

LAW REVIEW¹ 23009

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**USERRA's Five-Year Limit Has Nine Exceptions.
One Exception Is for Service, beyond Five Years,
To Complete the Member's Initial Active Service Obligation**

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Subject Index Codes:

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Q: My son (age 27) enlisted in the Navy at age 21 and reported to basic training on 12/1/2016. Because he had chosen the Navy's nuclear power program, his active-duty obligation was for six years, and he remained on active duty for exactly six years, until he was released from active duty on 11/30/2022. He affiliated with the Navy Reserve immediately

¹ Please see 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, and we add new articles each month. I am the author of more than 90% of the articles published so far, 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 on active duty and in the Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and I currently serve on the Executive Committee and as Chairman of the Membership Committee. I took part in the drafting of USERRA, to replace the 1940 reemployment statute, while employed as an attorney for the United States Department of Labor (DOL). I have also worked with USERRA and the predecessor reemployment statute as a Navy judge advocate, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and as an attorney for the United States Office of Special Counsel (OSC). For six years (June 2009 through May 2015), I was a full-time employee of ROA, serving as the first Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC. My paid ROA employment ended 5/31/2015, but I have continued many of the SMLC functions as a volunteer and ROA member. You can reach me by e-mail at SWright@roa.org.

after he was released from active duty, and he recently did his first Navy Reserve drill weekend.³

My son started a new job, working for our city government, in January 2016 and worked there for more than ten months, until he resigned in November 2016 to report to basic training. He told his immediate supervisor and the city's personnel office that he was resigning because he had enlisted in the Navy, but he did not say anything about the possibility of returning to work for the city after leaving active duty.

I am a retired Army Reserve Colonel and a life member of the Reserve Organization of America (ROA).⁴ I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform. During my 25 years in the Army Reserve, after I left active duty in 1995, I utilized your articles in dealing with my own civilian employer and I shared your articles with many of my Army Reserve colleagues and subordinates.

I was under the impression that USERRA only applied to National Guard and Reserve service, but when I read your Law Review 23001 (January 2023) I came to realize that USERRA also applies to service in the Active Component of the Navy or any other armed force. Does my son have the right to reemployment with our city government?

My son is planning to start college in September 2023, but that is still seven months away, and he needs gainful employment in the meantime. He has been unable to find a job because employers are reluctant to hire him, knowing that he will be leaving in a few months to start college. Should my son apply for reemployment with the city government?

Answer, bottom line up front: YES. If your son meets the five USERRA conditions for reemployment, and it will be easy for him to meet them if somebody explains the conditions to him, he will be entitled to reemployment as a matter of federal law. He will not be required to promise that he will remain in his city job for any minimum period after reemployment.

³ Your son is eligible to join ROA, and we would love to have him as a member. He can join on-line at www.roa.org. The cost is only \$20 per year or \$450 for a life membership.

⁴ In 2018, the members of the Reserve Officers Association amended the organization's constitution and made all past and present uniformed services personnel (E-1 through O-10) eligible for full membership, including voting and running for office. The organization adopted the "doing business as" name "Reserve Organization of America" (ROA) to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

Explanation

Any service member or veteran who meets the following conditions is entitled to reemployment under USERRA:

- a. Left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.⁵
- b. Gave the employer prior oral or written notice.⁶
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which the person seeks reemployment.⁷
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.⁸
- e. After release from the period of service, has made a timely application for reemployment.⁹

A person who meets these five conditions is entitled to prompt reinstatement in the job that he or she would have attained if he or she had remained continuously employed by the civilian employer, or another job (for which he or she is qualified) that is of like seniority, status, and pay.¹⁰ Upon reemployment, the person is entitled to be treated as if he or she had been continuously employed, for seniority and pension purposes in the civilian job.¹¹

Your son can treat his job at the city as an “unburned bridge”—he was not required to decide when he left the job to enter active duty that he would want to return to the job when he left active duty. The pertinent paragraph of USERRA’s legislative history is as follows:

The Committee [House Committee on Veterans’ Affairs] does not intend that the requirement to give notice to one’s employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the service member’s civilian job as an “unburned bridge.” Not until the individual’s discharge or release from service and/or transportation back home, which triggers the application time, does the

⁵ 38 U.S.C. § 4312(a).

⁶ 38 U.S.C. § 4312(a)(1).

⁷ 38 U.S.C. § 4312(c).

⁸ Disqualifying bad discharges include bad conduct discharges and dishonorable discharges (awarded by court martial for serious offenses) and other-than-honorable administrative discharges. 38 U.S.C. § 4304.

⁹ 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). Shorter deadlines apply after shorter periods of service.

¹⁰ 38 U.S.C. § 4313(a)(2)(A).

¹¹ 38 U.S.C. § 4316(a), 4318.

service member have to decide whether to recross that bridge. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946): “He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life.”¹²

Section 4331 of USERRA¹³ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The pertinent section of the DOL USERRA Regulations is as follows:

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.¹⁴

Q: You said that the period of uniformed service must not have exceeded five years. My son was on active duty for exactly six years. Does that mean that he does not have the right to reemployment?

A: No. As I have explained in detail in Law Review 16043 (May 2016), there are nine exceptions 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 with a specific employer. One of the exceptions is as follows: “[service] that is required, *beyond five years*, to complete an initial period of obligated service.”¹⁵

Q: How much of the five-year limit does my son have left?

¹² H.R. Rep. No. 103-65, pt. 1 (1993), reprinted in KATHRYN PISCITELLI & EDWARD STILL, THE USERRA MANUAL: UNIFORMED SERVICES EMPLOYMENT & REEMPLOYMENT RIGHTS app. D-1, at 827 (2021 ed.).

¹³ 38 U.S.C. § 4331.

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

¹⁵ 38 U.S.C. § 4312(c)(1) (emphasis supplied). Your son’s sixth year of active duty, after 11/30/2021, does not count toward his five-year limit with respect to his right to reemployment with the city government.

A: None. Your son has used the entire limit. Only the part of his six-year period of service that exceeds the five-year limit (one year) is exempted by section 4312(c)(1).

Q: My son affiliated with the Navy Reserve immediately after he left active duty. If my son returns to work for the city, his pre-service employer, will he lose his job the first time that he misses work for a drill weekend or annual training period?

A: No. His drill weekends and annual training periods do not count toward exhausting his five-year limit with respect to his employment relationship with the city.¹⁶ If your son is involuntarily called to active duty from the Navy Reserve, the involuntary period does not count toward exhausting his five-year limit.¹⁷ Under limited circumstances, even voluntary active duty can be exempted from the limit.¹⁸

Because your son has used his entire five-year limit with respect to his employer relationship with the city, he needs to be very careful, going forward, to ensure that any military leave that he takes while employed by the city is exempt from the limit.¹⁹

Q: Is it too late for my son to apply for reemployment with the city government?

A: No, it is not too late. After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply for reemployment.²⁰ Because your son was released from active duty on 11/30/2022, he has until 2/28/2023 to apply for reemployment (31 days in December, 31 days in January, and 28 days in February).

Q: What is an application for reemployment?

A: The pertinent section of the Department of Labor USERRA Regulation is as follows:

Is an application for reemployment required to be in any particular form?

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not

¹⁶ 38 U.S.C. § 4312(c)(3).

¹⁷ 38 U.S.C. § 4312(c)(4).

¹⁸ *Id.*

¹⁹ Your son should read Law Review 16043 (May 2016) very carefully. That article goes into detail as to what counts and what does not count in exhausting the five-year limit. If your son leaves his city job in September 2023, as planned, he will get a fresh five-year limit with his next employer.

²⁰ 38 U.S.C. § 4312(e)(1)(d).

required to identify a particular reemployment position in which he or she is interested.²¹

Q: When my son starts his college career in September 2023, will USERRA protect his college career when he must miss classes for military duty?

A: No, because the college is not his employer. However, Congress has enacted a similar law that protects post-secondary students.²²

Please join or support the Reserve Organization of America (ROA).

This article is one of 2,000-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, and we add new articles each month.

ROA is more than 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national 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, ESGR volunteers, DOL investigators, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We supply information to service members, without regard to their membership status, or lack thereof, in our organization, but please understand that ROA members, through their dues and contributions, pay the cost of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any of our country’s eight uniformed services,²³ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.²⁴ Enlisted personnel as well as officers are eligible for full membership, and

²¹ 20 C.F.R. § 1002.118 (bold question in original). See Law Review 14045 (March 2014) for a sample application for reemployment letter.

²² 20 U.S.C. § 1091c. See also 34 C.F.R. § 668.18. See generally Law Review 21038 (July 2021); Law Review 21048 (August 2021), and Law Review 20149 (August 2021).

²³ Congress recently created the United States Space Force as the eighth uniformed service.

²⁴ If you are under the age of thirty-five, you can become an associate member for free for five years or until you turn thirty-five, whichever comes first.

eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve.

If you are eligible, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

Reserve Organization of America
1 Constitution Avenue NE
Washington, DC 20002²⁵

²⁵ You can also contribute on-line at www.roa.org.