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Don't Conflate the Five-Year Limit with the 90-day Deadline To Apply for Reemployment

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Q: I am a Colonel in the Air Force Reserve and a member of the Reserve Organization of America.³ I have read with great interest many of your “Law

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

Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On the civilian side, I work for a major corporation—let's call it Daddy Warbucks Industries or DWI. I have worked for the company for more than 20 years, since 1998. I have been away from my DWI job many times for military training and service, including drill weekends, annual training, Additional Flight Training Periods (AFTP), two involuntary call-ups, and four extended periods of voluntary active duty. I am currently on a two-year voluntary active duty period, scheduled to end 9/30/2019 (the end of the current fiscal year).

After having read several of your articles about the importance of careful tracking of the five-year limit in order to avoid exceeding the limit, I recently reread your Law Review 16043 (May 2016) and then put all my military orders into two piles. The first pile is for the orders that clearly count toward my five-year limit at DWI, and the second pile is for the orders that are exempt. My current orders are not exempt. After having done this computation, I now realize that when I leave active duty as scheduled on 9/30/2019 I will be over the five-year limit by exactly seven days. Is there any wiggle-room in the five-year limit?

I also know that after I leave active duty on 9/30/2019 I have 90 days to apply for reemployment. I plan to apply for reemployment on 10/1/2019, immediately after I leave active duty. Because my total period of absence from my DWI job is less than five years and 90 days I am ok, right?

Answer, bottom line up front

No, that is not ok. You must meet five conditions to have the right to reemployment. You must meet all five conditions. If your cumulative period of non-exempt uniformed service relating to your employment relationship with DWI exceeds five years you do not have the right to reemployment, no matter

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 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 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.

how quickly you apply for reemployment. There is no wiggle-room in the five-year limit. If you are beyond the limit by even one day, you are out of luck.

Explanation

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you (or any returning service member or veteran) must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.⁴
- b. You must have given the employer prior oral or written notice.⁵
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.⁶ I will discuss this condition separately, below.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁷
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.⁸

The five-year limit

Section 4312(c) of USERRA sets forth the five-year limit 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;
 - (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

⁴ 38 U.S.C. 4312(a).

⁵ 38 U.S.C. 4312(a)(1).

⁶ 38 U.S.C. 4312(c).

⁷ 38 U.S.C. 4304.

⁸ After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

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 of title 10 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 [10 USCS § 12304];
 - (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.⁹

There is no wiggle room in the five-year limit. Section 4312(c) does not say that you get your job back “unless you exceed the limit by more than a little.” By contrast, there is some wiggle room in the deadline to apply for reemployment:

A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection *shall not automatically forfeit such person's entitlement* to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.¹⁰

By expressly including wiggle room in section 4312(e) (the deadline to apply for reemployment) but not in section 4312(c) (the five-year limit), Congress clearly implied that the inclusion in one subsection but exclusion from the other was

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

¹⁰ 38 U.S.C. 4312(e)(3) (emphasis supplied).

intentional.¹¹ If you want to retain the opportunity to return to work at DWI, you must remain within the five-year limit. I strongly suggest that you get the Air Force to release you from active duty on 9/20/2019, before you go over the limit.¹²

Q: I have 60 days of leave in the bank. I plan to go on terminal leave on or about 8/1/2019 and apply for reemployment at DWI shortly thereafter. Does that solve the problem?

A: No, that does not solve the problem. While you are on terminal leave you are still on active duty and the five-year clock is still ticking.¹³ You must *leave active duty* to stop the clock.

Q: I have heard from the regional vice president of DWI, and he told me that he is anxious for me to return because there is a vacancy that is right up my alley and the company has been unable to find a qualified candidate. If I am beyond the five-year limit but the company takes me back anyway, am I out of the woods?

A: No, you are not out of the woods. Under section 4318 of USERRA,¹⁴ you are entitled to be treated for seniority and pension purposes as if you had been continuously employed during the time that you were away from work for uniformed service, *but only if you meet the five USERRA conditions, including the five-year limit*. Let us say that you return to work for DWI in October 2019 and retire 15 years later, in October 2034. My nightmare is that at that time the company's personnel office audits your whole career and denies you DWI pension credit for your military service time, on the grounds that you were beyond the five-year limit when you returned to work in October 2019. I have seen something like this happen at a major airline. To protect your important financial interests, it is essential that you stay within the five-year limit.

¹¹ See *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008). The doctrine of *expressio unius est exclusio alterius* applies here. That is Latin for “to express one is to exclude all the others.” Section 4304 of USERRA, 38 U.S.C. 4304, provides that a person who has received one of four enumerated disqualifying bad discharges from military service is disqualified for reemployment. Petty received a general discharge under honorable conditions, not one of the enumerated disqualifying discharges. The 6th Circuit held that enumerating four disqualifying bad discharges meant that the employer and the court were precluded from adding another disqualifying discharge to the list. The same logic applies here. By including wiggle room in section 4312(e) but not in 4312(c), Congress implied that there is no wiggle room in section 4312(c).

¹² In March 1980, I completed my initial three-year obligated active duty period. I was given the opportunity to select any date in March as the date of my release from active duty, and I chose March 31. Perhaps that policy is still in effect, enabling you to select a release date prior to the expiration of your five-year limit.

¹³ Please see Law Review 19018 (February 2019).

¹⁴ 38 U.S.C. 4318.