

## LAW REVIEW<sup>1</sup> 20034

April 2020

### Can my Employer and the Union Agree To Exclude a Period of Uniformed Service from the USERRA Five-Year Limit?

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1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

**Q: I am a Lieutenant Colonel in the Air Force Reserve and a life member of the Reserve Organization of America (ROA).<sup>3</sup> For many years, I have been reading your “Law Review”**

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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 2000 “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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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

articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Your articles have been very helpful to me in understanding my USERRA rights and in being away from my civilian job multiple times, sometimes for lengthy periods of uniformed service, without losing my right to reinstatement in my civilian job and my right to continued accumulation of seniority and civilian pension credit for the times that I have been away from work for service.

On the civilian side, I am a pilot for a major airline—let's call it Very Big Air Line or VBAL. Like the pilots at almost all major airlines, the VBAL pilots are represented by a union—let's call it the VBAL Pilots Association or VBALPA.

I am concerned about the five-year limit under USERRA because I have been away from my VBAL job multiple times for service. I have read and reread your Law Review 16043 (May 2016), about what counts and what does not count in exhausting an employee's five-year limit with respect to a specific employer relationship. Some of my military service periods have been involuntary or otherwise exempt from the computation of the five-year limit, but other periods were not exempt. I recently did a comprehensive audit of all my military orders for periods of service after June 2007, when I started my VBAL job as a rookie pilot. I figure that I have used four years and seven months of my five-year limit, and I only have five months of "head room." Going forward, I am being very careful not to leave my VBAL job for military service unless I am *certain* that the period of service is exempt from the computation of my five-year limit.

Just in the last few weeks, there has been a fundamental change in the employment situation for pilots and the attitude of airlines to pilots who want to leave their civilian jobs to serve in the Air Force Reserve, Air National Guard, Navy Reserve, or other Reserve Components. Until a few weeks ago, there was a nationwide shortage of qualified pilots. When an airline pilot left his or her civilian job for a year of military service, that could create a significant problem for the airline's Chief Pilot in finding qualified Captains and First Officers for all the airline's scheduled flights.

The COVID-19 emergency has caused a dramatic reduction in the demand for airline travel. Recently, I have flown flights with 40 seats filled and 140 seats vacant. Until recently, almost every seat in the airliner was filled with a passenger.

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equal to the number of 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 dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

**Because it does not make economic sense to fly near-empty airplanes across the country, VBAL and other major airlines have cut scheduled flights by 50% or more. When fewer flights are scheduled, fewer pilots are needed.**

**Under the collective bargaining agreement (CBA) between VBAL and the VBALPA, a reduced need for pilots means that some pilots are furloughed.<sup>4</sup> Furloughs are based strictly on seniority, and so are recalls from furlough. The most junior pilots are the first to be furloughed and the last to be recalled from furlough.**

**Under the CBA between VBAL and the VBALPA, pilots who have been furloughed are entitled to certain benefits from the airline, and according them those benefits costs VBAL significant money. Like other major airlines, VBAL is looking for alternatives to furloughing pilots. If a pilot can be encouraged to leave his or her job for military service for a period, that reduces the need to furlough other pilots.**

**VBAL and the VBALPA recently signed a “letter agreement” which is an addendum to the CBA. The agreement provides that military service performed by a pilot between 4/1/2020 and 12/31/2020 will be exempt from the pilot’s five-year limit under USERRA.**

**Is that agreement enforceable? Let us assume that I volunteer for a six-month active duty period, from 4/1/2020 to 9/30/2020, and let us assume that this period of service is not exempt from the five-year limit under any of the nine exemptions set forth in section 4312(c) of USERRA.<sup>5</sup> Under these circumstances, will I have the right to reemployment under USERRA?**

**A:** Under those circumstances, you will have the right to reemployment, but not under USERRA. As an addendum to the CBA, the letter agreement is enforceable under the procedures established by the Railway Labor Act (RLA).<sup>6</sup>

As I have explained in Law Review 15116 (December 2015) and many other articles, a person has the right to reemployment after a period of uniformed service if he or she meets five simple conditions:

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<sup>4</sup> In the airline business, this action is called a “furlough.” In all other industries, it is called a “layoff.” The point is that an employee is transferred from a paid status to an unpaid status, with an expectation that the employee may be brought back to a paid status when business improves or when the retirement of more senior employees creates vacancies.

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

<sup>6</sup> Congress enacted the RLA in 1925, to govern labor-management relations in the railroad industry. In the 1950s, airlines were added to the RLA. In 1935, Congress enacted the National Labor Relations Act (NLRA), which governs private sector labor relations, except for the railroad and airline industries.

- a. Must have left a job (federal, state, local, or private sector) to perform service in the uniformed services as defined by USERRA.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit with respect to that employer relationship.
- d. Must not have received a disqualifying bad discharge from the military.<sup>7</sup>
- e. Must have made a timely application for reemployment with the pre-service employer after release from the period of service.<sup>8</sup>

VBAL, or VBAL and the VBALPA together, cannot change the five USERRA conditions, either by adding or deleting a condition. Section 4312(c) of USERRA sets forth the five-year limit and the 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
- (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;

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<sup>7</sup> Under section 4304 of USERRA, 38 U.S.C. 4304, a person does not have the right to reemployment if he or she received a punitive discharge by court martial, or if he or she received an "other than honorable" administrative discharge, or if he or she was "dropped from the rolls" of the uniformed service.

<sup>8</sup> After a period of service of 181 days or more, the service member or veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

- (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.<sup>9</sup>

If your period of service from 4/1/2020 until 9/30/2020 does not fit within one of the nine USERRA exemptions under section 4312(c), it will count toward your five-year limit with VBAL. If this period of service puts you over the USERRA five-year limit, you will not have the right to reemployment under USERRA. Under these circumstances, you have the right to reemployment under the CBA and the letter agreement. You will need to use the RLA enforcement procedures, not the USERRA enforcement procedures, to enforce your reemployment rights.

**Q: What is the relationship between USERRA and the CBA between VBAL and the VBALPA?**

**A:** USERRA is a floor and not a ceiling on the rights of those who are serving or have served our country in uniform. The agreement between your union and the employer can give you *greater or additional rights*, but the agreement cannot take away rights that Congress granted you when it enacted USERRA. The pertinent USERRA section is as follows:

- (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

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<sup>9</sup> 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in computing the five-year limit.

additional prerequisites to the exercise of any such right or the receipt of any such benefit.<sup>10</sup>

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

This article is one of 2000-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:

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

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<sup>10</sup> 38 U.S.C. 4302.