LAW REVIEW 15108[1]
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NDAA 2016 Fixes USERRA Glitch

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1.3.1.2—Character and duration of USERRA
1.8—Relationship between USERRA and other laws/policies

On November 25, 2015, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2016. Section 562 of this massive new Public Law amended section 4312(c) of title 38 of the United States Code to read 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--
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> (1) that is required, beyond five years, to complete an initial period of obligated service;
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> (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;
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> (3) performed as required pursuant to section 10147 of title 10, under section 502(a)

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 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 more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law 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 the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. 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 and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

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, *12304a, 12304b,* 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]

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA). Congress enacted the VRRA in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my late father) for World War II.[4]

I have been dealing with the VRRA and USERRA for more than 33 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991. The version of USERRA that President Bill Clinton signed into law on October 13, 1994 was about 85% the same as the Webman-Wright draft.

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[3] 38 U.S.C. 4312(c). The two italicized items, *12304a* and *12304b,* are the very recent amendment.

[4] As originally enacted in 1940, the VRRA only applied to those who were drafted. In 1941, as part of the Service Extension Act, Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees. Almost from the very beginning, the reemployment statute has applied to voluntary as well as involuntary service.

As I have explained in Law Review 1281 and other articles, you must meet five simple conditions to have the right to reemployment under 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.
b. You must have given the employer prior oral or written notice.
c. 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.
d. You must have served honorably, and 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.[5]

The five-year limit is cumulative, with respect to that specific employer relationship. When you start a new job with a new employer, you receive a fresh five-year limit pertaining to the new employer relationship. For this purpose, the Federal Government is considered to be a unitary employer. For example, if you leave your job at the Department of the Interior to take a new job at the Department of Energy, and take your federal civilian seniority and pension credit with you, you do not receive a fresh five-year limit.

Under section 4312(c) of USERRA (quoted above), there are nine exemptions—kinds of service that do not count toward exhausting your five-year limit.[6] The basic idea is that *all* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit. When Susan Webman and I drafted the interagency task force work product that became USERRA, we very carefully identified the sections of title 10 and title 14[7] that provide for *involuntary* call-up of military reservists and retirees. There must never be a situation wherein an individual goes over the five-year limit and thereby loses his or her civilian job because of an *involuntary* call to active duty.

According to the Department of Defense (DOD), more than 910,000 Reserve Component (RC) personnel have been voluntarily or involuntarily called to the colors since the terrorist attacks of September 11, 2001. There are thousands of RC members who have exhausted most but not

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[5] 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.

[6] Please see Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

[7] Title 14 of the United States Code pertains to the Coast Guard. We identified the title 14 sections that provide for the *involuntary* recall to active duty of Coast Guard reservists and retirees, and those title 14 sections are included in section 4312(c)(4)(A) of USERRA, along with the title 10 sections that provide for involuntary call-up of military reservists and retirees.

all of their five-year limits. It just will not do for an individual to go over the limit because of an involuntary call-up.

For example, let us take the hypothetical but realistic Lieutenant Colonel Eager Beaver, USAFR. In the 14-plus years since our generation's "date which will live in infamy," Eager has been on and off active duty many times. Some of these periods were involuntary and thereby were exempt from the computation of Eager's five-year limit with respect to his current employer. Some of his periods were voluntary but were exempt from the five-year limit under one of the other subsections of section 4312(c). Some of the periods were voluntary and were not exempt from the computation of Eager's limit. Eager has exhausted exactly four years and ten months of his five-year limit.

Eager is well aware that he is within two months of exceeding his five-year limit. He has carefully read my Law Review 201, and he is very much aware of the kinds of service that count toward the five-year limit and the kinds that are exempt. Eager knows not to volunteer for a non-exempt period, because such a period of service would put him over the five-year limit. We must not have a situation wherein Eager is involuntarily called to the colors and thereby exceeds the limit.

The problem is that in 2011 Congress amended title 10 and added two new sections that provide for *involuntary* call-up of RC members in some circumstances. Here are those two sections:

> § 12304a. Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve: order to active duty to provide assistance in response to a major disaster or emergency
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> (a) Authority. When a Governor requests Federal assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), the Secretary of Defense may, *without the consent of the member affected*, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request.
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> (b) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or any other law.
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> (c) Termination of duty. Whenever any unit or member of the reserve components is ordered to active duty under this section, the service of all units or members so ordered

to active duty may be terminated by order of the Secretary of Defense or law.[8]

History:

(Added Dec. 31, 2011, P.L. 112-81, Div A, Title V, Subtitle B, § 515(a)(1), 125 Stat. 1394.)

§ 12304b. Selected Reserve: order to active duty for preplanned missions in support of the combatant commands

(a) Authority. When the Secretary of a military department determines that it is necessary to augment the active forces for a preplanned mission in support of a combatant command, the Secretary may, subject to subsection (b), order any unit of the Selected Reserve (as defined in section 10143(a) of this title [10 USCS § 10143(a)]), *without the consent of the members*, to active duty for not more than 365 consecutive days.

(b) Limitations.
(1) Units may be ordered to active duty under this section only if--
(A) the manpower and associated costs of such active duty are specifically included and identified in the defense budget materials for the fiscal year or years in which such units are anticipated to be ordered to active duty; and
(B) the budget information on such costs includes a description of the mission for which such units are anticipated to be ordered to active duty and the anticipated length of time of the order of such units to active duty on an involuntary basis.
(2) Not more than 60,000 members of the reserve components of the armed forces may be on active duty under this section at any one time.

(c) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or total number of members in grade under this title or any other law.

(d) Notice to Congress. Whenever the Secretary of a military department orders any unit of the Selected Reserve to active duty under subsection (a), such Secretary shall submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of such unit.

(e) Termination of duty. Whenever any unit of the Selected Reserve is ordered to active

[8] 10 U.S.C. 12304a (emphasis supplied).

duty under subsection (a), the service of all units so ordered to active duty may be terminated--

(1) by order of the Secretary of the military department concerned; or

(2) by law.

(f) Relationship to War Powers Resolution. Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution (50 U.S.C. 1541 et seq.).

(g) Considerations for involuntary order to active duty. In determining which units of the Selected Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to--

(1) the length and nature of previous service, to assure such sharing of exposure to hazards as national security and military requirements will reasonably allow;

(2) the frequency of assignments during service career;

(3) family responsibilities; and

(4) employment necessary to maintain the national health, safety, or interest.

(h) Policies and procedures. The Secretaries of the military departments shall prescribe policies and procedures to carry out this section, including on determinations with respect to orders to active duty under subsection (g). Such policies and procedures shall not go into effect until approved by the Secretary of Defense.

(i) Defense budget materials defined. In this section, the term "defense budget materials" has the meaning given that term in section 231(f)(2) of this title [10 USCS § 231(f)(2)].[9]

History:

(Added Dec. 31, 2011, P.L. 112-81, Div A, Title V, Subtitle B, § 516(a)(1), 125 Stat. 1395; Jan. 2, 2013, P.L. 112-239, Div A, Title X, Subtitle C, § 1014(b), 126 Stat. 1908.)

The United States Code (U.S.C.) has 52 titles (broad subject areas). Within each title, sections are numbered consecutively. Title 10 and some other titles are very crowded. It has been necessary to give some new sections numbers like 12304a and 12304b. Section 12304a is *not the same thing* as section 12304(a)—that is subsection (a) of section 12304. Sections 12304a

[9] 10 U.S.C. 12304b (emphasis supplied).

and 12304b are separate sections that can be found after section 12304 and before section 12305.

When Congress added sections 12304a and 12304b in 2011, as part of the NDAA for Fiscal Year 2012, Congress should have amended section 4312(c) of title 38 at the same time, but this did not happen because of the way that Congress is organized. Separate committees of the House and Senate have "jurisdiction" over different titles of the United States Code. The House Armed Services Committee and Senate Armed Services Committee have jurisdiction over title 10 and over the annual NDAA. The House Veterans' Affairs Committee and Senate Veterans' Affairs Committee have jurisdiction over title 38.

Sections 12304a and 12304b should have been added to section 4312(c)(4)(A) of title 38 in 2011, but now this glitch has been corrected, four years late. Yes, you can call this a "technicality." But for some RC members fixing this technicality is important in their keeping rather than losing their civilian jobs.

Congratulations to Susan Lukas, Legislative Director of the Reserve Officers Association, for bringing this issue to the attention of appropriate legislators and staffers and getting this glitch corrected.