

## LAW REVIEW<sup>1</sup> 21057

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### USERRA's Five-Year Limit for the National Guard Member

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**Q: I am a Lieutenant Colonel in the Army National Guard (ARNG) and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>4</sup>**

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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 2,200 “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), 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 published so far, but we are always looking for “other than Sam” articles by other lawyers who are ROA members or willing to join ROA.

<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 and retired as a Captain (O-6) in 2007. I am a life member of ROA and have served on the national staff as the Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC during its six years in operation as a funded ROA program. I have continued some of the work of the SMLC as a volunteer and ROA member since I left the national staff in 2015.

<sup>3</sup> At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

<sup>4</sup> Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

I was born in 1979 and graduated from college in 2001. I was commissioned a second lieutenant upon graduation, through the Army's Reserve Officers Training Corps. I served on full-time regular active duty for the next five years, until I was released from active duty in May 2006. After I left active duty, I affiliated immediately with the ARNG.

On the civilian side, I am a teacher for a local school district. I was hired in August 2006, for the 2006-07 school year. My teacher job has been interrupted by many periods of military training and service, some voluntary and some involuntary. In January 2007, just four months after I began the teacher job, I was involuntarily recalled to active duty with my ARNG unit and deployed to Iraq. I returned home, with the unit, in January 2008. The school district reinstated me reluctantly, complaining about the "burden on the children" and on another teacher who had to be displaced to enable the district to reinstate me in the middle of the 2006-07 school year.<sup>5</sup>

In August 2011, I voluntarily returned to active duty, that time for service in Afghanistan. I missed all the 2011-12 school year. I was released from active duty and returned home in August 2012, just in time for the start of the 2012-13 school year. I have also been away from my job for drill periods (which are not always on weekends) and annual training periods in the ARNG.

In December 2019, I volunteered to return to full-time title 32<sup>6</sup> Active Guard & Reserve (AGR) duty at the Office of the Adjutant General of my State.<sup>7</sup> I understand that there is a five-year limit on the period or periods of full-time military duty that I can perform and still have the right to reemployment under USERRA, but I do not understand the details of the limit. I need to know whether my current service, on AGR duty since December 2019, counts toward the five-year limit. I need to know how much of the five-year limit I have already used and when my limit will be exhausted. I want to return to the teaching job when I leave this period of full-time AGR duty. How does the five-year limit work?

**A:** It is excellent that you are thinking ahead. All too often, I hear from reservists and National Guard members about the five-year limit, and when I compute their service, I find that they are already beyond the five-year limit.<sup>8</sup> Section 4312(c) of USERRA sets forth the five-year limit and its exceptions 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*

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<sup>5</sup> Because you met the five USERRA eligibility conditions at the time, the employer was required to reemploy you promptly *even if that meant displacing another employee*. See Law Review 21023 (April 2021).

<sup>6</sup> This refers to title 32 of the United States Code.

<sup>7</sup> The Adjutant General is the head of the ARNG and the Air National Guard (ANG) of a State.

<sup>8</sup> This is frustrating to me because I do not have the power to "turn back the hands of time."

*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 concerned,<sup>9</sup> 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;

(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 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)

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<sup>9</sup> The “Secretary concerned” is the Service Secretary, like the Secretary of the Army.

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 concerned.<sup>10</sup>

Your 2001-06 active duty does not count toward the five-year limit because you performed that active duty before you began the teaching job in August 2006.<sup>11</sup> Your year of involuntary active duty, from January 2007 to January 2008, is also exempt.<sup>12</sup> Your year of active duty from August 2011 to August 2012, although voluntary, is exempt because your orders contain “magic words” to the effect that the Secretary of the Army has determined that the period of service was necessary to meet a critical mission or requirement of the Army.<sup>13</sup> Your periods of inactive duty training (drills) and active duty for training are also exempt from the five-year limit.<sup>14</sup>

You had used none of your five-year limit before December 2019, when you began the current period of AGR duty. Voluntary AGR duty is not exempt from the five-year limit. If you remain on AGR duty, your five-year alarm clock will go off in December 2024, exactly five years after you started the AGR duty.

**Q: As a teacher, I only work nine months per year, from September 1 through May 31, roughly. I think that the three months each year (during the summer) when I would not be working anyway should not count toward exhausting my five-year limit. What do you say about that?**

**A:** That is not how the law is written. It is the *period of service* that counts toward the exhaustion of your five-year limit, unless the period is exempt under one of the subsections of section 4312(c). Each day that you are on this AGR duty counts toward exhausting your five-year limit, even if it is a day that you would not otherwise have worked at the school.

**Q: I want to remain on AGR duty until December 2025. If the school district approves my request for military leave beyond December 2024, will USERRA give me the right to reemployment when I finally leave active duty and come home in December 2025?**

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<sup>10</sup> 38 U.S.C. 4312(c) (emphasis supplied). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

<sup>11</sup> 38 U.S.C. 4312(c).

<sup>12</sup> 38 U.S.C. 4312(c)(4)(A).

<sup>13</sup> 38 U.S.C. 4312(c)(4)(D).

<sup>14</sup> 38 U.S.C. 4312(c)(3).

**A:** No. You must meet USERRA's five eligibility criteria (including the five-year limit) to have the right to reemployment. If you fail to meet one or more of the criteria, the employer has no obligation to *reemploy* you, but the school district might *rehire* you if it needs teachers at the time you apply.

**Q: What is the difference between rehiring me and reemploying me?**

**A:** There is a big difference. If you meet the five USERRA conditions, the school district must reemploy you promptly (within 14 days after you apply for reemployment) in the position of employment that *you would have attained if you had been continuously employed* (possibly a better job than the one you left) or another position, for which you are qualified, that is of like seniority, status, and pay.<sup>15</sup> Also, if you meet the five conditions and are reemployed, the school district must treat you *as if you had been continuously employed during the time you were away for civilian seniority and pension purposes.*<sup>16</sup> If you do not meet the five conditions, you will be a rookie teacher with no seniority or pension credit for the time you worked for the district before or for the time you were away from work for service.

**Q: Other than the five-year limit, what conditions must I meet to have the right to reemployment?**

**A:** You must have left the civilian job to perform uniformed service,<sup>17</sup> and you must have given the employer prior oral or written notice.<sup>18</sup> You already met those two conditions in December 2019. You must be released from the period of service without having received a disqualifying bad discharge from the military.<sup>19</sup>

Finally, you must make a timely application for reemployment after release from the period of service. After a period of service of 181 days or more, you have 90 days to apply for reemployment.<sup>20</sup>

**Q: As a member of the ARNG, I have a hybrid Federal-State status. I am subject to being called by the President, or I can volunteer, for duty or training under title 10 or title 32 of the United States Code. I am also subject to call-up by the Governor for State active duty—called by the Governor, under State authority, paid with State funds, for State emergencies like riots, fires, and floods. Several times over the years, I have been called to State active duty by**

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<sup>15</sup> 38 U.S.C. 4313(a)(2).

<sup>16</sup> 38 U.S.C. 4316(a), 4318.

<sup>17</sup> 38 U.S.C. 4312(a).

<sup>18</sup> 38 U.S.C. 4312(a)(1).

<sup>19</sup> 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offenses) and OTH (other than honorable) administrative discharges. You will not be discharged at the end of your AGR tour—you will simply be released from active duty and will return to the status of a traditional, part-time National Guard member.

<sup>20</sup> 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

**the Governor. Do those State active duty periods count toward my five-year limit under USERRA?**

**A:** State active duty that you performed before 1/5/2021 was not protected by USERRA, although it was protected by State law, and those State active duty periods do not count toward exhausting your five-year limit. As Kathryn Piscitelli and I explained in Law Review 21002 (January 2021), Congress amended USERRA very recently, and now State active duty is protected by USERRA under most circumstances.<sup>21</sup>

If you meet the five USERRA conditions and return to work for the school district in December 2024 and then return to the status of a traditional National Guard member, and if you are thereafter called to State active duty by the Governor, that period of service, even for just a few days, could put you over the five-year limit and cause you to lose your job. We need a statutory amendment exempting involuntary State active duty from the computation of the five-year limit.

**Q: Let us assume that I am released from active duty and apply for reemployment in December 2024, just prior to the exhaustion of my five-year limit. Let us also assume that I return to the status of a traditional, part-time National Guard member. How will USERRA protect me going forward?**

**A:** USERRA will protect you going forward, but you will need to ensure that any further military duty you perform is exempt from the five-year limit. Under these circumstances, you will have no headroom in your five-year limit.

**Q: What is the relationship between USERRA and State or local laws or ordinances?**

**A:** USERRA is a floor and not a ceiling on your rights as a service member or veteran. A State constitution or law or local ordinance can give you *greater or additional rights*, over and above USERRA, but State constitutions or laws or local ordinances cannot take away your rights under USERRA.<sup>22</sup> Under the “Supremacy Clause” of the Constitution,<sup>23</sup> Federal statutes like USERRA trump conflicting State constitutions, State statutes, and local ordinances.<sup>24</sup>

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<sup>21</sup> On 1/5/2021, President Trump signed the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Public Law 116-315. Section 7004 of that new law expanded USERRA’s definition of “service in the uniformed services” to include State active duty under most circumstances. State active duty is protected by USERRA if it is for a consecutive period of 14 days or more or if it is for a national emergency or major disaster declared by the President. This amendment applies on and after 1/5/2021. It is not retroactive.

<sup>22</sup> 38 U.S.C. 4302.

<sup>23</sup> United States Constitution, Article VI, Clause 2.

<sup>24</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

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

This article is one of 2,200-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 in October 1922 by a group of veterans of “The Great War” as World War I was then known. Captain Harry S. Truman was one of those veterans. 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 defense. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs. Indeed, ROA is the only military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs in the Supreme Court and other courts, we educate service members, attorneys, judges, employers, and others about the legal rights of service members and 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 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 one of our nation’s eight<sup>25</sup> uniformed services, you are eligible for full ROA membership, including the right to vote and run for office in the organization. Eligibility includes those who are serving or have served in the Active Component, the Reserve, or the National Guard, and enlisted members as well as officers are eligible.

If you are eligible, please join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448. The cost is only \$20 per year or \$450 for a life membership. If you are not eligible, please support us financially to help us continue this work. You can mail us a check as follows:

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<sup>25</sup> Congress recently established the United States Space Force as the eighth uniformed service.