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The Situation Has Changed, But USERRA Has Not

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About Sam Wright

1.1.2.3—USERRA applies to employees who have been laid off
1.3.1.1—Left job for service and gave prior notice
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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 period of military service, that could create a significant problem for the airline's Chief Pilot in finding qualified pilots for all the airline's scheduled flights.

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[1] I invite the reader's attention to 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.

[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 44 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.

The COVID-19 emergency has caused a dramatic reduction in the demand for airline travel. Recently, I heard from a Reserve Organization of America (ROA) member who is a pilot for a major airline. He told me that he is routinely flying 180-seat airplanes with only about 40 passengers on board, and one recent flight had only 13 passengers. Until recently, almost every seat in the airliner was filled with a passenger.

Because it does not make economic sense to fly near-empty airplanes across the country, major airlines have cut scheduled flights by 50% or more. When fewer flights are scheduled, fewer pilots are needed. Instead of discouraging pilots from leaving their jobs for military service, major airlines are encouraging pilots to leave for service. The national shortage of qualified pilots has become a glut.

Because the major airlines now have on board more pilots than they need, it is likely that the airlines will furlough many pilots, the most junior in terms of airline seniority.[3] A pilot who is suddenly off the airline's payroll will, in many cases, seek to return to active duty. In this scenario, it is possible to return to active duty while preserving the right to return to the airline when business conditions improve. To do this, the furloughed pilot needs to meet the five USERRA conditions for reemployment.

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:

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.[4]
e. Must have made a timely application for reemployment with the pre-service employer after release from the period of service.[5]

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[3] In the airline business, this action is called a "furlough." In other industries it is called a "layoff." The idea is that an employee is transferred from a paid status to an unpaid status, not because the employer is dissatisfied with the employee's work, but simply because the employer needs fewer employees than it formerly needed. Employees on the furlough or layoff list can expect to be called back to work if business conditions improve. Under the collective bargaining agreement between the union and the airline, furloughs and recalls from furlough are based strictly on seniority. The most junior pilots are the first to be furloughed and the last to be recalled.

[4] 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.

[5] 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.

If an individual has been furloughed or laid off by his or her employer, the individual is still considered to be an employee for as long as the individual has some reasonable expectation that he or she may be called back to an active working status. In Law Review 31 (October 2001), I wrote:

> Although you have been furloughed, you are still an employee of the airline. If you leave that status to perform service in the uniformed services, and if you meet USERRA's eligibility criteria, you will have the right to reemployment. *See Colon v. Shawnee County, Kansas,* 815 F.2d 594 (10th Cir. 1987).
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> Assume that you enter active duty in October 2001 and leave in October 2002. If you can show that you would have been recalled to work in September 2002, if you had not been on active duty at the time, you will be entitled to reemployment in an active job. Otherwise, you will at least be entitled to reinstatement on the furlough list, in the status that you would have attained if you had not gone back on active duty.

If you choose to go back on active duty while you are in a furlough status, you need to give notice to VBAL that you are going back on active duty. The best way to do this is by certified mail or the e-mail equivalent, so that you will be able to prove that you sent the notice and that the employer received it.

Q: Why should I give notice to the airline, while I am furloughed, that I am returning to active duty? Why does the airline need that information? I am not working anyway, so why do I need to give notice?

A: You need to give the employer prior notice, unless giving such notice is precluded by military necessity or otherwise impossible or unreasonable, because giving prior notice is one of the five conditions that you must meet to have the right to reemployment under USERRA. You cannot have it both ways. You cannot argue that you are an employee, so you will have the right to reemployment, but you are not an employee, so you are not required to give prior notice.

If you do not give prior notice, and the employer denies you reemployment on that basis, you can argue that giving prior notice was "unreasonable" because you had been furloughed. I am not confident that you will win that argument. In any case, giving prior notice to VBAL costs you very little in the way of time and money and is well worth the investment. If you give prior notice, and if you document the fact that you gave prior notice, you will not have to argue that your failure to give prior notice was excused.

Q: Let us assume that I am furloughed in April 2020 and not recalled by the airline until four years later, in April 2024. Let us assume further that, to have an income while in furlough

status with the airline, I return to active duty for two years, from 10/1/2020 until 9/30/2022. And let us assume further that my two-year active duty period is not exempt from the computation of USERRA's five-year limit under one of the subsections of section 4312(c).[6]

Does this two-year active duty period, in 2020-22, count toward my five-year limit? I think that this period does not count. During this active duty period I am absent from my civilian job because I was furloughed, not because I left the job to perform service. What do you think?

A: There is not a court case directly on point, but I think that under these circumstances your 2020-22 active duty period counts toward your five-year limit with VBAL. Under section 4312(c), it is the *cumulative period of uniformed service,* not the cumulative period of absence from the civilian job, that counts toward the five-year limit.

Section 4312(c) provides:

> 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—
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> **(1)** that is required, beyond five years, to complete an initial period of obligated service;
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> **(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;
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> **(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
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> **(4)** performed by a member of a uniformed service who is—
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> **(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;

[6] 38 U.S.C. 4312(c). Please see Law Revie 16043 (May 2016) for a detailed discussion of the five-year limit.

> **(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;
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> **(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;
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> **(D)** ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
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> **(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
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> **(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.[7]

As I have explained in Law Review 19106 (December 2019), it is ordinarily to the veteran's advantage to argue that the *period of service* (not the period of absence) is subject to the five-year limit.[8] We must be consistent in our interpretation. We cannot argue that the period of service rule or the period of absence rule applies, depending on which rule benefits the service member in that specific case.

At a minimum, I suggest that you should not assume that your period of active duty does not count toward your five-year limit just because you were in a furlough status at the time. If you make that assumption, you are betting your civilian job on your theory that the period is exempt.

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This article is one of 2000-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

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[7] 38 U.S.C. 4312(c) (emphasis supplied).

[8] The period of absence is almost always at least a few days longer than the period of service. The service member can leave the civilian job a few days or weeks before entering active duty. After the service member is released from the period of service, he or she has up to 90 days to apply for reemployment if the period of service lasted 181 days or more. 38 U.S.C. 4312(e)(1)(D).

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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