

## Involuntary Service Does Not Count Toward Exhausting your Five-Year Limit under USERRA

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

[Update on Sam Wright](#)

### 1.3.1.2—Character and duration of service

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 the Uniformed Services Employment and Reemployment Rights Act (USERRA):

- a. You must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services.<sup>3</sup>
- b. You must have given the employer prior oral or written notice.<sup>4</sup>

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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).

<sup>3</sup> 38 U.S.C. 4312(a).

<sup>4</sup> 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).

- 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.<sup>5</sup>
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>6</sup>
- e. You must have made a timely application for reemployment after release from the period of service.<sup>7</sup>

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
  - **(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

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

<sup>6</sup> 38 U.S.C. 4304.

<sup>7</sup> 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.

which personnel have been ordered to active duty under section 12304 of title 10;

- **(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>8</sup>

Section 4312(c)(4)(A) (italicized above) exempts from the five-year limit all *involuntary* military service periods performed by military retirees or by members of the National Guard or Reserve. Those of us who drafted USERRA took great care to ensure that all title 10 and title 14 (Coast Guard) sections that provide for the involuntary call to active duty or retention on active duty of an individual would be included in section 4312(c)(4)(A). It would be fundamentally unfair to allow an *involuntary* period of service to put an individual over the five-year limit and cause that individual to go over the five-year limit and thereby lose the right to reemployment.

For example, Lieutenant Colonel Eager Beaver, USAFR has been away from his civilian job at Daddy Warbucks Air Cargo Company (DWACC) many times for voluntary and involuntary service. Beaver has exhausted 4.5 years of his five-year limit with respect to DWACC, and he has only six months of head-room on the limit. We must ensure that an involuntary call to active duty does not put Beaver over the limit and cause him to lose his DWACC job.

In 2011, Congress added two new sections providing for *involuntary* call to active duty of Reserve Component personnel. Here are those two sections:

- **(a)** Authority. When a Governor requests Federal assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), the Secretary of Defense may, *without the consent of the member affected*, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request.
- **(b)** Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or any other law.

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<sup>8</sup> 38 U.S.C. 4312(c) (emphasis supplied).

- **(c)** Termination of duty. Whenever any unit or member of the reserve components is ordered to active duty under this section, the service of all units or members so ordered to active duty may be terminated by order of the Secretary of Defense or law.<sup>9</sup>
- **(a)** Authority. When the Secretary of a military department determines that it is necessary to augment the active forces for a preplanned mission in support of a combatant command, the Secretary may, subject to subsection (b), order any unit of the Selected Reserve (as defined in section 10143(a) of this title [10 USCS § 10143(a)]), *without the consent of the members*, to active duty for not more than 365 consecutive days.
- **(b)** Limitations.
  - **(1)** Units may be ordered to active duty under this section only if--
    - **(A)** the manpower and associated costs of such active duty are specifically included and identified in the defense budget materials for the fiscal year or years in which such units are anticipated to be ordered to active duty; and
    - **(B)** the budget information on such costs includes a description of the mission for which such units are anticipated to be ordered to active duty and the anticipated length of time of the order of such units to active duty on an involuntary basis.
  - **(2)** Not more than 60,000 members of the reserve components of the armed forces may be on active duty under this section at any one time.
- **(c)** Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or total number of members in grade under this title or any other law.
- **(d)** Notice to Congress. Whenever the Secretary of a military department orders any unit of the Selected Reserve to active duty under subsection (a), such Secretary shall submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of such unit.
- **(e)** Termination of duty. Whenever any unit of the Selected Reserve is ordered to active duty under subsection (a), the service of all units so ordered to active duty may be terminated--
  - **(1)** by order of the Secretary of the military department concerned; or
  - **(2)** by law.

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<sup>9</sup> 10 U.S.C. 12304a (emphasis supplied). This section was added to the United States Code by the National Defense Authorization Act for Fiscal Year 2012, Public Law 112-81, 125 Stat. 1394.

- **(f)** Relationship to War Powers Resolution. Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution (50 U.S.C. 1541 et seq.).
- **(g)** Considerations for involuntary order to active duty. In determining which units of the Selected Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to--
  - **(1)** the length and nature of previous service, to assure such sharing of exposure to hazards as national security and military requirements will reasonably allow;
  - **(2)** the frequency of assignments during service career;
  - **(3)** family responsibilities; and
  - **(4)** employment necessary to maintain the national health, safety, or interest.
- **(h)** Policies and procedures. The Secretaries of the military departments shall prescribe policies and procedures to carry out this section, including on determinations with respect to orders to active duty under subsection (g). Such policies and procedures shall not go into effect until approved by the Secretary of Defense.
- **(i)** Defense budget materials defined. In this section, the term "defense budget materials" has the meaning given that term in section 231(f)(2) of this title.<sup>10</sup>

For almost four years, there was an unsatisfactory situation, in that it was possible that a member of the National Guard or Reserve could be involuntarily called to active duty and could thereby go over the five-year limit and lose his or her right to reemployment. The National Defense Authorization Act for Fiscal Year 2012 should have, but did not, amend section 4312(c)(4)(A) of USERRA by adding sections 12304a and 12304b to the title 10 sections included in section 4312(c)(4)(A). That glitch was corrected by section 562 of the National Defense Authorization Act for Fiscal Year 2016.<sup>11</sup> That law amended section 4312(c)(4)(A) by adding sections 12304a and 12304b to the list of sections, duty under which does not count toward exhausting an individual's five-year limit.

When a period of service is exempt from the five-year limit under section 4312(c)(4)(A) of title 38, it is not, strictly speaking, necessary to have "magic words" in the orders, excluding the period of service from the individual's five-year limit. Involuntary service is exempt from the five-year limit under section 4312(c)(4)(A) and it is not necessary to have a determination and certification by the Service Secretary or the Assistant Secretary for M&RA. Nonetheless, it is useful to include "magic words" in the orders, to make clear to the civilian employer that the period of service does not count toward the individual's five-year limit.

In Law Review 17119 (December 2017), you will find a link to DODI 1205.12 of 2/24/2016 with Change 1 dated 5/20/2016 and a copy of the 7/14/2017 memorandum by the Acting Assistant

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<sup>10</sup> 10 U.S.C. 12304b (emphasis supplied). This section was added to the United States Code by the National Defense Authorization Act for Fiscal Year 2012, Public Law 112-81, 125 Stat. 1395.

<sup>11</sup> Public Law 114-92, 129 Stat. 726.

Secretary of the Air Force (Manpower & Reserve Affairs) and the National Guard Bureau memorandum dated 10/27/2017. These three documents share an inadvertent but important error that should be corrected as soon as possible.

These three documents refer to 10 U.S.C. 12304(a) and 10 U.S.C. 12304(b). Those references should be changed to 10 U.S.C. 12304a and 10 U.S.C. 12304b.

Section 12304(a) and section 12304(b) are subsections (a) and (b) of section 12304. Sections 12304a and 12304b are separate sections of title 10 that come after section 12304 and before section 12305. *Yes, the parentheses or lack thereof make a big difference.*