

## LAW REVIEW 16075<sup>1</sup>

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### Who Decides that a Period of Service Is Exempt from USERRA's Five-Year Limit?

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#### 1.3.1.2—Character and duration of service

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on October 13, 1994. USERRA was Public Law 103-353, 108 Stat. 3150. This law is codified at 38 U.S.C. 4301-4335. USERRA was the long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA, Public Law 76-783, 54 Stat. 885), the law that led to the drafting of more than ten million young men (including my late father) for World War II.

As I have explained in Law Review 15116 (December 2015) and other articles, a person has the right to reemployment under USERRA if he or she meets five simple conditions:

- a. Left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary uniformed service.
- b. Gave the employer prior oral or written notice, unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable.
- c. Has 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 he or she seeks reemployment. More on this below.

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<sup>1</sup> I invite your attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 "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. More than 1,000 of the articles are about USERRA and related laws, and I am the author of more than 1300 of the articles. The Reserve Officers Association (ROA) initiated this column in 1997.

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- d. Was released from the period of service after having served honorably and did not receive a disqualifying bad discharge from the military.
- e. 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, the returning service member has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

A person who meets these five conditions is entitled to prompt reinstatement in the position of employment that he or she would have attained if he or she had been continuously employed in the civilian job, or in another position (for which he or she is qualified) that is of like seniority, status, and pay. Upon reemployment, the returning service member is entitled to seniority and pension credit in the civilian job as if he or she had been continuously employed in that job during the entire period that he or she was away from work for service.

In our Law Review Library, you will find scores of articles about each of the five USERRA conditions. In this article, I will discuss the five-year limit.

USERRA's five-year limit is set forth in subsection 4312(c). Here is the entire text of that subsection:

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 the person seeks reemployment*, does not exceed five years, *except that any such period of service [counting toward the five-year limit] 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 the completion of skill training or retraining;
- (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, *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 service;
- (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;
- (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*.<sup>3</sup>

USERRA's legislative history explains the five-year limit and the exceptions to the limit in considerable detail. That explanation includes the following sentence: "In order, however, to ensure that the Armed Forces have an adequate supply of trained personnel, certain exceptions to the five years basic limitation would be established by the Committee [House Committee on Veterans' Affairs] bill." House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1). This committee report is reprinted in its entirety in Appendix B-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted sentence can be found on page 670 of the 2016 edition of the *Manual*.

As I have explained in great detail in Law Review 16043 (May 2016), there are nine exceptions to USERRA's five-year limit—that is, there are nine kinds of service that do not count toward exhausting an individual's five-year limit with respect to a specific employer relationship. Five of the nine exceptions require the "Secretary concerned" to make a determination and written certification:

- a. Section 4312(c)(3)—determining that training (beyond the routine annual training and inactive duty training) is necessary for professional development or for skill training or retraining.
- b. Section 4312(c)(4)(B)—determining that a person has been ordered to or retained on active duty (voluntarily) because of a war or national emergency.
- c. Section 4312(c)(4)(C)—determining that a person has been ordered to active duty (voluntarily) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304.
- d. Section 4312(c)(4)(D)—determining that a person has been ordered to active duty (voluntarily) for a critical mission or requirement of the armed forces.

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<sup>3</sup> 38 U.S.C. 4312(c) (emphasis supplied).

- e. Section 4312(c)(4)(F)—determining that a National Guard member has been ordered to full-time National Guard duty (other than for training) under 32 U.S.C. 502(f)(2)(A) 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.

The term “Secretary concerned” refers to the Secretary of the Army, with respect to matters concerning the Army, or the Secretary of the Air Force, for the Air Force, or the Secretary of the Navy, for the Navy and Marine Corps.<sup>4</sup> I invite your attention to DOD Instruction 1205.12 of February 24, 2016, with Change 1 effective May 20, 2016. Enclosure (2) of the Instruction provides, with respect to determinations that have the effect of excluding periods of time from USERRA’s five-year limit, that: “The authority for determining what constitutes a critical mission or requirement will not be delegated below the Assistant Secretary level.”

USERRA determinations under section 4312(c) of USERRA, for the Army, the Army Reserve, and the Army National Guard, are made by the Assistant Secretary of the Army for Manpower & Reserve Affairs. For the Air Force, the Air Force Reserve, and the Air National Guard, such determinations are made by the Assistant Secretary of the Air Force for Manpower & Reserve Affairs. For the Navy and Navy Reserve and the Marine Corps and Marine Corps Reserve, such determinations are made by the Assistant Secretary of the Navy for Manpower & Reserve Affairs. For the Coast Guard, such determinations are made by the Commandant of the Coast Guard.

This is not to say that the Assistant Secretary of the Army for Manpower & Reserve Affairs must personally decide that Sergeant Joe Smith of the Army Reserve is entitled to an exemption from the five-year limit for a particular period of service. Normally, the Assistant Secretary makes a broad-brush determination, in writing, that certain categories or service, for certain missions or operations or requirements, will be exempt. The personnel officer will then apply the Assistant Secretary’s memorandum and will include the “magic words” in Sergeant Smith’s orders, exempting the period of service from Smith’s five-year limit, if it is clear that Smith meets the criteria set forth in the Assistant Secretary’s memorandum. Doubtful or ambiguous cases can be referred to the Assistant Secretary for determination.

For example, I invite your attention to the memorandum of the Honorable Reginald J. Brown, the Assistant Secretary of the Army for Manpower & Reserve Affairs, dated December 2, 2003. I have attached a copy of this memorandum to the end of this article. Although this memorandum is almost 13 years old, it is still in effect, because neither Assistant Secretary Brown nor any of his successors has rescinded the memorandum nor amended and republished the memorandum.

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<sup>4</sup> See 38 U.S.C. 101(25).

I invite your attention specifically to the following two paragraphs in Part d of the Brown Memorandum:

I have determined that all RC [Reserve Component] personnel ordered to or retained on active duty under this process [soliciting volunteers] are placed on such orders based upon the Presidential Proclamation 7463, dated September 14, 2001, declaring a "National Emergency by Reason of Certain Terrorist Attacks." Further, I have determined that in accordance with 38 U.S.C. 4312(c)(4)(B) and DOD Instruction 1205.12, paragraph 6.6, that the periods of service occurring during the National Emergency occurring on or after September 14, 2001, performed by members who *volunteer* [emphasis supplied] for active duty UP [under the provisions of] 10 U.S.C. 12301(d), (other than for training) *in direct or indirect support* [emphasis supplied] of Operation Noble Eagle, Operation Enduring Freedom, Operation Iraqi Freedom, *or other missions and operations associated with the National Emergency* [emphasis supplied] *are exempt* [emphasis supplied] from the Uniformed Services Employment and Reemployment Rights Act (USERRA) five-year cumulative active duty limit for reemployment rights for such periods of service.

If the purpose of a member's orders is for the *direct or indirect support* [emphasis supplied] of such missions and operations, then affected members are to have the following language included in their orders: "You have been ordered to active duty in support of the National Emergency declared under Presidential Proclamation 7463, dated September 14, 2001. Under the provisions of Title 38, United States Code, Section 4312(c)(4)(B), this period of active duty is exempt from the five-year cumulative service limit on reemployment rights under Title 38, United States Code, Chapter 43." If circumstances prevent placing this authority on activation orders, the authority shall be included in a separate document and retained in the service member's personnel file.

The Assistant Secretary of the Air Force for Manpower & Reserve Affairs and the Assistant Secretary of the Navy for Manpower & Reserve Affairs have promulgated and published similar memoranda for their respective services.

Attachment: [Reginald Brown memorandum](#)