LAW REVIEW 201

Have I Exceeded the Five-Year Limit?

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Q: I am a Major in the New York Army National Guard and I have read with great interest your "Law Review" articles, on the ROA Web site (www.roa.org), concerning the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am currently on a period of involuntary active duty (mobilization), and I expect to leave active duty soon. I have contacted my employer's Human Relations (HR) Director, and she responded by e-mail, saying that I have exceeded USERRA's five-year limit and that the company has no obligation to reemploy me. I think that she is wrong, but this five-year limit is confusing. Please review for me what counts and what does not count.

I have worked for the XYZ Corporation, in New York City, since 1980, and I have been a member of the New York Army National Guard since 1981. When I joined the Guard, in 1981, I went away for about nine months of "boot camp" and elementary training in my military specialty. In 1987, I was gone for another nine months, for Officer Candidate School and some other military training, and I was commissioned a Second Lieutenant in 1987. I was mobilized for a year, in 1990-91, for the first Persian Gulf War. I performed a three-year voluntary AGR (Active Guard and Reserve) tour, from January 2001 to January 2004. Nine months later, in September 2004, I was involuntarily mobilized with my unit. I expect to leave active duty in late 2005. I have also done inactive duty training (drill weekends) one weekend every month, and about two weeks of annual training every year. I have done three voluntary six-month ADSW (active duty for special work) periods, in 1989, 1995, and 1999. Six times, I have been called to State active duty periods, by the Governor of New York, for a riot, two ice storms, two tornadoes, and a flood. Of all this duty, which parts count toward my five-year limit with the XYZ Corporation?

The way that I read your "Law Review" articles, Congress enacted USERRA in 1994. Does that mean that military duty that I performed before the enactment of USERRA is irrelevant for purposes of computing my five-year limit?

A: To have the right to reemployment under USERRA, you must meet five eligibility criteria, as I describe in Law Review 77. One criterion is that your cumulative period or periods of uniformed service, relating to that employer relationship, not exceed five years. Go to www.roa.org. Click on "Legislative Affairs" then "Law Review Archive." You will find almost 200 articles, mostly but not entirely about USERRA. You will find a topical index as well as a numerical index.

I address the five-year limit in some detail in Law Reviews 6 and 42. I have decided to write a new article on this subject, because I receive a great many questions on the five-year limit.

It is *not* correct to state that military duty performed before Congress enacted USERRA is irrelevant for purposes of the five-year limit. Congress enacted USERRA in 1994, as a rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. As part of USERRA, Congress enacted transition rules. Those rules are not codified, but you can find them in a lengthy note following section 4301 of title 38, in United States Code Annotated.

The VRR law had separate sections applying to active duty, active duty for training and inactive duty training, and initial active duty for training. Under the VRR law, the limit on active duty, with respect to a particular employer relationship, was four years. Involuntary active duty, as in a draft or an involuntary mobilization from a Reserve Component, did not count toward the four-year limit. Active duty for training, inactive duty training, and initial active duty training were also excluded from the computation of the four-year limit.

USERRA's transition rules provide that duty performed prior to December 12, 1994 (the effective date of most USERRA provisions) does not count toward USERRA's five-year limit if it did not count toward the VRR law's four-year limit. (USERRA applies to "reemployments initiated" on or after December 12, 1994—you apparently initiate a reemployment when you complete the relevant period of service and *apply* to get your job back.) Duty performed prior to December 12, 1994 that counted toward the VRR law's four-year limit will count toward USERRA's five-year limit.

All of this assumes, of course, that we are talking about the same civilian employer and the same employer relationship. USERRA's five-year limit only includes "such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment." 38 U.S.C. 4312(c). The VRR law's four-year limit was computed in a similar way. *See Hall v. Chicago & Eastern Illinois Railroad Co.,* 240 F. Supp. 797, 799-800 (N.D. Ill. 1964). Under either law, military service that you performed before starting the current employer relationship is irrelevant for reemployment rights purposes. In your case, however, all of your military service has been since you were hired by the XYZ Corporation, more than 25 years ago.

The Army training that you performed in 1981, when you joined the Army National Guard, and in 1987, when you earned your commission, were not "active duty" for VRR purposes and did not count toward the VRR law's four-year limit. Accordingly, those periods do not count toward USERRA's five-year limit. Similarly, the annual training tours and inactive duty training (weekend drill) periods that you have performed do not count toward your five-year limit, regardless of whether those periods were before or after December 12, 1994.

USERRA and the VRR law apply to *Federal* military service and training that you have performed, under either title 10 or title 32 of the United States Code. I invite your attention to my Law Review 45, with respect to USERRA coverage for National Guard members.

Like all other States, New York has enacted a State law that protects National Guard members performing State active duty. Your six periods of State active duty, when called by the Governor of New York for State emergencies, were covered by State law, not by USERRA or the VRR law. Those periods do not count toward your five-year limit.

Your involuntary mobilization periods, in 1990-91 and 2004-05, are exempted from the computation of your five-year limit. As I understand the facts, you are currently on active duty under involuntary mobilization orders. Since this current period is involuntary, it does not count toward your five-year limit. You will have the right to reemployment at the end of your current involuntary active duty period, assuming of course that you meet the other USERRA eligibility criteria. You must have given the XYZ Corporation prior notice, before the start of this current active duty period. You must be released from this current period under honorable conditions, and you must make a timely application for reemployment at the XYZ Corporation.

Your voluntary three-year AGR tour, from January 2001 to January 2004, counts toward your five-year limit. Similarly, the three voluntary six-month ADSW tours count toward your five-year limit. I figure that you have used about 4.5 years of your five-year limit. Going forward, you need to be very careful about any additional voluntary active duty, because you are approaching your limit.

Section 4312(c) of USERRA, 38 U.S.C. 4312(c), explicates the five-year limit, including the eight statutory exemptions from the limit. For the benefit of "Law Review" readers, I will summarize those exemptions.

Section 4312(c) (1) exempts "any service- that is required, beyond five years, to complete an initial period of obligated service." For example, consider Johnny Smith. In September 1999, he left his job as an employee of the City of New York and enlisted in the Navy. Smith chose the nuclear power option. Persons choosing that option are required to serve on active duty for six years—six years is Smith's "initial period of obligated service." When Smith leaves active duty in September 2005, he will have the right to reemployment with the City of New York, assuming that he meets the other USERRA eligibility criteria.

Section 4312(c)(2) exempts "any service- … 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." Smith expects to leave active duty on or about September 15, 2005 and to have the right to reemployment with the City of New York. But Smith is assigned to a nuclear submarine in the Indian Ocean. Three of the submarine's other enlisted

personnel who are trained in the operation of the propulsion system are stricken with sudden illnesses, just as an emergency arises in Southwest Asia. "The senior officer present afloat in foreign waters shall send to the United States by Government or other transportation as soon as possible each enlisted member of the naval service who is serving on a naval vessel, whose term of enlistment has expired, and who desires to return to the United States. However, when the senior officer present afloat considers it essential to the public interest, he may retain such member on active duty until the vessel returns to the United States." 10 U.S.C. 5540(a).

Pursuant to this statutory authority, the Commanding Officer of the submarine extended Smith's active duty period for several months, until the submarine returned to its home port at Bangor, Washington. This is an example of a situation wherein Petty Officer Smith was unable to obtain orders releasing him from his period of service before the expiration of his five-year limit (as extended by the period of initial obligated service). Smith's inability to obtain release from his period of service in September 2005, before the expiration of his five-year limit, was through no fault of his own. Smith has the right to reemployment when he is finally released from active duty in February 2006.

Section 4312(c)(3) exempts "any service- … 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." This subsection exempts Reserve and National Guard training from the computation of the five-year limit.

Section 10147 of title 10 establishes the general training requirements for members of the Ready Reserve. Each Ready Reserve member "shall be required, while in the Ready Reserve, to – participate in at least 48 scheduled drills or training periods during each year and serve on active duty for training for not less than 14 days (exclusive of traveltime) during each year." 10 U.S.C. 10147(a)(1). Time spent on this required training does not count toward the individual's five-year limit.

Sections 502(a) and 503 of title 32 establish very similar training requirements for members of the Army National Guard and Air National Guard. Those training periods are also exempted from the computation of the five-year limit.

National Guard and Reserve members are sometimes asked to perform training duty well in excess of these statutory minimums. These extra training periods are exempted from the five-year limit *if* the "Secretary concerned" has determined that such training is "necessary for professional development, or for skill training or retraining." These "magic words" should appear in the individual's orders for the period in question, or at least in the individual's Department of Defense (DOD) Form 214 (DD-214), received at the end of the period.

USERRA does not define the term "Secretary concerned," but that term is defined in 10 U.S.C. 101(a)(9). This is a reference to the Service Secretary—the Secretary of the

Army, the Secretary of the Navy, or the Secretary of the Air Force. For the Coast Guard, the Secretary concerned is the Secretary of Homeland Security.

A DOD regulation provides that this authority may be delegated, but not below the Assistant Secretary level. The Secretary of the Army has delegated this authority to the Assistant Secretary for Manpower and Reserve Affairs, and similarly for the Secretary of the Navy and the Secretary of the Air Force. The Secretary of Homeland Security has delegated this authority to the Commandant of the Coast Guard.

The Assistant Secretary of the Army for Manpower and Reserve Affairs could make this determination for an individual service member. More commonly, and more practicably, the Assistant Secretary will make the determination for a class of persons or a sort of training. For example, the Assistant Secretary could determine that attending the Army War College is necessary for the professional development of Army Reserve and Army National Guard officers. Once that determination has been made, including the magic words in individual orders should be a clerical function not requiring an individual determination by the Assistant Secretary. Individual determinations and certifications should not be necessary except in unusual circumstances.

Section 4312(c)(4)(A) exempts "any service- … performed by a member of a uniformed service who is – ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14."

Section 688 provides for involuntary recall to active duty of retired members of the Armed Forces, under certain circumstances (like national emergencies). Section 12301(a) provides authority for the involuntary call to active duty, during a time of war or national emergency declared by Congress, of Reserve and National Guard units and of members not assigned to units. Section 12301(g) provides for recalling to active duty or retaining on active duty service members who have been determined to be in a "captive status."

Section 12302 provides for the involuntary mobilization, for up to 24 months, for National Guard and Reserve units, and for individual members not assigned to units, during a time of national emergency declared by the President. This is the "partial mobilization" authority that has been utilized since September 11, 2001.

Section 12304 provides for the involuntary mobilization of certain Individual Ready Reserve (IRR) members in times of emergency. Section 12305 provides that when RC members have been involuntarily mobilized the President is authorized to suspend certain laws pertaining to separation of members of the Armed Forces, regular as well as Reserve and National Guard. This section is the authority for "stop loss" orders retaining individuals on active duty during times of emergency.

A "stop loss" order that retains an individual on active duty involuntarily will not cause that person to lose his or her right to reemployment, even if the stop loss order causes the

person to remain on active duty past the five-year limit. For example, let us say that Mary Jones' five-year limit with respect to the ABC Corporation expires in September 2005, and she expects to leave active duty, at the end of her obligated active service period, in that month. Jones' active duty period is extended by a stop loss order, because her unit is about to deploy to Iraq. That involuntary extension will not cause Jones to lose her right to reemployment.

The cited title 14 sections are similar provisions for the Coast Guard. Title 14 governs the Coast Guard, just as title 32 governs the National Guard.

Section 4312(c)(4)(B) exempts "any service- … performed by a member of a uniformed service who is - … 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 Congress, as determined by the Secretary concerned." Please note that the phrase "ordered to" does not necessarily connote involuntariness. Involuntary service would almost certainly be covered by section 4312(c)(4)(A). Subsection (B) gives the Service secretary or designee the authority to exempt *voluntary* service that is performed "because of a war or national emergency." This authority should not be abused, but it can be a very valuable way of meeting personnel shortages in this difficult time. An individual is more likely to volunteer if the service can assure the individual that the period of voluntary service will be exempted from the individual's five-year limit.

Section 4312(c)(4)(C) exempts "any service- … performed by a member of a uniformed service who is - … 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." Section 12304 has been utilized to mobilize RC personnel, including IRR members, and to deploy them to Iraq and Afghanistan. Accordingly, the relevant Service Secretary has the authority to accept *voluntary* service by other RC members, for the same mission, and to exempt such *voluntary* service from the computation of the individual's five-year limit.

Section 4312(c)(4)(D) exempts "any service- … performed by a member of a uniformed service who is - … ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services." As I have mentioned in previous "Law Review" articles, I largely drafted (along with Susan M. Webman, Esq.) the interagency task force work product that became USERRA, with only a few changes in Congress. Susan Webman and I did this drafting work in the late 1980s. Until August 1990, when the first President Bush mobilized National Guard and Reserve units in response to Iraq's invasion of Kuwait, involuntarily mobilizing RC units was considered infeasible, because of domestic and international political considerations. The model that was followed at the time was to solicit RC members to *volunteer* for contingency operations. For example, that model was utilized in the invasion of Panama in December 1989.

The Webman-Wright draft of section 4312(c)(4)(D) (not changed in the final version enacted by Congress) was based on the idea of utilizing volunteers. We had in mind that

the Service Secretary could deem a particular mission or requirement to be "critical" and thereby exempt such a period of service from the computation of the individual's five-year limit. This is a way to give the individual an incentive to volunteer.

Finally, section 4312(c)(4)(E) exempts "any service- … performed by a member of a uniformed service who is- … called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10." This refers to calling National Guard members to Federal active duty in case of invasion or insurrection. This authority is utilized very infrequently, but it was utilized in 1992, in response to the Rodney King riots in Los Angeles.

In summary, most National Guard and Reserve members do not need to worry about the five-year limit, for two reasons. First, the exemptions, as detailed above, are very generous. Second, starting a new job with a new employer gives the individual a fresh five-year limit with the new employer. I hope that this detailed information about section 4312(c) will be useful to those members who are legitimately concerned about the five-year limit.

**Military title shown for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Labor, or the U.S. Government.*