

LAW REVIEW¹ 23031

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You Must Document that you Have Not Exceeded USERRA's Five-Year Limit.

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- 1.1.2.5—USERRA applies to executive and professional employees.
- 1.3.1.2—Character and duration of service
- 1.3.1.3—Timely application for reemployment
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.3.2.3—Pension credit for service time
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a Colonel in the Army National Guard (ARNG), and I recently joined the Reserve Organization of America (ROA)³ as a life member. I have read with great interest many of

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, ROA members amended the organization's constitution to make enlisted service members, as well as officers, eligible for full membership, including voting and running for office. The organization adopted the doing-

your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I am a mid-level executive⁴ for a major corporation—let us call it Daddy Warbucks Industries or DWI.

I have worked for DWI since 7/1/1995. During that time, I have been away from my DWI job many times for voluntary and involuntary periods of military training and service. I was recently away from my DWI job for three years of active duty, from 6/1/2020 until 5/31/2023. This three-year active duty period was voluntary, but it was necessitated by the COVID-19 emergency.

I applied for reemployment at DWI on 6/1/2023, immediately after I left active duty. The company’s personnel office said that I am not entitled to reemployment because my periods of absence from my DWI job, over the last 28 years, exceed five years cumulatively. The personnel office said that they will not reemploy me until I provide documentation showing that I have not exceeded the five-year limit.

It is true that I have been away from my DWI for more than five years over the last 28 years since I started my DWI career, but I believe that most (maybe all) of my military service periods have been exempt from the five-year limit. What gives?

Answer, bottom line up front

As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.⁵
- b. You must have given the employer prior oral or written notice.⁶
- c. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years.⁷
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁸

business-as name of Reserve Organization of America to emphasize that the organization represents all service members, without regard to rank.

⁴ The fact that you hold an executive position does not detract from your USERRA rights. The Department of Labor (DOL) USERRA Regulation provides: “USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.” 20 C.F.R. § 1002.43.

⁵ 38 U.S.C. § 4312(a).

⁶ 38 U.S.C. § 4312(a)(1).

⁷ 38 U.S.C. § 4312(c).

⁸ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offences) and OTH (“other than honorable”) administrative discharges.

- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.⁹

You are required to document that you meet the five USERRA conditions.

It is clear beyond doubt that you left your civilian job in June 2020 to enter active duty and that you gave your employer prior oral or written notice. It is equally clear that you were released from active duty without having received a disqualifying bad discharge and that you made a timely application for reemployment. The remaining issue is the five-year limit.

Section 4312(f) of USERRA provides that a person who is applying for reemployment after a period of uniformed service that lasted for 31 days or more is required to provide to the employer, upon the employer's request, documentation showing that the person has not exceeded the cumulative five-year limit and that the person's application for reemployment was timely and that the person is not disqualified for reemployment by virtue of having received a disqualifying bad discharge from the military. Section 4312(f) provides as follows:

- (1)** A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that—
 - (A)** the person's application is timely;
 - (B)** the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and
 - (C)** the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.
- (2)** Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.
- (3)**
 - (A)** Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation

⁹ After a period of service that lasted more than 180 days, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.¹⁰

Section 4331 of USERRA¹¹ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. Three sections of the DOL USERRA Regulations address the requirement to provide documentation to the employer upon applying for reemployment:

Is the employee required to submit documentation to the employer in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

- (a) The reemployment application is timely;**
- (b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,**
- (c) The employee's separation or dismissal from service was not disqualifying.¹²**

Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to

¹⁰ 38 U.S.C. § 4312(f) (emphasis supplied).

¹¹ 38 U.S.C. § 4331.

¹² 20 C.F.R. § 1002.121 (bold question in original).

reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.¹³

What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

(a) Documents that satisfy the requirements of USERRA include the following:

- (1)** DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;
- (2)** Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
- (3)** Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
- (4)** Certificate of completion from military training school;
- (5)** Discharge certificate showing character of service; and,
- (6)** Copy of extracts from payroll documents showing periods of service;
- (7)** Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.¹⁴

Your employer (DWI) has requested that you provide documentation in connection with your recent application for reemployment, so you need to provide the employer a copy of your DD-214 that you received upon your release from active duty on 5/31/2023. You applied for reemployment on 6/1/2023, just one day after your release from active duty. After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment.¹⁵ Thus, your DD-214 demonstrates conclusively that your application for reemployment was timely. Your DD-214 also demonstrates conclusively that you served honorably and did not receive a disqualifying bad discharge from the Army.

Demonstrating that you have not exceeded the five-year limit during the 28 years that you have been employed by DWI will require additional paperwork and analysis.

^{12.} 20 C.F.R. § 1002.122 (bold question in original).

¹⁴ . 20 C.F.R. § 1002.1223 (bold question in original).

¹⁵ 38 U.S.C. § 4312(f).

USERRA'S five-year limit

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

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 [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;
 - (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 or under section 12406 of title 10; 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.¹⁶

Your recent three-year active duty period, from 2020 to 2023, may be exempt from the five-year limit.

Under section 4312(c)(4)(B),¹⁷ your 2020-23 active duty, although voluntary, can be exempted from the computation of the five-year limit if the “Secretary concerned” has determined that your active duty was “because of a war or national emergency declared by the President or Congress.” This does not mean that the Secretary of the Army personally must make that determination.¹⁸

If you can get the “magic words” added to your orders or your DD-214, your 2020-23 active duty period can be exempted from the five-year limit. Of course, it is too late to get the words added to your 2020 orders or to your 2023 DD-214. You should try to get a DD-215 (corrected DD-214) that includes the magic words.

If you are unable to get your 2020-23 active duty period exempted, you can still be entitled to reemployment by showing that you had not used up two years of your five-year limit before you reentered active duty in June 2020.

It appears that you had used only one year of your five-year limit prior to June 2020, so you are entitled to reemployment even if the 2020-23 period is not exempt. Your drill weekends and annual training periods do not count toward exhausting your five-year limit.¹⁹ Your nine-month Army War College residential course is also exempt.²⁰ Your year in Iraq, on involuntary mobilization orders, is exempt.²¹

You were on voluntary active duty for one year, from 10/1/2013 until 9/30/2014. That period is not exempt, but you still have one year of headroom in your five-year limit even if the 2020-23 period counts.

¹⁶ 38 U.S.C. § 4312(c) (emphasis supplied). 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.

¹⁷ 38 U.S.C. § 4312(c)(4)(B).

¹⁸ DOD Instruction 1205.12, of 2/24/2016, with Change 1 effective 5/20/2016, provides that this authority can be delegated, but not below the Assistant Secretary level. These determinations are normally made by the Assistant Secretary of the Army for Manpower & Reserve Affairs, or the official with that title in the Department of the Air Force or the Department of the Navy. See Law Review 16075 (August 2016), Law Review 18026 (March 2018), and Law Review 19062 (July 2019).

¹⁹ 38 U.S.C. § 4312(c)(3).

²⁰ *Id.*

²¹ 38 U.S.C. § 4312(c)(3)(4)(A).

Q: My employer has a record of all the time that I was away from work for uniformed service, and the employer insists that all that time counts toward the five-year limit. For example, before my 2013-14 active duty period, my last day at the civilian job was 9/15/2013. On the back end, after release from active duty on 9/30/2014, I waited 80 days to apply for reemployment. The employer insists that the entire time from 9/15/2013 until 12/19/2014 counts toward the five-year limit. Is the employer correct?

A: No. The employer is wrong. It is the “cumulative period of [nonexempt] service” that counts toward the five-year limit. During your 2013-14 active duty period you used exactly one year of your five-year limit, not one year plus 95 days.²²

Q: I want to retire from my DWI career in July 2025, with 30 years of DWI pension credit. Am I entitled to do that?

I began my career at DWI on 7/1/1995. As of 7/1/2025, just two years from now, I will have 30 years of DWI service, and that will entitle me to the full retirement benefit, not a lesser benefit based on a shorter career of company service. To have 30 years of DWI pension credit by 7/1/2025, I must receive DWI pension credit for all the periods when my DWI career was interrupted by voluntary or involuntary military service. Am I entitled to DWI pension credit for all of these periods of military-related absence from my civilian job?

A: Yes, but only if you demonstrate that you met all five USERRA conditions for each period when you have been away from your DWI job to perform service in the uniformed services. Section 4318 of USERRA governs your civilian pension rights for periods when you have been away from your civilian job for uniformed service. That section reads as follows:

- (a)**
 - (1)**
 - (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.**
 - (B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5.**

²² See 38 U.S.C. § 4312(c). See also Law Review 17120 (December 2017).

The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2)

(A) *A person reemployed under this chapter* shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, *upon reemployment under this chapter*, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)

(1) An employer *reemploying a person under this chapter* shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide—

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) *A person reemployed under this chapter* shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the

plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) *Any employer who reemploys a person under this chapter* and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.²³

Thus, you are entitled to DWI pension credit for all the periods that you have been away from your civilian job for uniformed service, including your final three-year period of service (2020-23), *if you demonstrate that you meet the five USERRA conditions for each period of service*. This includes the five-year limit. If the 2020-23 period of active duty puts you over the five-year limit with respect to your employer relationship with DWI, the company is not required to treat you as if you had been continuously employed by DWI during that period.

If the documentation that you need to prove that you have not exceeded the five-year limit is not yet readily available, the company is required to reemploy you promptly *while awaiting the documentation*.²⁴ But in this situation the company is permitted to delay giving you company

²³ 38 U.S.C. § 4318 (emphasis supplied). The right to be treated as if one had been continuously employed by the civilian employer, for pension purposes, and the other rights set forth in section 4318, apply to a person who has been *reemployed under this chapter (USERRA)*. I have highlighted five places in section 4318 where this limitation is made clear.

²⁴ 38 U.S.C. § 4312(f).

pension credit for that 2020-23 period when you were away from work for uniformed service. The pertinent subsection of section 4312(f) is as follows:

An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).²⁵

Lesson to be learned.

You could have saved yourself a lot of trouble if you had kept better track of your five-year limit on an ongoing basis. When the Army asked you to volunteer to return to active duty in 2020, for the COVID emergency, you should have insisted on the inclusion of “Secretarial determination” language in your orders.

Please join or support 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. 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.

²⁵ 38 U.S.C. § 4312(f)(3)(B) (emphasis supplied).

If you are now serving or have ever served in any one of our nation's eight²⁶ 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
Washington, DC 20002²⁷

²⁶ Congress recently established the United States Space Force as the 8th uniformed service.

²⁷ You can also contribute on-line at www.roa.org.