

## LAW REVIEW<sup>1</sup> 22055

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### An ESGR Briefing Does Not Cover the Details of USERRA.

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#### 1.3.1.2—Character and duration of service

**Q: I am a Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I only recently became aware of the “Law Review Library” on the ROA website, and I have read several of your articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) with great interest.**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,000 “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 Spouses’ 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.

<sup>2</sup> 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>.

<sup>3</sup> At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing business as” name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

**Many years ago, when I was a junior officer, I left a civilian job to go on active duty and remained on active duty for seven years. At the time, I was vaguely aware that there is a five-year limit under USERRA, on the permissible duration of a person's period of service in the uniformed services, if the person is to have the right to reemployment after completing the period of service, but I had heard that all duty after the terrorist attacks of 9/11/2001 was exempt from the computation of the limit. I left active duty and applied for reemployment with my pre-service employer. I was shocked to learn that I did not have the right to reemployment because I was beyond the five-year limit.**

**Now that I am the commanding officer of a major Army Reserve unit, I decided that I was going to ensure that what happened to me would not happen to any of the other reservists assigned to my unit. I contacted the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR) and arranged for an ESGR volunteer to speak to our unit during a recent drill weekend.**

**The ESGR volunteer made a pretty good speech about getting employers to cooperate concerning Reserve Component service, but he did not address the five-year limit, and when I asked him questions about what counts and what does not count toward exhausting an individual's limit he said: "That is really complicated, and I am not qualified to answer that question."**

**How can I get a speaker for my unit who can address the important USERRA technicalities, like the computation of the five-year limit?**

**A: I invite your attention to: [https://www.youtube.com/embed/\\_XhVyECa7QY](https://www.youtube.com/embed/_XhVyECa7QY)**

You will find a 45-minute presentation about USERRA, with PowerPoint slides. In December 2021, I gave that presentation to Navy Reservists at the Navy Reserve Center in Cincinnati, and the presentation was recorded. In that presentation, I give a detailed explanation of the conditions that an individual must meet to have the right to reemployment, and this includes a detailed discussion of USERRA's five-year limit and the exemptions from the limit.

If you wish, I can give your unit an individualized briefing by remote means like Zoom or Teams. If your unit is located within 400 miles of my home in central Texas, I can speak to your unit in person.

More broadly, I invite your attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter), where you will find more than 2,000 "Law Review" articles about USERRA and other laws that are especially pertinent to those who serve our country in the Reserve Components of the armed forces. ROA initiated this column in 1997, and we add new articles each month. These articles are available for free to everyone, not just ROA members. There is no toll booth on the road to the Law Review Library.

With regard to the five-year limit, I invite your attention to Law Review 16043 (May 2016). That article explains in great detail what counts and what does not count in computing an individual's five-year limit. The title of the article is "You Must Keep Track of your own Five-Year Limit."

Drill weekends, annual training, and involuntary call-ups are excluded from the computation of the five-year limit. Some voluntary service is also excluded, but it is not correct to say that all service after 9/11/2001 is exempt. A service member who frequently volunteers for lengthy service periods needs to understand which periods count toward the five-year limit and which periods are exempt. Law Review 16043 contains all the information that you need about the five-year limit.

As I explain in detail in Law Review 15116 (December 2015) and many other articles, a person must meet five simple conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services, as defined by USERRA.<sup>4</sup>
- b. Must have given the employer prior oral or written notice.<sup>5</sup>
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the individual's employer relationship with that employer.<sup>6</sup>
- d. Must have served honorably and must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>7</sup>
- e. Must have made a timely application for reemployment with the pre-service employer after release from the period of service.<sup>8</sup>

If you meet these five conditions, you are entitled to prompt reinstatement in the position that you would have attained if you had been continuously employed in the civilian job (possibly a better job than the one you left).<sup>9</sup> You are also entitled, upon your reemployment, to continuous seniority and pension credit, as if you had been continuously employed.<sup>10</sup>

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<sup>4</sup> 38 U.S.C. § 4312(a).

<sup>5</sup> 38 U.S.C. § 4312(a)(1).

<sup>6</sup> 38 U.S.C. § 4312(c) (discussed in detail above).

<sup>7</sup> 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges awarded by court martial for serious misconduct and OTH ("other than honorable") administrative discharges.

<sup>8</sup> After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>9</sup> 38 U.S.C. § 4313(a)(2)(A).

<sup>10</sup> 38 U.S.C. §§ 4316(a), 4318.

Our “Law Review” articles contain all the information that you need to ensure that you meet the USERRA conditions and to enforce your USERRA rights, if necessary. These articles are available for free to all Reserve Component service members, regardless of their membership status, or lack thereof, in ROA, but we certainly hope that they will join.

### **Please join or support ROA**

This article is one of 2,000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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 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 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.

If you are now serving or have ever served in any one of our nation’s eight<sup>11</sup> uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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](http://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:

Reserve Organization of America  
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<sup>11</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>12</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).