

LAW REVIEW¹ 19083

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USERRA Is a Floor and not a Ceiling

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

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Q: I am a retired Air Force Reserve Colonel and a life member of the Reserve Organization of America.³ I am also an airline pilot for one of our country's largest airlines (let's call it Very Big

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 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 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

Air Line or VBAL). I am the Military Affairs Advocate for the VBAL Pilots Association (VBALPA), the union for pilots of our airline. In that capacity, I assist other VBAL pilots who are National Guard and Reserve members in exercising and enforcing their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and under the collective bargaining agreement (CBA) between VBAL and the VBALPA.

Under the CBA, a pilot can be absent from his or her civilian job for up to six years at a time for “military leave.” The limit is not cumulative, meaning that the pilot can return to work for a while after six years of military leave and then go again for another military leave period of up to six years. The entire period that the pilot is away from work for military reasons counts toward the six-year limit. This includes the time between leaving the job and entering active duty (usually a few days) and the time (up to 90 days) between leaving active duty and returning to work for the airline. Under the CBA, there are no exemptions for involuntary call-ups—all military leave periods count toward the six-year limit.

How is the six-year limit under the CBA different from the five-year limit under USERRA?

A: In some ways, the CBA limit is more generous than USERRA, but in other ways it is less generous. Some pilots have rights under both USERRA and not the CBA. Some pilots have rights under the CBA but not USERRA. Some pilots have rights under USERRA but not the CBA. Some pilots, who have been away from work for lengthy non-exempt periods of service, have rights under neither the CBA nor USERRA.

Under USERRA, the five-year limit is cumulative with respect to a service member’s employer relationship with a specific employer, but there are nine exemptions, meaning that there are nine kinds of service that do not count toward exhausting the individual’s five-year limit with a specific employer.⁴

Under USERRA, it is only the *period of uniformed service* that counts toward the individual’s five-year limit.⁵ The period between leaving the job and entering active duty does not count toward exhausting the individual’s five-year limit. Similarly, the period between leaving active duty and applying for reemployment is exempt from the five-year limit.

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 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.

⁴ Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count toward exhausting the five-year limit.

⁵ Please see Law Review 19052 (June 2019).

For example, Mary Jones was on active duty for exactly one year, from 10/1/2018 until 9/30/2019. Let us assume that this year of active duty did not fit within one of USERRA's nine exemptions. Mary left her civilian job on 9/15/2018 and spent 15 days getting her affairs in order before reporting to active duty. After leaving active duty on 9/30/2019, Mary waited 60 days before applying for reemployment.⁶ Mary was away from her civilian job for one year and 75 days, but only the one-year period of service counts toward exhausting her five-year limit.

Examples of VBAL pilots who have reinstatement rights under the CBA but not reemployment rights under USERRA

Joe Smith, a VBAL pilot, was away from his civilian job for five years and six months for military service. He was on active duty for five years and four months. The other two months were for periods before and after his active duty period. None of his active duty period was exempt from USERRA's five-year limit. Joe does not have reemployment rights under USERRA because his period of active duty exceeds the five-year limit by four months. But Joe has reinstatement rights under the CBA because his "military leave" period was within the CBA's six-year limit.

Juanita Williams, another VBAL pilot, was on active duty and away from her VBAL job for four years, from 2006 to 2010, and again for another four years from 2015 to 2019. Neither active duty period was exempt from USERRA's five-year period. Juanita does not have reemployment rights under USERRA because she has exceeded the five-year *cumulative* limit. But Juanita has reinstatement rights under the CBA because her most recent "military leave" period is within the CBA's six-year limit.

Examples of VBAL pilots who have reemployment rights under USERRA although they are beyond the CBA's six-year limit

Steve Sims began his VBAL pilot career in 2008, after leaving ten years of Air Force active duty.⁷ In early 2011, he left his VBAL job when he was involuntarily called to active duty for one year. He returned to VBAL seven years and 60 days later.⁸ Steve's first year of active duty, from 2011 to 2012, was exempt from the five-year limit because he was called to the colors involuntarily.⁹ Another two years of his active duty were exempt because his orders contained the "magic words" exempting those periods from the five-year limit.¹⁰ Steve did not use any of his five-year

⁶ Mary had 90 days to apply for reemployment because her period of service exceeded 180 days. 38 U.S.C. 4312(e)(1)(D).

⁷ The ten years of active duty, from 1998 to 2008, does not count toward Steve's five-year limit because that period came before he started his VBAL job.

⁸ The 60 days was for the 15 days before he reported to active duty in 2011, while he got his affairs in order, and 45 days in 2019, after he left active duty but before he applied for reemployment at VBAL.

⁹ 38 U.S.C. 4312(c)(4)(A).

¹⁰ Please see Law Review 16043 (May 2016).

limit between 2008, when he started his VBAL job, and 2011, when he began his long active duty period.

Steve has reemployment rights at VBAL because he has not exceeded the five-year limit under USERRA—three of the seven years are exempt from counting toward exhausting his limit.¹¹ It does not matter that Steve has exceeded the CBA’s six-year limit on the duration of a “military leave” period.

Q: What is the relationship between USERRA and the CBA?

A: As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the VRRA, the Supreme Court held: “No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act.”¹²

Under section 4302, USERRA is a floor and not a ceiling on the rights of service members and veterans. That section provides:

- (a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.¹³

Under section 4302(a), USERRA does not supersede or override the CBA to the extent that it accords reinstatement rights to a service member or veteran like Joe Smith or Juanita Williams—a person who is beyond USERRA’s five-year limit but within the CBA’s six-year limit. But that does not mean that Joe Smith and Juanita Williams have reemployment rights *under USERRA*. Because they do not meet the five USERRA conditions for reemployment, their rights depend entirely

¹¹ This assumes, of course, that Steve meets the other four USERRA conditions. He must have left his job in 2011 to perform uniformed service and must have given VBAL prior oral or written notice. He must have been released from active duty in 2018 without having received a disqualifying bad discharge from the Air Force. 38 U.S.C. 4304. And he must have made a timely application for reemployment at VBAL after leaving active duty in 2018. 38 U.S.C. 4312(e)(1)(D).

¹² *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

¹³ 38 U.S.C. 4302.

upon the wording and interpretation of the CBA. Similarly, they must rely on the CBA's enforcement mechanism (grievance arbitration) to enforce their rights.

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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 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:

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