

## **Military Retiree Must Wait 180 Days after Retirement To Start DOD Civilian Job**

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Update on Sam Wright

9.0--Miscellaneous

**Q: I am an Army Reserve Lieutenant Colonel and a life member of the Reserve Officers Association (ROA). I participated in the Army Reserve Officers Training Corps (ROTC) while in college, from 1991 until 1995. Upon graduation, I was commissioned a second lieutenant. I then served on active duty for exactly five years, from June 1995 until June 2000, when I was released from active duty and affiliated with the Army Reserve.**

**After the terrorist attacks of 9/11/2001, I was recalled to active duty in 2003, for the invasion of Iraq. Although my involuntary call-up expired in 2004, I voluntarily chose to remain on active duty, and I have been on active duty continuously since March 2003. I am an Army Reserve officer, not a Regular Army officer, but I am approaching eligibility for a regular military retirement—based on five years of active duty from June 1995 until June 2000 and 15 years of active duty from March 2003 until March 2018.**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1500 "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 1300 of the articles.

<sup>2</sup> 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 35 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. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org) or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

**I am currently serving at a major military command. In anticipation of my eligibility for military retirement early next year, I have started exploring the possibility of remaining at this same major military command in a civil service position. The command's civilian personnel office told me that I must wait at least 180 days after my military retirement before I am eligible to be hired as a DOD civilian. Is that true?**

**A:** Yes, that is true, unless the Secretary of the Army grants a waiver and the Office of Personnel Management (OPM) approves. I invite your attention to section 3326(b) of title 5 of the United States Code:

A retired member of the armed forces may be appointed to a position in the civil service in or under the Department of Defense [DOD] (including a nonappropriated fund instrumentality under the jurisdiction of the armed forces) during the period of 180 days immediately after his retirement only if—

- (1) the proposed appointment is authorized by the Secretary concerned [the Service Secretary] or his designee for the purpose and, if the position is in the competitive service, after approval by the Office of Personnel Management; or
- (2) the minimum rate of basic pay for the position has been increased under section 5305 of this title.<sup>3</sup>

Thus, if you retire from military service in March, you will not be eligible for appointment to a federal civil service position in DOD until September, unless the Secretary of the Army grants a waiver and the Office of Personnel Management (OPM) approves. I understand that waivers are not approved except in unusual circumstances.

**Q: Is this a new requirement?**

**A:** No, the requirement has been on the books for many years, but shortly after the September 11 terrorist attacks Congress suspended the operation of the 180-day rule. On December 23, 2016, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2017.<sup>4</sup> Section 1111 of NDAA 2017 amended section 3326(b) of title 5 of the United States Code by striking paragraph (3) of that subsection. Paragraph (3) provided for the suspension of the 180-day rule. Thus, the repeal of paragraph (3) meant that the 180-day rule is back in effect, as of December 23, 2016.

**Q: What is the purpose of this requirement?**

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<sup>3</sup> 5 U.S.C. 3326(b).

<sup>4</sup> Public Law 114-328, 130 Stat. 2450. The citation means that this was the 328<sup>th</sup> new Public Law enacted during the 114<sup>th</sup> Congress (2015-16), and you can find this massive new law in Volume 130 of *Statutes at Large*, starting on page 2450.

**A:** The apparent purpose is to ensure that career federal employees get an opportunity to compete for opportunities like this and to ensure that military officers do not “rig” the qualification requirements to benefit one of their own who is about to retire from military service. Some say that Congress enacted this provision as a sop to federal employee unions like the American Federation of Government Employees (AFGE).

**Q: My friend Mary Jones is also an Army Reserve Lieutenant Colonel and is also presently on active duty at this same major military command. She is approaching her 50<sup>th</sup> birthday and is also approaching her Army Reserve Mandatory Retirement Date (MRD). Mary was commissioned a second lieutenant on February 1, 1990, so she will attain 28 years of commissioned service by February 2018.**

**Mary will leave active duty in a few weeks, at the end of her current orders. Instead of returning to the status of a traditional reservist, Mary will probably become a “gray area retiree” when she leaves active duty in a few weeks. Does the 180-day rule apply to Mary?**

**A:** No. A “gray area retiree” is not a retiree for this purpose.<sup>5</sup>

If Mary has “contingency service” after January 28, 2008, she may be eligible to start receiving her Army Reserve retired pay before her 60<sup>th</sup> birthday, under a 2008 amendment to the Reserve Retirement Law.<sup>6</sup> But she does not qualify as a retiree until her 60<sup>th</sup> birthday.

I hope that this article is helpful to military personnel who are approaching retirement and who want to work for DOD as civilians after military retirement.

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<sup>5</sup> A gray area retiree is a reservist or National Guard member who has completed all the requirements for receiving the Reserve Component retirement except having attained his or her 60<sup>th</sup> birthday. The statutory name for gray area retiree is a member of the Inactive Status List (ISL). Please see Law Review 16089 (September 2016). A person on the ISL is not required to wait 180 days after joining the ISL before taking a civilian job in DOD.

<sup>6</sup> Please see Law Review 16090 (September 2016).