LAW REVIEW 15071[1]
August 2015

New Air Force Memorandum on USERRA's Five-Year Limit

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.3.1.2—Character and duration of service

In Law Review 1223 (March 2012), I addressed in detail the memorandum dated October 25, 2011 about "Civilian Reemployment Protections for Air Force Military Personnel" signed by the Honorable Daniel B. Ginsberg, the Assistant Secretary of the Air Force for Manpower & Reserve Affairs (at that time). I included a link to a copy of the 2011 Ginsberg memorandum in Law Review 1223.

Mr. Ginsberg is no longer the Assistant Secretary of the Air Force for Manpower & Reserve Affairs, and his 2011 memorandum has been superseded by a new memorandum dated July 13, 2015, signed by Daniel R. Sitterly, the Principal Deputy Assistant Secretary of the Air Force for Manpower & Reserve Affairs. We have reprinted the entire text of the 2015 Sitterly memorandum at the end of this article.

---

[1] We invite the reader's attention to 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.

[2] Captain Wright is the author or co-author of more than 1,200 of the almost 1,400 published "Law Review" articles. He has his BA from Northwestern University in 1973, his JD (law degree) from the University of Houston in 1976, and his LLM (advanced law degree) from Georgetown University in 1980. He developed an interest and expertise in the reemployment statute 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 Public Law 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is presently codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335). USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard & Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, at Tully Rinckey PLLC. From June 2009 through May 2015, Wright was the Director of ROA's Service Members Law Center (SMLC), and during that six-year program he received and responded to more than 35,000 e-mail and telephone inquiries, of which about half were about USERRA. As of 1 June 2015, Captain Wright is no longer employed by ROA, but he is continuing to write the "Law Review" articles as feasible. Captain Wright has returned to Tully Rinckey PLLC, this time in an "of counsel" arrangement. To schedule a consultation with Captain Wright or another highly qualified Tully Rinckey attorney, please call Zachary Merriman at (518) 640-3538. Please mention Captain Wright when you call.

As I have explained in Law Review 1281 and other articles, you must meet five simple conditions to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA):

a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA.
b. You must have given the employer prior oral or written notice.
c. You must not have exceeded USERRA's 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 must have been 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 must have made a timely application for reemployment with the pre-service employer.

It is necessary to meet all five of these conditions to have the right to reemployment. If you are beyond the cumulative five-year limit, you do not have the right to reemployment, even if you meet the other four conditions. Accordingly, this article discusses exclusively the five-year limit, which is set forth in section 4312(c) of USERRA, as follows:

(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]

You will note from the italicized language above that sections 4312(c)(3), 4312(c)(4)(B), 4312(c)(4)(C), 4312(c)(4)(D), and 4312(c)(4)(E) require the "Secretary concerned" to make certain determinations and written certifications. The "Secretary concerned" is the Service Secretary, like the Secretary of the Air Force. In promulgating his 2011 memorandum, Mr. Ginsberg was acting under authority properly delegated by the Secretary of the Air Force. Similarly, Mr. Sitterly's 2015 memorandum is based on authority properly delegated by the Secretary of the Air Force.

Mr. Sitterly's first paragraph contains two errors that should be corrected. The second sentence of that paragraph states: "USERRA provisions provide protection to anyone absent from a position of civilian employment because of uniformed service if a number of conditions are met, one of which is that the *cumulative length of absences from civilian employment does not exceed five years."* (Emphasis supplied.) This sentence is wrong in two important ways.

First, it is the *cumulative period or periods of uniformed service*, not the "cumulative length of absences," that is subject to the five-year limit. For example, Jimmy Doolittle is a Colonel in the Air Force Reserve (USAFR). He began his employment at Daddy Warbucks International (DWI) in January 2010. During the first nine months of 2010, he was absent from his DWI job several times for drill weekends, but those short periods of service are exempt from the computation of Doolittle's five-year limit under section 4312(c)(3).[4] Doolittle began a lengthy period of voluntary, non-exempt active duty on October 1, 2010. That period of active duty ended on September 29, 2015—four years, 11 months, and 29 days of service—within the five-year limit, albeit just barely.

Doolittle's last day at his civilian job, before he reported to active duty, was September 16, 2010. Doolittle needed and he took two weeks to get his affairs in order, and this is permissible under USERRA.[5] The 14-day period of absence from his DWI job, before he reported to active duty, does not count toward Doolittle's five-year limit with respect to his employer relationship with DWI.

---

[3] 38 U.S.C. 4312(c) (emphasis supplied). Please see Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count toward exhausting your five-year limit with respect to a particular employer relationship.

[4] 38 U.S.C. 4312(c)(3).

[5] *See* 20 C.F.R. 1002.74 (DOL USERRA Regulation).

After he was released from active duty on September 29, 2015, Doolittle waited 89 days to apply for reemployment. This was permissible under USERRA.[6] This 89-day of absence from his civilian job, after he was released from active duty, does not count toward Doolittle's five-year limit.

Second, the Sitterly memorandum erroneously refers to "absences from civilian employment." In fact, the five-year limit only counts periods of service relating to the individual service member's employer relationship with *that specific civilian employer,* not civilian employment in general.

For example, Mary Jones is a Colonel in the Air National Guard (ANG). In the late 1990s, when she was a junior officer in the ANG, her civilian job was at DWI. She was away from her DWI job for a period of active duty that lasted four years and 11 months, from October 1, 1998 until August 31, 2003. In the fall of 2003, she made a timely application for reemployment at DWI and returned to work for that company.

In late 2005, Jones quit her DWI job. She started a new civilian job at ABC Corporation on January 1, 2006. She was away from her ABC job for a new period of voluntary, non-exempt active duty, from October 1, 2006 through August 31, 2011 (four years and 11 months). Jones was away from "civilian employment" for a period of almost ten years, but her period of service relating to her ABC employment does not exceed the five-year limit, and Jones has the right to reemployment.[7]

In his 2015 memorandum, Mr. Sitterly "categorically approves" four kinds of service as exempt from the computation of the individual's five-year limit with respect to a particular civilian employer. The first exempt category is as follows:

> Periods of service performed by an ARC [Air Reserve Command--this includes both the USAFR and the ANG] 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*[8] of missions and operations associated with the National Emergency by Reason of Certain Terrorist Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.[9]

---

[6] After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D).

[7] This assumes, of course, that Jones meets the other USERRA conditions, including prior notice to ABC, release from the period of service without a disqualifying bad discharge from the Air Force, and a time application for reemployment at ABC.

[8] It should be easy to determine when the individual service member is providing *direct support* to overseas contingency operations under the 2001 national emergency declaration. Determining that the individual is providing "indirect support" may be more difficult and controversial. In questionable circumstances, the personnel officer should check with the office of the Assistant Secretary of the Air Force for Manpower & Reserve Affairs as to whether the exemption words should be included in the individual's orders.

[9] Emphasis supplied. You can find this paragraph at the bottom of the first page of the Sitterly memorandum.

A personnel officer preparing activation orders for USAFR and ANG personnel needs to be familiar with the Sitterly memorandum. If an individual service member's duty meets the criteria set forth in the memorandum, the personnel officer needs to include the following statement in the 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)."[10]

In the 14 years since the September 11 terrorist attacks, the policy of the USAFR and ANG has been to rely primarily on individual ANG and USAFR members to volunteer to serve, and the involuntary call-up authority has been used sparingly.[11] Because of this Air Force policy and practice, there are thousands of ANG and USAFR members who have used up most of their five-year limits with their current civilian employers. Going forward, these individuals need to be very careful about the five-year limit—to ensure that they do not lose their reemployment rights by inadvertently going over the limit.

If you want to retain the right to return to your pre-service civilian job, you need to monitor your own five-year limit. Do not expect the Air Force, or your civilian employer, or ESGR, or DOL to monitor this for you. You need to be clear as to which periods count toward your limit and which periods are exempt. The time to check is *before* you have agreed to perform a new period of voluntary active duty that may put you over the limit, not after you are already over the limit.

During the six years[12] that I was the Director of the Service Members Law Center (SMLC), as a full-time employee of the Reserve Officers Association (ROA), I provided detailed advice about the five-year limit hundreds of times, for no charge, as a free service of the SMLC. As I explained in footnote 2, my ROA employment ended on May 31, 2015. I am no longer in a position to provide this service for free, but I now can provide the service for a reasonable fee, through Tully Rinckey PLLC.

(The Sitterly memorandum is reprinted in full on the following pages)

[10] This language appears in the final paragraph on the second page of the Sitterly memorandum. The very next sentence states: "If this statement should have been but was not included in the activation orders, the statement should be included in a separate document and retained in the service member's personnel file."
[11] In the Army Reserve and Army National Guard, a very different policy has been applied. In those components, primary reliance has been on use of the involuntary call-up authority.
[12] June 2009 through May 2015.

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

13 JUL 2015

MEMORANDUM FOR THE CHIEF OF STAFF OF THE AIR FORCE
DIRECTOR, AIR NATIONAL GUARD
CHIEF, AIR FORCE RESERVE

FROM: Principal Deputy Assistant Secretary of the Air Force (Manpower and Reserve Affairs)

SUBJECT: Civilian Reemployment Protections for Air Force Military Personnel

References: (a) DODI 1205.12, *"Civilian Employment and Reemployment Rights of applicants for, and Service Members and Former Service Members of the Uniformed Services", 04/04/1996, Incorporating Change 1, 04/16/1997*

(b) SAF/MR Memorandum, Subject, *"Reemployment Protections for Activated Reserve Component Members", 12/07/1996*

(c) SAF/MR Memorandum, Subject, *"Civilian Reemployment Protections for Air Force Military Personnel", 10/25/2011*

This memorandum incorporates, clarifies and supersedes references (b), and (c). Current policy regarding members' rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Title 38, United States Code (U.S.C.), Chapter 43, is clarified by this memorandum. USERRA provisions provide protection to anyone absent from a position of civilian employment because of uniformed service if a number of conditions are met, one of which is that the cumulative length of absences from civilian employment does not exceed five years. In addition, USERRA exempts certain periods of active duty performed by a member of the uniformed services from the five year cumulative service limit. Enclosure 2, paragraph E2.3 of the Department of Defense Instruction (DoDI) 1205.12 provides a list of periods of service that are exempt from the five year period.

USERRA and DoDI 1205.12 provide authority for the Secretary of the Air Force to designate certain other periods of service as exempt from the five year limit. This memorandum addresses designated exemptions given under my authority, acting on behalf of the Secretary of the Air Force.

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

a. Periods of service performed by an ARC 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 Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.

b. Periods of service performed by a member of the Regular Air Force retained on active duty under 10 U.S.C. § 12305 or other provision of the law on or after September 14th, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.

c. 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).[1]

d. Periods of service when an ARC member performs duty to fulfill additional training requirements necessary for professional development not specifically exempted above, or for the completion of skill training or retraining, to include "Seasoning Training" after the completion of AFSC awarding training. This categorical exemption is for duty performed for all Technical and Professional training based at school houses or formal courseware listed in the Air Force Education and Training Course Announcements. This includes AFSC awarding courses and required supplemental training. Members will have the following statement included on their orders: "The periods of service under these orders is exempt from the five-year limit as provided in 38 U.S.C. § 4312 (c)(3)." ARC members enrolled in sister service courses must apply to SAF/MR for a USERRA exemption, unless the sister service is the executive agent for a mandatory course for members prior to deployment.

Exemptions a. and b. above, are specifically based on the authority of 38 U.S.C. § 4312 (c)(4)(B) which exempts the service of a member who is "ordered to or retained on active duty (other than for training) under any provision of the law ***because*** of a war or national emergency..." (emphasis added). In other words, the basis for the order must be linked to the war or national emergency.[2] Members who meet this criterion shall have the following statement included in the 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 this statement should have been but was not included in the activation orders, the statement should be included in a separate document and retained in the service member's personnel file. Periods of service that would occur regardless of war or national emergency are not automatically exempt. The Director, Air National Guard (NGB/CF) and Chief, Air Force Reserve (AF/RE) shall provide additional procedural direction and guidance regarding the specific positions that meet exemption criteria and other policy guidance as they determine appropriate.

---

[1] Approved in-resident DE are listed in Attachment 2, *Officer/Civilian DE Institutions and Programs* in AFI 36-2301, Developmental Education (16 July 2010).

[2] Linkage to the National Emergency may be shown by one or more 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 the 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 U.S.C. §12310 (AGR duty), 10 U.S.C. § 10211, or 10 U.S.C. §12402 will not fit this criteria.

Exemption c. above, is specifically based on the authority of 38 U.S.C. §4312 (c)(3) which exempts the service of a member who is performing duty "necessary for professional development" and certifies the approved DE in accordance with Reference (a).

Exemption d. above, is specifically based on the authority of 38 U.S.C. §4312 (c)(3) which exempts the service of a member who is performing duty "for completion of skill training or retraining."

Exemptions for periods of service when an ARC member is ordered to active duty in support of a critical mission or requirement (as defined in DoDI 1205.12, Enclosure 1, paragraphs E1.1.1 and E1.1.2) of the uniformed services must be approved by SAF/MR. The designation of a critical requirement to gain necessary experience to qualify for key leadership positions must be employed judiciously. This exemption will not be used to routinely extend reemployment rights or to extend individuals in repeated statutory or AGR tours.

Commanders must remain vigilant to potential hardships to employers when approving short notice orders for military duty. Employers understand their obligation. I ask each commander to consider the impact on the employer and whether the training must be accomplished during peak work cycles within various industries and employment sectors. Requests for exemptions should be routed to NGB/CF or AF/RE, as appropriate, for initial review and consideration. NGB/CF and AF/RE may disapprove requests. All subsequent USERRA exemption requests will be staffed through SAF/MRR and AF/JAA for a recommendation to the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) (SAF/MR).

DANIEL R. SITTERLY
Principal Deputy Assistant Secretary
(Manpower and Reserve Affairs)