

LAW REVIEW¹ 23037

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Retiring from the Army Reserve and Becoming a FEMA Reservist Does Not Give you a New Five-Year Limit under USERRA.

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

1.1.3.6b—USERRA and FEMA reservists

1.3.1.2—Character and duration of service

Q: I am an Army Reserve Colonel, recently retired, and a life member of the Reserve Organization of America (ROA).³ For many years, I have read with great interest your “Law Review” articles about the

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, 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 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.

Uniformed Services Employment and Reemployment Rights Act (USERRA).

I was born in 1971. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC), and I was commissioned a Second Lieutenant upon my graduation in May 1993. I remained on active duty for ten years, until May 2003, when I was released from active duty and affiliated with the Army Reserve (USAR). I retired from the USAR in May 2023, with 30 years of commissioned service.

I was hired by a large company—let us call it Daddy Warbucks Industries or DWI—in July 2003. My DWI career has been interrupted many times by short and long periods of military training and service, including drill weekends, annual training, two involuntary mobilizations, a year for the Army War College, and several voluntary active duty periods of varying durations.

I have read and reread your Law Review 16043 (May 2016), to understand USERRA's five-year limit and the exceptions to the limit. I have added up all my non-exempt periods of service in the uniformed services, and the total comes to four years, 11 months, and four days, not counting the service that I performed before I began my DWI career in July 2003.

I have read with great interest your Law Review 23007 (February 2023), about the recent USERRA amendment that expands USERRA to make it apply to Federal Emergency Management Agency (FEMA) reservists. Now that I am retired from the USAR, I want to sign up as a FEMA reservist. In the USAR, I served for a time as an Emergency

Preparedness Liaison Officer (EPLO), and I worked with FEMA personnel in responding to two disasters.

I want to sign up as a FEMA reservist. My concern is the five-year limit under USERRA. If I sign up as a FEMA reservist, will I lose my right to reemployment the first time that I serve for 27 days or more under a FEMA reservist mobilization?

Answer, bottom line up front

Yes. You do not get a fresh five-year limit by retiring from the USAR and signing up as a FEMA reservist. The only way that you can get a fresh five-year limit is to leave your DWI job and start a new job with a new employer.

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 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.⁴

I have reviewed all of your orders and DD-214s that you have received for periods of service after July 2003, when you began your career at DWI. I agree with your computation. You are very close to exceeding your five-year limit with respect to your employer relationship with DWI.

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 your five-year limit. Unfortunately, none of the exemptions pertain to the kinds of service that FEMA reservists perform. Going forward, we need to push for a statutory amendment to section 4312(c), to exempt some FEMA reservist service from the five-year limit.

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.

⁴ 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.

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.

If you are now serving or have ever served in any one of our nation’s eight⁵ 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

⁵ Congress recently established the United States Space Force as the eighth uniformed service.

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
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⁶ You can also contribute on-line at www.roa.org.