

## Executive Order Authorizes Air Force To Recall up to 1,000 Retired Aviators to Active Duty—Yes, they Will Have USERRA Rights

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[Update on Sam Wright](#)

1.1.3.1—USERRA applies to voluntary military service

1.1.3.2—USERRA applies to regular military service

1.3.1.2—Character and duration of service

CNBC [has reported](#) that President Trump recently signed an Executive Order authorizing the Air Force to recall up to 1,000 retired aviators to active duty:

Many of those who will be recalled, voluntarily or involuntarily, have post-retirement civilian jobs and will have to leave those jobs to reenter active duty. They will have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the five USERRA conditions:

- a. Must have left a civilian job (federal, state, local, or private sector) to perform uniformed service.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service *with respect to the employer relationship for which the person seeks reemployment*.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. Must have made a timely application for reemployment.<sup>2</sup>

For example, Mary Jones graduated from the United States Air Force Academy in 1987 and was commissioned a Second Lieutenant. She remained on active duty for the next 28 years and retired as a Lieutenant Colonel on September 30, 2015. She was hired by Daddy Warbucks Industries (DWI) in January 2016. In January 2018, she is recalled to active duty for three years, running to January 2021.

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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 the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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> After a period of service of 181 days or more, the returning veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

If Mary gives notice to DWI, and if she serves honorably, and if she makes a timely application for reemployment after leaving active duty in January 2021, she will have the right to reemployment in the position that she would have attained if she had remained continuously employed or another position (for which she is qualified) that is of like seniority, status, and pay.<sup>3</sup> Upon reemployment in 2021, she is entitled to civilian pension and seniority credit as if she had been continuously employed by DWI during the 2018-21 active duty period.<sup>4</sup>

If Mary is recalled to active duty involuntarily, her three-year active duty period will not count toward her five-year limit.<sup>5</sup> If Mary is recalled to active duty voluntarily, her three-year period will probably count toward her five-year limit at DWI, but that does not disqualify her from reemployment because her five-year limit applies “with respect to the employer relationship for which a person seeks reemployment.”<sup>6</sup> Thus, her 1987-2015 active duty period, before she was hired by DWI in 2016, is irrelevant for purposes of the five-year limit.

Contrary to popular misconception, USERRA applies to regular military service, as well as National Guard and Reserve service. If the Air Force finds it necessary to utilize the authority that President Trump has given them, those who are recalled voluntarily or involuntarily can have USERRA reemployment rights.

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<sup>3</sup> 38 U.S.C. 4313(a)(2)(A).

<sup>4</sup> 38 U.S.C. 4316(a), 4318.

<sup>5</sup> 38 U.S.C. 4312(c)(4)(A).

<sup>6</sup> 38 U.S.C. 4312(c).