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DOL-VETS Fact Sheet on USERRA Gets the Five-Year Limit Wrong

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[Update on Sam Wright](#)

1.3.1.2—Character and duration of service

1.3.2.2—Continuous accumulation of seniority-escalator principle

The Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) has important responsibilities related to the enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA).³ On the DOL-VETS website, you can find several "fact sheets" about USERRA, including VETS USERRA Fact Sheet 3.⁴ That fact sheet includes the following misleading sentence: "USERRA establishes the *cumulative length of time that an individual may be absent from work for military duty* and retain reemployment rights to five years."

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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 Those responsibilities are set forth in sections 4321, 4322, and 4323 of USERRA, 38 U.S.C. 4321-23.

⁴ See https://www.dol.gov/vets/programs/userra/userra_fs.htm.

This statement is wrong because it is the *cumulative period of service*, not the period of absence from the job, that is subject to the five-year limit.⁵ For example, Mary Jones was hired by Coors Heineken & Schlitz Incorporated (CHSI) on 1/1/2013. On 9/16/2013, she left her job to report to Army basic training, and she reported as ordered on 10/1/2013. She remained on active duty for exactly five years, until she was released from active duty on 9/30/2018. Mary then waited 85 days before applying for reemployment at CHSI on 12/24/2018. The CHSI personnel department contends that Mary is not entitled to reemployment because she has been absent from her job for five years and 100 days.

The personnel department is wrong. Mary's *period of service* did not exceed five years. The 15-day period between Mary's last day at the civilian job and her entry of active duty and the 85-day period between her release from active duty and her application for reemployment do not count toward the five-year limit. Mary is entitled to reemployment at CHSI.⁶

Mary was entitled to leave her civilian job 15 days before the date when she was to report to basic training. The DOL-VETS 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.⁷

Because Mary's period of uniformed service lasted more than 180 days, she had 90 days (starting on the date of release from service) to apply for reemployment with her pre-service employer, CHSI.⁸ Her application for reemployment on 12/24/2018 was timely. The 15-day period before she reported to basic training and the 85-day period after she was released from active duty and before she applied for reemployment do not count in exhausting her five-year limit with CHSI.

⁵ It should also be noted that there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting an individual's five-year limit with respect to a specific employer relationship. Please see Law Review 16043 (May 2016).

⁶ This assumes, of course, that Mary meets the other USERRA eligibility conditions. She must have given CHSI prior oral or written notice that she was leaving her job to perform uniformed service. She must have been released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA, 38 U.S.C. 4304. I am also assuming, for purposes of this article, that Mary did not perform any other non-exempt uniformed service between 1/1/2013 (when she was hired by CHSI) and 9/15/2013 (when she left her job to report to basic training).

⁷ 20 C.F.R. 1002.74(b).

⁸ 38 U.S.C. 4312(e)(1)(D).

Section 4312(c) of USERRA⁹ sets forth the five-year limit and the nine exemptions from the limit. That section provides that a person is entitled to reemployment “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.”¹⁰ Thus, it is clear that the five-year limit applies to the *cumulative period of service*, not the period of absence, which will be at least a few days longer than the period of service.

The DOL-VETS USERRA regulations also make clear that the period of service controls: “In general, the employee *may perform service in the uniformed services for a cumulative period of five (5) years* and retain reemployment rights with the employer.”¹¹ The regulations also provide: “The five-year limit includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit.”¹²

Q: For purposes of USERRA’s escalator principle, is Mary entitled to be treated as if she had been continuously employed during the entire period of five years and 100 days that she was away from her CHSI job for military service?

A: Yes. USERRA’s escalator principle is stated as follows:

A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of commencement of service in the uniformed services *plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.*¹³

USERRA’s legislative history makes clear that the returning service member or veteran who meets the five USERRA conditions and returns to work for the pre-service employer must be treated, for seniority purposes upon return, as if he or she had been continuously employed in the civilian job during the entire period of the military-related absence from work:

Section 4315(a) [later renumbered as 4316(a)] would recodify the “escalator” principle as it applies to seniority and all rights and benefits which flow from seniority, calculated as if the person had never left employment. For example, in determining how much vacation (length of vacation) a servicemember is entitled to in the years following reinstatement, *all time away from work (period between leaving the job and entering military service,*

⁹ 38 U.S.C. 4312(c).

¹⁰ *Id.*

¹¹ 20 C.F.R. 1002.99 (emphasis supplied).

¹² 20 C.F.R. 1002.100.

¹³ 38 U.S.C. 4316(a) (emphasis supplied).

*period of military service, and period between discharge or release from military service and reemployment) would be required to be considered under this section, together with the pre-military service period of employment.*¹⁴

¹⁴ House Committee Report, House Committee on Veterans' Affairs, April 28, 1993, H.R. Rep. 103-65 (Part I), reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 721 of the 2018 edition of the *Manual*.