

LAW REVIEW¹ 18073

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Air Force Memorandum on USERRA's Five-Year Limit Needs To Be Rewritten

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[Update on Sam Wright](#)

- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.3.1.3—Timely application for reemployment
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
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On 7/14/2017, Daniel R. Sitterly (the Acting Assistant Secretary of the Air Force for Manpower & Reserve Affairs) sent a memorandum about the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA) to the Chief of Staff of the Air Force, the Director of the Air National Guard, and the Chief of the Air Force Reserve. I have attached a link to this memorandum at the bottom of this article.³

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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—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 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.

³ Section 4312(c) of USERRA, 38 U.S.C. 4312(c), sets forth the five-year limit and the nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit with respect to his or her current civilian employer. Five of the exemptions require the "Secretary concerned" to make a determination and certification, for the period of service to be exempted from the five-year limit. Those subsections are 4312(c)(3), 4312(c)(4)(B), 4312(c)(4)(C),

This memorandum contains multiple errors and should be rewritten. For example, the memorandum states that one of the conditions for the right to reemployment is that “the cumulative length of the *absences* from *civilian employment* does not exceed five years.” This statement is wrong.

In the first place, it is the *cumulative period or periods of service*, not the periods of *absence*, that are subject to the five-year limit. For example, Master Sergeant Mary Jones, USAFR was on active duty for exactly one year, from 1/1/2017 until 12/31/2017. She left her job to prepare for her deployment on 12/16/2016.⁴ After she was released from active duty on 12/31/2017, she waited 60 days, until 3/1/2018, to apply for reemployment at her pre-service job.⁵ After she applied for reemployment, the employer waited another two weeks to put her back on the payroll on 3/16/2018. Jones was away from her job for one year and three months, but only the one year of uniformed service counts toward her five-year limit.⁶ If her year of uniformed service is exempt from the five-year limit under one of the nine exemptions set forth in section 4312(c) of USERRA,⁷ that year does not count toward exhausting her five-year limit.⁸

Second, the five-year limit does not apply to all periods of service that caused absence from “civilian employment.” Only periods of uniformed service “with respect to the employer

4312(c)(4)(D), and 4312(c)(4)(F). The other four exemptions do not require a secretarial determination. The “Secretary concerned” is the Service Secretary, like the Secretary of the Air Force, the Secretary of the Navy, the Secretary of the Army, or the Secretary of Homeland Security, for the Coast Guard. As I have explained in detail in Law Review 16075 (August 2016), the authority to make these determinations that result in exemptions has been delegated to the Assistant Secretary for Manpower & Reserve Affairs of each military department (Army, Navy, and Air Force). These assistant secretaries have written memoranda about the exemptions from the five-year limit, but the memoranda are poorly written and badly out of date. For the Coast Guard, the authority to make these determinations has been delegated to the Commandant of the Coast Guard. In the Coast Guard, there has been no attempt to draft general memoranda exempting periods of service from the five-year limit. The Coast Guard is small enough for the Commandant to make the determinations on a case-by-case basis. That approach would never work in the Army or the Air Force.

⁴ The Department of Labor (DOL) USERRA Regulations provide: “If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.” 20 C.F.R. 1002.74(b). It was reasonable and permissible for Jones to leave her civilian job on 12/16/2016, 16 days before her required report date for active duty, to put her affairs in order. After she meets the five USERRA conditions and returns to work, Jones is entitled to seniority and pension credit for the entire time that she was away from work for service, including this 16-day period on the front end. But only her year of active duty, from 1/1/2017 to 12/31/2017, counts toward exhausting her five-year limit with her current civilian employer. Please see Law Review 60 (December 2002) and Law Review 10015 (February 2010).

⁵ After a period of service of more than 180 days, as in this case, Jones had 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Thus, her application for reemployment on 3/1/2018 was timely. The period after she left active duty, while she was waiting to submit her application for reemployment, counts toward Jones’ seniority and pension credit at the civilian job, but that period does not count toward exhausting her five-year limit with her current civilian employer.

⁶ Please see Law Review 17120 (December 2017).

⁷ 38 U.S.C. 4312(c). I have copied section 4312(c) in its entirety at the bottom of this article.

⁸ Please see Law Review 16043 (May 2016) for a detailed discussion of the nine exemptions from the five-year limit.

relationship for which a person seeks reemployment" are subject to the five-year limit.⁹ For example, Master Sergeant Jones was hired by Coors Heineken & Schlitz Incorporated (CHSI) in January 2016, almost a year before she left her job to report to the relevant active duty period. Before January 2016, Jones was employed by the City of Mudville. Periods of uniformed service that Jones performed while employed by the City of Mudville are irrelevant for purposes of computing her five-year limit with CHSI. When she started a new employer relationship with a new civilian employer in January 2016, Jones received a fresh five-year limit.¹⁰

The Sitterly memorandum also refers to periods of service under 10 U.S.C. 12304(a) and 12304(b) after 10/1/2015 and provides that those periods of service are exempt from the five-year limit. The memorandum should read that periods of service under 10 U.S.C. 12304a and 12304b are exempt. *This is an important typographical error that needs to be corrected.*

Section 12304a is not the same thing as section 12304(a), and section 12304b is not the same thing as section 12304(b). Section 12304(a) is subsection (a) of section 12304. Section 12304a is a *separate section* that comes after section 12304 and before section 12305, and likewise for section 12304b.

The United States Code (U.S.C.) is codified in 52 titles, and sections are numbered consecutively within a title. Some of the titles have become crowded over the decades, and it has been necessary for Congress to enact new sections with numbers like 12304a and 12304b.

Judge advocates assigned to Mr. Sitterly's office in 2017 should have known this and should have corrected these errors before the memorandum was finalized. It is my experience that Active Component judge advocates are often allergic to reading and understanding laws like USERRA, laws that are generally associated with the Reserve Components.

At least the Air Force has tried to keep its five-year memorandum up to date. The corresponding memorandum for the Department of the Army is more than 15 years old and badly needs updating. All three military departments need to update, correct, and rewrite their five-year memoranda.

These memoranda also need to be made *accessible* to Reserve and National Guard service members and their civilian employers. An Air National Guard Lieutenant Colonel provided me the Sitterly memorandum. He told me that finding the memorandum required many hours of searching on the Internet.

Here is the entire text of section 4312(c) of USERRA:

⁹ 38 U.S.C. 4312(c).

¹⁰ Please see Law Review 11002 (January 2011).

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.¹¹

Here is a link to the 7/14/2017 Sitterly memorandum:

<http://www.roa.org/resource/resmgr/files/SAF-Memo.pdf>

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