

LAW REVIEW 17119¹
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**Military Personnel Officers Need to Dot Is and Cross Ts
with respect USERRA's Five-Year Limit**

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

1.3.1.2—Character and duration of service

Q: I am a Major in the Air National Guard (ANG) and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am particularly interested in Law Review 16043 (May 2016) and Law Review 17002 (January 2017), concerning USERRA’s five-year cumulative limit on the duration of the period or periods of uniformed service that an individual can perform with respect to the employer relationship for which he or she seeks reemployment and on the nine exemptions—kinds of service that do not count toward exhausting the individual’s five-year limit.

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 (VRRRA—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 VRRRA 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 VRRRA 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.

On the civilian side, I am a GS-13 employee of the United States Department of the Interior (DOI). My DOI supervisor and the DOI personnel office have given me a very hard time about my absences from work for active duty and training duty in the ANG and the Air Force. I fully understand that I need to dot the i's and cross the t's to protect my USERRA rights. If I give DOI an excuse to fire me or deny me reemployment, it will use that excuse to get rid of me.

I have been away from my DOI job several times for lengthy military periods, plus drill weekends and annual training tours. Some of my military periods have counted toward my five-year limit with DOI, but most of the periods have been exempt. The way that I figure it, I have used two years of my five-year limit and I have three years of head room.

As you advised in Law Review 16043 (May 2016), I have been tracking carefully my five-year limit. When I am offered the opportunity to return to active duty for an extended period (more than 30 days), I want to ensure that the period does not count toward exhausting my five-year limit with DOI. I am not in any danger of exceeding the five-year limit now, but I want to continue my ANG career and my DOI career for at least another ten years. I want to ensure that I do not lose out on the opportunity to go on active duty sometime in the next decade because I am approaching my five-year limit.

I am currently on active duty for one year. My orders state: "Purpose: In support of Contingency 13223J—Operation Freedom Sentinel." The orders also state: "The period of service under these orders is exempt from the five-year limit as provided in 38 U.S.C. 4312."

Is this statement sufficient? Can I be assured that this one-year period of service does not count toward my five-year limit?

A: I am concerned that the statement is not sufficient and that your current one-year period of service may not be exempt from the five-year limit. Military personnel officers need to exercise more care in the drafting of military orders and separation documents (DD-214s) to protect the USERRA rights of National Guard and Reserve service members.

You are exactly right to be concerned and to track your five-year limit *before* you have exceeded it, not after. I get more questions about USERRA's five-year limit than about any other USERRA topic. Frequently, I hear from a service member who is concerned about the limit, and when I add up all his or her periods of service, and subtract those that are exempt, I find that he or she is already over the limit. I find this situation very frustrating. I do not have the power to turn back the hands of time.

There are nine generous exemptions from the five-year limit, but it is not correct to state that all military service since 9/11/2001 does not count toward the limit. I have heard that bum scoop repeated far too often, from people who should know better.

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 perform service in the uniformed services.³
- b. You must have given the employer prior oral or written notice.⁴
- 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.⁵
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. You must have made a timely application for reemployment after release from the period of service.⁷

You must meet all five of these conditions to have the right to reemployment. If you are beyond the five-year limit, even after exempt periods have been subtracted, you do not have the right to reemployment.

Section 4312(c) sets forth the five-year limit and the exemptions, 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

³ 38 U.S.C. 4312(a).

⁴ 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).

⁵ 38 U.S.C. 4312(c).

⁶ 38 U.S.C. 4304.

⁷ After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

- **(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.⁸

Q: Subsections (c)(3), (c)(4)(B), (c)(4)(C), (c)(4)(D), and (c)(4)(F) require the “Secretary concerned” to make a determination, for an exemption from the five-year limit to apply. Who is the “Secretary concerned?” Who has the authority to determine that a period of service is exempt from the five-year limit?

A: The “Secretary concerned” is the Secretary of the Air Force, for matters pertaining to the Air Force, the Secretary of the Army, for matters pertaining to the Army, the Secretary of the Navy, for matters pertaining to the Navy or Marine Corps, and the Secretary of Homeland Security, for matters pertaining to the Coast Guard.⁹

As I have explained in footnote 2 and Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. The Department of Defense (DOD) promulgated USERRA regulations in 1996 and amended them in 1997—these regulations are called DOD Instruction (DODI) 1205.12. DOD promulgated a new version of DODI 1205.12 on 2/24/2016 and made Change 1 to the new version on 5/20/2016. Here is a link to the new version:

<http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/120512p.pdf>

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

⁹ 10 U.S.C. 101(a)(9).

I invite your attention to this language in the current version of DODI 1205.12: *“The authority for determining what constitutes a critical mission or requirement shall not be delegated below the Assistant Secretary level or the Commandant of the Coast Guard.”*¹⁰

Under DODI 1205.12, the requirement that the authority to determine the applicability of exemptions to the five-year limit not be delegated below the Assistant Secretary level only applies to “critical mission or requirement” determinations under section 4312(c)(4)(D) of USERRA.¹¹ Nonetheless, determinations that periods of service are exempt from USERRA’s five-year limit, under the subsections of section 4312(c) that require the “Secretary concerned” to make a determination and certification, are normally made by the Assistant Secretary of the Air Force for Manpower & Reserve Affairs (M&RA), the Assistant Secretary of the Army for M&RA, the Assistant Secretary of the Navy for M&RA, or the Commandant of the Coast Guard.

For the Department of the Air Force, the current policy memorandum on exemptions to the five-year limit was promulgated by Daniel R. Sitterly, the Acting Assistant Secretary of the Air Force (M&RA) on 7/14/2017. The Sitterly memorandum is copied, in its entirety, at the end of this article.

Your orders, for your current active duty period, meet the criteria set forth in the Sitterly memorandum. That memorandum includes the specific “magic words” that should be included in the orders of a service member who meets the criteria:

Members who meet this criterion shall have the following statement included in the 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).” If this statement should have been but was not included in the activation orders, the statement should be included in a separate document and retained in the service member’s personnel file.

Your orders contain “magic words,” but those words differ from the specific sentence mandated by the Sitterly memorandum. Since it is too late to include the correct “magic words” in your orders, those words should be written in a separate document that is included in your personnel file. When you complete this current active duty period and return to the status of a traditional ANG member, the correct “magic words” should be included in your DD-214.

I also invite the reader’s attention to the National Guard Bureau “Memorandum for Military Personnel Management Officers” dated 10/27/2017. That memorandum is copied in its entirety at the end of this article.

¹⁰ DODI 1205.12 dated 2/24/2016 with Change 1 dated 5/20/2016, Enclosure 2, page 7 (emphasis supplied).

¹¹ 38 U.S.C. 4312(c)(4)(D).

Please note that the National Guard Bureau memorandum specifically includes Operation Freedom Sentinel among the operations for which “magic words” should routinely be included in orders.

Q: What is the potential impact of an insufficient determination that my current year of active duty is exempt from the five-year limit?

A: Let us say that in 2025-26 you do a year of voluntary active duty—a period that clearly is not exempt from the five-year limit. At the end of the period, you apply for reemployment at DOI, and the department denies your application, contending that you are over the five-year limit because your 2017-18 active duty period was not exempt, because the determination was insufficient. That is the nightmare scenario that I am trying to help you to avoid.

Q: The federal Office of Personnel Management (OPM) operates a website called “USA Jobs.” I frequently review that website, looking for GS-13 and GS-14 opportunities in other federal departments and agencies. If I leave my DOI job to take a federal civilian job in another department or agency, do I get a fresh five-year limit with the new employer?

A: No. If you start a new employer relationship with a new employer you get a fresh five-year limit, but the Federal Government is treated as a unitary employer. If you leave your DOI job for a civil service job in another department or agency and take your federal seniority and pension credit with you, you do not have a new employer relationship and you do not get a fresh five-year limit.

Here are the two memoranda referred to in this article:

DEPARTMENT OF THE AIR FORCE WASHINGTON DC

OFFICE OF THE ASSISTANT SECRETARY

14 July 2017

MEMORANDUM FOR CHIEF OF STAFF OF THE AIR FORCE

DIRECTOR, AIR NATIONAL GUARD

CHIEF, AIR FORCE RESERVE

FROM: Assistant Secretary of the Air Force (Manpower and Reserve Affairs)

SUBJECT: Civilian Reemployment Protections for Air Force Military Personnel

References:

(a) DODI 1205.12 "Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services", 02/24/2016

(b) SAF/MR Memorandum, Subject, "Civilian Reemployment Protections for Air Force Military Personnel", 7/13/2015

This memorandum incorporates, clarifies and supersedes reference (b). Current policy regarding members' rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Title 38, United States Code (U.S.C.), Chapter 43, is clarified by this memorandum.

USERRA provisions provide protection to anyone absent from a position of civilian employment because of uniformed service if a number of conditions are met, one of which is that the cumulative length of absences from civilian employment does not exceed five years.

In addition, USERRA exempts certain periods of active duty performed by a member of the uniformed services from the five year cumulative service limit. USERRA and DoDI 1205.12 provide authority for the Secretary of the Air Force to designate certain other periods of service as exempt from the five year limit. This memorandum addresses designated exemptions given under my authority, acting on behalf of the Secretary of the Air Force.

I categorically approve the following exemptions from the five-year limit: a. Periods of service performed by an Air Force Reserve Component (ARC) member ordered to or retained on active duty under 10 U.S.C. §12301(d) on or after September 14, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations. The basis for the order must be linked to the war or national emergency. 1

Members who meet this criterion shall have the following statement included in the 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)." If this statement should have been but was not included in the activation orders, the statement should be included in a separate document and retained in the service member's personnel file.

b. Periods of service performed by an ARC member ordered to or retained on active duty under 10 U.S.C. §12304(a) or §12304(b) on or after October 1, 2015.

1 Linkage to the National Emergency may be shown by one or more various 'indicia', including citation to Presidential Proclamation 7463; or, to Executive Order 13223; or to a named operational mission associated with the National Emergency; or to the funding sources that

support named operations or missions associated with the National Emergency. In most cases, members ordered to duty under 10 U.S.C. §1230I(d), but serving under U.S.C. §12310 (AGR duty); 10 U.S.C. § 10211, or 10 U.S.C. §12402 will not fit this criterion.

c. Periods of service performed by a member of the Regular Air Force retained on active duty under 10 U.S.C. § 12305 or other provision of the law on or after September 14, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.

d. Periods of service performed by an ARC member for the purpose of fulfilling training requirements necessary for professional development through in-residence Developmental Education (DE).

2 This categorical exemption is specifically based on the authority of 38 U.S.C. §4312 (c)(3) which exempts the service of a member who is performing duty "necessary for professional development" and certifies the approved DE in accordance with Reference (a).

f. Periods of service when an ARC member performs duty to fulfill additional training requirements necessary for professional development not specifically exempted above, or for the completion of skill training or retraining, to include "Seasoning Training" after the completion of AF Specialty Code (AFSC) awarding training. This categorical exemption is for duty performed for all Technical and Professional training based at school houses or formal courseware listed in the Air Force Education and Training Course Announcements. This includes AFSC awarding courses and required supplemental training.

Members will have the following statement included on their orders: "The periods of service under these orders is exempt from the five-year limit as provided in 38 U.S.C. § 4312 (c)(3)." ARC members enrolled in sister service courses must apply to SAF/MR for a USERRA exemption, unless the sister service is the executive agent for a mandatory course for members prior to deployment. Individual exemptions (non-categorical) for periods of service when an ARC member is ordered to active duty in support of a critical mission or requirement (as defined in DoDI 1205.12, Enclosure 2, paragraph b (4)(c)) of the uniformed services must be approved by SAF/MR.

The designation of a critical requirement to gain necessary experience to qualify for key leadership positions must be employed judiciously. This exemption will not be used to routinely extend reemployment rights or to extend individuals in repeated statutory or Active Guard/Reserve (AGR) tours. Individual exemptions will not be granted if the member has sufficient cumulative five year service limit time remaining to complete the term of duty.

Requests for individual exemptions should be reviewed and signed by NGB/CF or AF/RE. NGB/CF and AF/RE may disapprove requests (disapproved packages need not be routed further). All individual exemption requests will be staffed through SAF/MRR and AF/JAA for a recommendation to the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) (SAF/MR).

Commanders must remain vigilant to potential hardships to employers when approving short notice orders for military duty. Employers understand their obligation. I ask each commander to consider the impact on the employer and whether the training must be accomplished during peak work cycles within various industries and employment sectors.

Finally, I ask for Air Force leaders at all levels to continue to maintain the balance between mission, civilian employer, and family for each Airman in order to better sustain a healthy operational reserve.

DANIEL R. SITTERLY

Acting Assistant Secretary of the Air Force (Manpower and Reserve Affairs)

2 Approved in-resident DE are listed in Attachment 2, Officer/Civilian DE Institutions and Programs in AFI 36-2301, Developmental Education (16 July 2010).

MEMORANDUM FOR MILITARY PERSONNEL MANAGEMENT OFFICERS

FROM: NGB/A1P

SUBJECT: Uniformed Services Employment and Reemployment Rights Act (USERRA) Secretary of Defense common & recent contingency and type of duty exemptions.

This memorandum clarifies which of the Presidential and Secretary of Defense contingency operations and types of duty are USERRA exempt under Title 38, U.S.C Chapter 43, Employment and Reemployment Rights of Members of the Uniformed Services. This memorandum is not all inclusive. The intent is to assist in employee-employer relations regarding eligible USERRA exempt orders for common and recent operations for ANG in support of national emergency missions.

USERRA Exempt Contingencies and Types of Duty
CONTINGENCY OPERATION OR TYPE OF DUTY

DATES EXECUTIVE ORDER

Noble Eagle Combat Air 15 Sep 01 – ongoing

13223C Noble Eagle Homeland Defense 15 Sep 01 – ongoing
13223B Operation Enduring Freedom 25 Sep 01 – ongoing
13223D Operation Iraqi Freedom 19 Mar 03 – 31 Aug 10
13223F Operation New Dawn 1 Sep 10 – 15 Dec 11
13223H Operation Inherent Resolve 15 Jun 14 – ongoing
13223I Operation Freedom Sentinel 1 Jan 15 – ongoing
13223J Operation Spartan Shield 1 Sep 15 – ongoing
13223K Active Duty Other Than War or National Emergency
On or after 1 Oct 15 10 U.S.C. §12304(a) or §12304(b)
Pre-Planned Combatant Commander Support 25 Nov 15 - ongoing
10 U.S.C § 12304b Partial Mobilizations 1 Jan 53 – ongoing 10 U.S.C § 12302

Service performed under these Executive Orders or type of duty are exempt from the five-year limit as provided in Title 38 U.S.C § 4312 (c)(4)(b). Members should include this memorandum with their orders when submitted to their employer for USERRA exemption eligibility.

The point of contact for this topic is Master Sergeant Russell H. Gately, NGB/A1PS, commercial (240) 612-8281, DSN 612-8281, and email russell.h.gately.mil@mail.mil.

MALINDA M. BEGGS, Colonel, USAF
Chief, Force Management Programs

UPDATE—AUGUST 2018

Please see Law Review 18073 (August 2018) for more information about the July 2017 Daniel Sitterly memorandum.