

## LAW REVIEW 18031<sup>1</sup>

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### I Think that I Am Entitled to Reemployment under State Law although I Will Be beyond USERRA's Five-Year Limit

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[\(Update on Sam Wright\)](#)

1.1.1.7—USERRA applies to state and local governments

1.1.3.1—USERRA applies to voluntary service

1.3.1.2—Character and duration of service

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

2.0—Paid leave for government employees who are Reserve Component members

**Q: I am a Lieutenant Colonel in the Illinois Army National Guard (ILARNG), and I recently joined the Reserve Officers Association (ROA) because I am impressed with your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have read many of the articles, especially Law Review 16043 (May 2016), about USERRA’s five-year limit.**

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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 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.

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

**On the civilian side, I work for the State of Illinois and have for many years. I have been away from my state job for, cumulatively, more than eight years for military periods of varying durations. Some of the periods are exempt from the computation of my five-year limit with the State of Illinois as my employer, but I figure that I am within two months of exhausting my five-year limit. Going forward, I am being careful to ensure that any further military duty that I perform will be exempt from the five-year limit. Your Law Review 16043 has been most helpful to me in understanding what periods count toward the five-year limit and what periods are exempt.**

**I have been offered the opportunity to volunteer for a one-year active duty period, and the opportunity is very interesting to me. The problem is that the period (if I choose to do it) is clearly not exempt from the five-year limit and will clearly put me over my cumulative five-year limit with the State of Illinois.**

**A lawyer friend of mine told me that under Illinois Consolidated Statutes (ILCS) section 325/1 an employee of the State of Illinois who is a member of the National Guard or Reserve is entitled to reinstatement in the civilian job after *any period* of military service or training and there is no five-year limit. I think that if I avail myself of the opportunity to do one more year of voluntary active duty I will still have the right to reinstatement under Illinois state law, even if I am beyond USERRA's five-year limit. What do you think?**

#### **Answer, bottom line up front**

If you proceed to avail yourself of this one-year active duty opportunity, you will have an *arguable* claim to reinstatement under Illinois law, but this is not a slam-dunk argument. Because you have worked for the state for many years, you have a great deal at stake here, in terms of seniority and pension credit in the civilian job. I urge you to think long and hard before you bet all of that on an *arguable* interpretation of state law. I question your lawyer friend's interpretation of 5 ILCS 325/1.

#### **Explanation**

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

- a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.
- b. Must have given the employer prior oral or written notice.
- c. 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. There are nine exemptions—kinds of service that do not count toward exhausting your five-year limit.

- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. Must have made a timely application for reemployment, after release from the period of service.<sup>3</sup>

You must meet all five of these conditions to have the right to reemployment under USERRA. If you are beyond the five-year limit even after the exempt periods are subtracted from the cumulative total, you do not have the right to reemployment under federal law.

Now, let us turn to the question of whether you will have the right to reinstatement under Illinois law. Here is the entire text of the Illinois statutory section that your lawyer friend cited for you:

**(a)** *Any full-time employee of the State of Illinois, a unit of local government, a public institution of higher education (as defined in Section 1 of the Board of Higher Education Act [110 ILCS 205/1]), or a school district, other than an independent contractor, who is a member of any reserve component of the United States Armed Forces or of any reserve component of the Illinois State Militia, shall be granted leave from his or her public employment for any period actively spent in military service, including:*

- (1)** basic training;
- (2)** special or advanced training, whether or not within the State, and whether or not voluntary;
- (3)** annual training; and
- (4)** any other training or duty required by the United States Armed Forces.

- During these leaves, the employee's seniority and other benefits shall continue to accrue.
- During leaves for annual training, the employee shall continue to receive his or her regular compensation as a public employee. During leaves for basic training, for up to 60 days of special or advanced training, and for any other training or duty required by the United States Armed Forces, if the employee's daily rate of compensation for military activities is less than his or her daily rate of compensation as a public employee, he or she shall receive his or her regular compensation as a public employee minus the amount of his or her base pay for military activities.

**(b)** *Any full-time employee of the State of Illinois or a public institution of higher education (as defined in Section 1 of the Board of Higher Education Act), other than an independent contractor, who is a member of the Illinois National Guard or a reserve component of the United States Armed Forces or the Illinois State Militia and who is mobilized to active duty shall continue during the period of active duty to receive his or*

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<sup>3</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.

her benefits and regular compensation as a State employee, minus an amount equal to his or her military active duty base pay.

**(c)** In making the calculations required under this Section, the applicable governmental unit shall:

**(1)** determine the employee's daily rate of compensation as a public employee by dividing the employee's regular compensation as a public employee during the pay period by the number of work days in the pay period;

**(2)** determine the employee's daily rate of compensation for military activities by dividing the employee's base pay for the applicable military activities by the number of calendar days in the month; and

**(3)** provide for an offset from the employee's gross compensation of the lesser of (i) the amount determined under paragraph (1) of this subsection (c) multiplied by the number of days that the public employee would have otherwise been required to work for the applicable governmental unit during the pay period or (ii) the amount determined under paragraph (2) of this subsection multiplied by the number of days that the public employee would have otherwise been required to work for the applicable governmental unit during the pay period.

**(d)** The Department of Central Management Services and the State Comptroller shall coordinate in the development of procedures for the implementation of this Section.<sup>4</sup>

Your job-protected right to absent yourself from your state job for military *training* is protected “*whether or not voluntary*.”<sup>5</sup> But other military duty is protected by this section only if it is “*required by the United States Armed Forces*.”<sup>6</sup> The State of Illinois is likely to argue that if you *volunteer* for a lengthy period of military duty (not National Guard or Reserve training), section 325/1 does not apply to that duty and the absence from state employment necessitated by that duty.<sup>7</sup>

#### **Q: What is the relationship between USERRA and state laws?**

**A:** USERRA is a floor and not a ceiling on rights. A state law can give you *greater or additional rights* but cannot take away rights granted to you by USERRA. Here is the pertinent USERRA section:

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<sup>4</sup> 5 ILCS 325/1 (emphasis supplied).

<sup>5</sup> 5 ILCS 325/1(a)(2) (emphasis supplied).

<sup>6</sup> 5 ILCS 325/1(a)(4) (emphasis supplied). Yes, USERRA applies to voluntary as well as involuntary military service, but in enacting laws providing for the right to reinstatement for persons who are not entitled to reemployment under USERRA, for whatever reason, a state is not precluded from making a distinction between voluntary and involuntary duty.

<sup>7</sup> I have done a computerized legal search on 5 ILCS 325/1, looking for published court decisions construing or applying this section. I found only three reported court decisions, and those decisions do not address the question of whether there is a five-year or other limit on cumulative military leaves of absence under that section.

- (a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.<sup>8</sup>

If you are claiming reemployment rights under state law because you are beyond the five-year limit or because you fail to meet some other USERRA condition, you should not expect to get any help from the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) or from the United States Department of Justice (DOJ). Those agencies only have authority to enforce USERRA.

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<sup>8</sup> 38 U.S.C. 4302.