

LAW REVIEW¹ 19070

August 2019

New Department of the Navy Memo on USERRA's Five-Year Limit

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

1.3.1.2—Character and duration of service

On 12/11/2018, Secretary of the Navy Richard V. Spencer promulgated a new Department of the Navy memo on the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The memo contains several serious errors. The Secretary should withdraw, rewrite, and reissue this memo as soon as possible. The memo includes the following erroneous paragraph:

Reserve Service Members who are *absent from their civilian employment* due to uniformed service retain their reemployment rights if they meet the requirements of Reference (b) [USERRA]. One of these requirements is that the *cumulative length of the member's absences from civilian employment* does not exceed five years.

Emphasis supplied.

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.

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
- 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--*

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).

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).

- (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
- (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

The Spencer 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.¹⁰

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 Third-Class Petty Officer (E-4) in the Navy 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 38 U.S.C. 4312(c) (emphasis supplied).

¹⁰ Please see Law Review 19052 (June 2019).

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.¹¹ 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.¹² Mary's application for reemployment on 12/1/2019 was timely. Mary has used three years of her five-year limit.¹³ 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 Spencer 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 Marine Corps Reserve. 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.

The Spencer Memo replaces a memo dated 3/11/2002, just six months after the terrorist attacks of 9/11/2001. The new memo was long overdue, but it is most unfortunate that the Secretary of the Navy's staff, and especially the assigned lawyers, did not take the time to check their work and get it right.

I invite the reader's attention to Law Review 19062 (July 2019) for a copy of the Department of the Army's new memo on the five-year limit and an unfavorable review of that memo. I also invite the reader's attention to Law Review 19022 (February 2019), for a copy of the Department of the Air Force memo and a favorable review of that memo. I invite the reader's attention to Law Review 16043 (May 2016), for a detailed discussion of USERRA's five-year limit—what counts and what does not count in exhausting an individual's limit.

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¹¹ 20 C.F.R. 1002.74(b).

¹² 38 U.S.C. 4312(e)(1)(D).

¹³ 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).

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 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 Secretary of the Navy’s memo begins on the following page.



THE SECRETARY OF THE NAVY
WASHINGTON DC 20350-1000

December 11, 2018

MEMORANDUM FOR CHIEF OF NAVAL OPERATIONS
COMMANDANT OF THE MARINE CORPS

SUBJECT: Reemployment Protections for Navy and Marine Corps Military Personnel

References: (a) Memorandum for Chief of Naval Operations and Commandant of the Marine Corps, REEMPLOYMENT PROTECTIONS FOR PERSONNEL ACTIVATED OR RETAINED IN SUPPORT OF THE NATIONAL EMERGENCY dated 11 Mar 2002
(b) 38 U.S.C. Chapter 43, Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
(c) Department of Defense Instruction 1205.12
(d) Memorandum for Assistant Secretary of the Navy (Manpower and Reserve Affairs), REQUIRED UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT VERBIAGE ON QUALIFYING RESERVE COMPONENT ORDERS dated 21 Jun 2018

This Memorandum supersedes reference (a). Reserve Service Members who are absent from their civilian employment due to uniformed service retain their re-employment rights if they meet the requirements of reference (b). One of these requirements is that the cumulative length of the member's absences from civilian employment does not exceed five years. Reference (b) exempts certain periods of active duty from this five-year limit. References (b) and (c) provide authority for the Secretary of the Navy to designate additional periods of service as exempt from the five-year period.

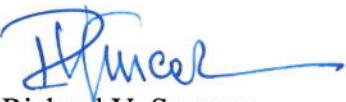
The following exemptions are categorically approved:

- Entry level training. The Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)) may maintain a list of any additional training requirements that are certified as exempt from the USERRA 5-year cumulative service limit. All training requirements certified by the Secretary shall be necessary for professional development or for completion of skill training or retraining.
- Periods of service performed by a Navy or Marine Corps Reserve member ordered to or retained on active duty (other than for training) under Presidential Proclamation 7463 of September 14, 2001 and successive Declarations of National Emergency signed by the President.
- Periods of service performed by a Navy or Marine Corps Reserve member ordered to or retained on active duty (other than for training) when such period of service is mission critical and/or fulfills a critical requirement, as determined by the ASN (M&RA). The

Subj: Reemployment Protections for Navy and Marine Corps Military Personnel

ASN (M&RA) may maintain a list of all mission critical service and critical requirements that are certified as exempt from the USERRA 5-year cumulative service limit.

- Activation orders for personnel must include a statement reflecting the exemption status from the 5-year cumulative service limit, as well as the statutory or Secretarial authority under which the orders were issued, in accordance with reference (d). Attachment (1) contains language approved by the Department of Labor for use in all activation orders. For periods of service where exemption applicability is unclear, questions, or appeals for exemption may be submitted to the ASN (M&RA) for adjudication. Ensure all personnel are advised regarding their rights, benefits, and responsibilities with respect to civilian employment as provided by USERRA.



Richard V. Spencer

Attachment:
As stated

Periods of uniformed service performed under the following authorities are exempt from the five-year service limitation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) found in 38 U.S.C. § 4312(c). The language below has been approved by the Department of Labor and shall be inserted into Service Members' orders to ensure that the authority and exemption status of a period of service is clear under the provisions of USERRA.

Exemptions Authorized by 38 U.S.C. § 4312(c):

Authority: 10 U.S.C. § 12301(a) – Full Mobilization (Congressional Declaration of National Emergency)

This period of uniformed service is ordered under 10 U.S.C. § 12301(a). Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Authority: 10 U.S.C. § 12301(g) – Service Member in a Captive Status

This period of uniformed service is ordered under 10 U.S.C. § 12301(g). Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Authority: 10 U.S.C. § 12302 – Partial Mobilization (Presidential Declaration of National Emergency)

This period of uniformed service is ordered under 10 U.S.C. § 12302. Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Authority: 10 U.S.C. § 12304 – Presidential Reserve Call Up

This period of uniformed service is ordered under 10 U.S.C. § 12304. Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Authority: 10 U.S.C. § 12304a – Defense Support of Civil Authorities

This period of uniformed service is ordered under 10 U.S.C. § 12304a. Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Authority: 10 U.S.C. § 12304b – Support for Preplanned Missions in Support of the Combatant Commanders

This period of uniformed service is ordered under 10 U.S.C. § 12304b. Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Authority: 10 U.S.C. § 12305 – Authority of the President to Suspend Certain Laws Relating to Promotion, Retirement, and Separation

This period of uniformed service is ordered under 10 U.S.C. § 12305. Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Authority: Initial Training Exceeding Five Years in Duration

This period of uniformed service is ordered under (insert authority), 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 U.S.C. § 4312(c)).

Authority: 10 U.S.C. § 688 – Retired Members Ordered to Active Duty

This period of uniformed service is ordered under 10 U.S.C. § 688. Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Exemptions Authorized by the Secretary of the Navy in Accordance with this Memorandum:

The following authorities for exempting periods of military service from the 5-year cumulative service limit may only be used when the underlying basis for service has been exempted by the appropriate authority in accordance with this Memorandum:

Authority: 10 U.S.C. § 12301(d) – Voluntary Activation for Training Requirements Certified by the Secretary of the Navy as Necessary for Professional Development or Skill Training or Retraining

This period of uniformed service is ordered under 10 U.S.C. § 12301(d). In accordance with 38 U.S.C. Chapter 43, as implemented by the Secretary of the Navy in the MEMORANDUM titled REEMPLOYMENT PROTECTIONS FOR NAVY AND MARINE CORPS MILITARY PERSONNEL, this period of service 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 U.S.C. § 4312(c)).

Authority: Active Duty Under a Provision of Law Because of a War or National Emergency Declared by the President or the Congress, as Determined by the Secretary

This period of uniformed service is ordered under (insert authority). In accordance with 38 U.S.C. Chapter 43, as implemented by the Secretary of the Navy in the MEMORANDUM titled REEMPLOYMENT PROTECTIONS FOR NAVY AND MARINE CORPS MILITARY PERSONNEL, this period of service orders or retains the member 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 U.S.C. § 4312(c)).

Authority: Voluntary Activation for Critical Mission or Requirement of the Uniformed Services

This period of uniformed service is ordered under (insert authority). In accordance with 38 U.S.C. Chapter 43, as implemented by the Secretary of the Navy in the MEMORANDUM titled REEMPLOYMENT PROTECTIONS FOR NAVY AND MARINE CORPS MILITARY PERSONNEL, 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 exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

Other Authorities:

Authorities that are not listed above should contain the following language:

This period of uniformed service is ordered under (insert authority). Therefore, the service is nonexempt under USERRA's five-year service limitation (38 U.S.C. 4312(c)).

Questions regarding whether a period of service is exempt should be submitted through the service chain of command to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) for adjudication.