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**Yes, You Have the Right to Reemployment with the Successor in Interest to
your Pre-Service Employer, but you Don't Get a Fresh Five-Year Limit.
You Can't Have it Both Ways.**

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

1.1.1.9—USERRA applies to successors in interest.

1.3.1.2—Character and duration of service

Q: I am a Colonel in the Air Force Reserve³ 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).

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 The factual set-up for this article is hypothetical but realistic.

⁴ In 2018, members of the Reserve Officers Association amended the organization’s constitution and made enlisted service members eligible for full membership, including voting and running for office. The organization adopted

On the civilian side, I have been an airline pilot for 20 years, since 2003. I was hired by Continental Airlines (CAL) and worked there continuously (except for short breaks for drill weekends and annual training) until July 2007, when I was involuntarily called to active duty for one year. In July 2008, I volunteered to remain on active duty for another three years.

When I was released from active duty in July 2011, I learned that CAL had merged with United Airlines (UAL), and the new combined airline was using the UAL name.⁵ I applied for reemployment with UAL and was reemployed. I was given seniority and pension credit for my four years of CAL employment and for the four years of active duty time.

I participated in the Air Force Reserve Officers Training Corps (ROTC) while in college, and I was commissioned a Second Lieutenant upon graduation in 1996. I served on full-time active duty from May 1996, when I was commissioned, until May 2003, when I was released from active duty. I immediately transitioned to the Air Force Reserve (USAFR), and I am approaching my mandatory retirement date in May 2026 (30 years of commissioned service).

The Air Force has offered me the opportunity to return to active duty, voluntarily, for three years, in a position of great responsibility. I think that this would be a great way to cap off my Air Force career, and I want to take advantage of this great opportunity. I inquired of the UAL personnel office as to whether I can return to active duty for three years and then return to UAL in 2026, when I retire from the USAFR. The personnel officer told me that I have already used three or four years of my five-year limit with UAL and that if I return to active duty for three years I will be over the five-year limit and will not have the right to reemployment with the airline. I contacted my union, and they said that the personnel officer is correct.

I thought that the five-year limit is computed on a per-employer basis. The way that I figure it, I have a five-year limit with CAL (which I did not exceed) and a new five-year limit with UAL. What gives?

Answer, bottom line up front

It is not correct to say that the five-year limit is computed on a “per employer” basis. Rather, a person who meets the other four USERRA conditions⁶ is entitled to reemployment “if such

the new “doing business as” name of Reserve Organization of America to emphasize the fact that the organization represents and admits to membership service members of all ranks, from E-1 to O-10.

⁵ The new combined airline, referred to as “New United,” is the successor in interest to the former Continental and “old United.”

⁶ The person must have left a civilian job to perform service in the uniformed services and must have given the employer prior oral or written notice. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely

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.”⁷

You have had a continuous employer relationship with CAL and its successor in interest, UAL, since 2003. We must look back to 2003, when you began your CAL employment, to determine how much of the five-year limit you have used.⁸

You had the right to reemployment with UAL in 2011 because you met the five USERRA conditions and because UAL was the successor in interest to your pre-service employer, CAL. You cannot have it both ways. You cannot argue that UAL is the same employer, for purposes of your right to reemployment in 2011, but a different employer, for purposes of computing the five-year limit.

Explanation

UAL is the successor in interest to CAL.

Section 4303 of USERRA defines 17 terms used in this law. When a statute defines terms used in that statute, the statutory definition controls, not the dictionary definition or the definition found elsewhere in the United States Code. The USERRA definition of “employer” includes “any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph.”⁹ The term “successor in interest” is also defined in USERRA.¹⁰ UAL clearly qualifies as the successor in interest to your pre-service employer, CAL.

You have used three years of your five-year limit.

Section 4312(c) 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

application for reemployment with the pre-service employer or the successor-in-interest to the pre-service employer. *See generally* Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

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

⁸ Under section 4312(c), there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit. *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your limit.

⁹ 38 U.S.C. § 4303(4)(A)(iv).

¹⁰ 38 U.S.C. § 4303(4)(D).

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.¹¹

Your drill weekends and annual training tours that you have performed during your CAL-UAL career do not count toward exhausting your five-year limit.¹² The year that you were away to

¹¹ 38 U.S.C. § 4312(c) (emphasis supplied). See *generally* Law Revie2 16043 (May 2016) for a detailed discussion of what counts, and what does not count, in exhausting an individual's five-year limit.

¹² 38 U.S.C. § 4312(c)(3).

attend the Air War College is also exempt.¹³ Your year of involuntary service, from July 2007 until July 2008, does not count toward exhausting your limit.¹⁴

Your three-year voluntary extension of your one year of involuntary service, from July 2008 until July 2011, is not exempt from the five-year limit.¹⁵ You have used three years of your five-year limit. If you return to active duty for more than two years, you will be beyond the five-year limit, unless your additional period is exempt under one of the subsections of section 4312(c).

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, who had commanded American troops in the recently concluded “Great War.” 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 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 advocate for the rights and interests of service members and 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.

¹³ Id.

¹⁴ 38 U.S.C. § 4312(c)(4)(A).

¹⁵ This period can be exempted from the five-year limit if the “Secretary concerned” (the Secretary of the Air Force) has determined that this voluntary extension was “because of a war or national emergency declared by the President or by Congress.” 38 U.S.C. § 4312(c)(4)(B). I have reviewed the orders that you received in 2008 and the DD-214 that you received in 2011, and I do not see those “magic words” in either document.

If you are now serving or have ever served in any one of our nation's eight¹⁶ 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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¹⁶ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁷ You can also contribute on-line at www.roa.org.