

## LAW REVIEW<sup>1</sup> 19022

February 2019

### New Department of the Air Force Memorandum on USERRA's Five-Year Limit and the Exemptions from the Limit

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

[Update on Sam Wright](#)

#### 1.3.1.2—Character and duration of service

In Law Review 18073 (August 2018), I attached a copy of the 7/14/2017 Department of the Air Force memorandum about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and specifically about USERRA's five-year cumulative limit on the duration of the period or periods of uniformed service that an individual can perform, with respect to an employer relationship, and retain the right to reemployment with that employer, and about USERRA's nine exemptions to the five-year limit. In Law Review 18073, I criticized the 7/14/2017 memorandum for its errors and misleading statements and strongly suggested that the memorandum needed to be rewritten.

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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 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.

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

I was most pleased to learn that the 2017 memorandum has been replaced by a new memorandum dated 10/10/2018. The new memorandum is signed by the Honorable Shon J. Monasco, the new Assistant Secretary of the Air Force for Manpower & Reserve Affairs. I am attaching a copy of the new memorandum at the bottom of this article.

I am pleased with the new memorandum. It is well written, and it has addressed each of the deficiencies of the 2017 memorandum that I addressed in Law Review 18073. It is most gratifying that our “Law Review” articles are being read and utilized at the Pentagon, among other places.

I invite the reader’s attention specifically to two paragraphs of the 2018 memorandum:

Some past orders lacked clarity on whether they qualified for USERRA exemption [exemption from the computation of the individual’s five-year limit]. NGB/CF and AF/RE have designated offices of responsibility for exemption determinations and have defined processes for service members and employers to receive confirmation on the exemption status of periods of service. For Air National Guard related USERRA inquiries, please contact NGB/A1PS at 240-612-8281 or [usaf.jbanafw.ngba1.mbx.a1ps@mail.mil](mailto:usaf.jbanafw.ngba1.mbx.a1ps@mail.mil). For Air Force Reserve related inquiries, please contact AFEC/A1CE at 703-614-0728. My office of responsibility for USERRA policy is the Deputy Assistant Secretary for Reserve Affairs and Airman Readiness (SAF/MRR) at 703-697-6430.

Further, AF/RE and NGB/CF will implement processes and update technical means to ensure future military orders include clear statements on exemption or non-exemption, the applicable exemption authority, and contact information for the home unit commander or a designee to address questions regarding periods of service in accordance with reference (c) [OASD Memorandum, Subject, “*Required USERRA Verbiage on Qualifying Reserve Component Orders*,” 6/21/2018]. The attached Department of Labor-developed spreadsheet identifies the proper verbiage to legally determine exemption status under each exempt category and should be used on all qualifying Reserve Component orders. It is understood that current order-writing systems may require system changes prior to full compliance.

I wholeheartedly endorse this attempt to improve the processes of order-writing for Reserve Component members and communicating with the civilian employers of Air Force Reserve and Air National Guard personnel, *with one important caveat. The person tasked to receive and respond to inquiries and complaints from civilian employers must be a full-timer, not a traditional Air Force Reservist or Air National Guard member.*

In most cases, the “home unit commander” will be a traditional Reserve Component member—a part-timer with his or her own civilian employer to worry about. If the unit commander’s contact information is routinely provided to the civilian employers of unit members, the unit commander will likely be overwhelmed with employer inquiries and complaints, and the unit commander’s relationship with his or her own civilian employer will suffer.

I also invite the reader’s attention to the final paragraph of the 2018 Air Force memorandum:

Commanders must remain vigilant to potential hardships to employers when approving short notice military orders. I ask each commander to consider employer impact when determining whether training must be accomplished during peak work cycles within various industries and employment sectors. Finally, I ask Air Force leaders at all levels to continue to maintain balance between mission, civilian employment, and family for each Airman in order to better sustain a healthy operational reserve.

I wholeheartedly endorse this approach. In Law Review 30 (October 2001), I wrote:

If there is a way for you (as the Commanding Officer) to schedule her [the unit member’s] AFTP [Additional Flight Training Periods] and other training in such a way as to minimize the disruption of the employer’s operations, without detracting from readiness, safety, and mission accomplishment, you should do that. If, however, there is an unavoidable conflict between the needs of the Air Force and the needs of the civilian employer, the needs of the Air Force must prevail.

In the Air Force Reserve and Air National Guard, unlike the Army Reserve and Army National Guard, the policy since 9/11/2001 has been to rely primarily upon volunteerism rather than utilizing the involuntary mobilization authorities. The problem with relying on volunteerism is that there will always be a handful of traditional reservists and Guard members who will volunteer serially, while most unit members will only perform the mandatory minimum.

Captain Eager Beaver, USAFR has been away from his civilian job 12 times for voluntary special assignments in the Air Force Reserve over the last three years. When he volunteers the 13<sup>th</sup> time, it is appropriate for the unit commander to say: “Thank you for volunteering, but this time I will find somebody else for this special assignment.”

*We must never lambaste the volunteer.* All military service is voluntary, in that Congress abolished the draft and established the All-Volunteer Military 46 years ago, in 1973. We must honor all those who volunteer to serve our country in uniform, especially those who volunteer to serve longer and more frequently than most of their colleagues. But that does not mean that we need to give orders to Captain Eager Beaver every time he volunteers.

I am informed that the Department of the Army and the Department of the Navy are working on new policy memoranda about USERRA. We will keep the readers informed of developments on this issue.

The 2018 Department of the Air Force memorandum begins on the following page.



# DEPARTMENT OF THE AIR FORCE

WASHINGTON DC

OCT 10 2018

## OFFICE OF THE ASSISTANT SECRETARY

MEMORANDUM FOR CHIEF OF STAFF OF THE AIR FORCE  
DIRECTOR, AIR NATIONAL GUARD  
CHIEF, AIR FORCE RESERVE

FROM: Assistant Secretary of the Air Force (Manpower and Reserve Affairs)

SUBJECT: Civilian Reemployment Protections for Air Force Military Personnel

- References:
- (a) DODI 1205.12 "*Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services*," 02/24/2016
  - (b) SAF/MR Memorandum, Subject, "*Civilian Reemployment Protections for Air Force Military Personnel*," 7/14/2017
  - (c) OASD Memorandum, Subject, "*Required Uniformed Services Employment Rights Act Verbiage on Qualifying Reserve Component Orders*," 6/21/2018

This memorandum incorporates and clarifies current policy regarding members' rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Title 38, United States Code (U.S.C.), Chapter 43 and supersedes reference (b). USERRA provisions provide protection to anyone absent from civilian employment due to uniformed service if a number of conditions are met, one of which is that the cumulative period of service away from one's current employer does not exceed five years. However, USERRA categorically exempts certain types of uniformed service, such as involuntary mobilization, annual training, and drill weekends (among others) from that five year cumulative service limit. USERRA and DoDI 1205.12 also provide the Secretary of the Air Force the authority to determine certain other periods of service exempt from the five year limit.

Under authority delegated by the Secretary of the Air Force, I have determined the following periods of service are exempt from the five-year limit:

- a. Periods of service performed by an Air Force Reserve Component (ARC) member ordered to or retained on active duty under 10 U.S.C. §12301(d) on or after September 14, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations. The basis for the order must be linked to the war or national emergency.<sup>1</sup>
- b. Periods of service performed by an ARC member through in-residence Developmental Education (DE).<sup>2</sup> This exemption is specifically based on the authority of 38 U.S.C. §4312 (c)(3), which exempts the service of a member who is performing duty "necessary for professional development" and certifies the approved DE in accordance with Reference (a).

<sup>1</sup> Linkage to the National Emergency may be shown by one or more indicia, including citation to Presidential Proclamation 7463; or, to Executive Order 13223; or to a named operational mission associated with the National Emergency; or to the funding sources that support named operations or missions associated with the National Emergency. In most cases, members ordered to duty under 10 U.S.C. §12301(d), but serving under 10 U.S.C. §12310 (AGR duty); 10 U.S.C. § 10211, or 10 U.S.C. §12402 will not fit this criteria.

<sup>2</sup> Approved in-resident DE is found in AFI36-2656, *Developmental Education* (23 July 2018).

c. Periods of service when an ARC member performs duty to fulfill additional training requirements necessary for professional development (not exempted in paragraph b) or for the completion of skill training or retraining, to include "Seasoning Training" upon the completion of AF Specialty Code (AFSC) awarding training. This exemption is for duty performed for all Technical and Professional training based at school houses or formal courseware listed in the Air Force Education and Training Course Announcements to include AFSC awarding courses and required supplemental training. ARC members enrolled in sister service courses must apply to the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) (SAF/MR) for a USERRA exemption, unless the sister service is the lead component for a mandatory course for members prior to deployment.

Individuals seeking exemptions for periods of service when an ARC member is ordered to active duty in support of a critical mission or requirement (as defined in DoDI 1205.12, Enclosure 2, paragraph 1.b. (4)(c)) of the uniformed services must seek approval from SAF/MR. NGB/CF or AF/RE will review and endorse all individual exemptions requests and may disapprove such requests without further routing. NGB/CF and AF/RE will staff all endorsed individual exemption requests through SAF/MRR and AF/JAA for a recommendation to SAF/MR. The designation of a critical requirement to gain necessary experience to qualify for key leadership positions must be employed judiciously. This exemption will not be used to routinely extend reemployment rights or to extend individuals in repeated statutory or Active Guard and Reserve (AGR) tours. Individual exemptions will not be granted if the member has sufficient cumulative five year service limit time remaining to complete the term of duty.

Some past orders lacked clarity on whether they qualified for USERRA exemption. NGB/CF and AF/RE have designated offices of responsibility for exemption determinations and have defined processes for service members and employers to receive confirmation on the exemption status of periods of service. For Air National Guard related USERRA inquiries please contact NGB/A1PS at 240-612-8281 or usaf.jbanafw.ngba1.mbx.a1ps@mail.mil. For Air Force Reserve related inquiries, please contact ARFC/A1CE at 703-614-0728. My office of responsibility for USERRA policy is the Deputy Assistant Secretary for Reserve Affairs and Airman Readiness (SAF/MRR) at 703-697-6430.

Further, AF/RE and NGB/CF will implement processes and update technical means to ensure future military orders include clear statements on exemption or non-exemption, the applicable exemption authority, and contact information for the home unit commander or a designee to address questions regarding periods of service in accordance with reference (c). The attached Department of Labor-developed spreadsheet identifies the proper verbiage required to legally determine exemption status under each exempt category and should be used on all qualifying Reserve Component orders. It is understood that current order writing systems may require system changes prior to full compliance.

Commanders must remain vigilant to potential hardships to employers when approving short notice military orders. I ask each commander to consider employer impact when determining whether training must be accomplished during peak work cycles within various industries and employment sectors. Finally, I ask Air Force leaders at all levels to continue to maintain balance between mission, civilian employment, and family for each Airman in order to better sustain a healthy operational reserve.



Shon J. Manasco  
Assistant Secretary of the Air Force  
(Manpower and Reserve Affairs)

Attachments:

1. Department of Labor Coordinated Exemption Verbiage
2. OASD Memorandum, Subject, "Required Uniformed Services Employment Rights Act Verbiage on Qualifying Reserve Component Orders," 6/21/2018

## DOL Coordinated Required Exemption Verbiage

A	B	C	D	E
1	Always include this language: "This period of uniformed service is ordered under"	Always fill in with authority  EXAMPLE: This period of uniformed service is ordered under	Additional authority. Use if appropriate. If service is already per se exempt as indicated in red on column C not necessary to use in order to be able to include the statement that the service is exempt.]	Exemption statement. If red text from columns C or D is used then use the below sentence with the word "exempt." If no red text applies use "none exempt" in the sentence below.
2				Therefore, the service is exempt/none exempt under USERRA's five-year service limitation (38 USC 4312(c))
3				Therefore, the service is none exempt under USERRA's five-year service limitation (38 USC 4312(c)).
4	EXAMPLE: This period of uniformed service is ordered under	10 USC § 12301(d)	and the member is 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.	Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
5		10 USC § 12301(d)		
6	EXAMPLE: This period of uniformed service is ordered under	10 USC § 12301(g)		Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
7	EXAMPLE: This period of uniformed service is ordered under	14 USC § 359		Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
8	EXAMPLE: This period of uniformed service is ordered under		and is required, beyond five years, to complete an initial period of obligated service.	Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
9	EXAMPLE: This period of uniformed service is ordered under	32 USC § 504		Therefore, the service is none exempt under USERRA's five-year service limitation (38 USC 4312(c)).
10	EXAMPLE: This period of uniformed service is ordered under	32 USC § 504	and is required, beyond five years, to complete an initial period of obligated service.	Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
11				
12	This period of uniformed service is ordered under	(fill in statutory authority)	and fulfills 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.	Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
13	This period of uniformed service is ordered under	(fill in statutory authority)	and the member is 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.	Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
14	This period of uniformed service is ordered under	(fill in statutory authority)		

## DOL Coordinated Required Exemption Verbiage

A	B	C	D	E
	<b>Always include this language:</b>		<i>Additional authority. Use if appropriate. [If service is already per se exempt as indicated in red on column C not necessary to use in order to be able to include the statement that the service is exempt.]</i>	<i>Exemption statement. If red text from columns C or D is used then use the below sentence with the word "exempt." If no red text applies use "nonexempt" in the sentence below.</i>
1	"This period of uniformed service is ordered under"			Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)]
15	This period of uniformed service is ordered under	(fill in statutory authority)	and the member is 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 123104 of title 10.	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
16	This period of uniformed service is ordered under	(fill in statutory authority)	and the member is ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services.	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
17	This period of uniformed service is ordered under	(fill in statutory authority)	and the member is ordered to full-time National Guard duty (other than for training) under section 502(e)(2)(A) of title 32 as 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.	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
18	This period of uniformed service is ordered under	32 USC § 503	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
19	This period of uniformed service is ordered under	32 USC § 502(a)	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
20	This period of uniformed service is ordered under	10 USC chapter 15	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
21	This period of uniformed service is ordered under	10 USC § 6 688	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
22	This period of uniformed service is ordered under	10 USC § 10147	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
23	This period of uniformed service is ordered under	10 USC § 12301(a)	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
24	This period of uniformed service is ordered under	10 USC § 12301(g)	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
25	This period of uniformed service is ordered under	10 USC § 12302	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
26	This period of uniformed service is ordered under	10 USC § 12304	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
27	This period of uniformed service is ordered under	10 USC § 12304a	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
28	This period of uniformed service is ordered under	10 USC § 12304b	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
29	This period of uniformed service is ordered under	10 USC § 12305	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
30	This period of uniformed service is ordered under	10 USC § 12406	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
31	This period of uniformed service is ordered under	14 USC § 331	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
32	This period of uniformed service is ordered under	14 USC § 332	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
33	This period of uniformed service is ordered under	14 USC § 339	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].
34	This period of uniformed service is ordered under	14 USC § 360	-----	Therefore, the service is <u>exempt</u> under USERRA's five-year service limitation [38 USC 4312(c)].

## DOL Coordinated Required Exemption Verbiage

	A	B	C	D	E
	<i>Always include this language:</i>		<i>Always fill in with authority</i>	<i>Additional authority. Use if appropriate. [If service is already per se exempt as indicated in red on column C not necessary to use in order to be able to include the statement that the service is exempt.]</i>	<i>Exemption statement. If red text from columns C or D is used then use the below sentence with the word "exempt." If no red text applies use "nonexempt" in the sentence below.</i>
1	"This period of uniformed service is ordered under"				
2					Therefore, the service is exempt/nonexempt under USERRA's five-year service limitation (38 USC 4312(c))
35	This period of uniformed service is ordered under	<b>14 USC § 367</b>			Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
36	This period of uniformed service is ordered under	<b>14 USC § 712</b>			Therefore, the service is exempt under USERRA's five-year service limitation (38 USC 4312(c)).
37					
38	<b>EXAMPLE:</b>	This period of uniformed service is ordered under	<b>32 USC § 504</b>		Therefore, the service is nonexempt under USERRA's five-year service limitation (38 USC 4312(c)).
39	<b>EXAMPLE:</b>	This period of uniformed service is ordered under	<b>10 USC § 12301(d)</b>		Therefore, the service is nonexempt under USERRA's five-year service limitation (38 USC 4312(c)).
40	<b>EXAMPLE:</b>	This period of uniformed service is ordered under	<b>10 USC § 12301(h)</b>		Therefore, the service is nonexempt under USERRA's five-year service limitation (38 USC 4312(c)).
41					



MANPOWER AND  
RESERVE AFFAIRS

## OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

1500 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1500

JUN 21 2018

### MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (MANPOWER AND RESERVE AFFAIRS)

ASSISTANT SECRETARY OF THE NAVY (MANPOWER  
AND RESERVE AFFAIRS)

ASSISTANT SECRETARY OF THE AIR FORCE (MANPOWER  
AND RESERVE AFFAIRS)

ACTING DIRECTOR, RESERVE & MILITARY PERSONNEL U.S.  
COAST GUARD

**SUBJECT:** Required Uniformed Services Employment and Reemployment Rights Act Verbiage  
on Qualifying Reserve Component Orders

This memorandum formally calls your attention to the requirement by the Department of Defense Instruction (DoDI) 1205.12, "Civilian Employment and Reemployment Rights for Service Members, Former Service Members and Applicants of the Uniformed Services." Please identify a point of contact for this matter within your department and provide a copy of your Reserve Component's implementation plan to the Deputy Assistant Secretary of Defense for Reserve Integration (DASD RI) point of contact by September 1, 2018.

Per DoDI 1205.12, orders that qualify for an exemption from the 5-year cumulative service limit established in the Uniformed Services Employment and Reemployment Act (USERRA) must:

- 1) Include a statement reflecting the exemption status from the 5-year cumulative service limit.
- 2) Include the statutory or Secretarial authority under which the service is exempt.

Additionally, all Reserve Component orders must:

- 3) Include contact information for either the Service member's home unit commander or a unit/Reserve Component point of contact designated to address employer concerns regarding the period of service.

The current requirement to include exemption status and exemption authority on qualifying orders is intended to mitigate friction points between the DoD and civilian employers, and to minimize the demand for time-consuming reviews of Service members' personnel records to determine reemployment eligibility and timelines. Under USERRA, Service members absent from a civilian employer due to uniformed service retain reemployment eligibility for up to five cumulative years, not including periods of service exempted by statutory or Secretarial authority. The inconsistent application of required exemption verbiage on qualifying orders over a period

of many years has led to the inability of Service members and employers to confidently determine reemployment timelines and make informed employment decisions. Conducting retroactive reviews of personnel records to assist in these determinations has proven extremely difficult, inexact, and time-consuming; while the demand for these manual reviews will only increase as more Service members exceed the 5-year service limit due to the continued use of the Reserve Component as an operational force.

The additional requirement to include the contact information for Service members' home unit commander or a unit/Reserve Component representative is intended to allow employers to address their concerns over periods of uniformed service promptly, and at the lowest possible level. Increased Reserve Component readiness requirements require increased communication with civilian employers to confirm service dates and mitigate impacts to civilian employment, if it is both possible and reasonable to do so. Per DoDI 1205.12, the designated Reserve Component representative will consider written requests from civilian employers of National Guard or Reserve members to adjust Service members' absences from civilian employment unless prevented by military necessity or it is otherwise impossible or unreasonable under the circumstances. The designated representative must be either a commander or officer in charge with the military authority to delay, defer, cancel, or reschedule military service, in accordance with DoDI 1205.12.

It is understood and expected that some Reserve Component order writing systems will need to process system change requests to comply with these requirements. The following directions should be adhered to in implementing the requirements outlined in this memorandum:

**Exemption statements and authorities:** The authorities exempted by statute from USERRA's 5-year cumulative service limit under title 10, title 32, and title 14 are listed in 38 U.S.C. § 4312. Additionally, periods of service under other authorities may be exempted from the 5-year cumulative service limit by the Secretaries of the Military Departments and Commandant of the Coast Guard when utilized in support of critical missions or requirements. Periods of service exempted by Secretarial authority will be determined and certified in writing via policy memorandum at a minimum, every 2 years. The authority for determining what constitutes a critical mission or requirement for this purpose will not be delegated below the Assistant Secretary level. Per DoDI 1205.12, orders for periods of service exempt by either statutory or Secretarial authority require a statement reflecting the exemption status of the period of service. Specific verbiage is required for this statement to be valid and able to withstand legal scrutiny. The Department of Labor Veterans Employment and Training Service (DOL VETS) has provided approved verbiage that captures the legally required elements for these statements. This DOL VETS-approved verbiage should be utilized on all Reserve Component orders that qualify for an exemption from USERRA's 5-year cumulative service limit. If a Reserve Component finds it necessary to vary from this approved verbiage due to system limitations, etc., alternative verbiage must be coordinated with DOL VETS before implementation by coordinating with the Employer Support of the Guard and Reserve (ESGR) point of contact listed below.

**Contact information for home unit commander or unit/Reserve Component representative:** Per DoDI 1205.12, employers have the right to voice their concerns over the timing, frequency, and duration of uniformed service to an appropriate military authority. Additionally, it is DoD policy to provide civilian employers verification of absences due to uniformed service regardless of the duration of service, upon request. Therefore, all Reserve Component orders should include the contact information for either the Service member's home unit commander or a unit/Reserve Component point of contact designated to address employer concerns for the period of service. This designated representative will consider requests from civilian employers of National Guard and Reserve members to adjust the Service member's absences from civilian employment, unless prevented by military necessity or it is otherwise impossible or unreasonable under the circumstances. Per DoDI 1205.12, the designated Reserve Component representative must be either a commander or officer in charge with the military authority to delay, defer, cancel or reschedule the military service. For this reason, neither the Employer Support of the Guard and Reserve (ESGR) program, nor any ESGR employee should be listed as the designated representative in this capacity. However, ESGR continues to be the appropriate point of contact for Service member and employer questions related to USERRA-employment protections and for Service members to request free, neutral mediation to resolve employment-related conflicts due to uniformed service.

My point of contact for this matter is Lieutenant Colonel Colette Ching, Chief of Ombudsman Services, ESGR. She can be reached at [colette.a.ching@mail.mil](mailto:colette.a.ching@mail.mil) or 571-372-0671. The secondary point of contact for this matter is Mr. Robert Lyon, Assistant Chief of Ombudsman Services, ESGR. He can be reached at [robert.j.lyon2.civ@mail.mil](mailto:robert.j.lyon2.civ@mail.mil) or 571-372-0663.



Matthew P. Dubois  
Deputy Assistant Secretary of Defense  
(Reserve Integration)

Attachments:

1. DoDI 1205.12
2. DOL Coordinated Required Exemption Verbiage spreadsheet