

Yes, USERRA Applies to Retired Regular Officers

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Q: I am a retired Regular Army Colonel. I served as a Medical Corps officer on active duty for 28 years, from 1989 until 2017, when I retired. I specialized in infectious diseases, and I now teach that subject as a professor at a medical school.

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 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 (VRRRA—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 VRRRA 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 VRRRA 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.

I was contacted by the Army, asking me to return to active duty for a year, or maybe longer, to address the COVID-19 emergency. I am seriously contemplating responding affirmatively to the Army's invitation. I did some research on-line and found one of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does USERRA apply to my situation? If I leave my professor position to return to active duty for a year, will I have the right to reinstatement in my position?

A: Yes, USERRA applies to regular military service, as well as service in the National Guard or Reserve. Under USERRA, a person who meets five simple conditions has the right to reemployment:

- a. The person must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.³
- b. The person must have given the employer prior oral or written notice.⁴
- c. The person's cumulative period or periods of uniformed service, relating to the employer relationship with that employer, must not have exceeded five years.⁵
- d. The person must have been released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. The person must have made a timely application for reemployment after release from the period of service.⁷

If you meet these five conditions after your period of service, you will have the right to reemployment. If the medical school refuses to reemploy you or delays your reemployment, it is violating federal law.

Q: It seems that I am well beyond the five-year limit already because I was on active duty from 1989 until 2017. What gives?

³ 38 U.S.C. 4312(a)

⁴ 38 U.S.C. 4312(a)(1).

⁵ 38 U.S.C. 4312(c). There are nine exemptions to the five-year limit—that is, there are nine kinds of service that do not count toward exhausting an individual's five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the limit.

⁶ Disqualifying bad discharges include punitive discharges (by court martial) and OTH (other than honorable) administrative discharges.

⁷ After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). After a period of service of more than 30 days but less than 181 days, the person has 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service of less than 31 days, the person must report back to the employer "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation from the place of service to the person's residence." 38 U.S.C. 4312(e)(1)(A).

A: The five-year limit applies “with respect to the employer relationship for which a person seeks reemployment.”⁸ Your 28 years of active duty were before you were hired by the medical school. That active duty period is irrelevant for purposes of computing the five-year limit.

Q: When I told the dean of the medical school about the communication that I had received from the Army, she told me that the school would hold my job for me if I am called back to active duty involuntarily but not if I volunteer. Does my volunteering to return to active duty disqualify me from reemployment rights under USERRA?

A: No. USERRA applies equally to voluntary and involuntary service. USERRA’s definition of “service in the uniformed services” is as follows:

The term “service in the uniformed services” means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.⁹

Q: The dean told me that if I volunteer to return to active duty, she will not give me a military leave of absence and she will ensure that I never work at the medical school again. What do you say about that?

A: You do not need the employer’s permission, and the employer does not get a veto. The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.¹⁰

⁸ 38 U.S.C. 4312(c).

⁹ 38 U.S.C. 4303(13) (emphasis supplied).

¹⁰ 20 C.F.R. 1002.87 (bold question in original).

Thank you for your service to our country for an entire career of 28 years, and thank you especially for your willingness to serve again for this present emergency.

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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 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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