

LAW REVIEW¹ 22005

January 2022

USERRA, the Five-Year Limit, and the National Guard Member

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

[About Sam Wright](#)

1.1.3.3—USERRA applies to National Guard service

1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Sergeant Major in the Army National Guard and a member of the Reserve Organization of America (ROA).³ I have read with great interest several 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 2300 “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 Spouse 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 At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing business as” name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

I have read and reread your Law Review 15116 (December 2015), about the five conditions that a person must meet to have the right to reemployment under USERRA. My question is about the five-year limit. I understand that there is a cumulative limit of five years (60 months) on the cumulative duration of the periods of uniformed service that I can perform with respect to the employer relationship for which I seek reemployment. I also understand that there are nine exemptions from the five-year limit—nine kinds of service that do not count toward exhausting my five-year limit with my current employer, a major company that I will call “Daddy Warbucks Industries” or DWI.

I went to work for DWI in January 2001, shortly after I left my initial active duty period in the Regular Army. I have been away from my DWI job for weekend drills (not all of which have been limited to weekends) and annual training tours (not all of which have been limited to “two weeks in the summer” like in the “good old days” prior to 9/11/2001.⁴ I was involuntarily called to active duty for a year in 2004-05 (Iraq) and again for a year in Afghanistan in 2009-10. I have also done several voluntary tours of “Active Duty for Special Work” (ADSW) and “Active Duty for Operational Support” (ADOS)

I have read and reread your Law Review 16043 (May 2016) about what counts and what does not count toward exhausting my five-year limit with my current civilian employer. I understand that my drill weekends and annual training tours and my involuntary call-ups for Iraq and Afghanistan do not count toward my five-year limit. I understand further that my voluntary ADOS and ADSW periods probably do count toward the five-year limit. The way I figure it, I have used 49 months of my 60-month limit with respect to my employer relationship with DWI.

I have been offered the opportunity to return to active duty for another 12 months, from 7/1/2022 until 6/30/2023. If I take this opportunity, and if this new 12-month period is not exempt from USERRA’s five-year limit, I will be over the limit by one month. That is why it is critical that I know if the period will be exempt before I agree to serve this new active-duty period.

The proposed orders are for Active Duty for Operational Support (ADOS), and the orders will be signed by the Deputy Chief of Staff for Personnel of the Army National Guard of my state. The proposed orders, similar to other orders that many of my Army National Guard colleagues in this state have received, include the following statement: “I certify that the duty herein was reviewed and determined to be essential for the accomplishment of Army National Guard Programs and Missions.”

⁴ See Law Review 13099 (July 2013). The title of that article is “This Is Not your Father’s National Guard.”

Is this statement sufficient to exempt this period of service from the computation of my five-year limit with respect to my employment relationship with DWI?

Answer, bottom line up front:

First, let me say that it is great that you are asking this question and checking out the five-year limit *before you exceed it*. Frequently, I hear from Reserve Component personnel asking about the five-year limit. When I total up what the person has already done, I find that her or she is already seven years into the five-year limit. This experience is frustrating for me because *I do not have the power to turn back the hands of time*.

The answer to your question is No. That statement is not sufficient to exempt your upcoming ADOS period from the five-year limit because the Deputy Chief of Staff for Personnel of your state's Army National Guard does not have the authority to determine that the mission for which these orders are contemplated is "critical" and that this 12-month period will not count toward your five-year limit. If you take this ADOS opportunity and serve this 12-month period, as contemplated, you will be beyond your five-year limit, and you will not have the right to reemployment at DWI.

Explanation:

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 concerned,⁵ 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 *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 concerned.⁶

As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions from 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 respect to an employer relationship. The quoted language from your draft orders seems designed to try to bring your 12-month ADOS period within the

⁵ The "Secretary concerned" is the Service Secretary, like the Secretary of the Army.

⁶ 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.

following exemption: “ordered to active duty in support, *as determined by the Secretary concerned*, of a critical mission or requirement of the uniformed services.”⁷

The pertinent subsection of the Department of Defense (DOD) USERRA regulation provides: “The authority for determining what constitutes a critical mission or requirement [and thus exempting a period of service from USERRA’s five-year limit] *will not be delegated below the Assistant Secretary level.*”⁸

The Secretary of the Army or the Assistant Secretary of the Army for Manpower and Reserve Affairs can determine that your upcoming ADOS period is necessitated by a critical mission or requirement and that the 12-month period will not count toward your five-year limit. The Deputy Chief of Staff for Personnel of the Army National Guard of your state does not have the authority to make that determination.

In a 2010 case, the United States District Court for the Eastern District of Virginia dealt with the case of a Coast Guard member who had been away from his civilian job for more than five years of uniformed service. The Coast Guard member claimed that his service, beyond five years, had been for a “national emergency” and that the period was exempt from the five-year limit. The federal judge held that the Coast Guard member did not have the right to reemployment because he had failed to demonstrate that appropriate military authorities had determined the “emergency” character of the service.⁹

I call upon the Adjutant General¹⁰ of each state and territory and the District of Columbia to ensure that orders for National Guard members are written with USERRA in mind. It would be unconscionable if a National Guard member lost his or her civilian job because of sloppy drafting of orders at the TAG’s headquarters.

Q: During my 20 years of DWI employment, I have been away from my civilian job several times for state active duty—called by the Governor, under state authority, paid with state funds, for state missions like riots and floods. Do those state active duty periods count toward my five-year limit with DWI?

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

⁷ 38 U.S.C. § 4312(c)(4)(D) (emphasis supplied).

⁸ 32 C.F.R. § 104.6(a)((3)(iv)(C)(1) (emphasis supplied).

⁹ See *Sutton v. City of Chesapeake*, 713 F. Supp. 2d 547, 554-55 (E.D. Va. 2010).

¹⁰ The Adjutant General (TAG) is the head of the Army National Guard and Air National Guard of a specific state. The TAG is a state official and is ordinarily appointed by the Governor.

(January 2021), Congress amended USERRA very recently, and now state active duty is protected by USERRA under most circumstances.¹¹

State active duty that you have performed or will perform after 1/5/2021 is now protected by USERRA, and those recent state duty periods probably count toward your five-year limit *even if involuntary*. We (the Reserve Organization of America) have asked Congress to exempt state active duty periods from the computation of the five-year limit.

Please join or support ROA

This article is one of 2,300-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. New articles are added each month.

ROA is almost 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 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 eight¹² 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

¹¹ 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.

¹² Congress recently established the United States Space Force as the 8th uniformed service.

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 20002