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Being Retained on Active Duty under a “Stop Loss” Order Does Not Cause you To Exceed USERRA’s Five-Year Limit And Lose your Right to Reemployment

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[About Sam Wright](#)

1.1.2.1—USERRA applies to regular military service

1.3.1.1—Left job for service and gave prior notice

1.3.1.2—Character and duration of service

1.3.1.3—Timely application for reemployment

Q: I am a second-class petty officer (E-5) in the Regular Navy. I enlisted in the spring of 2015 and reported to basic training in May 2015. Before I enlisted, I worked for a funeral home in my hometown—let’s call it “Funerals R Us” or FRUS. Other local businesses have been hard hit by the COVID-19 pandemic, and some of them have had to lay off employees or even file for bankruptcy, but FRUS is doing more business than ever before.

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 (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.

When I enlisted, I signed a contract in which I agreed to remain on active duty for five years, from May 2015 until May 2020. Just recently, I learned that the Navy will be extending my active duty involuntarily under a “stop loss” order because of the COVID-19 emergency.

While doing an Internet search, I found one of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I understand that one of the conditions for reemployment under that law is that the person’s period of uniformed service must not have been more than five years. If the “stop loss” order keeps me on active duty beyond the fifth anniversary of my entry on active duty, does that cause me to lose my right to reemployment?

A: No. As I have explained in detail in Law Review 16043 (May 2016) and other articles, there are nine exemptions to the five-year limit. That is, there are nine kinds of service that are exempted from the computation of the individual’s five-year limit with respect to that employer relationship. USERRA provides that a period “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” does not count in the computation of the person’s five-year limit.³ If the stop loss order extends your active duty period until later this year or even into next year, you will still have the right to reemployment, assuming of course that you meet the other four USERRA conditions for reemployment.⁴

Q: When I enlisted in the spring of 2015, I intended to remain on active duty for a full career of 20 years or more. I told Mr. Williams, the owner-operator of FRUS, that I had enlisted, and he put on a party for me on my last day at work before I went to basic training. I told him of my plan to remain on active duty for a full career, and I did not say anything about returning in five years to resume my job at the funeral home. At the time, I had no idea that federal law gave me the right to reemployment. Does that matter?

A: No, none of that matters. USERRA kept your job behind you as an “unburned bridge.” You were not required to predict that you would return within five years, and you were not required to inform the civilian employer about USERRA. The Department of Labor (DOL) USERRA regulation provides as follows:

³ 38 U.S.C. 4312(c)(2).

⁴ You must have left the FRUS job to perform uniformed service, and you must have given the employer prior oral or written notice. You must be released from the period of service without receiving a disqualifying bad discharge from the Navy, and you must make a timely application for reemployment. Because your period of service has exceeded 180 days, you have 90 days (starting on the date of release from active duty) to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.⁵

Q: A year ago, in May 2019, I was back home visiting my parents for a few days. I called upon Mr. Williams at the funeral home and told him that I would likely be leaving active duty in May 2020 and that I would likely seek reemployment under USERRA. He told me that USERRA only applies to folks in the National Guard or Reserve, not to folks like me in the Regular Navy. What do you say about that?

A: Mr. Williams is wrong. USERRA applies to persons serving in the regular military, as well as the National Guard or Reserve. Please see Law Review 0719 (May 2007).

Q: Mr. Williams also told me that I need an “honorable discharge” to have the right to reemployment. The personnel officer told me that I will not receive an honorable discharge until I complete my eight-year enlistment in 2023. What gives?

A: You will not receive an honorable discharge when you leave active duty later this year or next year. Instead, you will receive a DD-214, showing (among other information) your date of entry on active duty, your date of release from active duty, and that your service was honorable. That is all the documentation that you need to have the right to reemployment.

The DD-214 should also show that your release from active duty was extended beyond May 2020 because of the stop loss order. I suggest that you provide a copy of this article to the personnel officer and respectfully request that the DD-214 contain language about the stop loss order. Such a statement will likely be helpful to you in securing prompt reemployment at the funeral home.

Like everyone enlisting in the armed forces since the early 1980s, you signed up for an eight-year enlistment. If you choose not to affiliate with the Navy Reserve after you leave active duty, you will be part of the Individual Ready Reserve (IRR) until you complete the entire eight-year enlistment. At that point, the Navy will send you an honorable discharge in the mail.

⁵ 20 C.F.R. 1002.88 (bold question in original).

Thank you for your service to our country in the United States Navy. We hope that you will consider continuing your service in the Navy Reserve after you leave active duty.

Please join or support ROA

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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