

Using your Vacation Does Not Mean that the Period of Service Does Not Count toward the Five-year Limit

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[Update on Sam Wright](#)

1.1.3.3—USERRA applies to regular military service

1.3.1.1—Left job for service and gave prior notice

1.3.1.2—Character and duration of service

1.3.2.11—Vacations, holidays and days off

Q: I am a Lieutenant (O-3) in the Navy Reserve. A friend referred me to your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I graduated from college in 2009 and then took a job as a management trainee for a local company—let’s call it Coors Heineken & Schlitz Incorporated or CHSI. In 2011, I decided to enlist in the Navy. I entered active duty on October 1, 2011, to attend Officer Candidate School (OCS). I successfully completed OCS and was commissioned an Ensign. I remained on active duty for exactly five years, leaving active duty on September 30, 2016.

¹ I invite the reader’s attention to 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.

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 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.

I gave CHSI prior oral and written notice before I left the job to report to OCS in 2011. I applied for reemployment at CHSI within a week after I left active duty, and I returned to work in October 2016. I am a member of the Navy Reserve at least until 2019, when I complete the eight-year period for which I enlisted. I recently became an active Navy Reservist, affiliating with a Navy Reserve unit on October 1, 2017.

My drill weekends have not, so far, posed a problem with my CHSI job, because the drills are held on Saturday and Sunday and I do not ordinarily work at the company on weekends, and because the location of my Navy Reserve drills is within 20 miles of my home. My Navy Reserve unit will perform two weeks of annual training in January 2018, and I am expected to participate with the unit. I gave notice to my immediate civilian supervisor and to the CHSI personnel office.

The CHSI personnel director told me that there is a cumulative five-year limit under USERRA, on the duration of the period or periods of uniformed service that an individual can perform with respect to an employer relationship with a specific employer. The personnel director told me that I have used every day of my five-year limit, with my active duty from October 1, 2011 through September 30, 2016. She told me that if I miss even one day of work for military training or service I will be discharged by the company.

I have been accumulating vacation days since I returned to work at CHSI in October 2016. I have three weeks of vacation in the bank, and I propose to request two weeks of vacation for the period of my annual training in January. I propose to conceal from the employer the fact that I am using my vacation for my annual military training.

If I do my annual training while on vacation from the CHSI job, does the period still count toward my five-year limit? How do you advise me to proceed?

A: The personnel director is correct that there is a five-year limit and that it is cumulative with respect to an employer relationship. The director is correct that your five-year period of active duty (2011-16) counts toward your limit and that you have used your entire five-year limit. The director did not tell you that there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your limit.

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

Subsection (a) 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 [10 USCS § 12304];
 - (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 declared by the President and supported by Federal funds, as determined by the Secretary concerned.³

Your Navy Reserve drills and annual training are performed under section 10147 of title 10 of the United States Code. That section provides as follows:

- (a) Except as specifically provided in regulations to be prescribed by the Secretary of Defense, or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, each person who is enlisted, inducted, or appointed in an armed force, and who becomes a member of the Ready Reserve

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

under any provision of law except section 513 or 10145(b) of this title, shall be required, while in the Ready Reserve, to--

- **(1)** participate in at least 48 scheduled drills or training periods during each year and serve on active duty for training of not less than 14 days (exclusive of traveltime) during each year; or
- **(2)** *serve on active duty for training not more than 30 days during each year.*

- **(b)** A member who has served on active duty for one year or longer may not be required to perform a period of active duty for training if the first day of that period falls during the last 120 days of the member's required membership in the Ready Reserve.⁴

Your annual training period does not count toward exhausting your five-year limit with CHSI, because section 4312(c)(3) explicitly so provides. Thus, your upcoming period of annual training will not put you over the limit.

Because you have no head room in your five-year limit with CHSI, you need to be very careful, going forward, that any military duty that you perform must be exempt from the five-year limit. Your regularly scheduled Navy Reserve training periods are exempt from the five-year limit. If you are selected for a longer training period, like the Naval War College, that period will be exempt from the five-year limit if the Secretary of the Navy determines and certifies in writing that the longer training is necessary for career development or skill training or retraining.⁵ These “magic words” should be included in your military orders or your DD-214.

If you are called to active duty involuntarily, as in a mobilization, your period of involuntary service is exempt from the five-year limit.⁶ If you voluntarily return to active duty, your voluntary period of service can be exempted from the five-year limit under section 4312(c)(4)(B),⁷ 4312(c)(4)(C),⁸ or 4312(c)(4)(D)⁹ with a determination by the Service Secretary, and that determination must be shown in your orders or your DD-214.

Under section 4316(d), you have the right but not the obligation to use, during a period of uniformed service, any vacation, annual leave, or similar leave with pay that you have accrued before the start of the period of service.¹⁰ Using accrued vacation during a period of service does not mean that the period of service does not count toward your five-year limit.

⁴ 10 U.S.C. 10147 (emphasis supplied).

⁵ 38 U.S.C. 4312(c)(3).

⁶ 38 U.S.C. 4312(c)(4)(A).

⁷ 38 U.S.C. 4312(c)(4)(B).

⁸ 38 U.S.C. 4312(c)(4)(C).

⁹ 38 U.S.C. 4312(c)(4)(D).

¹⁰ 38 U.S.C. 4316(d).

If you are away from your civilian job for uniformed service, do not try to conceal that fact from your employer. As a condition precedent to your right to reemployment, you must have “given advance written or verbal notice of such service to [your] employer.”¹¹

¹¹ 38 U.S.C. 4312(a)(1). Prior notice is not required if it is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b).