

## What Happens when your Probationary Period Is Interrupted by a Call to the Colors?

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**Q: I am a Sergeant in the Army National Guard.<sup>3</sup> I graduated from high school in 2005 and enlisted in the Army. I served on active duty for exactly four years, from October 1, 2005 until**

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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 almost 1,400 "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 is the author or co-author of more than 1,200 of the almost 1,400 "Law Review" articles available at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, 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, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> National Guard members have always been eligible for ROA membership, and in 2013 ROA members amended the ROA Constitution to make noncommissioned officers (NCOs) eligible for full membership in ROA. The newly elected President of ROA's Department of Florida is an NCO in the Air Force Reserve. We sure would like to have you as a member of ROA. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at (800) 809-9448.

September 30, 2009. After I left active duty, I affiliated with the Army National Guard in my home state.

A few months after I left active duty, I joined my local police department as a rookie. I entered the police academy in January 2010 and graduated in July of that year. In our city, police academy graduates are classified as probationary police officers (probies) for a year, while they undergo significant additional classroom and field training. About 75% of probies complete the training successfully, and a new police officer has seniority as of the date of completion of the training.

In January 2011, when I was about halfway through the probie training, I was called to involuntary active duty along with my ARNG unit, and we deployed to Afghanistan, where I was wounded in action. Other members of the unit completed their year of active duty and were released in January 2012, but I was retained on active duty for medical treatment and rehabilitation. The Army medically retired me and released me from active duty in January 2015.

I applied for reemployment with the city just a few days after I left active duty. The city's personnel department asked the city attorney for an opinion, and she wrote a letter saying that I am not eligible for reemployment because I was still in a probationary status when I left my city job for active duty and because my wounds and my present physical status disqualify me from working as a police officer.

Doing an Internet search, I found your excellent "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). How does USERRA apply to my situation? Am I entitled to reemployment in my police officer job?

**A:** First, let me say that your probationary status at the time you were called to the colors in no way detracts from your USERRA rights.

Your probationary status, at the time you were called up by the Army, in no way shields the employer from liability under USERRA. Section 4331 of USERRA<sup>4</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 regulations in the *Federal Register* September 20, 2004. After considering comments received and making a few adjustments, 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). One section of the DOL regulations explains that USERRA applies to temporary, part-time, probationary, and seasonal employment positions:

**§ 1002.41 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, *probationary*, or seasonal employment position?**

USERRA rights are not diminished because an employee holds a temporary, part-time,

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<sup>4</sup> 38 U.S.C. 4331.

*probationary*, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.<sup>5</sup>

As I have explained in Law Review 1281 and other articles, you (or any service member) have the right to reemployment under USERRA if you meet five simple conditions:

- a. You held a civilian job (federal, state, local, or private sector) and you left the job for the purpose of performing voluntary or involuntary service in the uniformed services. You clearly meet this condition.
- b. You gave the employer prior oral or written notice that you would be leaving the job for service. For purposes of this article, I shall assume that you gave such notice when you were called to active duty in January 2011.
- c. You have not exceeded the cumulative five-year limit with respect to the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. You clearly meet this condition.<sup>6</sup>
- d. You did not receive a disqualifying bad discharge from the military, as enumerated in section 4304 of USERRA.<sup>7</sup> It is clear that you served honorably and that you did not receive a disqualifying bad discharge from the Army.
- e. After release from the period of service, you made a timely application for reemployment. Because your period of service lasted more than 180 days, you had 90 days (starting on the date of release) to apply for reemployment.<sup>8</sup> It is clear that you applied for reemployment well within that deadline.

Because you met the five USERRA conditions, you were entitled to *prompt* reemployment.<sup>9</sup> You were entitled to be reemployed in the position that you *would have attained if you had been continuously employed* or (at the employer's option) in another position, for which you were qualified, that was of like seniority, status, and pay.<sup>10</sup> You were entitled, upon reemployment by the city, to seniority and pension credit with the city *as if you had been continuously employed* during the entire period (four years plus) that you were away from work for uniformed service.<sup>11</sup>

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<sup>5</sup> 20 C.F.R. 1002.41 (bold question in original, emphasis by italics supplied).

<sup>6</sup> Please see Law Review 201 for a detailed discussion of what counts and what does not count toward exhausting your five-year limit. Your 2005-09 active duty period does not count because it was before you started your employment relationship with the city government. Your involuntary year of active duty also does not count, but even if all your active duty after you began your city employment counts you are still well short of the five-year limit.

<sup>7</sup> 38 U.S.C. 4304.

<sup>8</sup> 38 U.S.C. 4312(e)(1)(D).

<sup>9</sup> The city should have acted on your application for reemployment and had you back on the payroll within two weeks after your application. See 20 C.F.R. 1002.181.

<sup>10</sup> 38 U.S.C. 4313(a)(2)(A).

<sup>11</sup> 38 U.S.C. 4316(a), 4318.

**Q: What do you think of the city attorney's assertion that my combat wounds and my current physical condition disqualifies me from the police officer job?**

**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, 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>12</sup>

Section 4313(a)(3) of USERRA<sup>13</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>14</sup>

**Q: I have visible scars on my face and body, but I have only minor physical limitations. I think that I will pass the medical examination with flying colors and that I am qualified to return to my police officer job, without needing any accommodations from the city.**

**Let us assume that I return to my job as a police officer. You said that I am entitled to be treated *as if I had been continuously employed* for seniority and pension purposes. What about my interrupted probie year?**

**In July 2010, I was one of 20 rookie police officers who graduated from our city's police academy. I was halfway through the probie training year when I was called to active duty in January 2011. Of the other 19 rookie officers, 16 completed the probie training and were certified as full-fledged police officers in July 2011, a year after we graduated from the**

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<sup>12</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>13</sup> 38 U.S.C. 4313(a)(3).

<sup>14</sup> Please see Law Review 0640 (December 2006), Law Review 0854 (November 2008), and Law Review 15057 (July 2015).

**academy. Of the other three, one was killed in the line of duty during his probie year. The other two were marginal officers who had only barely graduated from the academy, and they left the force in August 2011, after failing to complete the probie training successfully.**

**When I return to the police department in 2015, am I entitled to be treated as a full-fledged police officer who completed the probie training in July 2011?**

**A:** No. You will need to complete the probie training after you return to work. When you complete the probie training, at that point you are entitled to have your seniority date as a full-fledged police officer backdated to the date that you would have completed the training but for the military interruption. I invite your attention to *Diehl v. Lehigh Valley Railroad Co.*, 348 U.S. 960 (1955);<sup>15</sup> *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964);<sup>16</sup> and *Brooks v. Missouri Pacific Railroad Co.*, 376 U.S. 182 (1964).<sup>17</sup>

**Q: I thought that USERRA was enacted in 1994. Why are 1955 and 1964 Supreme Court decisions relevant to this discussion?**

**A:** As I have explained in Law Review 15067 and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which dates from 1940. You should think of the reemployment statute as 75 years old, not 21.

USERRA's 1994 legislative history includes the following paragraph:

The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protecting against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977).<sup>18</sup>

There have been 16 United States Supreme Court decisions about the VRRRA and one (so far) about USERRA. I invite the reader's attention to Category 10.1 in our Law Review Subject Index. You will find a case note about each of these 17 important decisions.

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<sup>15</sup> The citation means that you can find this United States Supreme Court decision in Volume 348 of *United States Reports*, starting on page 960. I discuss *Diehl* in detail in Law Review 0834.

<sup>16</sup> I discuss *Tilton* in detail in Law Review 0846.

<sup>17</sup> I discuss *Brooks* in detail in Law Review 0853.

<sup>18</sup> House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.