

LAW REVIEW 1214

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Air Force Progress on Exemptions to USERRA's Five-Year Limit

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1.3.1.2—Character and Duration of Service

On October 25, 2011, the Honorable Daniel B. Ginsberg (Assistant Secretary of the Air Force for Manpower and Reserve Affairs) published a memorandum addressed to the Chief of Staff of the Air Force, the Director of the Air National Guard, and the Chief of Air Force Reserve. The memorandum relates to the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

As I explained in [Law Review 0766](#) and other articles^[1], an individual must meet five eligibility criteria to have the right to reemployment under USERRA:

1. Must have left a position of employment (federal, state, local, or private sector) for the purpose of performing service in the uniformed services.
2. Must have given the employer prior oral or written notice.
3. Cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, must not have exceeded five years.
4. Must have been released from the period of service without having received a punitive or other-than-honorable discharge.
5. Must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

I receive more inquiries about the five-year limit than the other four criteria combined. I invite the reader's attention to [Law Review 201](#) for a definitive discussion of what counts and what does not count toward exhausting an individual's limit. The shorthand is that *all* involuntary service and *some* voluntary service are exempted from the computation of the limit.

Section 4312(c) of USERRA [38 U.S.C. 4312(c)] sets forth the five-year limit and its eight exemptions. Four of those exemptions [4312(c)(3), 4312(c)(4)(B), 4312(c)(4)(C), and 4312(c)(4)(D)] require the "Secretary concerned" to make a written determination and certification. The term "Secretary concerned" refers to the Secretary of the Air Force, with respect to matters relating to the Air Force (including the Air Force Reserve and the Air National Guard). See 10 U.S.C. 101(a)(9)(C). In the second paragraph of his memorandum, Assistant Secretary Ginsberg made clear that he was "acting on behalf of the Secretary of the Air Force."

In his memorandum, Assistant Secretary Ginsberg wrote:

"I categorically approve the following exemptions from the five-year limit:

1. Periods of service performed by an ARC [Air Reserve Command] member ordered to or retained on active duty under 10 U.S.C. 12301(d) on or after September 14,

2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Acts, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.

2. Periods of service performed by a member of the Regular Air Force retained on active duty under 10 U.S.C. 12305 or other provisions of law on or after September 14, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Acts, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.
3. Periods of service performed by an ARC member for the purpose of fulfilling training requirements necessary for professional development through in-residence Developmental Education (DE)."

In his memorandum, Assistant Secretary Ginsberg stressed that for items a and b (above), the basis for the order must be linked to the war or national emergency. In a footnote he wrote: "Linkage to the National Emergency may be shown by one or more [of] various 'indicia' including citation to Presidential Proclamation 7463 or to Executive Order 13223 or to a named operational mission associated with the National Emergency or to funding sources that support named operations or missions associated with the National Emergency. In most cases, members ordered to duty under 10 U.S.C. 12301(d) but serving under 10 U.S.C. 12310 (AGR duty), 10 U.S.C. 10211, or 10 U.S.C. 12402 will not fit this criteria."

Assistant Secretary Ginsberg directed that the following statement be included in the service member's orders: "The period of service under these orders is exempt from the five-year limit as provided in 38 U.S.C. 4312(c)(4)(B)." If the statement should have been but was not included in the member's orders, the statement is to be included in the member's DD-214 and personnel file. The member can probably rely on such a statement. USERRA gives the service secretary the authority to make such determinations, and those determinations are probably not subject to judicial review, although USERRA does not explicitly preclude judicial review of such determinations.

The Ginsberg Memorandum will be helpful to Air Force Reserve and Air National Guard personnel trying to remain on active duty a little longer without giving up the right to reemployment in the pre-service job. I hope that the Secretary of the Army, the Secretary of the Navy, and the Secretary of Homeland Security (Coast Guard) will follow suit.

UPDATE:

[Civilian Reemployment Protections for Air Force Military Personnel](#)

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 700 articles about USERRA and other laws that are particularly pertinent to those who serve our nation in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.