

You Must Track your own Five-Year Limit—Part 2

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.1.3.1—USERRA applies to voluntary service

1.3.1.3—Character and duration of service

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Army Reserve currently on active duty. I have worked for the Federal Government (several different agencies) since 1999. I left my CHSI job to return to active duty, voluntarily, on 10/1/2014. My original orders were for one year, through 9/30/2015. I asked for and the Army gave me one-year extensions in September 2015, September 2016, and September 2017. My current orders expire 9/30/2018, and this time it is likely that the orders will not be extended.

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 (VRRRA—the 1940 version of the federal reemployment statute) for 36 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.

I gave prior oral and written notice to my direct federal civilian supervisor and the personnel director of my federal agency of my Army orders in 2014, and I have also given them notice of each extension. Each time, the personnel director responded courteously saying: "Thank so for the notice. Be safe. Stay on active duty as long as you wish. Your job will be here for you when you return."

Recently, when I learned that this time the Army probably won't extend my orders yet again, I contacted the personnel office at my federal civilian agency and learned that the personnel director with whom I have been dealing retired a few months ago. The new director told me that there is a cumulative five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and that my last four years of active duty, when added to some service that I performed in 2001-02 and 2005-07 and 2009-11 puts me over the five-year limit. The new director told me that USERRA does not require the agency to reemploy me because I am beyond the five-year limit and that the agency will not rehire me because it has no current vacancy for a person with my skills and experience.

I have worked for several federal agencies since I began my federal civilian career in 1999. I worked for the United States Department of Commerce from 1999 to 2003, for the Department of Labor from 2003 to 2008, and the Department of the Interior from 2008 to 2012. I began my current federal civilian job with another department in October 2012, two years before I left to go on this current active duty period. I think that my 2001-02, 2005-07, and 2009-11 active duty periods should not count toward my five-year limit because I performed those periods before I began my current civilian job at a different federal agency.

More importantly, I think that I was misled by the recently retired personnel director of my federal agency. She assured me, in writing, four times, that I could remain on active duty for as long as I wished and that my job would be there for me on my eventual return. I think that it is unfair and illegal for the federal agency to walk away from her assurances to me and deny me reemployment based on my having exceeded the five-year limit. What do you think?

Answer, bottom line up front:

To have the right to reemployment with any employer (federal, state, local, or private sector), you must meet the five USERRA conditions, including the five-year cumulative limit on the duration of the period or periods of uniformed service relating to the employer relationship for which you seek reemployment. The Federal Government is a unitary employer for purposes of the five-year limit. When you leave a job at one federal agency to take a new job at another federal agency and take your federal seniority and pension credit with you to the new job, you do not have a new employer relationship and you do not get a fresh five-year limit.

The personnel director's assurances to you, even in writing, are not binding on the Federal Government. If you are in fact over the five-year limit with respect to your employer relationship with the Federal Government, you do not have the right to reemployment.

As I have explained in detail in Law Review 16043 (May 2016) and other articles, there are nine exemptions to the five-year limit. That means that there are nine kinds of service that do not count toward exhausting your five-year limit. I would need to review all your military orders and DD-214 forms since 1999, when you began your federal civilian career. It may be that some of your active duty periods are exempt from the five-year limit and that when these exempt periods are subtracted you are still within the five-year limit.

Explanation

The Supreme Court has held that the Federal Government is *not bound by bad advice or erroneous information provided by federal employees*.³ Applying those precedents to your situation means that your argument that you should not be denied reemployment based on having exceeded the five-year limit because you relied on what the personnel director told you is not likely to be accepted by the Merit Systems Protection Board (MSPB), which adjudicates claims that federal executive agencies have violated USERRA.

Whether you work for the Federal Government, a state or local government, or a private employer, you need to track your own five-year limit, and Law Review 16043 will help you do that. You need to know which periods of military service count toward your five-year limit and which periods are exempt. You need to ensure that you remain within your five-year limit. Please do not contact me after you are already beyond the limit, because I do not have the power to turn back the hands of time.

You may need legal advice in determining which periods of service count toward the five-year limit and which are exempt. *Do not ask your employer to agree or disagree with your assertion that a specific period of service is exempt from the five-year limit, and do not get into an argument with the employer about the five-year limit until you have been released from the period of service and have applied for reemployment.*

³ See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).