

LAW REVIEW¹ 19062

July 2019

New Army Memorandum on USERRA's 5-Year Limit

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[Update on Sam Wright](#)

1.3.1.2—Character and duration of service

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

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.³
- b. You must have given the employer prior oral or written notice.⁴

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "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 1600 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.

³ 38 U.S.C. 4312(a).

⁴ 38 U.S.C. 4312(a)(1). Prior notice to the employer is not required when giving such notice is precluded by military necessity or is otherwise impossible or unreasonable. 38 U.S.C. 4312(b).

- c. You must not have exceeded the five-year limit on the cumulative duration of your period or periods of uniformed service, relating to the employer relationship for which you seek reemployment.⁵
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.⁷

If you meet all five of these conditions, the employer has a legal obligation to reemploy you promptly and to treat you, for seniority and pension purposes, as if you had been continuously employed in the civilian job during the entire time that you were away from the job for the purpose of performing uniformed service.⁸

You must meet all five conditions to have the right to reemployment. Thus, if you have exceeded your five-year limit with respect to your current civilian employer you do not have the right to reemployment, even if you meet the other four conditions. Section 4312(c) of USERRA sets forth the five-year limit and the nine exemptions from the 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 and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining*; or

⁵ 38 U.S.C. 4312(c).

⁶ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial) and other-than-honorable administrative discharges.

⁷ 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.

⁸ 38 U.S.C. 4316(a), 4318. The period that you are away from work for service includes the period of service as well as the period between leaving the job and starting the period of service and the period between leaving the period of service and returning to the civilian job. Please see Law Review 19052 (June 2019).

(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;

(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

On 5/20/2019, Secretary of the Army Mark Esper¹⁰ signed and released a comprehensive memorandum about the application of USERRA's five-year limit to the Army Reserve and the Army National Guard.¹¹ You will find the complete text of the Esper Memorandum appended to the end of this article. The second paragraph of the Memorandum is as follows:

The purpose of this memorandum is to certify the periods of service deemed exempt from the 5-year cumulative limit for Army Reserve and Army National Guard Soldiers pursuant to references 1a [section 4312 of USERRA] and 1b [Department of Defense Instruction 1205.12 of 2/24/2016]. The USERRA provides protections to Reserve Component (RC) Soldiers who are absent from a position of civilian employment because of military service. Generally, the cumulative length of *absence from civilian employment* cannot exceed 5 years; this rule is known as the 5-year cumulative service year limit. However, USERRA exempts certain periods of active duty from the limit.¹²

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

¹⁰ Esper has since been appointed the Acting Secretary of Defense.

¹¹ USERRA and its five-year limit also apply to the Active Army. Please see Law Review 18103 (October 2018).

¹² Emphasis supplied.

The Esper Memorandum contains several significant errors. It should be withdrawn and rewritten to correct those errors. First, the Memorandum states that the five-year limit applies to the period of “absence from civilian employment.” In fact, it is the *cumulative period of service*, not the period of absence from the civilian job, that is subject to the five-year limit.¹³

The period of absence from the job will almost always be at least a few days longer than the period of service. For example, let us take Mary Jones, a Specialist (E-4) in the Army Reserve. Mary volunteers for a three-year recall to active duty, and she is on active duty for exactly three years, from 10/1/2016 until 9/30/2019. Mary left her civilian job on 9/15/2016, to get her affairs in order before reporting to an extended period of active duty. After she was released from active duty on 9/30/2019, she waited 61 days before applying for reemployment on 12/1/2019.

Mary was entitled to leave her job a few days before her active duty report date to get her affairs in order.¹⁴ Upon released from a continuous period of uniformed service that lasted more than 180 days, Mary had the right to wait up to 90 days to apply for reemployment.¹⁵ Mary’s application for reemployment on 12/1/2019 was timely. Mary has used three years of her five-year limit.¹⁶ The 15 days between leaving the civilian job and entering active duty and the 61 days between leaving active duty and applying for reemployment do not count toward exhausting Mary’s five-year cumulative limit with respect to her current employer relationship.

The Esper Memorandum is also wrong because it states that the five-year limit applies to the individual’s “civilian employment.” In fact, the limit only applies to the individual’s employer relationship with his or her current civilian employer (federal, state, local, or private sector).

For example, let us consider Sergeant Major (E-9) Bob Smith, who is nearing the end of his long and distinguished career in the Army National Guard. From 1995 until 2005, Bob worked for the ABC Corporation, and during that decade of civilian employment he used four years of his five-year limit with respect to the ABC Corporation, not including periods that were exempt from the five-year limit. In 2005, Bob resigned his job at ABC and started a new job at the XYZ Corporation. In the 14 years since he started working for XYZ, he has been away from his XYZ job for four years of non-exempt uniformed service. Bob has been away from “civilian employment” for eight years of non-exempt service, but he has not exceeded his five-year limit with respect to his relationship with XYZ, his current civilian employer.

¹³ Please see Law Review 19052 (June 2019).

¹⁴ 20 C.F.R. 1002.74(b).

¹⁵ 38 U.S.C. 4312(e)(1)(D).

¹⁶ For purposes of this example, I am assuming that this three-year period of service is not exempt from the five-year limit under any of the subsections of section 4312(c).

As I have explained in detail in Law Review 16043 (May 2016), there are ten exemptions from the five-year limit, and five of them require the “Secretary concerned”¹⁷ to make a determination. These five subsections are as follows:

- a. 4312(c)(3). Additional National Guard and Reserve training requirements necessary for professional development or for skill training or retraining.
- b. 4312(c)(4)(B). Ordered to or retained on active duty because of a war or national emergency declared by the President or Congress.
- c. 4312(c)(4)(C). Ordered to active duty in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304.
- d. 4312(c)(4)(D). Ordered to active duty in support of a critical mission or requirement of the uniformed service.
- e. 4312(c)(4)(F). Ordered to full-time National Guard duty to respond to a national emergency declared by the President and supported by federal funds.

In addition, there are five other exemptions from the five-year limit that do not require a determination by the Service Secretary:

- a. 4312(c)(1). Service that is required, beyond five years, to complete an initial period of obligated service.¹⁸
- b. 4312(c)(2). Service “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.”¹⁹
- c. 4312(c)(3). Regularly scheduled periods of inactive duty training (drills) and annual training for Reserve and National Guard personnel.²⁰

¹⁷ The Secretary of the Army is the “Secretary concerned” with respect to the Army, including the Army Reserve and the Army National Guard. 10 U.S.C. 101(a)(9).

¹⁸ For example, Alexandra Adams joined the Army and chose “helicopter pilot” as her career field. Under her enlistment contract, she is required to remain on active duty for seven years. If she leaves active duty after seven years, and if she meets the other USERRA eligibility criteria, she has the right to reemployment in her pre-service civilian job. The period beyond five years is exempt from her five-year limit.

¹⁹ For example, let us assume that Barry Bonds enlisted in the Army and agreed to serve on active duty for exactly five years, from 10/1/2014 through 9/30/2019. Bonds expects to leave active duty, as scheduled, on 9/30/2019, before the expiration of his five-year limit. In September 2019, Bonds’ Army unit is deployed to the Middle East because of a national emergency. Bonds’ active duty period is involuntarily extended until 12/31/2019. Bonds has the right to reemployment at his pre-service job, assuming he meets the other four USERRA conditions. The three-month involuntary extension of his active duty does not cause him to exceed the five-year limit.

²⁰ If these training periods are extended beyond the standard minimums, the Service Secretary must certify that the additional periods were necessary for professional development or for skill training or retraining.

- d. 4312(c)(4)(A). Performed by a member of a uniformed service who is *involuntarily* 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 14.²¹
- e. 4312(c)(4)(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.

The Esper Memorandum mentions some but not all the exemptions, including those that require and those that do not require a determination by the Service Secretary. I suggest that the memorandum be rewritten to incorporate all the potential exemptions to the five-year limit.

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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 defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

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

²¹ These are all the sections that provide for *involuntary* call-up of military retirees or National Guard or Reserve personnel. The title 14 sections pertain to the Coast Guard.

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

The entire text of the Esper Memorandum begins on the following page:



SECRETARY OF THE ARMY
WASHINGTON

20 MAY 2019

MEMORANDUM FOR

ASSISTANT SECRETARY OF THE ARMY (MANPOWER AND RESERVE AFFAIRS)
DEPUTY CHIEF OF STAFF, G-1
CHIEF, ARMY RESERVE
DIRECTOR, ARMY NATIONAL GUARD

SUBJECT: Periods of Service Exempt from 5 year Cumulative Limit Under the Uniformed Services Employment and Reemployment Rights Act

1. References:

- a. Title 38 United States Code (USC), Section 4312 (Reemployment Rights of Persons who Serve in the Uniformed Services).
- b. Department of Defense Instruction (DoDI) 1205.12, Civilian Employment and Reemployment Rights for Service Members, Former Service Members and Applicants of the Uniformed Service, February 24, 2016.
- c. Army Regulation (AR) 135-200 (Active Duty for Missions, Projects, and Training for Reserve Component Soldiers), 26 September 2017.
- d. AR 350-1 (Army Training and Leader Development), 10 December 2017.

2. The purpose of this memorandum is to certify the periods of service deemed exempt from the Uniformed Services Employment and Reemployment Rights Act (USERRA) 5 year cumulative limit for Army Reserve and Army National Guard Soldiers pursuant to references 1a and 1b. The USERRA provides protections to Reserve Component (RC) Soldiers who are absent from a position of civilian employment because of military service. Generally, the cumulative length of absence from civilian employment cannot exceed 5 years; this rule is known as the 5 year cumulative service year limit. However, USERRA exempts certain periods of active duty from the limit.

3. The following types of service are statutorily exempt from USERRA's 5 year cumulative limit:

- a. Service under Title 10, USC, Sections 688, 10147, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, 12305, and 12406.
- b. Service under Title 32, USC, Sections 502(a) and 503.
- c. Service under Title 32, USC, Section 502(f)(2)(A), when ordered to full-time National Guard duty (other than for training) by the President or the Secretary of Defense for the

SUBJECT: Periods of Service Exempt from 5 year Cumulative Limit Under the Uniformed Services Employment and Reemployment Rights Act

purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary of the Army.

4. In addition to the periods that are statutorily exempt, reference 1b, assigns authority to the Secretary of the Army to determine certain periods of service exempt from the 5 year cumulative limit. The following are approved exemptions to the 5 year limit and shall not count toward the five year accumulation:

- a. Service under Title 10, USC, Section 12301(d) when utilized for Contingency Operation-Active Duty Operational Support (CO-ADOS) as defined in reference 1c.
- b. Service under Title 10, USC, Section 12301(d) when utilized to attend an in-residence Professional Military Education course as defined in reference 1d.
- c. Service under Title 10, USC, Section 12301(h).

5. Pursuant to reference 1b, I delegate the authority to the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA(M&RA)) for determining what constitutes an exempted critical mission or requirement not covered in paragraph 4 of this memorandum. Requests for an individual exemption under the critical mission or requirement must be reviewed and recommended by the Chief, Army Reserve or the Director, Army National Guard before submitting to ASA(M&RA) for approval.

6. Pursuant to reference 1b, enclosure 2, paragraph 1b(10), the Chief, Army Reserve and the Director, Army National Guard will:

- a. Establish component specific policy that will facilitate the certification of a Soldier's period of service exemption status upon a Soldier's or employer's request.
- b. Designate an office within your headquarters that serves as the proponent on USERRA matters. You are authorized to work directly with Employer Support for Guard and Reserve on policy questions and to coordinate responses to Soldier or employer inquiries.

7. The Deputy Chief of Staff, G-1 will incorporate the USERRA exemption authority as a mandatory entry to RC personnel orders generated within Integrated Personnel and Pay System—Army.



Mark T. Esper

CF: Administrative Assistant to the Secretary of the Army