

LAW REVIEW¹ 19053

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They Told me that my Orders Are “USERRA-Exempt.” Does that Mean that I Don’t Get my Job back?

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 Second Lieutenant in the Army Reserve. On the civilian side, I am a junior manager for a major corporation—let’s call it Daddy Warbucks Industries or DWI. While doing Internet research, I found one of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Recently, I volunteered and was selected for a one-year call to active duty, for deployment to Southwest Asia (SWA). The personnel officer told me that my orders are “USERRA-exempt.”

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 43 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.

Does that mean that DWI will not be required to reemploy me when I return from this year of active duty?

A: No, that is not what “USERRA-exempt” means. The personnel officer means that this year of active duty does not count toward exhausting your five-year limit under USERRA.

As I have explained in Law Review 16043 (May 2016) and many other articles, there is a cumulative five-year limit on the duration of the period or periods of uniformed service that you can perform, with respect to a specific employer relationship, and still have the right to reemployment.³ Under section 4312(c) of USERRA,⁴ there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your limit. The personnel officer is telling you that your upcoming year of active duty falls within one of the exemptions and does not count toward your limit.

I do not like and do not use the term “USERRA-exempt.” I prefer “exempt from counting toward your USERRA five-year limit.”

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you will have the right to reemployment at DWI if you meet the five USERRA conditions.

- a. You must have left your job to perform service in the uniformed services.⁵
- b. You must have given the employer prior oral or written notice before leaving the job.⁶
- c. Your cumulative period or periods of uniformed service, relating to your employment relationship with DWI, must not have exceeded five years.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁷
- e. You must have made a timely application for reemployment after release from the period of service.⁸

If you meet all five of these conditions, you will have the right to reemployment at DWI, and that includes being treated for seniority and pension purposes as if you had been continuously employed by DWI during the days, weeks, months, or years that you are away from the job for

³ If you leave your DWI job and start a new job with a new employer, you get a fresh five-year limit with the new employer.

⁴ 38 U.S.C. 4312(c).

⁵ 38 U.S.C. 4312(a).

⁶ 38 U.S.C. 4312(a)(1). You are excused from the obligation to provide prior notice if giving such notice is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b).

⁷ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial as part of the sentence for a conviction of a serious crime) and other-than-honorable administrative discharges.

⁸ 38 U.S.C. 4312(e). 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.

voluntary or involuntary military service or training. USERRA keeps your DWI job behind you as an unburned bridge. To preserve the option of returning to DWI after a period of service, you need to keep track of your own five-year limit and ensure that you do not inadvertently go over the limit.⁹

Please join or contribute to ROA:

This article is one of 1800-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national defense needs.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002

⁹ Please see Law Review 16043 (May 2016).