

March 2018

Duty under 10 U.S.C. 12301(d) Can Be Exempt from the Five-Year Limit under USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)²
[\(Update on Sam Wright\)](#)

1.3.1.2—Character and duration of service

Q: I am a Captain in the Army Reserve and a member of the Reserve Officers Association (ROA). On the civilian side, I am a GS-13 employee of the Department of the Army (DA). I am currently on a one-year voluntary recall to active duty, and I expect to leave active duty at the end of the current fiscal year (9/30/2018). My orders cite as authority “10 U.S.C. 12301(d).”

My orders also contain the following sentence in the “additional instructions” section: “This active duty period is exempt from the five-year cumulative service limit on reemployment rights under title 38, U.S.C., section 4312(c)(4)(B).”

I have read several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 16043

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1600 “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 1400 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.

(May 2016). That article is a very detailed description of USERRA's five-year limit—what counts and what does not count.

I have had a protracted argument with my civilian DA supervisor and the DA personnel office at my base as to whether my current year of active duty counts toward my five-year limit. I contend that the current active duty period is exempt from the five-year limit, based on the statement in my orders. My supervisor and the DA personnel office insist that this year counts toward exhausting my limit. Who is right?

Answer, bottom line up front

Your current year of active duty, under the orders you sent me, is clearly exempt from the computation of your five-year limit. But there is absolutely no point in the initiation or continuation of an argument with your civilian employer about the five-year limit, or any of the other USERRA conditions for reemployment, until you have been released from the period of service and have applied for reemployment.

Explanation

As I have explained in Law Review 15116 (December 2015) and many other articles, a service member or veteran must meet five simple conditions to have the right to reemployment under USERRA:

- a. Left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service, as defined by USERRA.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which the person seeks reemployment.
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.
- e. Made a timely application for reemployment, after release from the period of service.

At this point, today, you meet the first two conditions for reemployment, in that you left your civilian job to perform service and gave the employer prior oral or written notice. It is very likely but not certain that you will meet the other three conditions after the end of your current orders on 9/30/2018. Your active duty could be extended, voluntarily or involuntarily, beyond the end of your current orders. You could do something incredibly stupid ("Let's wake up the prisoners and play the naked pyramid game again.") and receive a disqualifying bad discharge. You could get a great job offer in the private sector and choose not to apply for reemployment in your civilian DA job. God forbid, you could die. Until you have been released from the period

of service and have applied for reemployment, there is no point in having a discussion or argument about the five USERRA conditions.

In Law Review 16043 (May 2016), I advised the individual Reserve Component (RC) service member to track his or her own five-year limit carefully. If you want to maintain the option of returning to your pre-service employer, you must track how much of the five-year limit you have used and how much “head room” you have remaining. But *do not involve the civilian employer in the tracking process*. While you are on active duty, there is just no point in getting into an argument with the employer as to whether a specific period of service counts toward the limit or is exempt from the limit.

Now, let me turn to the question of whether your current year of service counts toward the limit or is exempt. Section 4312(c) of USERRA sets forth the five-year limit and the exemptions (kinds of service that do not count toward exhausting the individual’s limit). That subsection reads 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 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;
 - (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

Q: The Staff Judge Advocate of the DA organization that is my civilian employer has stated that my current year of voluntary active duty is not exempt from the five-year limit because my orders cite 10 U.S.C. 12301(d) and that subsection is not one of the title 10 subsections listed in section 4312(c)(4)(A) of USERRA.⁴ What do you say about that?

A: Your current year of active duty is exempt from the five-year limit under section 4312(c)(4)(B).⁵ That is the subsection of USERRA that is cited in your orders, in the sentence that states that this period of service is exempt from the five-year limit.

As I carefully and comprehensively explained in Law Review 16043 (May 2016), section 4312(c) sets forth nine separate exemptions from the five-year limit. To be exempt from the five-year limit, a period of service needs to qualify under *one of the exemptions*, not two or more.

The Secretary of the Army determined that your current year of active duty, under the orders that you sent me, was “because of a war or national emergency declared by the President or the Congress.” If that determination had not been made, the statement about the current duty being exempt from the five-year limit would not have been included in your orders. Your current year of service is clearly exempt from the five-year limit.

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

⁴ 38 U.S.C. 4312(c)(4)(A).

⁵ 38 U.S.C. 4312(c)(4)(B).