

# Law Review 13043

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## **USERRA and the Collective Bargaining Agreement—What Is the Limit on Duration of my Active Duty?**

By Captain Samuel F. Wright, JAGC, USN (Ret.)

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**Q: I am an Air National Guard officer and a member of ROA. I have been away from my United Air Lines (UAL) job for several years, first for an involuntary call to active duty and then for voluntary extensions of my active duty. I expect to leave active duty at the end of this fiscal year (September 30, 2013). I am trying to figure out if I will have the right to reemployment at UAL in October, and this sure does get complicated. Here (below) is an excerpt from the collective bargaining agreement (CBA) between my union and UAL.**

### **12-D Military Leave (“MLOA”)**

**12-D-1** Unless required by law, a Pilot may not exceed six (6) consecutive years of military leave. **This six (6) year limit shall not commence until all furloughed Pilots are offered recall.**

**12-D-2** Notwithstanding Section 11-A-4, a Pilot shall accrue vacation for the first ninety (90) consecutive days of military leave. Thereafter, he shall have his vacation accrual reduced by one-twelfth (1/12) for each full Bid Period he is on a military leave of absence in excess of ninety (90) days.

### **12-D-3 Return from Military Leave Page 144**

Notwithstanding the requirements of Section 8-E-6-f and Section 12-H, the following shall apply to a Pilot who returns from a military leave of absence:

**12-D-3-a** If a Pilot was displaced pursuant to Section 8 while on military leave, when he returns to Active Service with the Company, in addition to the option in Section 12-D-3-b, he shall be permitted to displace to any Category that his seniority entitles him.

**12-D-3-b** A Pilot returning to Active Service with the Company shall be eligible to be awarded a position in any Category as follows:

**12-D-3-b-(1)** The Pilot shall make his request no later than ten (10) days after first notifying the Company of his intention to return to work or the date he is scheduled to report for training, whichever is first;

**12-D-3-b-(2)** The Category to be awarded is one in which the Pilot’s seniority would have entitled him to fill during the vacancy bidding process while he was on military leave; and

**12-D-3-b-(3)** The returning Pilot shall have any training freeze associated with such vacancy commence on the date that the vacancy was awarded to a junior Pilot.

**Please review for me my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and under the CBA between my union and the airline.**

#### **Reemployment rights under USERRA**

**A:** Let me address USERRA first, as that answer is much clearer. As I explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

1. You must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
2. You must have given the employer prior oral or written notice.
3. You must not have 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 below.)
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have made a timely application for reemployment with the pre-service employer, after release from the period of service. After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

You must meet all five of these conditions to have the right to reemployment under USERRA. I am sure that you left your UAL job for the purpose of service and that you gave prior oral or written notice to the airline. I am sure that you will be released from active duty on or about September 30 without a disqualifying bad discharge. You certainly have it in your power to make a timely application for reemployment, after release from active duty. The “big question” in your case is the five-year limit.

#### **Computation of the five-year limit under USERRA**

The CBA refers to “six (6) consecutive years of military leave.” (Emphasis supplied.) Under USERRA, the limit is *cumulative*, with respect to the employer relationship for which you seek reemployment. In other words, if you began your UAL career on January 1, 1995, we must look back 18 years in determining how much of the five-year limit you have utilized. I invite your attention to Law Review 201<sup>[1]</sup> (October 2005), wherein I discuss in great detail the five-year limit—what counts and what does not count. The shorthand is that in computing your five-year limit with respect to UAL you can exempt *all* involuntary service (mobilizations) and *some* voluntary service.

I suggest that you read Law Review 201 and then gather together all your military orders for periods of service after you began your UAL career. Put the orders in three stacks. The first stack is for the periods of service that clearly count toward the five-year limit. The second stack is for periods that clearly do not count, and the third stack is for periods as to which you are uncertain. We may need to count the days of service in order to determine whether you are within the five-year limit (1826 days). If you are beyond the limit with respect to your UAL employment, you do not have the right to reemployment.

#### **Reemployment rights under USERRA**

If you meet the five USERRA conditions, including the five-year limit, as of October of this year, then UAL will have the legal duty to reemploy you *promptly* (generally, within two weeks after your application) *in the position of employment that you would have attained if you had been continuously employed*, or at the employer’s option in another position (for which you are qualified) that is of like seniority, status, and pay. If you meet the USERRA conditions, the employer must reemploy you promptly *even if that means displacing another employee*.

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which dates back to 1940. In its first case construing the VRRA,

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.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).[\[2\]](#)

It has always been the case that *the escalator can descend as well as ascend*, especially in an economic downturn. If you meet the five USERRA conditions in October 2013, UAL must ascertain *where you would have been at UAL if you had been continuously employed*—we call this your escalated reinstatement position or ERP.

In a unionized situation like that involving UAL pilots, determining your ERP is relatively simple and straightforward. Think back to your classmates at the UAL rookie pilot school in January 1995. Let us assume that Joe Smith was hired one day before you and Mary Jones was hired one day after you, and both have been continuously employed since January 1995 and are still employed. Where are Smith and Jones today? Answering that question gives us a very good idea as to where you would be at UAL if you had been continuously employed.

Under section 4318 of USERRA, an individual who leaves a civilian job for military service and meets the five conditions, and returns to work for the pre-service civilian employer, must be treated *as if he or she had been continuously employed* for purposes of the civilian pension plan (defined contribution plans as well as defined benefit plans). For many reasons, it is very important to meet the five USERRA conditions if it is possible to do so.

### **Reemployment rights for those who have been furloughed**

A pilot who has been furloughed (laid off temporarily with the expectation of being called back to work when conditions improve) can have reemployment rights under USERRA, because a furloughed

employee is still an employee for USERRA purposes. *But the individual must have given the airline notice before going on active duty.* If Alex Adams was furloughed from UAL in 2002 and went on active duty in

2003 (and gave UAL notice), Alex had the right to reemployment when he left active duty in 2007, provided he met the five conditions. Alex would be entitled to reemployment in an active job if he would have

been called back from furlough but for having been on active duty. Otherwise, Alex is at least entitled to reinstatement on the furlough list.

### **Reemployment rights under the CBA**

For purposes of this part of the article, let us assume that you are beyond the five-year limit—even crediting you for any exemptions that apply. In that situation, you do not have rights under USERRA, but you may have rights under the CBA. Under section 4302(a) of USERRA, this federal statute does not supersede or override a CBA that *gives you greater or additional rights*.

If you are beyond the USERRA five-year *cumulative* limit but within the CBA six-year *consecutive* limit, you could have the right to return to UAL *under the CBA*. *This is not a USERRA issue.* This is solely a CBA issue. To enforce your CBA rights, you must utilize the enforcement mechanism provided by the CBA—filing a grievance with the union, perhaps leading to the case being presented to an arbitrator, in accordance with the CBA. In this situation, you cannot file suit under USERRA because you do not have USERRA rights.

The language of the CBA is ambiguous and confusing in several important respects.[\[3\]](#) Is the six-year limit under the CBA *in addition to* the five-year limit under USERRA? If Bob Bradley has exhausted his five-year cumulative limit under USERRA, is he permitted to go on active duty for an additional six consecutive years and still have reemployment rights under the CBA?

Is the person who is beyond the five-year USERRA limit but within the six-year CBA limit entitled to be treated *as if he or she had been continuously employed* for seniority and pension purposes (as under USERRA)? The CBA does not clearly answer this question.

For example, let us assume that Connie Cummings went to work for UAL as a pilot in 2005. She was on active duty for five years and 11 months, ending in December 2012. None of her active duty is exempt from the five-year limit, so she is 11 months past the five-year limit, but she is still within the six-year limit under the CBA. Does Connie get to keep her original 2005 hire date for seniority purposes? Or does she start over as a rookie? The CBA does not clearly answer this question.

Section 12-D-1 of the CBA contains the following sentence: "This six (6) year limit shall not commence until all furloughed Pilots are offered recall." What does this sentence mean? It is a puzzle.

All of these questions are for UAL and the union to figure out, or for the arbitrator to figure out for them. These are not USERRA issues, in the context of an individual who fails to meet the five USERRA conditions.

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[1] I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 863 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

[2] This citation means that you can find the *Fishgold* case in Volume 328 of *United States Reports* (the official reporter for United States Supreme Court decisions) starting on page 275. The particular language quoted can be found on page 285.

[3] It is not at all unusual for CBA language to be ambiguous. The CBA is the result of bargaining and compromise involving the union and the employer. To avoid a strike or lockout, the union and the employer may agree to ambiguous language and "kick the can down the road" and resolve the ambiguity, or let the arbitrator resolve it, if and when the specific issue arises in an actual case.