment rights and other military-legal issues for almost 40 years, as a judge advocate in the Navy and Navy Reserve, as an attorney for the United States Department of Labor (DOL—1982-92), as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. After leaving the employ of ROA recently, he returned to Tully Rinckey PLLC, the law firm where he worked before ROA established the SMLC in June 2009. Captain Wright is available (for a reasonable fee, of course) at Tully Rinckey PLLC, at (202) 787-1900 or [SWright@fedattorney.com](mailto:SWright@fedattorney.com).

In January 1999, I joined the police department of my home town, an intermediate size city in the Midwest, and I have served continuously ever since. My police department career has been interrupted by three 12-month periods of involuntary active duty—from March 2003 to March 2004 (in Iraq), from July 2007 to July 2008 (in Iraq), and from June 2010 to June 2011 (in Afghanistan). I have also performed weekend drills and annual training periods in the 12-21 day range. I have given my police department supervisor and the police chief prior written and oral notice each time that I have been away from work for military service or training, even a drill weekend.

My most recent involuntary call-up was scheduled to last one year, but I was wounded in action in Afghanistan and my active duty period was extended for an additional four years. I notified the police chief of my wounds and of the various extensions of my active duty period. I finally left active duty (by way of a medical retirement) on May 31, 2015. I applied for reemployment at the police department on June 15 and provided the police chief a copy of the Department of Defense Form 214 (DD 214) that I had received from the Army a few days earlier, but I have not yet been returned to the payroll or allowed to return to work.

The police chief has told me that before I will be allowed to return to work I must bring in a note from an Army physician or Department of Veterans Affairs (VA) physician, attesting that I am physically and psychologically ready to return to work as a police officer. The Army hospital where I was treated for the last four years is many hundreds of miles away. The nearest VA hospital is closer, but it has a long waiting list for appointments. When I called to make an appointment, I was told that an appointment is not available unless I need medical treatment—that the VA does not schedule physical and mental examinations just for the convenience of the civilian employers of veterans.

**Am I entitled to reemployment under USERRA? Is it my responsibility to document my physical and psychological readiness to return to work?**

**You are entitled to reemployment because you meet the five USERRA conditions.**

**A:** Let me take your questions in order. Yes, you are entitled to prompt reemployment<sup>3</sup> because you meet the five USERRA conditions:

- a. You left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA.
- b. You gave the employer prior oral or written notice each time you needed to miss work for uniformed service.

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<sup>3</sup> Prompt reemployment means within two weeks after your application for reemployment, except in unusual circumstances that are not present in your case. See 20 C.F.R. 1002.181 (Department of Labor USERRA Regulations). Because you applied for reemployment on June 15 and at that point met the five USERRA conditions, you should have been back on the payroll by June 29. The city has already violated USERRA by failing to act promptly on your application for reemployment.

- c. You have not exceeded USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service. More on this condition below.
- d. Each time, you were released from the period of service without having received a disqualifying bad discharge from the Army.
- e. After each period of service, you were timely in reporting back to work or applying for reemployment.<sup>4</sup>

**You have not exceeded USERRA's five-year limit.**

USERRA's five-year limit is set forth in section 4312(c), as follows:

(c) Subsection (a) shall apply [the right to reemployment] to a person who is *absent from a position of employment* by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, *except that any such period of service shall not include any service--*

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) *performed as required pursuant to section 10147 of title 10*, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is--

(A) *ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10* or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

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<sup>4</sup> After a period of service of less than 31 days, you are required to report back to work at your first regularly scheduled work period following the release from the period of service, the time reasonably required for safe transportation from the place of service to your residence, plus eight hours for rest. After a period of service of 31-180 days, you are required to apply for reemployment within 14 days. After a period of service of 181 days or more, you are required to apply for reemployment within 90 days. See 38 U.S.C. 4312(e).

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.<sup>5</sup>

Your 1994-98 period of active duty does not count toward your five-year limit because you were not absent from your position of employment with the city for that active duty period, in that you did not begin your city employment until after that active duty period. Your drill weekends and annual training periods are exempt from the five-year limit under section 4312(c)(3).<sup>6</sup> Your three involuntary call-up periods are exempt under section 4312(c)(4)(A).<sup>7</sup>

After your 2010-11 involuntary call-up, you were extended on active duty for another four years, while you were treated for your combat wounds and while your military medical retirement was processed. That four-year period can probably be exempted from the computation of the five-year limit under section 4312(c)(4)(B).<sup>8</sup> But in your case you do not need to have that four-year limit exempted, because even if that entire period counts you are still well within the five-year limit.

**It is not your responsibility to document your physical and psychological readiness to return to work.**

USERRA does have a documentation requirement for the service member returning from a period of uniformed service and seeking reemployment, but the service member is only required to document (upon the employer's request) that his or her application for reemployment is timely, that he or she has not exceeded the five-year limit, and that he or she is not disqualified for reemployment by virtue of having received a disqualifying bad discharge from the military.<sup>9</sup> A "physician's note" about your physical and psychological readiness to return to work is not among the kinds of documentation that the employer is entitled to demand.<sup>10</sup>

Section 4312(f) of USERRA addresses the kind of documentation that the employer is permitted to demand of the returning veteran seeking reemployment:

**(f)**

**(1)**A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the

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<sup>5</sup> 38 U.S.C. 4312(c) (emphasis supplied). Please see Law Review 201 for a detailed discussion of the five-year limit and its exemptions.

<sup>6</sup> 38 U.S.C. 4312(c)(3).

<sup>7</sup> 38 U.S.C. 4312(c)(4)(A).

<sup>8</sup> 38 U.S.C. 4312(c)(4)(B).

<sup>9</sup> 38 U.S.C. 4312(f)(1).

<sup>10</sup> See *Brown v. Prairie Farms Dairy, Inc.*, 872 F. Supp. 2d 637 (M.D. Tenn. 2012). I discuss *Brown* in detail in Law Review 13035 (March 2013).

person's employer (upon the request of such employer) documentation to establish that—

**(A)** the person's application is timely;

**(B)** the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

**(C)** the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

**(2)** Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

**(3)**

**(A)** Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

**(B)** An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

**(4)** An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.<sup>11</sup>

Section 4331 of USERRA<sup>12</sup> gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA regulations in December 2005. The regulations are now published in title 20, Code of Federal Regulations, Part 1002.

The DOL USERRA Regulations specifically address the kind of documentation that the returning veteran is required to produce, upon the employer's demand, under section 4312(f). The Regulation lists seven kinds of documentation that the returning veteran might provide, but the first item listed is "DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty."<sup>13</sup>

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<sup>11</sup> 38 U.S.C. 4312(f).

<sup>12</sup> 38 U.S.C. 4331.

<sup>13</sup> 20 C.F.R. 1002.123(a)(1).

Under section 4312(f)(1) of USERRA, the returning veteran is required to provide documentation establishing that his or her application for reemployment is timely, that he or she has not exceeded the five-year limit set forth in section 4312(c), and that he or she is not disqualified from reemployment by having received one of the unfavorable discharges listed in section 4304. Your DD-214 clearly documents two of these three elements. It shows that you were released from the period of service on May 31, so your application for reemployment (made on June 15, 2015) was clearly timely. The DD-214 shows that your service was honorable and that he you did not receive one of the disqualifying bad discharges listed in section 4304.<sup>14</sup>

The doctrine of *expressio unius est exclusio alterius*<sup>15</sup> clearly applies here. In section 4312(f), Congress has listed three items that the returning veteran is required to document, upon the employer's request. Listing these three items clearly means that the employer is precluded from demanding any other documentation.

The United States Court of Appeals for the 6<sup>th</sup> Circuit<sup>16</sup> has applied the *expressio unius est exclusio alterius* maxim to section 4304 of USERRA.<sup>17</sup> In his opinion in *Brown*, Judge John T. Nixon applied this same maxim of statutory construction to section 4312(f). He wrote: "Consequently, any efforts by Defendant to impose requirements that go beyond those outlined in USERRA—even if they were a general 'company policy' and were not imposed on Plaintiff specifically—cannot serve as a condition on Plaintiff's reemployment under section 4312."<sup>18</sup>

**It is not unreasonable or unlawful for the employer to insist upon an examination to determine your fitness to return to work, but the employer must pay for it, and your right to reemployment with the city is *not* contingent upon your "passing" the examination.**

**Q: I have been rated as 50% disabled. I have visible scars on my face and body, and I have some physical limitations. But I am very familiar with the requirements of the police officer job, and I am confident that I can do the job. I have not asked and do not plan to ask for any accommodations for disabilities resulting from the wounds I suffered in Afghanistan. Why do I even need a medical examination?**

**A:** I am sure that I do not have to remind you that being a police officer is hard work and not for everyone. Before putting you back on the street with a badge and a gun, the police chief is entitled to assurance that you are ready and able to return to patrol duties. The safety of you,

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<sup>14</sup> For purposes of dotting the is and crossing the ts, I suggest that you provide a memorandum to the police chief showing that you have not exceeded the five-year limit.

<sup>15</sup> This term is Latin for "to express one is to exclude all the others."

<sup>16</sup> The 6<sup>th</sup> Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

<sup>17</sup> See *Petty v. Metro Government of Nashville-Davidson County*, 538 F.3d 431 (6<sup>th</sup> Cir. 2008), cert. denied, 556 U.S. 1165 (2009).

<sup>18</sup> *Brown*, 872 F. Supp. 2d at 643.

your police department colleagues, and the public makes it prudent for the police chief to be careful in this regard. But the examination is for the purpose of determining *in which job* you are to be reemployed and what kind of accommodations (if any) you will need. Because you meet the five USERRA conditions, you are entitled to reemployment, even if you are no longer qualified to be a police officer (either temporarily or permanently) because of disabilities you sustained or aggravated during your most recent active duty period.<sup>19</sup>

Section 4313(a)(3) of USERRA<sup>20</sup> applies to the situation (possibly including your situation) of a returning veteran who meets the five USERRA conditions but who returns to work with a temporary or permanent disability incurred during the period of service. The employer is required to make “reasonable efforts ... to accommodate the disability.”

Of course, some disabilities cannot be accommodated in some kinds of jobs. A blinded veteran cannot return to the cockpit of an airliner. A person with a severe case of Post-Traumatic Stress Disorder (PTSD) probably cannot return to a job as a police officer.

If your physical or psychological disabilities preclude you from returning to your police officer job, the employer must reemploy you in some other position for which you are qualified or can become qualified with reasonable employer efforts, even if that means placing you outside the police department and bumping another city employee.<sup>21</sup>

**Under USERRA, you are entitled to be treated for pension purposes as if you had been continuously employed in the police officer job during each of the periods that you have been away from the job for uniformed service.**

**Q: Under state law in our state, police officers and firefighters are entitled to retire with generous benefits after 20 years of service as a police officer or firefighter. I was hired as a police officer in January 1999, so I am now only 3.5 years away from retirement eligibility, assuming that my continuous accumulation of pension credit continued during each of the periods that I have been away from work for uniformed service. Am I entitled to be treated as if I had been continuously employed by the city during each of the short and long periods when I have been away from my job for uniformed service?**

**A:** Yes, under section 4318 of USERRA.<sup>22</sup> You have continued accruing city pension credit each day since January 1999, when you reported to the police academy.

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<sup>19</sup> The employer is the city government as a whole, not just the police department. You are entitled to reemployment by the city even if there is no job in the police department for which you are qualified or can become qualified with reasonable employer efforts.

<sup>20</sup> 38 U.S.C. 4313(a)(3).

<sup>21</sup> Please see Law Review 0640 (December 2006), Law Review 0854 (November 2008), and Law Review 15057 (July 2015).

<sup>22</sup> 38 U.S.C. 4318. *See also* 20 C.F.R. 1002.259.

## **Pension credit for 1994-98 active duty period**

**Q: Joe Smith graduated from high school with me in May 1994. Instead of enlisting in the military, Joe went directly to our local police department. His police academy class started in September 1994. Joe has already completed his 20 years of police service and retired.**

**Does USERRA require the city to give me police pension credit for my 1994-98 active duty period?**

**A:** No. USERRA applies to a period of uniformed service that *interrupts* the relevant civilian employment. USERRA does not apply to your 1994-98 active duty period because you did not work for the city before that period.

In many states, possibly including your state, the state law provides the opportunity to purchase or otherwise obtain state public employee retirement credit for a period of military active duty that precedes the start of one's career as a state or local public employee. It is possible that you have the right to pension credit for your 1994-98 active duty period by state law.

## **USERRA is a floor and not a ceiling**

**Q: What is the relationship between USERRA and state law?**

**A:** Under section 4302 of USERRA,<sup>23</sup> USERRA is *a floor and not a ceiling*. USERRA does not supersede or override a state law, collective bargaining agreement, employer policy or practice, or other matter that provides you *greater or additional rights*. If state law gives you the right to pension credit for your 1994-98 active duty period, that state law is not superseded by USERRA.

## **What happens if I cannot return to the police officer job?**

**Q: In our state, the right to a generous retirement after just 20 years of service applies only to police officers and firefighters. Other city employees must work longer and receive less generous retirement benefits. Let us assume that it is determined that my disabilities preclude my returning to work as a police officer, and I return to work as an assistant librarian instead. In that circumstance, will I still be entitled to retire in January 2019 with 20 years of employment?**

**A:** Probably not. Under section 4313(a)(3)<sup>24</sup> you are entitled to be reemployed in the position that you would have attained if you had been continuously employed (the police officer

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<sup>23</sup> 38 U.S.C. 4302.

<sup>24</sup> 38 U.S.C. 4313(a)(3).



position), provided your disability can be reasonably accommodated in that position. If your disability cannot be reasonably accommodated in that position, you are entitled to another position (for which you are qualified or can become qualified with reasonable employer efforts) that is of like seniority, status, and pay. If there is no position for which you are qualified or can become qualified that is of like seniority, status, and pay, you are entitled to the "closest approximation." If the assistant librarian position is the closest approximation, you are entitled to that position and the compensation that goes with it, and that compensation does not include the 20-year retirement benefit for police officers and firefighters.

### **Making up for missed promotion exam**

**Q: When I reported to the police academy in January 1999, there were 40 men (myself included) and seven women in the class. Four months later, 30 men and five women graduated. Of those 35 police officers, 20 are still on the police force. Of those 20, only two (myself and one other) are still patrol officers. The other 18 have been promoted at least once, to Sergeant, and six have been promoted twice, to Sergeant and later to Lieutenant.**

**In this police department, promotion to Sergeant and to Lieutenant is based on a promotion exam. A promotion exam was offered in February 2011, three days after I was wounded in Afghanistan. On the day of the exam, I was in 12-hour surgery at a military hospital in Landstuhl, Germany. Of course, I missed the exam, and it has not been offered again since.**

**If I can be promoted to Sergeant, this will add significantly to my pay and status during my last 3.5 years on the police force. More importantly, being promoted to Sergeant will significantly increase my monthly pension check during the second half of my life, after I retire from the police department.**

**Does USERRA require the police department to give me the opportunity to take a make-up exam? If I score well on the make-up exam, will I receive a retroactive promotion?**

**A: Yes to both questions. I invite your attention to the DOL USERRA Regulation:**

(b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and

responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.<sup>25</sup>

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<sup>25</sup> 20 C.F.R. 1002.193(b).