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USERRA's Five-Year Limit—Why Is it so Complicated?

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1.3.1.2—Character and duration of service

Q: I am a second class petty officer (E-5) in the Coast Guard Reserve. I recently joined ROA after you amended your constitution to make noncommissioned officers and petty officers eligible. I have been away from my civilian job six times for lengthy (measured in months) periods of military service, plus dozens of drill weekends and annual training tours. I am trying to figure out how much of the five-year limit I have already used and how much "head room" I have remaining. Why is USERRA so darned complicated?

A: USERRA really is not complicated. As I explained in Law Review 1281[1] (August 2012) and other articles, you have the right to reemployment under USERRA if you meet five simple 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.
b. You gave the employer prior oral or written notice.
c. You have not 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.
d. You were released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from the period of service, you made a timely application for reemployment with the pre-service employer.[2]

If you meet these five conditions, you have the right to reemployment as a matter of federal law. If you fail to meet one or more of the five conditions, you do not have the right to reemployment. This is simple and straightforward.

Yes, the five-year limit can get complicated, but only if you are pushing the envelope with multiple periods of *voluntary* active duty. If you are called up *involuntarily* under title 10 or title 14 of the United States Code, that involuntary period does not count toward your five-year

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,017 articles about USERRA and other 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. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

[2] 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).

limit. Moreover, your reserve training periods (annual training and inactive duty training or drills) do not count toward your five-year limit.

Section 4312(c) of USERRA sets forth the five-year limit and its nine exemptions. Here is the entire text of that subsection:

"(c) Subsection (a) [the right to reemployment] shall apply 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
(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."[3]

Subsection (c)(3) excludes your regularly scheduled inactive duty training and annual training from the computation of your five-year limit. Training beyond the standard annual training is excluded from the limit if the "Secretary concerned" has determined and certified in writing that the training is necessary for professional development or for skill training or retraining.

[3] 38 U.S.C. 4312(c).

Because you are a Coast Guard Reservist, the Secretary concerned is the Secretary of Homeland Security, and the Secretary has delegated this authority to the Commandant of the Coast Guard. If you have training orders that are longer than the standard annual training tour, the orders should contain "magic words" to the effect that the Commandant of the Coast Guard has determined that this training is necessary for professional development or skill training or retraining. These magic words are not necessary for standard drill periods and annual training tours.

If you are called to active duty *involuntarily* under sections 12301(a), 12302, 12303, or 12304 of title 10 of the United States Code, subsection (c)(4)(A) specifically excludes such involuntary call-up periods from the computation of your five-year limit. If you volunteer for active duty, under section 12301(d) of title 10 for example, your period of active duty will count toward your five-year limit unless the "Secretary concerned"[4] has determined that your voluntary active duty was in support of a critical mission or requirement of your uniformed service, under section 4312(c)(4)(D). If the Secretary or Commandant has made such a determination, your orders should contain the "magic words" certifying that such a determination has been made. If your service is voluntary and the "magic words" are not in the orders, you should assume that the period is going to count toward your five-year limit.

Q: In 2010, some fools at British Petroleum negligently caused a massive explosion and oil spill in the Gulf of Mexico. I was one of several hundred Coast Guard Reserve members involuntarily called to active duty to deal with the consequence management. Does that period of involuntary active duty count toward my five-year limit?

A: No. Section 4312(c)(4)(A) specifically excludes from the computation of the five-year limit duty performed "under section 331, 332, 359, 360, 367, or 712 of title 14" of the United States Code. Title 14 deals with the Coast Guard. Your involuntary activation orders for the Deepwater Horizon contingency will cite one of these title 14 sections, and that period of service specifically does not count toward your five-year limit.

Q: I have performed several back-to-back periods of voluntary active duty. Each time that my orders are extended, I give notice to my civilian employer by filling out a "military leave" form that is available on the company's employee website. If I give this notice and provide a copy of my orders, does that mean that the new period of duty is automatically exempt from the five-year limit?

A: No, it does not mean that. Whether or not the period counts toward your five-year limit, you must give prior notice to the employer, unless giving prior notice is precluded by military necessity or otherwise impossible or unreasonable.[5] Giving prior notice is necessary, but it does not relate to the question of whether the period of service counts toward the five-year limit.

[4] The Commandant of the Coast Guard for you.
[5] 38 U.S.C. 4312(a)(1), 4312(b).

I urge you to avoid getting into an argument with the employer as to whether periods of service count or do not count toward the five-year limit. There is no occasion for the employer to make a determination about the five-year limit or the other eligibility conditions unless and until you have been released from the period of service and have applied for reemployment.

If you want to preserve the right to return to the civilian job, you need to track carefully your usage of the five-year limit, but this is none of the employer's business, during your period of service. Do not expect the employer to know or care whether a new period of service will put you over the limit. That is for you to track, not the employer.

When you apply for reemployment, after leaving active duty, you must provide to the employer, upon the employer's request, documentation to establish that you have not exceeded the five-year limit, except as permitted by the nine exceptions to the limit contained in section 4312(c).[6] As you prepare to leave active duty and apply for reemployment, you should carefully prepare the documentation that you will provide to the employer to show that you are within the five-year cumulative limit with that employer.

I suggest that you read carefully my Law Review 201 (August 2005), a definitive summary of the five-year limit and its exceptions. Then, take all of your Coast Guard orders and put them into three stacks. Stack 1 is for the periods that clearly count toward the five-year limit. Stack 2 is for the periods that clearly do not count. Stack 3 is for the periods as to which you are uncertain.

If you are uncertain about some active duty periods, call me at 800-809-9448, extension 730, or e-mail me at SWright@roa.org. Do not call me or e-mail me while you are on the clock at your civilian job, and do not use the employer's telephone or computer to call me or e-mail me. I am here at my post answering calls and e-mails during regular business hours Monday-Friday and until 10 pm Eastern Time on Mondays and Thursdays. The point of the evening availability is to make it possible for reservists like you to call me or e-mail me from the privacy of your own home, outside your civilian work hours.

As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to contact me (or anybody else) to complain about your employer and to seek advice and assistance in dealing with the employer. Moreover, if your employer is annoyed with you because you have been repeatedly away from work for Coast Guard service, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

Q: I graduated from high school in 1999 and enlisted in the Coast Guard. I did not work for my current employer (the XYZ Company) before my 1999 enlistment. I remained on active duty for seven years. I was hired by XYZ in 2006, after I left active duty and affiliated with the Coast Guard Reserve. Does my active duty period from 1999 to 2006 count toward my five-year limit with respect to XYZ?

[6] 38 U.S.C. 4312(f)(1)(B).

A: No. Your five-year limit only counts military duty that you have performed "with respect to the employer relationship for which a person seeks reemployment."[7] In computing your five-year limit, you need not concern yourself with military duty that you performed prior to your 2006 hire date at XYZ.

[7] 38 U.S.C. 4312(c).