

## LAW REVIEW<sup>1</sup> 19105

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### The Coast Guard and USERRA's Five-Year Limit- The Title 14 Section Numbers Have Changed

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[About Sam Wright](#)

1.3.1.3—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

**Q: I am a Commander in the Coast Guard Reserve and a member of the Reserve Organization of America.<sup>3</sup> I have read with great interest many of your “Law Review” articles about the**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1900 "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 1700 of the articles.

<sup>2</sup> 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](mailto:SWright@roa.org).

<sup>3</sup> 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 personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of

**Uniformed Services Employment and Reemployment Rights Act (USERRA).** I was particularly interested in Law Review 16043 (May 2016), concerning USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service that an individual can perform with respect to an employer relationship with a specific employer, and still have the right to reemployment.

I work for a large company—let's call it Daddy Warbucks Industries or DWI. Since I began my job at DWI in 1999, I have been away from my civilian job for Coast Guard duty and training for a cumulative period of seven years, but three of those years are exempt from the computation of the five-year limit, as you explained in Law Review 16043. Thus, I still have a year of "head room" in my five-year limit. Going forward, I am careful not to volunteer for any additional duty that is not exempt from counting toward exhaustion of my five-year limit.

I have heard that the numbering system of title 14 of the United States Code (which governs the Coast Guard) has been changed, and some of the title 14 sections cited in section 4312(c) of USERRA<sup>4</sup> are no longer correct. Is that true?

A: Yes, that is true. Section 4312(c) reads as follows:

(c) 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 [[10 USCS § 10147](#)], under section 502(a) or 503 of title 32 [[32 USCS § 502\(a\)](#) or [503](#)], 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—

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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.

<sup>4</sup> 38 U.S.C. 4312(c).

- (A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 [[10 USCS § 688](#), [12301\(a\)](#), [12301\(g\)](#), [12302](#), [12304](#), [12304a](#), [12304b](#), or [12305](#)] or under section 331, 332, 359, 360, 367, or 712 of title 14 [[14 USCS § 2127](#), [2128](#), [2308](#), [2309](#), [2314](#), or [3713](#)];
- (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 [[10 USCS §§ 331](#) et seq.] or under section 12406 of title 10 [[10 USCS § 12406](#)]; or
- (F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 [[32 USCS § 502\(f\)\(2\)\(A\)](#)] 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.<sup>5</sup>

Section 4312(c)(4)(A) lists section 331 of title 14—duty under this section does not count toward exhausting the individual’s five-year limit with respect to a specific employer relationship. Section 331 is now section 2127. This section refers to involuntary active duty by a retired Coast Guard officer.

Section 4312(c)(4)(A) also lists section 332 of title 14—now section 2128. This section refers to voluntary active duty by a retired Coast Guard officer. Section 2128 (332) pertains to voluntary active duty by a retired Coast Guard officer.

Section 4312(c)(4)(A) also lists section 359 of title 14—now section 2308. This section refers to involuntary active duty by a retired Coast Guard enlisted member.

Section 4312(c)(4)(A) also lists section 360 of title 14—now section 2309. This section refers to voluntary active duty by a retired Coast Guard enlisted member.

Section 4312(c)(4)(A) also lists section 367 of title 14—now section 2314. This section refers to the involuntary retention on active duty of a Coast Guard enlisted member.

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<sup>5</sup> 38 U.S.C. 4312(c).

Section 4312(c)(4)(A) also lists section 712 of title 14—now section 3713. That section pertains to involuntary active duty by a Coast Guard Reserve member (officer or enlisted) during or to aid in the prevention of a serious natural or man-made disaster, accident, catastrophe, act of terrorism, or transportation security incident.

Duty performed under these title 14 sections does not count toward exhausting the individual's five-year limit.

**Q: Sections 4312(c)(3), 4312(c)(4)(B), 4312(c)(4)(C), and 4312(c)(4)(F) refer to determinations made by the "Secretary concerned"—determinations that are necessary for a period of service to be exempted from the five-year limit. Who is the "Secretary concerned" for the Coast Guard?**

**A:** The Coast Guard is part of the Department of Homeland Security (DHS). The DHS Secretary has delegated the authority to make these determinations to the Commandant of the Coast Guard.

**Q: In Law Review 19070 (August 2019), you wrote about the memorandum signed by the Assistant Secretary of the Navy for Manpower & Reserve Affairs concerning exemptions from the five-year limit for personnel in the Navy and Marine Corps. In Law Review 19062 (July 2019), you wrote about the memorandum signed by the Assistant Secretary of the Army for Manpower & Reserve Affairs, concerning exemptions from the five-year limit for Army personnel. In Law Review 19022 (February 2019), you wrote about the memorandum signed by the Assistant Secretary of the Air Force for Manpower & Reserve Affairs, concerning exemptions from the five-year limit for Air Force personnel. Has the Commandant of the Coast Guard signed such a generalized memorandum on the five-year limit?**

**A:** As best I can determine, no. Perhaps the Coast Guard is small enough that the Commandant can make individual determinations on a case-by-case basis.

### **Please join or support ROA**

This article is one of 1900-plus "Law Review" articles available at [www.roa.org/lawcenter](http://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](http://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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