

LAW REVIEW 17027¹

March 2017

Don't Let USERRA's Five-Year Limit Bite You

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

Update on Sam Wright

1.0—USERRA generally

1.3.1.2—Character and duration of service

1.3.1.3—Timely application for reemployment

Importance of the five-year limit

I continue to hear from Reserve Component (RC) personnel who have exceeded the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA) without realizing it. I reiterate the advice that I have given in Law Review 16043 (May 2016) and many other articles:

If you want to maintain the option of reemployment at your pre-service job, you need to keep track of your own five-year limit—how much of the limit have you exhausted and how much head-room do you have remaining? Do not expect your civilian employer, your service, Employer Support of the Guard and Reserve (ESGR), or the Department of Labor (DOL) to track this for you.³

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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 the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer.

³ Law Review 16043 (May 2016).

The time to track your five-year limit is *before you have exceeded it, not after*. I frequently hear from RC members who are already over the limit when they contact me. I find that experience very frustrating, because *I do not have the power to turn back the hands of time*.

As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to 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.
- 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.

You must meet all five of these conditions to have the right to reemployment. If you are beyond the five-year limit, you do not have the right to reemployment, even if you meet the other four conditions.

As I explain in detail in Law Review 16043, there are nine generous exemptions—kinds of service that do not count toward exhausting your five-year limit with a specific employer. *But it is not correct to say that all military service since the terrorist attacks of 9/11/2001 is exempt.* That is “bum scoop” that I hear repeated far too often.

Under section 4312(c)(3) of USERRA,⁴ the periods of inactive duty training (like drill weekends)⁵ and annual training that you perform, under section 10147 of title 10⁶ or under section 502(a) or 503 of title 32⁷ are exempt per se from the five-year limit, and no “magic words” are needed. If you engage in a longer period of military training, like attendance at the Naval War College on a residential (full-time) basis, your period of service will count toward the exhaustion of your five-year limit unless the training has been “determined and certified in writing by the Secretary

⁴ 38 U.S.C. 4312(c)(3).

⁵ Inactive duty training periods are not limited to Saturdays and Sundays but can be held on any day of the week. A period of inactive duty training is protected by USERRA and is exempt from the five-year limit regardless of the day of the week.

⁶ 10 U.S.C. 10147.

⁷ 32 U.S.C. 502(a), 503. Title 32 of the United States Code pertains to the National Guard. I have seen National Guard orders that cite 32 U.S.C. 504. Please note that duty performed under section 504 is not exempt from the five-year limit.

concerned [the Service Secretary] to be necessary for professional development or for completion of skill training or retraining.”⁸

If you volunteer for or agree to perform a lengthy period of RC training, like a service war college, you should insist upon the inclusion of these “magic words” in the orders. Without such magic words, the period of service will count toward your five-year limit. Only you can ensure that you meet the five USERRA conditions, including the five-year limit.

If you are “ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12032, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14”⁹ your period of service is *per se* exempt from the five-year limit, and no “magic words” are needed. Please note that the exempt subsections include section 12301(a) and section 12301(g) *but not section 12301(d)*. I have written:

If your orders cite section 12301(d), you should assume that the period of service will count toward your five-year limit, unless there are magic words in your orders indicating that the Service Secretary has determined that the period of service called for in the orders will not count toward your five-year limit.¹⁰

As I have explained in Law Review 17014 (February 2017), when an RC member suffers a serious wound or injury while on active duty and in the line of duty the service will ordinarily offer the individual the opportunity to remain on active duty (perhaps for years) for medical treatment and to process the individual for a military disability retirement. *This period of extended active duty ordinarily counts toward the individual’s five-year limit.*

In Law Review 17014, I proposed that Congress amend USERRA to exclude active duty extensions of this sort (for medical treatment) from the computation of the five-year limit. There is no reason to believe that my proposal will be enacted anytime soon. If it is enacted, it will almost certainly not be retroactive. If you remain on active duty for medical treatment, you should assume that the extended period will count toward your five-year limit.

Documenting that you are within the five-year limit

Section 4312(f) of USERRA provides:

- (f) (1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that--
 - (A) the person's application is timely;

⁸ 38 U.S.C. 4312(c)(3).

⁹ Title 14 of the United States Code pertains to the Coast Guard.

¹⁰ Law Review 16043 (May 2016).

- **(B)** *the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and*
- **(C)** *the person's entitlement to the benefits under this chapter [USERRA] has not been terminated pursuant to section 4304.*
 - **(2)** Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.
 - **(3)** (A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.
 - **(B)** An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).
 - **(4)** An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.¹¹

When you apply for reemployment after a period of uniformed service of 31 days or more, you must provide the employer (upon the employer's request) documentation showing that you are not disqualified for reemployment by having exceeded the five-year limit. If your cumulative period or periods of service with the pre-service employer exceed five years, you need to prepare documentation showing that some of your service is exempt, so that the non-exempt period does not exceed five years.

Obtaining information about USERRA

I have been dealing with USERRA and the predecessor reemployment statute for almost 35 years, and I have made protecting the rights of service members (especially reemployment rights and voting rights) the focus of my military career and my legal career. 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

¹¹ 38 U.S.C. 4312(f) (emphasis supplied).

largely drafted the work product of an interagency task force that studied the VRRA with a view toward suggesting improvements. President George H.W. Bush presented our draft to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft.

I have also dealt with USERRA and the predecessor statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense 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).

I was the SMLC Director, as a full-time employee of ROA, for exactly six years, from June 2009 through May 2015. During that time, I received and responded to approximately 35,000 e-mail and telephone inquiries from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. About half of the inquiries were about USERRA, and the other half were about other military-legal issues. Please see Law Review 15052 (June 2015) for a detailed discussion of the accomplishments of the SMLC.

My ROA employment ended May 31, 2015, but I have continued the work of the SMLC as a volunteer. I am still available by telephone or e-mail, but I am no longer in the DC metro area. You can reach me by telephone at (202) 210-4194 (cell phone) or by e-mail at samwright50@yahoo.com.

If you have questions about military-legal issues, and especially about USERRA, please check out our Law Review Library at www.roa.org/lawcenter. If you do not find the answer to your specific question, please contact me by e-mail or telephone. I will discuss the matter with you free of charge for up to one hour. If you need more than that, I will charge a very reasonable fee. If you need legal representation, I know several attorneys that I can refer you to, attorneys who are well qualified to represent plaintiffs in USERRA cases or other military-related cases.

If you already have an attorney, please inform the attorney of our Law Review Library and invite him or her to contact me by e-mail or telephone. The same offer applies to attorneys—up to one hour free and a reasonable fee beyond that.