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One More Exemption from USERRA's Five-Year Limit

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1.3.1.2—Character and Duration of Service

In [Law Review 201](#) and other articles, I have written that there are eight exemptions from the five-year limit on the duration of service, relating to that particular employer relationship, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). As a result of section 575 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012, there is now a ninth exemption. Section 575 amended section 4312(c)(4) of USERRA [38 U.S.C. 4312(c)(4)] by adding a new subsection (F), as follows:

...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.

Title 32 of the United States Code relates to the National Guard. It is one of 49 titles (broad subject areas) of the United States Code, the compilation of federal laws of general and permanent import. A member of the Army National Guard or Air National Guard can be called to duty (voluntarily or involuntarily) under title 10 (Armed Forces) or under title 32. Duty for a national emergency will normally be under title 10, but there are circumstances wherein such duty could be performed under title 32.

As I explained in [Law Review 0766](#) and other articles, an individual must meet five conditions to have the right to reemployment under USERRA, following a period when the individual has been away from his or her civilian job for the purpose of performing service in the uniformed services. One of the conditions is that the person's cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, [\[1\]](#) not have exceeded five years. There have been eight and are now nine exemptions. These are kinds of service that do not count toward the individual's five-year limit with that particular employer.

Please note the final clause of the newly added subsection (F): "as determined by the Secretary concerned." This is a reference to the service secretary. See 10 U.S.C. 101(a)(9). For a member of the Army National Guard, the Secretary concerned is the Secretary of the Army. For a member of the Air National Guard, the Secretary concerned is the Secretary of the Air Force.

Let us say that Major Joe Smith of the Air National Guard is performing duty under 32 U.S.C. 502(f)(2)(A)—the kind of duty that could be exempted under the new subsection. The Secretary of the Air Force [\[2\]](#) needs to determine that Major Smith's duty is "for the purpose of responding to a national emergency declared by the President and supported by Federal funds." That determination must be reduced to writing, and Major Smith's orders must refer to the determination. If it is too late to include a reference to the determination in Major Smith's orders, the separation document that Major Smith receives upon release from this period of service must refer to the determination. The National Guard Bureau is working on procedures to implement this new subsection.

As the Director of the Service Members Law Center, I received and responded to 5,405 inquiries during 2011, and 62% of the inquiries were about USERRA. Among the USERRA inquiries, the most common subject was the five-year limit. If you are going to be away from your civilian job repeatedly for lengthy tours of uniformed service, it is essential that you understand what counts and what does not count toward your five-year limit. It is incumbent on you to track how much of the five-year limit

you have used and how much “head room” you still have. If you exceed the cumulative five-year limit with your current employer, you will not have the right to reemployment upon release from a period of service.

If you have questions about USERRA or other military-legal topics, call me at 800-809-9448, extension 730, or e-mail me at SWright@roa.org. I am here taking calls during regular business hours and until 10 pm Eastern Time on Thursdays. The purpose of the Thursday evening availability is to make it possible for National Guard and Reserve personnel to call me outside their civilian work hours. If the employer is annoyed with Joe Smith because of his frequent absences from work for military service, and if the employer is searching for an excuse to fire Smith, the last thing that Smith should do is to give the employer the excuse that he or she is seeking. When seeking information or assistance in dealing with your civilian employer, do not use the employer’s telephone, computer, e-mail system, or time paid by the employer.

[1] This means that service the individual performed before he or she began the employer relationship with the current employer does not count toward the individual’s limit.

[2] The authority to make this sort of determination can be and normally is delegated to the Assistant Secretary for Manpower and Reserve Affairs, Department of the Air Force.