

USERRA and the Military Personnel Officer

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Update on Sam Wright

1.3.1.2—Character and duration of service

1.3.1.3—Timely application for reemployment

1.8—Relationship between USERRA and other laws/policies

Q: I am a Captain in the Air Force, on active duty. I serve in the Military Personnel Flight at a major Air Force base. Our flight is responsible for administering the personnel system for officers and enlisted personnel in the Air Force, the Air Force Reserve (USAFR), and the Air National Guard (ANG). For USAFR and ANG personnel, we prepare the orders that bring them on active duty and the DD-214 forms that they are issued when they leave active duty.

A reservist (let's call her Josephine Smith) recently told me that because of something she called "You Sarah" we need to include specific "magic words" in her orders, exempting her current year of active duty from the "five-year limit." I am confused. What is "You Sarah?" What is the "five-year limit?" And what are "magic words?"

A: The reservist is referring to the Uniformed Services Employment and Reemployment Rights Act (USERRA). This is an important federal law that is codified in title 38 of the United States Code, at sections 4301 through 4335.³

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1600 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, 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. I am the author of more than 1400 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 34 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 proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC.

³ 38 U.S.C. 4301-35.

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994.⁴ 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).⁵ For more than 75 years, federal law has provided that a person who leaves a civilian job for voluntary or involuntary military service has had the right to reinstatement in the civilian job upon release from service.

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

- a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the five-year limit, as discussed below.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. Must have made a timely application for reemployment, after release from the period of service.⁷

If Josephine Smith meets these five conditions, she is entitled to prompt reinstatement in the position that she would have attained if she had been continuously employed (perhaps a better job than the one she left)⁸, and she is entitled (upon reemployment) to be treated for seniority and pension purposes as if she had been continuously employed in the civilian job during the entire time that she was away from the job for service.⁹ Getting her job back and being treated as if she had been continuously employed is a big deal for Josephine Smith and for most Reserve Component (RC)¹⁰ members. Without a law like USERRA, the services would not be able to recruit and retain a sufficient quality and quantity of personnel.¹¹

⁴ Public Law 103-353, 108 Stat. 3150.

⁵ Public Law 76-783, 54 Stat. 885. The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II.

⁶ A person who has received a punitive discharge by court martial or an other-than-honorable administrative discharge is not entitled to reemployment. See 38 U.S.C. 4304.

⁷ 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.

⁸ 38 U.S.C. 4313(a).

⁹ 38 U.S.C. 4316(a), 4318.

¹⁰ Our nation has seven Reserve Components. In order of size they are the Coast Guard Reserve (USCGR), the Marine Corps Reserve (USMCR), the Navy Reserve (USNR), the USAFR, the ANG, the Army Reserve (USAR), and the Army National Guard (ARNG). RC personnel account for almost half of the personnel strength of our nation's five armed forces. Almost one million RC personnel have been called to the colors since the terrorist attacks of September 11, 2001.

¹¹ Please see Law Review 14080 (July 2014).

When Josephine is released from her current period of service and applies for reemployment with her civilian employer back home, she will need to provide to the employer (upon the employer's request) documentation showing that her application for reemployment is timely, that she is not disqualified from reemployment by having received an unsatisfactory discharge from the Air Force, and that she is not disqualified by having exceeded the five-year limit.¹² Josephine needs documentation, in her orders or her DD-214, showing that this current year of active duty does not count toward exhausting her five-year limit.

Section 4312(c) of USERRA sets forth the five-year limit and the nine exemptions from the limit, as follows:

- 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, 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

¹² 38 U.S.C. 4312(f). Please see Law Review 16127 (December 2016) for a detailed discussion of USERRA's documentation requirement.

declared by the President and supported by Federal funds, *as determined by the Secretary concerned.*¹³

I explain the five-year limit and its exemptions in detail in Law Review 16043 (May 2016) and Law Review 16075 (August 2016). There are nine exemptions—kinds of service that do not count toward exhausting the individual’s five-year limit. Five of the nine exemptions 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 (involuntarily) 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.
- 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 Air Force, with respect to matters concerning the Air Force, or the Secretary of the Army, with respect to matters concerning the Army, or the Secretary of the Navy, with respect to matters concerning the Navy or Marine Corps, or the Secretary of the Department of Homeland Security, with respect to matters concerning the Coast Guard.¹⁴ The pertinent Department of Defense (DOD) instruction provides that the Service Secretary can delegate the authority to make determinations and certifications referred to in section 4312(c) of USERRA, but not below the Assistant Secretary level.¹⁵

In the Air Force (including the USAFR and ANG), determinations that a period of service is exempt from a service member’s five-year limit are normally made by the Assistant Secretary of the Air Force for Manpower & Reserve Affairs.¹⁶ I invite your attention to the October 25, 2011 “Memorandum for the Chief of Staff of the Air Force, the Director of the Air National Guard, and

¹³ 38 U.S.C. 4312(c) (emphasis supplied).

¹⁴ 10 U.S.C. 101(25).

¹⁵ Please see DOD Instruction 1205.12 of February 24, 2016, with Change 1 effective May 20, 2016. Enclosure (2) of the Instruction provides: “The authority for determining what constitutes a critical mission or requirement will not be delegated below the Assistant Secretary level.” This sentence can be read narrowly as only applying to section 4312(c)(4)(D), which allows the Service Secretary to exempt voluntary service “for a critical mission or requirement.” In an abundance of caution, this limitation on delegation is read to apply to all five of the subsections that provide for Service Secretary determinations that result in exemptions from the five-year limit.

¹⁶ For the Army, such determinations are made by the Assistant Secretary of the Army for Manpower & Reserve Affairs. For the Navy and Marine Corps, 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, as delegated by the Secretary of the Department of Homeland Security.

the Chief of the Air Force Reserve" signed by the Honorable Daniel B. Ginsberg, then serving as the Assistant Secretary of the Air Force for Manpower & Reserve Affairs.¹⁷

This is not to say that the Assistant Secretary of the Air Force for Manpower & Reserve Affairs must personally determine that Josephine Smith's current year of active duty is exempt from the computation of her five-year limit. At the Military Personnel Flight, you need to be aware of the 2011 Ginsberg memorandum. When you find that an individual service member's situation meets the criteria set forth in the memorandum, you are to include these specific "magic words" in his or her 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)." In the service member's orders, you should specifically cite the 2011 Ginsberg memorandum or any later superseding memorandum issued by the Assistant Secretary of the Air Force.

Q: Josephine Smith received her orders and began her period of active duty eight months ago, so how are we supposed to amend orders that have already been in effect for eight months?

A: In that situation, you should include the exemption statement in Josephine's DD-214. The 2011 Ginsberg memorandum includes the following sentences:

If this statement [the USERRA five-year exemption statement] should have been but was not included in the activation orders, the statement should be included in a separation document and retained in the service member's personnel file. The Director, Air National Guard, and Chief, Air Force Reserve, shall prepare additional procedural direction and guidance regarding the specific positions that meet exemption criteria and other policy guidance as they determine appropriate.

Q: Josephine Smith volunteered for this year of active duty. Why should she have these "magic words" included in her orders?

A: If Josephine was called to active duty involuntarily, as in a unit call-up, her period of service is exempted from her five-year limit under section 4312(c)(4)(A).¹⁸

Q: Josephine's current active duty period is only for one year. Why does the five-year limit even matter in her situation?

¹⁷ I have attached a link to this memorandum at the bottom of this article. Please see Law Review 16075 (August 2016) for a link to the similar memorandum by the Assistant Secretary of the Army for Manpower & Reserve Affairs. I believe that there is such a memorandum signed by the Assistant Secretary of the Navy for Manpower & Reserve Affairs, but we have been unable to find it. Assistance by readers would be greatly appreciated. When we find it, we will attach it to this article. For the Coast Guard, the Commandant has chosen to make individual determinations rather than issuing an overarching policy memorandum.

¹⁸ 38 U.S.C. 4312(c)(4)(A). That subsection lists all the title 10 and title 14 sections that provide for involuntary call-up or extension on active duty of military personnel. (Title 14 pertains to the Coast Guard.) If Josephine was called to active duty involuntarily, she does not need "magic words" in her orders or her DD-214, because section 4312(c)(4)(A) is not one of the subsections that require a determination by the Service Secretary.

A: Under section 4312(c), the five-year limit applies to “such person’s cumulative period of service in the uniformed services, with respect to the employer relationship for which the person seeks reemployment.”¹⁹

For example, let us assume that Josephine began working for Daddy Warbucks International (DWI) 12 years ago, in January 2005, and she still works for that company. Let us assume that Josephine has exhausted 4.5 years of her five-year limit, based on non-exempt uniformed service periods between January 2005 and May 2016, when she began her current active duty period. If Josephine’s current year of active duty is not exempt, she will be beyond the five-year limit when she is released from active duty in May 2017, and she will not be entitled to reemployment at DWI. If her current year of active duty is exempt, she will be entitled to reemployment at DWI. Yes, including the “magic words” in her orders or her DD-214 is important.

Perhaps the current year of active duty will not put Josephine over the five-year limit with respect to her employer relationship with DWI. Nonetheless, exempting the current period from her five-year limit is likely to be important to Josephine. Perhaps she intends to continue her DWI career for many more years, and perhaps she is not close to retirement in the USAFR. Perhaps she intends to perform non-exempt active duty periods during her DWI career. It is important to Josephine to be able to establish that her 2016-17 active duty period is exempt from her five-year limit.

Yes, this USERRA stuff can be complicated, but USERRA is not new—it was enacted in 1994. Those who administer the military personnel system need to be aware of USERRA, especially with respect to the five-year limit.

[Air Force Memo on Civilian Reemployment, 2011 \(pdf\)](#)

For a copy of the Department of the Army memorandum, please see [Law Review 16075](#) (August 2016).

Here is the Department of the Navy's written policy on [exemptions from USERRA's five-year limit](#):

¹⁹ 38 U.S.C. 4312(c).