

USERRA's Five-Year Limit Applies to the Cumulative Period of Uniformed Service that you Have Performed with Respect to the Employer Relationship for which you Seek Reemployment, Not the Cumulative Days of Absence from the Civilian Job.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader's attention to 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.

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>.

³ In 2018, members of the Reserve Officers Association amended the organization’s constitution and made enlisted personnel eligible for full membership, including voting and running for office. The organization adopted the

While in college, I participated in the Army's Reserve Officers Training Corps (ROTC). When I graduated in 1995, I was commissioned a second lieutenant. I remained on active duty for 12 years. When I was released from active duty in May 2007, I affiliated with the Army Reserve, and soon thereafter I found a civilian job working for a large company—let us call it Daddy Warbucks Industries or DWI.

I left my DWI job when I was called to active duty involuntarily in 2008-09 and 2011-12, and I was also away from work for drill weekends and annual training periods. I went on voluntary Active Guard and Reserve (AGR) duty on 10/1/2018, and my current orders expire on 9/30/2023 (exactly five years later). I want to extend my active duty for at least 30 days to give me time to train my replacement, but an Army lawyer that I consulted told me that if I remain on active duty for even one day past 9/30/2023 I will lose the right to reemployment. Is that correct?

Answer, bottom line up front

Yes. To have the right to reemployment under USERRA, you must meet the five USERRA conditions.⁴ You must meet all five USERRA conditions, including the five-year limit.

As of now, you have not exceeded the five-year limit, but if you remain on active duty past 9/30/2023 you will be beyond the five-year limit and you will not have the right to reemployment.

Explanation

The five-year limit, and the exceptions to the limit, are set forth in section 4312(c) of USERRA, 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*

⁴ “doing business as” name of “Reserve Organization of America” to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

⁴ You must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA. 38 U.S.C. § 4312(a). You must have given the employer prior oral or written notice. 38 U.S.C. § 4312(a)(1). You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. 38 U.S.C. § 4312(c). You must have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. § 4304. After release from the period of service, you must have made a timely application for reemployment. 38 U.S.C. § 4312(e). See generally Law Review 15116 (December 2015) for a detailed discussion of the USERRA eligibility criteria.

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 [10 USCS § 10147], under section 502(a) or 503 of title 32 [32 USCS § 502(a) or 503], 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 [10 USCS § 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305] or under section 331, 332, 359, 360, 367, or 712 of title 14 [14 USCS § 2127, 2128, 2308, 2309, 2314, or 3713];
 - (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 [10 USCS § 12304];
 - (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 [32 USCS § 502(f)(2)(A)] 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.⁵

Your 12 years of active duty, from 1995 to 2007, does not count toward your five-year limit with respect to your employer relationship with DWI because you performed this active duty before you began your DWI job in 2007.⁶ Your involuntary active-duty periods in 2008-09 and 2011-12 are also exempted from the computation of your five-year limit.⁷ Your drill weekends and annual training periods are also exempt.⁸

You had the full five-year limit in front of you when you began your AGR tour on 10/1/2018, but voluntary AGR duty is not exempt from the five-year limit. Your five-year alarm clock started running on 10/1/2018, and the alarm goes off at midnight on 9/30/2023. If you remain on active duty even one day after 9/30/2023 you will not have the right to reemployment at DWI.

Q: My five years of active duty have included many weekends and holidays when I would not otherwise have worked at DWI. I understand that federal employees who are reservists or National Guard members get 15 days of paid military leave, and only workdays count in exhausting the 15-day entitlement. If weekends and holidays do not count in exhausting the entitlement to 15 days of paid military leave, why should weekends and holidays count in exhausting USERRA's five-year limit?

A: You are referring to *Butterbaugh v. Department of Justice*.⁹ Under section 6323 of title 5 of the United States Code, federal employees who are reservists or National Guard members are entitled to 15 days of paid military leave. Two decades ago, the United States Court of Appeals for the Federal Circuit¹⁰ held that only workdays should count in computing the 15 days of paid military leave.

Butterbaugh is a great case, but it is utterly irrelevant to the interpretation of section 4312(c) of USERRA, the five-year limit. Under that subsection, it is “such person’s cumulative period of uniformed service” that counts toward the five-year limit, not the number of days that the person is absent from his or her civilian job.

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⁵ 38 U.S.C. § 4312(c). See generally 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 a specific employer.

⁶ 38 U.S.C. § 4312(c).

⁷ 38 U.S.C. § 4312(c)(4)(A).

⁸ 38 U.S.C. § 4312(c)(3).

⁹ 336 F.3d 1332 (Fed. Cir. 2003).

¹⁰ The Federal Circuit is the federal appellate court that sits in our nation’s capital and has nationwide jurisdiction over certain kinds of cases, including appeals from decisions of the Merit Systems Protection Board (MSPB).

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. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing. 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 eight¹¹ 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 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
1 Constitution Ave. NE
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¹¹ Congress recently established the United States Space Force as the 8th uniformed service.

¹² You can also contribute on-line at www.roa.org.