

LAW REVIEW¹ 18112

December 2018

Does my Initial Training in the Army National Guard Count toward my Five-Year Limit?

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 Private (E-1) in the Army National Guard and a member of the Reserve Organization of America.³ I will report to Army Basic Training on 1/2/2019. I have read with great interest

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 At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost

several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), including Law Review 15116 (December 2015)⁴ and Law Review 16043 (May 2016).⁵

I expect to remain on active duty for two years and 11 months, from January 2019 through November 2021. After Basic Training, I will go through Special Forces Training and then Special Forces Medic Training. When I complete this training in late 2021, I expect to leave active duty and return to the police department.

After I leave active duty and return to the police department in late 2021, I will become a traditional National Guard member. I will need time off from my civilian job for inactive duty training (drills) and annual training. Because I will be a Special Forces soldier, my periodic training will be well beyond the traditional pattern of one weekend per month and two weeks in the summer. I will be subject to call-up for emergencies like Iraq and Afghanistan, and I would like to volunteer for some active duty opportunities as well.

When I leave active duty in late 2021, I will be well within the five-year limit, and I will have the right to reemployment. My concern is that if my upcoming active duty period counts toward my five-year limit my National Guard participation after reemployment will be severely constrained. Will my upcoming period count toward my five-year limit with the MPD? Will my periodic training count? What about involuntary call-ups?

A: Section 4312(c) of USERRA sets for the five-year limit and its exemptions 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;

equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁴ Law Review 15116 is a primer on USERRA's five conditions upon the right to reemployment.

⁵ Law Review 16043 is a detailed discussion of USERRA's five-year limit and the nine exemptions to the limit—kinds of service that do not count toward exhausting your limit with a specific employer.

(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.⁶

Your upcoming training period of almost three years should be exempt from your five-year limit under section 4312(c)(3), above. You will need the “Secretary concerned” (the Service Secretary—the Secretary of the Army for you) to determine and certify in writing that this period of training is necessary for your professional development and skill training. The “certification” should be by “magic words” in your orders. If there is not time to get these words included in your orders, the words should be included in the DD-214 that you receive when you leave active duty in late 2021. You should contact the Staff Judge Advocate to the Adjutant General of your state to communicate your need for these “magic words.”

After you leave active duty and return to the MPD, your periodic training (drills and annual training) will be exempt from the five-year limit under section 4312(c)(3), and you will not need “magic words” for those periods. If you are called to active duty involuntarily, your involuntary period is exempt from the five-year limit under section 4312(c)(4)(A). If you volunteer for active duty, the Secretary of the Army can exempt your voluntary service from the five-year limit under section 4312(c)(4)(B), (C), (D), or (F), with appropriate “magic words.”

⁶ 38 U.S.C. 4312(c) (emphasis supplied). Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit.

As a member of the National Guard, you will be subject to call-up for state active duty by the Governor, for state emergencies like hurricanes, riots, fires, etc. State law (not USERRA) will protect your right to reinstatement in your civilian job after periods of state active duty, and these state active duty periods do not count toward your five-year limit under USERRA. Please see the “state laws” section at www.roa.org/lawcenter. You will find 54 articles (50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) about the state and territorial laws that protect National Guard members on state or territorial active duty.