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You Were Entitled to Reemployment in 2012 Because you Had Not Exceeded USERRA's Five-Year Limit

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[About Sam Wright](#)

1.3.1.2—Character and duration of service

Q: I am the same retired Army Reserve Colonel who asked the questions in Law Review 22016, the immediately preceding article in the Law Review series. Now that I am getting ready to retire from my Federal civilian career, I inquired as to why I was not credited with Federal civilian pension credit for my final active-duty period, from 10/1/2008 until 9/30/2012. The agency's personnel office told me that the agency considered crediting me for that period of service but decided not to because I was beyond the five-year limit in October 2012, when I applied for reemployment.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 38 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 <mailto:swright@roa.org>.

I think that most of my military-service periods were exempt from USERRA's five-year limit and that I was still within the limit in October 2012. What do you think?

Answer, bottom line up front

I have reviewed all your military orders and DD-214 forms, which you sent me. You used exactly four years of your five-year limit during your distinguished career in the Army and Army Reserve. In October 2012, when you completed your final active-duty period and applied for reemployment, you still had one year of head-room remaining in your five-year limit. You met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). You were entitled to reemployment, and denying you Federal civilian pension credit for the 2008-12 active-duty period violated USERRA.

Explanation

Section 4312(c) of USERRA sets forth the five-year limit and the exemptions from the limit, as follows:

(c) 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;*

- (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 [10 USCS §§ 331 et seq.] or under section 12406 of title 10 [10 USCS § 12406]; 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.³

Your initial period of active duty, from May 1992 to May 1998, does not count toward your five-year limit because you did not perform that active duty “with respect to the employer relationship for which a person seeks reemployment.”⁴

Your involuntary call-up for Operation Desert Shield/Storm, in 1990-91, was before USERRA was enacted on 10/13/1994. The 1940 Veterans’ Reemployment Rights Act (VRRA) was in effect at the time. Under the VRRA, there was a four-year limit, and involuntary active duty was exempted from that limit. Under the transition rules from the VRRA to USERRA, a period of service that was performed before the date of enactment of USERRA and that was exempt from the VRRA’s four-year limit is also exempt from USERRA’s five-year limit.⁵ Thus, your 1990-91 active-duty period does not count toward your five-year limit.

³ 38 U.S.C. § 4312(c) (emphasis supplied). See also Law Review 16043 (May 2016), for a detailed discussion of what counts and what does not count in exhausting an individual’s five-year limit with respect to a specific employer relationship.

⁴ 38 U.S.C. § 4312(c). You performed that active-duty period before you began your Federal civilian career in 1988, so that period is not related to your employer relationship with the Federal Government.

⁵ See 38 U.S.C.A. § 4301 note (reproducing § 8(a)(3) of Public Law 103-353, as amended by Public Law 104-275, title III, § 312, October 9, 1996, 110 Stat. 3336. See also 20 C.F.R. § 1002.102 and § 4:12 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. That section can be found on pages 151-53 of the 2021 edition of the *Manual*.

Your involuntary call-ups in 2001-02 and 2005-06 do not count toward exhausting your five-year limit.⁶ Your periods of inactive duty training (drills) and annual training are exempt from the computation of your five-year limit.⁷

Your four-year period of voluntary AGR duty, from 10/1/2008 through 9/30/2012, counts toward exhausting your five-year limit, but all your other military service periods that you performed during your career as a Federal civilian employee are exempt. You did not exceed the five-year limit.

You clearly met the other four USERRA conditions for reemployment.⁸ In 2008, you left your civilian job to perform uniformed service, and you gave the employer prior oral or written notice.⁹ You served honorably, and you did not receive a disqualifying bad discharge from the Army.¹⁰ When you left active duty the final time on 9/30/2012, you made a timely application for reemployment with your pre-service employer, well within the 90-day deadline for doing so.¹¹

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ROA is almost a century old—it was established on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to

⁶ 38 U.S.C. § 4312(c)(4)(A).

⁷ 38 U.S.C. § 4312(c)(3).

⁸ See Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions for reemployment.

⁹ 38 U.S.C. § 4312(a).

¹⁰ 38 U.S.C. § 4304.

¹¹ 38 U.S.C. § 4312(e)(1)(D). After a period of service of 181 days or more, the individual has 90 days to apply for reemployment.

exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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.

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4312(c)¹² Congress recently established the United States Space Force as the 8th uniformed service.