

## LAW REVIEW<sup>1</sup> 22007

January 2022

### **What if I Take Two Months off and then Return to Active Duty instead of Applying for Reemployment?**

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[About Sam Wright](#)

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**Q: I am a Colonel in the Air National Guard and a life member of the Reserve Organization of America (ROA).<sup>3</sup> On the civilian side, I am a GS-14 employee of a Federal agency. I have been**

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<sup>1</sup> I invite the reader's attention to <http://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.

<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 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>.

<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

**away from my civilian job for active duty for several years, but most of the active duty that I have performed has been exempt from USERRA's five-year limit. I have read and reread your Law Review 16043 (May 2016), and I am confident that I have used only two years of the five-year limit, and all my other duty does not count toward the limit.**

**My current orders expire 7/31/2022. When those orders end, I plan to take 61 days off, from 8/1/2022 through 9/30/2022. I will then start a new active duty period, from 10/1/2022 through 9/30/2023. That will almost certainly be my final active duty period because I expect to retire in the fall of 2023.**

**I understand that I must apply for reemployment within 90 days after leaving a period of service that has lasted for 181 days or more. Under the circumstances as I have explained them, am I required to apply for reemployment during the 61-day gap between my departure from active duty (7/31/2022) and my return to active duty (10/1/2022)? How do you suggest that I handle this situation?**

**A:** After a period of service lasting 181 days or more, you have 90 days to apply for reemployment.<sup>4</sup> As long as you either apply for reemployment or return to active duty within that 90-day period after 7/31/2022, you will have the right to reemployment.<sup>5</sup>

I do have one serious concern about your proposed course of action. What happens if you, your spouse, or your minor child suffers a serious illness or injury during the 61-day interim between your departure from active duty and your return to active duty?

When you leave active duty and return to the status of a part-time Air National Guard officer, your right to military health care for yourself and your family generally ends. Under USERRA, you are entitled to immediate reinstatement of your civilian health insurance coverage *upon your return to work*.<sup>6</sup> If you leave active duty and do not apply for reemployment and do not return to work, you may find that you have no health coverage at a time of great need for such coverage. I suggest that you make some arrangement for health insurance to cover the 61-day gap.

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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> 38 U.S.C. § 4312(e)(1)(D).

<sup>5</sup> This assumes, of course, that you meet the other four conditions for reemployment. You must have left the civilian job to perform uniformed service, and you must have given the employer prior oral or written notice. You must have been released from the period of service without having exceeded the cumulative five-year limit with that employer and without having received a disqualifying bad discharge from the military. Please see Law Review 15116 (December 2015) for a detailed discussion of USERRA's eligibility conditions.

<sup>6</sup> 38 U.S.C. § 4317(b).

**Q: Is my five-year clock running during the 61-day gap?**

**A:** No. As to the five-year limit, it is the “cumulative period of service in the uniformed service, with respect to the employer relationship for which the person seeks reemployment” that is subject to the five-year limit.<sup>7</sup> During the 61-day interim, you are not performing uniformed service, and this period does not count toward your five-year limit.

The 61-day period probably does count toward your 90-day deadline to apply for reemployment. When you leave active duty on 9/30/2023, you should apply for reemployment within 29 days because you will have already used 61 days of the 90-day deadline.

**Please join or support ROA**

This article is one of 2,300-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 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 eight<sup>8</sup> 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

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<sup>7</sup> 38 U.S.C. § 4312(c).

<sup>8</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at <http://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:

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