

## **The Five-Year Limit Is Based on your Periods of Service, Not Absence from the Civilian Job**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

[Update on Sam Wright](#)

1.1.3.2—USERRA applies to regular military service

1.3.1.2—Character and duration of service

**Q: A friend brought to my attention your Law Review 17102 (October 2017) and pointed out to me that the Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to persons who have performed *regular* military service, as well as persons who have served in the National Guard or Reserve. When that application was brought to my attention, I applied for reemployment with the employer that I had left to join the Regular Army. Fortunately, the 90-day deadline for me to apply for reemployment, after leaving active duty on 9/30/2017, had not yet expired.**

**I graduated from high school in 2009. In early 2011, I was hired by an intermediate size local company—let’s call it Coors Heineken & Schlitz Incorporated or CHSI. After I had been at the**

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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> 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](mailto:SWright@roa.org).

company about a year, I visited an Army recruiter and enlisted. I served on active duty for exactly five years, from 10/1/2012 until 9/30/2017. After I read your Law Review 17102, I applied for reemployment at CHSI on 11/15/2017, well within the 90-day deadline.

In September 2012, my last day at work, at CHSI, was Friday, 9/14/2012. I had no idea that I might have the right to reemployment after my service, and at that point I had not heard of USERRA, but I told my CHSI supervisor that I was leaving because I was joining the Army. The company treated me to lunch on my last day at work, to honor my decision to enlist.

I left my CHSI job 17 days before I reported to basic training, on 10/1/2012. I left the job a little early because I needed some time to get my affairs in order before reporting to basic training. After I left active duty on 9/30, I waited until 11/15/2017 to apply for reemployment. I did not apply earlier because I had no idea that I might have the right to reemployment until I read your Law Review 17102.

The CHSI personnel director told me that she is very familiar with USERRA. She said that I do not have the right to reemployment at CHSI because a period of five years and 61 days elapsed between my last day at work (9/14/2012) and the date that I applied for reemployment (11/15/2017).

Does the five-year limit count only the period of my active duty (exactly five years)? Or does the limit count the entire time that I was away from my civilian job?

The personnel director insisted that the entire period of absence is subject to the five-year limit. In support of that proposition, she cited Section E2-3 of Enclosure (2) of Department of Defense Instruction (DODI) 1205.12, dated 4/4/1996, with Change 1 dated 4/16/1997. That section provides: "In order to retain reemployment rights and benefits provided by Chapter 43 of 38 U.S.C. [USERRA], the cumulative length of *absences* from the same employer cannot exceed 5 years." (Emphasis supplied.)

Is it the period of *service* that is subject to the five-year limit? Or is it the period of *absence*?

**A:** It is the period of *service* that is subject to the five-year limit, not the period of *absence*. The quoted sentence from DODI 1205.12 is flat wrong. I have pointed out the error to DOD several times, but it has not been corrected.

In 1996, DOD published a notice about this instruction in the *Federal Register*. The notice was ambiguous and confusing. It said that the regulation was final, but it also invited those persons with comments or suggestions to call a Colonel Branson and provided a Pentagon telephone number. I called Colonel Branson and told him about the ambiguous *Federal Register* notice. He responded: "What the f... is the *Federal Register*?"

I patiently explained to Colonel Branson that the *Federal Register* is a federal publication that comes out every business day and that includes both proposed and final regulations adopted or under consideration by federal agencies. He said, “We have lawyers here in the Pentagon who handle that legal mumbo-jumbo.”

I told him that there were several errors in the regulation’s summary of USERRA, including the statements that the “cumulative length of *absences*” was subject to the five-year limit. He told me that the regulation was final and that he was not interested in hearing my suggestions about the regulation’s wording. It was a very frustrating conversation.

Section 4312(c) of USERRA sets forth the five-year limit and its 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
  - **(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.<sup>3</sup>

The Department of Labor (DOL) USERRA Regulation makes it very clear that only the *period of service* is subject to the five-year limit, as follows:

**Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?**

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*No. The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.*<sup>4</sup>

You have used every day of your five-year limit, but you have not exceeded the five-year limit. The 16 days between your departure from your civilian job and your entry on active duty by reporting to basic training, and the 45 days between your departure from active duty and your application for reemployment do not count toward exhausting your five-year limit.

If you meet the other four USERRA conditions,<sup>5</sup> you are entitled to reemployment.

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<sup>3</sup> 38 U.S.C. 4312(c) (emphasis supplied).

<sup>4</sup> 20 C.F.R. 1002.100 (bold question in original, emphasis by italics supplied).

<sup>5</sup> You must have left the civilian job to perform uniformed service, and you clearly did that. You were required to give the employer prior oral or written notice. You were not required to tell the employer about the law or to predict that you would be returning to the company after completing your military service. 20 C.F.R. 1002.88. You must have served honorably and have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. 4304. You must have made a timely application for reemployment, and you clearly did.